



**IT IS ORDERED as set forth below:**

**Date: April 18, 2008**

*C. Ray Mullins*

**C. Ray Mullins  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

BCC SYSTEMS, INC.,

Debtor,

CASE NO. 05-84208-CRM

CHAPTER 7

WILLIAM LANG, as Chapter 7 Trustee for  
the Estate of BCC SYSTEMS, INC.,

Movant,

v.

MARY BROOKS,

Respondent.

CONTESTED MATTER

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**ORDER DENYING TRUSTEE'S OBJECTION TO THE CLAIM OF MARY  
BROOKS**

**THIS MATTER** is before the Court on the Chapter 7 Trustee's (the "Trustee") Omnibus Objection to the Claims of Four Creditors (the "Objection"). Mary Brooks (the

“Respondent”) was the only creditor to respond to the objection. The Trustee and the Respondent were present at a hearing on February 14, 2008. The Court now finds in favor of the Respondent.

On February 9, 2006, Respondent filed a proof of claim for a secured claim in the amount of \$540,740.59. The claim represented a security interest for the sale of Respondent’s business to Debtor. The security agreement executed between the Debtor and the Respondent failed to list the Respondent as a lien holder on six vehicles, ultimately involved in a sale by the Trustee. So far, Respondent claims to have recovered about \$10,000 in property. On January 19, 2006, the Court granted the Trustee’s Motion for Authorization to Conduct a Private Sale of the Debtor’s Interest in Certain Personal Property Free and Clear of Liens and Other Interest. The Trustee sold the six vehicles and collected about \$17,000 in proceeds that he is now holding. According to the Trustee, those funds represent all of the money remaining in the estate.

Respondent claims that she is entitled to recover the proceeds as she held a priority equitable interest in the vehicles that the Trustee does not have the power to avoid under § 544. Section 544 (a)(1) empowers a trustee to operate as a judicial lienholder with priority over any unperfected security interest as of the date of filing and avoid any such transaction. It states:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists; ...

11 U.S.C. § 544(a)(1) (2008).

Respondent relies on Wenco Industries, Inc. v. Stalzer, 165 B.R. 327 (Bankr. N.D. Ga. 1994) (Bihary, CJ). The question presented in that case and the present case are the same: Does Georgia law give a judicial lien creditor of a party listed as the owner of a vehicle a superior

interest in the vehicle over a party holding an equitable unrecorded interest? Id. at 331.

In Wenco Industries, Judge Bihary first looks to the Georgia statute on the transfer of vehicles generally, O.C.G.A. 40-3-32.<sup>1</sup> It states, in relevant part:

**40-3-32. Transfer of vehicle generally.**

(a) If an owner transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of delivery of the vehicle, execute an assignment and warranty of title to the transferee in the space provided therefor on the certificate of title or as the commissioner prescribes and cause the certificate and assignment to be delivered to the transferee. If the transferor willfully fails to deliver the properly assigned certificate of title to the transferee, the transferor shall be guilty of a misdemeanor. In addition, the transferor shall be civilly liable to the transferee for all damages, including reasonable attorney's fees, occasioned by the transferor's failure to comply with this subsection.

(d) Except as provided in Code Section 40-3-33 and as between the parties, a transfer by an owner is not effective until this Code section and Code Section 40-3-33 have been complied with; and no purchaser or transferee shall acquire any right, title, or interest in and to a vehicle purchased by him unless and until he shall obtain from the transferor the certificate of title thereto, duly transferred in accordance with this Code section

O.C.G.A. 40-3-32 (2007).

Finding that the statute did not specifically address the rights in question, Judge Bihary interpreted the rights of a judicial lien creditor against those of a party holding an equitable unrecorded interest by applying the reasoning of the Seventh Circuit's interpretation of a similar law in Illinois. In In re Robinson, 655 F.2d 166 (7th Cir. 1981), the Seventh Circuit construed an Illinois statute similar to the Georgia statute and found that the trustee, as hypothetical judicial lien creditor, did not prevail in a dispute over a truck.

Judge Bihary's interpretation of the Georgia statute, like the Seventh Circuit's interpretation of the Illinois statute relied on the "*except as...between the parties*" language present in both statutes. Each court concluded that a transfer was effective between the parties

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<sup>1</sup> The statute reads the same as it did in 1994.

even though the parties had not fully complied with the statute. In fact, in Wenco Industries, the parties agreed that Georgia law did not require proof of the transfer to establish ownership. Id. at 330 (citing Allen v. Holloway, 119 Ga.App. 676, 168 S.E.2d 196 (1969)). Next the courts determined the status of the trustee.

Both courts concluded that the trustee was a third party in the transaction, but did not find that determinative. Both courts found that absent express language in the statutes, judicial lienholders were not protected. Neither the Illinois statute nor the Georgia statute specifically included or excluded judicial lienholders among the class of persons against whom the transfer was ineffective without full compliance with the statute. Moreover, Judge Bihary found that Georgia law appeared to grant priority to an unrecorded equitable interest in real property over a subsequent judgment lien, preventing the trustee from asserting a § 544(a)(1) claim. Citing Ivey v. Transouth Financial Corp. (In re Clifford), 566 F.2d 1023, 1027 (5<sup>th</sup> Cir. 1978); Updike v. First Federal Savings & Loan Ass'n of Columbus (In re Updike), 93 B.R. 795, 798 (Bankr. M.D. Ga. 1988). Judge Bihary found that the rule with regard to unrecorded equitable interests in automobiles should be the same.

The Trustee's strong-arm powers under § 544(a)(1) do not give him priority over the Respondent's unrecorded equitable interest in the vehicles in this case. The conclusion in Wenco Industries is not intuitive as the trustee's "strong-arm powers" are commonly used to avoid improperly perfected interests. Nonetheless, Georgia law appears to deviate from common practice in the case of automobiles. Accordingly,

**IT IS ORDERED** that the Trustee's Objection be and is hereby **DENIED**.

The Clerk's Office is directed to serve a copy of this Order upon Debtor's Counsel, Respondent's Counsel, and the Chapter 7 Trustee.

**END OF DOCUMENT**