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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 96-53513-JRG

TRANS-EAGLE CORPORATION,
Debtor.

_____ /

SUZANNE L. DECKER, Trustee, Adversary No. 96-5381
Plaintiff,

vs.

JERRY LIU, SYNEX, INFORMATION
TECHNOLOGIES, INC., A.C.T. COMPUTERS,
INC., PACIFIC BUSINESS FUNDING CORP.,
SUPERCOM, INC., and C. KEVIN CHUANG,

Defendants.
_____ /

**ORDER ON COURT'S MOTION TO RECONSIDER APPROVAL OF
STIPULATION RE MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The court, on its own motion, determined that it should
reconsider its approval of the Stipulation Re Motion for Summary

1 Judgment between plaintiff Decker and defendant Synnex filed on March
2 20, 1998. Subsequent review led the court to conclude that the
3 parties intent was not clear with respect to paragraph 2 of the
4 stipulation. That paragraph provides:

5 The debtor and Synnex entered into the Security Agreement
6 after this case commenced, but making that Security
7 Agreement is not void as a violation of 11 U.S.C. §362(a).
8 However, whatever security interest might have been granted
pursuant to the Security Agreement did not attach to any
property of the estate.

9 Did the parties believe that the Security Agreement was void as a
10 violation of § 362(a) but, for some undisclosed reason, agree they
11 would not treat it in that fashion? Stated another way, did the
12 stipulation change the result the law would have otherwise dictated?
13 For the reasons hereafter stated the court will not vacate or modify
14 its prior approval of the Stipulation.

15 II. DISCUSSION

16 The stipulation involves a Security Agreement executed by the
17 debtor in favor of Synnex on May 16, 1998, seven days after the filing
18 of the bankruptcy petition on May 9, 1996. Section 362(a)(4) of the
19 Bankruptcy Code provides that the filing of the petition operates as
20 a stay of "any act to create, perfect, or enforce any lien against
21 property of the estate." If the execution of the Security Agreement
22 is viewed as an act to create a lien, then it seems it would violate
23 the stay. The Ninth Circuit in In re Schwartz, 954 F.2d 569, 571 (9th
24 Cir. 1992) held that violations of the automatic stay are void, not
25 voidable. If Schwartz controls, the Security Agreement would be void
26 and the Stipulation would be contrary to existing law. Despite
27 signing the Stipulation, Synnex states that it has always believed
28 that Schwartz controls and that the Security Agreement is void as a

1 matter of law.

2 Plaintiff contends that the stipulation is not contrary to
 3 existing law. She relies on In re McConville, 110 F.3d 47 (9th Cir.
 4 1996) for the proposition that the "creation and perfection of post-
 5 petition liens against property of the estate are not necessarily
 6 void, though they may be violations of the automatic stay."

7 In McConville, lenders made a loan to the debtor and recorded a
 8 deed of trust post-petition without knowledge of the bankruptcy
 9 filing. The Ninth Circuit held that the debtor violated § 364(c)(2)
 10 by incurring secured debt without prior court authorization. The
 11 court then looked at the equities of the case and determined that the
 12 lenders should get back the amount of money they loaned and the Court
 13 gave the lenders a lien on the proceeds of the sale of the property.
 14 The Court also mentioned that it is governed by its precedents in
 15 Schwartz, and In re Shamblin, 890 F.2d 123, 127 (9th Cir. 1989),
 16 "which simply hold that the creation of a lien does not transfer
 17 property for purposes of § 549." See In re McConville, 110 F.3d at
 18 49. However, the Court provided no discussion of this statement and
 19 simply shifted its focus to § 364 on which it based the ruling.

20 In Schwartz, the Court provided a detailed discussion of the
 21 interrelationship between § 549 and § 362. The parties in Schwartz
 22 had based their argument on § 549 and the Court found the "supposed
 23 conflict" between the sections initially troubling noting the "the
 24 expansive definition of 'transfer' means that sections 362 and 549,
 25 at times cover the same transaction." Schwartz, at 573. The court
 26 resolved the "supposed conflict" noting that:

27 /////

28 /////

1 ..., a straightforward analysis of section 549 reveals that
2 it is not intended to cover the same type of actions
3 prohibited by the automatic stay nor rendered moot by
4 section 362's voiding of all automatic stay violations.
5 Section 549 applies to unauthorized transfers of estate
6 property which are not otherwise prohibited by the
7 Code....In most circumstances, section 549 applies to
8 transfers in which the debtor is a willing
9 participant....Section 362's automatic stay does not apply
10 to sales or transfers of property initiated by the debtor.

11 Schwartz, at 573-574.

12 It is noteworthy that in both Schwartz and Shamblin it was the
13 creditor that was the active party attempting to create the lien.¹
14 The debtor did not participate in the attempt to create a lien. In
15 this case the debtor was an active participant. The present fact
16 pattern differs from Schwartz and Shamblin, and from McConville as
17 well. It is therefore not clear what approach to avoidance the Ninth
18 Circuit would take were it to have the present case before it.

19 III. CONCLUSION

20 Based on the foregoing the court believes there was a valid legal
21 basis for the stipulation between the parties. As such, the court
22 will not disturb its prior ruling.²

23 ¹ Schwartz involved a penalty assessment by the Internal Revenue Service during the
24 debtor's Chapter 11 case. Shamblin involved a state tax sale conducted after the
25 bankruptcy petition was filed.

26 ² Plaintiff initially contended that under In re Mulvania, 214 B.R. 1 (9th Cir. BAP
27 1997), this court is powerless to change its prior order. Given the court ruling, the
28 point is moot. Nevertheless, the court determined it had the ability to modify its ruling
had it determined it was necessary to do so.

The court in Mulvania stated that a bankruptcy court no longer has the inherent
power to reconsider its prior orders, rather its power to reconsider is governed by Federal
Rule of Bankruptcy Procedure 9024 applying Federal Rule of Civil Procedure 60. Id. at 9
citing In re Met-L-Wood Corp., 861 F.2d 1012, 1018 (7th Cir. 1988). The Ninth Circuit BAP
reversed the bankruptcy courts's reformation of the order approving the stipulation and
remanded with instructions to analyze the issue under Rule 60.

Rule 60(b) provides that on motion and upon such terms as are just, the court may
relieve a party or a party's legal representative from a final judgment, order or
proceeding. The court may act *sua sponte* and reconsider its own orders under Rule 60(b).

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 DATED: _____
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4 JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE
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24 See 10 Collier on Bankruptcy ¶ 9024.04 (15th ed. rev. 1997) citing Cisneros v. United States
(In re Cisneros), 994 F.2d 1462 (9th Cir. 1993).

25 Plaintiff argued at the hearing that too much time has passed for the court to
26 reconsider its prior order. A motion under Rule 60(b)(1) must be made within a reasonable
27 time, and within a maximum time limit of one year after the final judgment, order or
28 proceeding was entered or taken. See Rule 60(b). The order approving the stipulation was
filed on March 20, 1998, and the order setting a hearing to reconsider that order was filed
on October 23, 1998. Action was taken within the time limit and within a reasonable time.
Thus, the court had authority to proceed.