UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 93-40149
	)	
WHITE HILLS, INC.	)	Chapter 12
Tax I.D. No. 46-0341465	)	
Debtor.	)	
	)	
RICK GARTNER	)	Adv. No. 99-4004
Plaintiff,	)	
-vs-	)	
	)	MEMORANDUM OF FINAL DECISION
MARQUETTE BANK, successor in	)	
interest to Farmers and	)	
Merchants Bank, and	)	
WHITE HILLS, INC.	)	
Defendants.	)	

The matter before the Court is Plaintiff's complaint to determine the validity of his ag products processor's lien and its priority in regards to the crop mortgage held by Defendant Marquette Bank. Preliminary rulings on several matters were made in an earlier memorandum of decision. This Memorandum of Decision, Order, and subsequent judgment shall constitute the Court's final findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff has an ag products processors' lien on Debtor's 1998 hay crop for $7,405.65.

I.

Debtor's principal, Darrel Cwach, made arrangements with Rick Gartner to help Debtor[1] windrow and bale hay during the 1998 hay season. Gartner used his windrower and tractor to cut most of Debtor's hay over the season. Gartner and Cwach also exchanged

[1] Debtor was operating under a confirmed Chapter 12 plan at the time. The hay harvested was property of the bankruptcy estate. 11 U.S.C. § 1207(a)(1).

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other equipment and labor back and forth and Gartner did some baling for Debtor.

At the end of the season, Gartner billed Debtor for windrowing, baling, some cultivation, tractor use, parts, and some labor. Gartner did not receive payment. On November 3, 1998, Gartner filed a threshers' lien claiming he was owed $17,207.27 by Debtor.

In December 1998, Gartner obtained relief from the automatic stay to enforce his lien. Upon Debtor's motion, the relief from stay order was vacated. As part of the reinstatement, Debtor, Gartner, and Marquette Bank, Debtor's primary lender, agreed that any party could bring an action to determine the validity, priority, and extent of Gartner's ag products processors' lien as compared to the Bank's general mortgage on Debtor's 1998 crops.

Gartner commenced this lien-related adversary proceeding on February 8, 1999. On a summary judgment motion by the Bank, the Court concluded that the state statute on ag products processors' liens covers windrowing; that an ag products processors' lien can attach to hay that has been mowed, raked, or baled; that Gartner was not entitled to a lien for certain labor costs; that Gartner was not precluded from obtaining an ag products processors' lien although he hired employees to do some of the work; and that Gartner's lien substantially complied with the ag products processors' lien statute by setting forth the number of acres he windrowed, the crop that was windrowed, his charge per acre, and a description of the land where the work was performed.

A trial was held April 14, 1999. In light of the Court's earlier rulings and with the aid of their respective expert witnesses, the parties agreed at trial that Debtor White Hills owed Gartner $7,620.90 for custom windrowing and another $7,865.25 for baling, discing, parts, labor, and tractor rental for a total owed of $15,486.15, and that Gartner owed Cwach and Debtor $8,080.50 for equipment use and related matters. After an offset, that left Debtor and Cwach owing Gartner $7,405.65. The parties also agreed that at most Gartner was entitled to an ag products processors' lien for his windrowing and that the Court would determine the validity and amount of that lien.

The question of fact presented is whether Gartner and Debtor, through Cwach, had one agreement for Gartner to windrow for Debtor throughout the haying season or several separate agreements as the various hay cuttings matured. Determination of the nature of Gartner and Debtor's agreement is necessary for the Court to determine when Gartner completed his windrowing and then apply S.D.C.L. § 38-17-16. The remaining question of law, discussed but not fully decided by the earlier summary judgment decision, is whether state law allows Gartner to have one lien on the entire season's hay crop or whether a separate lien had to be filed for each cutting of hay.

II.

NATURE OF THE PARTIES' AGREEMENT

Based on the testimony offered, the Court concludes that Gartner and Cwach had reached an agreement in the spring of 1998

that Gartner would do all - or as much as he could do - of Debtor White Hills' windrowing of hay in 1998 as it matured. At the spring luncheon meeting between Gartner and Cwach, they made their plans regarding what work Debtor needed to have done, the approximate number of acres of hay to put up, the equipment they each had, and Gartner's availability. Their agreement on the windrowing was based on the availability of Gartner's equipment and the fact that Daryl Cwach did not have the equipment to do it himself. While Cwach may have directed which field to cut when, those daily directives, usually to his son, did not constitute separate agreements. Instead, these directives fulfilled the parties' earlier agreement on how Debtor's windrowing would get done (with Gartner's equipment), by whom (Gartner and his employee Martin Cwach), and for how much ($7.00 an acres). There was no renegotiation of terms as each cutting matured. Cwach and Gartner both understood that Gartner would do them. Gartner kept records of the acres windrowed. Cwach hired only one other person, Richard List, to windrow. List did only one cutting on two of Debtor's mid-sized fields because Gartner was not available when those fields were ready. Gartner did all the other windrowing.

III.
VALIDITY AND EXTENT OF GARTNER'S LIEN

Having concluded that the parties had one agreement for Gartner to windrow for Debtor for the entire haying season, the remaining question of law is whether under S.D.C.L. § 38-17-16 Gartner could file one lien for the whole summer's windrowing when

his work encompassed more than one cutting of hay. Section 38-17-16 provides that if a person has an ag products processors' lien under § 38-17-14 and properly files it under § 38-17-15, then his lien "has priority over all other liens and encumbrances upon the grain, **if filed within thirty days from the day on which the** harvesting, threshing, shelling, or other **processing was completed**." S.D.C.L. § 38-17-16 (emphasis added). No South Dakota cases have interpreted the phrase "from the day on which the . . . processing was completed." There appears to be no reason, however, to stray from its ordinary meaning of when the work was finished or done. S.D.C.L. § 2-14-1; *Juttelstad v. Juttelstad*, 587 N.W.2d 447, 450 (S.D. 1998).

When the work of cutting hay is "completed," since hay may be harvested or cut one to four times over a spring-to-fall growing season, is a bit tougher question. An Idaho decision provides some guidance. In *Beckstead v. Griffith*, 83 P. 764 (Idaho 1906), the issue presented was whether an ag products processors' lien could be given on one season's full hay crop where the purported lien holder had performed some but not all of the haying on a ranch that year and where the liens were filed at the end of the season. The Idaho statute gave the ag processor 60 days from completion of the work to file his lien but is otherwise similar to South Dakota's law. The Idaho court treated all the stacks obtained that year as one crop, noting that it was the only crop grown on the ranch and that the boundaries for the fields were the work was performed were

known and all enclosed by one fence. *Id.* at 765. The Idaho court, interpreting all the related statutes, concluded that its legislature had intended to protect the farm laborer for the reasonable wages owed him. *Id.* at 766. It emphasized that the statute gave the farm laborer a lien on *all* the hay that he helped harvest; the statute did not require the lien holder to designate a particular stack of hay or the particular piece of ground from which it came for the lien to attach. *Id.* at 767.

In light of the guidance provided by *Beckstead* and after applying the plain meaning of "completed" in § 38-17-16, the Court concludes that Gartner could file one lien for all the 1998 windrowing he did under his and Cwach's singular agreement because he did not complete the windowing until October 12, 1998, a date established by Dale Kessler's testimony. This conclusion also recognizes the same definition of a "crop" of hay for Gartner as it does for the Bank. Hay may be processed through more than one cutting in a season but only one crop is harvested each season. *Beckstead*, 83 P. at 765; *see Hayes v. First State Bank of Bertrand*, 98 N.W. 423 (Neb. 1904). The Court cannot require Gartner to file a lien for each cutting of hay when he had an agreement to windrow as much of the entire hay crop as he could, yet allow the Bank, who received a continuing lien on post-petition "crops" under Debtor's plan, to have a blanket lien on the entire hay crop rather than just on the first cutting. *See In re Beck*, 61 B.R. 671 (Bankr. D. Neb. 1985)(bank's post-petition security interest attaches to all

hay cuttings from fields planted pre-petition, not just the first cutting).

Further, the circumstances support an equitable lien in Gartner's favor in addition to the statutory lien. *Black Hills Institute of Geological Research, Inc. v. Williams*, 88 F.3d 614, 616 (8th Cir. 1996)(application of equitable liens when right to statutory lien may also have existed). But for the windrowing, the Bank may not have had a 1998 hay crop securing its loan. General considerations of justice, in light of these parties and circumstances, warrant an assurance, through a superior lien, that Gartner gets paid for this work. *Id.; see United States v. Van Vactor, Francis & Martin (In re Crouch)*, 51 B.R. 331 (Bankr. D. Ore. 1985)(claimants who helped process hay post-petition should be paid from the alfalfa crop proceeds before the lien holder is paid).

The Court also concludes that Gartner's lien attaches to all of Debtor's 1998 hay crop. There appear to be no other ag product processors' liens on the hay and Gartner windrowed most all of it. There is, therefore, no need to identify a particular bale of hay to which Gartner's lien attaches. *Horne v. Hoyt*, 44 A. 292, 293 (Me. 1895); and *see Beckstead*, 83 P. at 767.

The Bank's argument that allowing Gartner to file a lien after the entire hay crop is cut will condone secret threshers' liens on hay cut early in the season and harm purchasers raises an issue not presented in this case. The only issue here is whether Gartner has

an ag products processors' lien under § 38-17-16 that has priority over the Banks' general crop mortgage. Purchasers of hay are treated under a separate statute, S.D.C.L. § 38-17-17. In § 38-17-17, the ten-day deadline for filing the lien is shorter and the language describing the triggering date is slightly different than in § 38-17-16, which governs the priority of the ag products processors' lien and other encumbrances. Interpretation of § 38-17-17 and a determination of whether the use of the word "service" in § 38-17-17 imparts a different result than the term "processing" in § 38-17-16 will have to await another day.

IV.

The Bank's claim that the lien fails under S.D.C.L. § 44-2-4 because Gartner did not mail Debtor a copy of the lien statement before filing it is without merit. Foremost, Debtor received notice of the lien only three days after it was filed and has claimed no harm by the slight delay. Second, § 44-2-4 refers back to a general personal property lien statement set forth in § 44-2-3. Section 44-2-3 provides how public notice of a general personal property lien is given. Since S.D.C.L. § 38-17-15 provides the means for giving public record notice of the more specific ag products processors' lien, nether § 44-2-3 nor § 44-2-4 apply to an ag products processors' lien. Moreover, the Bank's assertion that mailing the lien statement is the only way the farmer gets notice of the lien is contrary to South Dakota case law, which provides the law itself constitutes notice of the statutory lien. *Hahn v. Sleepy Eye Milling Co.*, 112 N.W. 843, 844-

45 (S.D. 1907).

V.

Finally, the Court dismisses as untimely the Bank's claim that Gartner violated the automatic stay by filing his ag products processor's lien. Since that issue could have been addressed on the record before trial, the Bank should have included it in a dispositive motion, which was due April 2, 1999. Further, even if there were violation, an issue on which the Court takes no position, the matter is no longer relevant since the main case has been dismissed and any voided transfer is reinstated under 11 U.S.C. § 349.

An order shall be entered directing entry of a judgment for Plaintiff. Counsel for Plaintiff shall prepare an appropriate judgment.

Dated this 17 day of May, 1999.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

MAY 18 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

MAY 18 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 99-04004 Form id: 122 Ntc Date: 05/18/1999 Off: 4 Page : 1
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