IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
ROSEN AUTO LEASING, INC.,	)	CASE NO. BK02-81781
	)	
Debtor(s).	)	CH. 7

MEMORANDUM

Hearing was held in Omaha, Nebraska, on July 1, 2002, on a motion for relief from stay by American National Bank (Fil. #9) and objections thereto. Tom Saladino and Mike Currans appeared for American National Bank, Robert Zuber and Ryan Forrest appeared for the debtor, Thomas Stalnaker appeared as the trustee, Robert Becker appeared for the trustee, Mark Carder appeared for U.S. Bank, Emmett Childers appeared for Security National Bank, Steve Woolley appeared for TeamBank, Trent Bausch appeared for Truckers Bank Plan, Michael Eversden appeared for Bank of Bennington, William Garbena appeared for Bank of Nebraska, Mike Kivett appeared for First National Bank of Omaha, Charles Benish appeared for CitiCorp. Leasing, Albert Kerkhove appeared for the Internal Revenue Service, Jeffrey Silver appeared for Charter West, Dave Koukol appeared for All Points Capital Corp., Mike Washburn appeared for Nebraska State Bank, Steve Turner appeared for Pinnacle Bank and Great Western Bank, and James Buser appeared for First Westroads Bank. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

The debtor, Rosen Auto Leasing ("Rosen"), prior to filing a Chapter 11 petition, was in the business of buying, selling, and leasing motor vehicles, and operating a motor vehicle rental agency under the name of the debtor and under the name of Metro Leasing, as well as under the name of Cheepers Rent-A-Car, a corporate subsidiary of the debtor.

The debtor had a banking relationship with American National Bank ("ANB"). Included in the banking relationship was a checking account into which Rosen deposited receipts from its sales and lease operations. The checking account appears to have been a general operating account from which business expenses were paid. In addition to the depository relationship, ANB was a lender to Rosen. To secure the obligations running from Rosen

to ANB, Cheepers Rent-A-Car to ANB, and Metro Leasing to ANB, Rosen gave ANB one or more deeds of trust on real estate located in Omaha, Nebraska, and Council Bluffs, Iowa. It is undisputed that ANB holds a first lien interest against the real property secured by the deeds of trust. It is also undisputed that ANB has both a contractual and common-law right of setoff against funds in the checking account.

Rosen initially filed a Chapter 11 case which has been converted to Chapter 7. While the case was in Chapter 11, ANB filed a motion for relief from the automatic stay requesting authority to exercise its contractual and common-law setoff rights against the deposits in the checking account. At that time, ANB was owed more than a million dollars and, as mentioned above, had lien rights with regard to the deeds of trust and setoff rights with regard to the checking account. The checking account, at the time the motion for relief was filed, contained approximately $134,000.

Numerous objections to the motion for relief were filed by creditors who assert liens against the proceeds of motor vehicle lease receivables and motor vehicle sales receivables. Each of the objecting creditors claims that the funds in the checking account represent proceeds of their collateral. Each wants ANB to first exhaust its rights against the real estate in which it holds deeds of trust before looking to the funds contained in the checking account in which the objectors claim an interest.

In other words, the objecting creditors are invoking the doctrine of marshaling assets. The marshaling doctrine means that if a senior lienholder has a lien that extends to two funds and a junior lienholder has recourse to only one of those funds, the court may require the senior lienholder to exhaust the fund to which only it has access before proceeding against the fund that is also available to the junior lienholder. Ramette v. United States (In re Bame), 279 B.R. 833, 837 (B.A.P. 8th Cir. 2002). The Eighth Circuit Bankruptcy Appellate Panel in that case cited numerous federal decisions for that proposition and for the proposition that the doctrine of marshaling is designed to promote fair dealing and justice and is applied when it can be equitably fashioned as to all parties. Id. When applying the doctrine, the court must balance the equities to determine whether marshaling is equitable in the given situation. Requiring marshaling is not appropriate where it will cause prejudice. Id.

In this case, although there are two funds, the real estate and the funds held in the checking account, there are junior creditors on each fund. With regard to the checking account, the objecting creditors claim an interest. With regard to the real estate, there is a second lien held by a third party which secures a debt of more than a million dollars.

Recently, the holder of the second lien on the real estate has filed an adversary proceeding against ANB. That adversary proceeding challenges the extent and validity of the lien represented by ANB's trust deeds. Basically, the plaintiff in the adversary proceeding asserts that certain obligations owed by Rosen to ANB are not actually secured by the real estate, notwithstanding language in the loan documents and deeds of trust relied upon by ANB. The trustee and U.S. Bank, one of the parties objecting to the motion for relief from the automatic stay, have intervened in the adversary proceeding. They do not appear to challenge the lien priority of ANB, but rather they challenge the extent and validity of the lien asserted by the third-party claimant because of his status as an "insider."

Therefore, as the adversary proceeding now stands, the pleadings put at issue the relative priorities as between ANB and the adversary plaintiff, with regard to rights to the proceeds of the real estate. Separate from the priority issues, the trustee and U.S. Bank have put in issue the lien status of the plaintiff vis-a-vis unsecured claimholders in the bankruptcy case. The claims of the intervenors do not legally impact the priority issues between ANB and the plaintiff. However, as a practical matter, the involvement of the intervenors complicates the lawsuit and may result in the ultimate determination of the rights of ANB, and its receipt of payment from the proceeds of the real estate if it is successful in the litigation, being delayed for months, if not years.

This bankruptcy case was filed in May of 2002. ANB's motion for relief from the automatic stay to permit setoff was filed in June of 2002. In November 2002, the debtor's place of business at 7700 L Street in Omaha was sold for $1.35 million. ANB received more than a million dollars of the sale proceeds, representing principal and interest on its note as well as attorney fees and costs, pursuant to court order. The trustee is holding the balance. The trustee continues to hold the amount of $85,119.89 from the sale of the L street property, $146,075.65 from the sale of a second parcel of real estate and the amount of $132,204.96 from the sale of a third parcel of real estate.

The proceeds being held by the trustee are the subject of the dispute between the parties involved in the adversary proceeding referred to above.

Although ANB has been paid more than a million dollars on its claim, it still has a claim, as of January 31, 2003, of $95,899.71 plus accruing interest and attorney fees from that date.

The marshaling doctrine is an equitable doctrine which may be used appropriately only if its operation does not result in prejudice to the senior lienholder, ANB, or the junior lienholder, the plaintiff in the adversary proceeding. Requiring ANB to seek recovery only through the real estate alone would erode the equity available to the junior lienholder on the real estate, thereby prejudicing that junior lienholder to the benefit of the junior creditors on the operating account. See Colvin v. Petree (In Re Dan Hixson Chevrolet Co.), 20 B.R. 108 (Bankr. N.D. Tex. 1982) and citations therein at 113-14.

In addition to the prejudice that application of the marshaling doctrine will have with regard to the second lienholder, application of the marshaling doctrine in this case will cause severe prejudice to ANB, the senior lienholder. As discussed above, the fund that the objectors desire ANB to be required to resort to is tied up in litigation with a second lienholder, the trustee, and U.S. Bank. ANB is prejudiced by the cost of that litigation and the delay in receiving payment, even if it is successful in that litigation. There is no such litigation pending with regard to the setoff rights of ANB, both contractual and common-law, concerning the funds being held in the checking account.

Generally, if the senior creditor will be prejudiced by the application of the marshaling doctrine, it should not be invoked. The Nebraska Court of Appeals in Janke v. Chace, 487 N.W.2d 301 (Neb. Ct. App. 1992), stated:

> Marshaling will not be permitted if it would hinder or impose hardship on the paramount creditor, inconvenience him in the collection of his debt, or deprive him of his rights under the contract. Marshaling will be denied if final satisfaction to the paramount creditor is uncertain or where the effect of applying the doctrine will be to compel the paramount creditor to proceed by an independent action, such as

> one for the foreclosure of a mortgage, since that will place an additional burden on the paramount creditor. It is the paramount creditor that cannot be prejudiced.

487 N.W.2d at 304.

The court cited for such statement the authority of Platte Valley Bank of North Bend v. Kracl, 185 Neb. 168, 174 N.W.2d 724 (1970). See also In re Mid-West Motors, Inc., 82 B.R. 439, 442 (Bankr. N.D. Tex. 1988) for the proposition that marshaling cannot be invoked if it will prejudice the senior creditor "in any manner." Finally, in discussing the appropriateness of invoking the marshaling doctrine, the Minnesota Court of Appeals, also citing Kracl, stated "[t]he doctrine of marshaling assets may not be applied so as to defeat statutory rights, and it will not be applied if it will impose a hardship on the paramount creditor, such as would be involved in requiring the bank to take legal action to foreclose on the real estate covered by the security agreement." Lieberman Music Co. v. Hagen, 394 N.W.2d 837, 841 (Minn. Ct. App. 1986).

Although in this case, because the trustee has sold the real estate in question, ANB would not be required to proceed with a mortgage foreclosure or deed of trust foreclosure action, it is involved in the equivalent litigation represented by the adversary proceeding discussed above. As between ANB and all other parties involved in the adversary proceeding, the issues concerning the extent and validity of ANB's lien concerning the remaining debt balance could probably be avoided if ANB is allowed to setoff the debtor's operating account.

According to the objecting creditors' point of view, they might be prejudiced if ANB is allowed to exercise its setoff rights. The setoff rights of ANB, contained in its contract document and recognized at common law, are also recognized by the statutory provisions of the Bankruptcy Code. See 11 U.S.C. § 553. Case law is consistent in recognizing setoff rights and minimizing the concerns of those who object to the holder of the setoff rights exercising such rights. Bohack Corp. v. Borden, Inc. (In re Bohack Corp.), 599 F.2d 1160, 1164-65 (2d Cir. 1979); New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952, 957-58 (2d Cir. 1978); United States v. Krause (In re Krause), 261 B.R. 218, 223 (B.A.P. 8th Cir. 2001); Stonitsch v. Waller (In re Waller), 28 B.R. 850, 857-58 (Bankr. W.D. Mo. 1983).

Considering the facts of this case, the pending adversary proceeding referred to above, the general rules recited in case law concerning the application of the marshaling doctrine and the contractual, common-law, and statutory setoff rights and the long history of case law recognition of the superiority of such rights, to require ANB to participate in the marshaling process and look first to the proceeds of the real estate prior to the exercise of its setoff rights would be prejudicial to ANB. Therefore, the request of the objecting parties that ANB be required to look to such real estate proceeds for payment of the debt prior to offsetting the funds contained in the debtor's operating account is denied.

Separate order will be entered.

DATED: April 4, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Trent Bausch	Charles Benish	James Buser
Mark Carder	Emmett Childers	Michael Eversden
William Biggs	William Garbena	Jay Gottlieb
Ed Hotz	Albert Kerkhove	Michael Kivett
Dave Koukol	*Tom Saladino	Thomas Stalnaker
Jeffrey Silver	Steve Turner	Mike Washburn
Steve Woolley	United States Trustee	

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

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IT IS ORDERED: For the reasons stated in the Memorandum of today's date, American National Bank's motion for relief from stay (Fil. #9) is granted.

DATED: April 4, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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