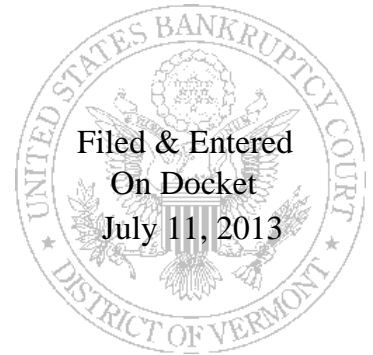


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**James Russell Cary,
Debtor.**

**Chapter 13
Case # 12-11009**

Appearances: *Donald Hayes, Esq.*
 Obuchowski & Emens-Butler, P.C.
 Bethel, VT
 For Debtor

Anitra Street
Creditor
Falls Church, VA
Pro se

MEMORANDUM OF DECISION

DENYING MOTION FOR RELIEF FROM THE COURT'S ORDER APPROVING DEBTOR'S SALE MOTION,
DENYING MOTION FOR RELIEF FROM STAY
AND DENYING MOTION TO REOPEN EVIDENTIARY HEARING

Anitra Street (the "Creditor") moves (1) for relief from this Court's prior order approving the sale of estate property, (2) for relief from stay, and (3) to reopen an evidentiary hearing held on June 20, 2013. For the reasons set forth below, the Court finds that, even assuming the Creditor was entitled to notice of the sale, the lack of notice was harmless, and all litigation with respect to the claim she had against the Debtor as of the date he filed this bankruptcy case must be addressed in this Court. The Court further finds that the Creditor had an adequate opportunity to present evidence, and any further factual proof on the stated issue will not alter this Court's ultimate determination, which is based on conclusions of law. Accordingly, the Court denies the Creditor's motion to reopen the evidentiary hearing, denies relief from stay, and denies the motion for relief from the Order approving the sale of estate property.

JURISDICTION

This Court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 157 and 1334, and declares them to be core proceedings under 28 U.S.C. § 157(b)(2)(G), (K) and (N), on which it has authority to enter final judgment.

PROCEDURAL HISTORY

James Russell Cary (the “Debtor”) initiated this Chapter 13 case on December 31, 2012. On February 15, 2013, the Debtor filed an emergency sale motion, seeking to sell 124 organic dairy cows then located at his farm (doc. # 26) (the “Sale Motion”). In the Sale Motion, the Debtor represented that all 124 cows were subject to a security interest held by the United States Department of Agriculture Farm Service Agency (“FSA”), and he could no longer afford to pay for the cows’ care. The Court held a hearing on the Sale Motion on February 19, 2013, at which the Debtor represented that no one other than FSA had an interest in the cows which were the subject of the Sale Motion, and the Trustee and FSA had consented to the sale. Based on the consents and the Debtor’s representations at the hearing with respect to the urgency of the sale, the Court entered an Order approving the sale that same day (doc. # 34) (the “Sale Order”).

On April 16, 2013, the Debtor filed a motion seeking Court approval to dispose of non-estate property, alleging that the Creditor still had 12 of her cows on his property and had refused to remove them despite his repeated requests (doc. # 51) (the “Disposal Motion”). In response, the Creditor filed a pleading – which the Clerk’s Office docketed as motion to reconsider – alleging that she had an ownership interest in some of the cows that the Debtor had sold and that the Debtor had failed to provide her with the required notice of that sale (doc. # 52) (the “Motion for Relief”). The Creditor then filed another pleading – construed as a supplement to the Motion for Relief – requesting that the Debtor provide written responses to questions relating to ownership of the Debtor’s cows (doc. # 58) (the “Supplement”). Additionally, the Creditor filed an emergency motion to compel the Debtor to provide information relating to her cows that were housed on his property (doc. # 75) (the “Motion to Compel”).

After a series of adjournments, the Court held an evidentiary hearing on the Disposal Motion, the Motion for Relief, and the Motion to Compel, on June 20, 2013. At the outset of the hearing, the parties advised the Court that they had reached an agreement regarding the Disposal Motion. Therefore, there was no testimony with respect to the merits of that motion. Shortly thereafter, the Creditor made an oral motion for relief from stay to pursue the state court lawsuit she was litigating against the Debtor prior to the Debtor’s bankruptcy filing, with respect to her transactions with the Debtor (the “Motion for Relief from Stay”). The parties presented arguments and the Court denied the Motion for Relief from Stay on the record. Additionally, at the conclusion of the evidentiary hearing, the parties presented arguments on the Motion to Compel, and based upon those arguments, the Court granted the Motion to Compel. The Court conducted an evidentiary hearing which lasted approximately four hours, and then offered the parties the opportunity to file post-trial memoranda of law. The parties declined to submit any written briefs on the

Motion for Relief, so the Court treated the matter as fully submitted and took the matter under advisement.

Subsequently, the parties notified the Court that they were unable to reach an agreement with respect to certain critical details concerning the Disposal Motion; it has been set for a status hearing (doc. ## 84, 95, 97). The Creditor also moved to reopen the evidentiary hearing, asserting that her testimony had been cut short due to time constraints arising from her need to catch a flight, and requesting the opportunity to present additional evidence relating to her purchase of cows from the Debtor (doc. # 87) (the “Motion to Reopen”). This Memorandum of Decision and related Order resolves the Motion to Reopen, the Motion for Relief from Stay, and the Motion for Relief. The Disposal Motion will be addressed through a separate order following the scheduled hearing.

PERTINENT FACTS & UNCONTESTED LEGAL CONCLUSIONS

Based on the evidence presented at the June 20, 2013 hearing, the Court makes the following findings of fact and conclusions of law:

1. The Debtor purchased cows and started farming operations in 2007.
2. In March 2008, the Debtor obtained financing from FSA to purchase additional cows. In return, FSA took a security interest in all of the Debtor’s cows.
3. FSA held a perfected security interest in all of the Debtor’s cows as of March 28, 2008, as evidenced by the Uniform Commercial Code (“UCC”) financing statement filed with the Vermont Secretary of State on March 26, 2008, and the Security Agreement dated March 28, 2008.
4. In April and May of 2008, the Creditor wrote two checks totaling \$30,000, which the Debtor understood to be a loan and used to fund general farm operating expenses, and which, the Creditor asserts, she intended to be for the purchase of some of the Debtor’s cows.
5. In the spring of 2009, the Creditor purchased approximately eight cows at auction. Some of those cows were bred and had calves. The auction cows and their progeny now total 12 (the “Creditor’s Cows”).
6. When the Court entered the Sale Order, FSA still had a perfected security interest in all of the Debtor’s cows.
7. The Debtor sold his cows pursuant to that Sale Order and the purchaser at the sale acted in good faith; the purchaser paid \$129,000 for the Debtor’s cows, which was equal to or in excess of the fair market value of the cows sold.
8. At the time of the sale, the Debtor owed FSA more than \$130,000; all sale proceeds were paid to the FSA. The Debtor subsequently paid the small remaining balance to the FSA.

9. None of the Creditor's Cows are, or ever were, subject to an FSA security interest, and the Sale Order did not authorize the sale of these cows. The ownership of the Creditor's Cows was not at issue in the Sale Motion.
10. The Creditor's Cows are the subject of the Disposal Motion. Those cows are currently located on the Debtor's real property which is being leased to the same party who purchased the Debtor's cows at the Court approved sale. He has been providing for the care and feeding of the Creditor's Cows since the sale.

DISCUSSION

A. The Creditor's Motion for Relief from Sale Order

Under Vermont law, purchasers of property encumbered by a perfected security interest generally take that property subject to the security interest. See In re Air Vermont, Inc., 44 B.R. 433, 436 (Bankr. D. Vt. 1984); 9A V.S.A. §§ 9-203(b), 9-317(b). The main exception to this general rule is that a buyer in the ordinary course of business may take property free and clear of a perfected security interest. See 9A V.S.A. § 9-320(a) and comment 2. However, the buyer in the ordinary course of business exception does not apply to purchasers of "farm products." 9A V.S.A. § 9-320(a) and comments 3, 4. "Farm products" include "goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are . . . livestock, born or unborn, including aquatic goods produced in aquacultural operations." 9A V.S.A. § 9-102. Federal law does limit the effect of the UCC farm products exception, by generally providing for buyers in the ordinary course of business to take farm products free of perfected security interests. See 7 U.S.C. § 1631(d). However, that general rule is subject to the following exception:

A buyer of farm products takes subject to a security interest created by the seller if –

- 2) in the case of a farm product produced in a State that has established a central filing system—
 - (A) the buyer has failed to register with the Secretary of State of such State prior to the purchase of farm products; and
 - (B) the secured party has filed an effective financing statement or notice that covers the farm products being sold.

7 U.S.C. § 1631(e).

As a preliminary matter, although docketed as a motion to reconsider, this Court construes the Motion for Relief as being filed under Fed.R.Civ.P. 60(b)(3), applicable to this bankruptcy proceeding by application of Fed.R.Bankr.P. 9024. Motions for relief from judgment are generally not favored, and the burden of proof is on the party seeking relief from judgment. U.S. v. Int'l Broth. of Teamsters, 247 F.3d 370, 391 (2d Cir. 2001). Relief under Rule 60(b)(3) is not justified where the omitted evidence has no

effect on the Court's ultimate decision. See Anderson v. Cryovac, Inc., 862 F.2d 910, 924-26 (1st Cir. 1988); PMC, Inc. v. Atomergic Chemetals Corp., 122 F.3d 1057, No. 95-7509, 1995 WL 595557, 1 (2d Cir. 1995) (unpublished table decision); Fed.R.Civ.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); Fed.R.Bankr.P. 9005.

In this case, the Court determines the Creditor has neither sustained her burden for relief from the Sale Order nor shown that the evidence she seeks to present would have an effect on the Court's ultimate decision. Under the Vermont Uniform Commercial Code, even if the Creditor did purchase some of the Debtor's cows, she would have bought them subject to FSA's security interest under Vermont law. See In re Air Vermont, Inc., 44 B.R. at 436. Further, the buyer in the ordinary course of business exception is inapplicable, as the Creditor purchased farm products. See 9A V.S.A. §§ 9-102, 9-320(a).

Similar results are reached under federal law. First, the Court takes judicial notice of the fact that Vermont has established a central filing system as defined in 7 U.S.C. § 1631. See Certification of Central Filing System; Vermont, 52 Fed. Reg. 27035-02, 1987 WL 142984 (July 17, 1987); see also Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006) (noting that courts may take judicial notice of public records); Fed. R. Evid. 201(b)(2). Further, the Creditor did not present any evidence to suggest that she ever registered with the Vermont Secretary of State. Finally, as previously indicated by its determination that FSA held a perfected security interest in the Debtor's cows, the Court finds that FSA had filed an effective financing statement that covered the cows that the Debtor sought to sell. See 9A V.S.A. §§ 9-310(a), 9-502(a).

Since any purchase by the Creditor, of the Debtor's cows, would thus have been subject to FSA's security interest, there would have been no net proceeds for the Creditor when the cows were sold, unless the value of the cows sold exceeded the amount due to FSA at the time. The Debtor's testimony credibly established that the cows were sold for fair market value and the record is clear that the sale proceeds were insufficient to pay the full amount due the FSA. Hence, even if the Creditor had an interest in the cows sold pursuant to the Sale Order, she would not have received any proceeds of sale and therefore the Debtor's failure to provide her with notice did not cause her any harm.

Moreover, pursuant to 11 U.S.C. § 363, even if the sale should not have proceeded without notice to the Creditor, the finality of the sale precludes the Creditor from voiding the sale, where, as here, the purchaser bought the property in good faith:

- (m) The reversal of modification on appeal of an authorization . . . of a sale . . . of property does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith.

11 U.S.C. § 363(m). The sale of all of the cows subject to the FSA lien, to the purchaser, may not be reversed or modified unless the Creditor established that the purchaser did not purchase the cows or consummate the sale transaction in good faith. She did not do so.

In sum, the Court finds the Creditor failed to show that the FSA security interest did not attach to all of the cows the Debtor sold, or that FSA was not entitled to all of the sale proceeds, or that the purchaser at the sale is not entitled to the protections of a good faith purchaser. Therefore, the Court finds the Creditor has not met her burden of establishing a right to relief from the Sale Order, and denies the Creditor's motion to set aside or reconsider that Order.

B. The Creditor's Motion to Reopen the Evidentiary Hearing

In her Motion to Reopen, the Creditor argues she was not given a full opportunity to present evidence at the June 20th hearing. The record shows otherwise. The *pro se* Creditor has been given extra latitude and explanations throughout this proceeding in light of the fact that she did not have the benefit of counsel in pursuing her claims against the Debtor. However, her *pro se* status does not relieve her of the duty to comply with the rules of procedure or the responsibility to present her evidence during the time set for the hearing.

Notwithstanding her post-hearing protestations to the contrary, the Court finds the Creditor was well aware that an evidentiary hearing had been scheduled for June 20th, based upon the filed notices and entered orders (doc. ## 61, 62, 69, 80) and the uncontroverted statements of the Debtor's counsel with respect to the numerous multi-hour telephone conversations he and the Creditor had had about the litigation schedule in the days leading up to the hearing. Additionally, the Creditor made full use of the time allotted for the hearing. At the June 20th hearing, she gave extensive testimony, introduced evidence and examined the Debtor. Then, at what appeared to be the close of evidence, the Court specifically asked the Creditor if she wanted to introduce any further testimony and the Creditor indicated she had no further testimony to present. It is too late now for the Creditor to rescind that response and reopen the record.

Lastly, the Motion to Reopen states that the Creditor wishes to reopen the hearing in order to present further evidence relating to her purchase of cows from the Debtor. As discussed *supra*, the Court finds that this factual issue is not ultimately controlling and evidence on this point would not change the outcome.

Accordingly, the Court finds the Creditor has failed to state a sufficient basis for the relief she seeks in the Motion to Reopen.

C. The Creditor's Motion for Relief from Stay

Although the Court ruled on the Motion for Relief from Stay at the June 20th hearing, the Court

here articulates further its rationale for denying that relief. The essential point is the Creditor did not establish cause for relief from the automatic stay. See 11 U.S.C. § 362(d).

The Creditor indicated she wished relief from stay to continue her state court lawsuit against the Debtor based upon allegations, including fraud and breach of contract, arising from her alleged purchase of cows from the Debtor. Since this claim arose pre-petition and is the basis of her claim against the Debtor in this bankruptcy case, it is a core proceeding, see 28 U.S.C. § 157(b)(2)(B), and must be addressed here, as part of the claims allowance process. The Creditor's claim is part of this bankruptcy case as the Debtor has listed it in his schedules; it is being treated in the Debtor's plan and that plan has been confirmed; and it will be discharged to the extent not paid, pursuant to Chapter 13 of the Bankruptcy Code. See 11 U.S.C. § 1328. In other words, the Creditor's claim against the Debtor is inextricably intertwined with, and fully adjudicated in, this bankruptcy case.


Further, the interests of judicial economy support adjudication by this Court of all claims within its jurisdiction. It is on these bases that the Court found the Creditor failed to show cause for relief from stay. See, e.g., In re Sonnax Industries, Inc., 907 F.2d 1280, 1285-88 (2d Cir. 1990).

CONCLUSION

Based upon the findings of fact and rationale set forth above, the Court reaches the following legal conclusions: (1) the Creditor has not shown that the Debtor's failure to provide her with notice of the sale caused her any harm or that the purchaser did not buy the cows in good faith; (2) the Creditor has failed to demonstrate cause for relief from stay to continue her lawsuit against the Debtor in state court; and (3) the Creditor had an adequate opportunity to present evidence relating to her interest in the cows the Debtor sold pursuant to the Sale Motion, and the additional proof the Creditor seeks to introduce at this time would not alter this Court's ultimate decision as to the validity of the sale. Accordingly, the Court denies the Creditor's Motion to Reopen the Evidentiary Hearing, the Creditor's Motion for Relief from Sale Order, the Creditor's Motion for Relief from Stay.

This memorandum constitutes the Court's findings of fact and conclusions of law.

July 11, 2013
Burlington, Vermont


Colleen A. Brown
United States Bankruptcy Judge