IT IS ORDERED as set forth below:

Date: July 22, 2010

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN RE:	:	CASE NUMBER
	:	
ERIC LEROY ANDERSON,	:	**10-72072-MGD**
	:	
Debtor.	:	CHAPTER 13
	:	

ORDER

The above-styled Chapter 13 case is before the Court on Eric LeRoy Anderson's ("Debtor") Amended Motion for Sanctions ("Motion") against The Fairville Company. (Docket No. 15). The matter came on for hearing on July 21, 2010. Also on the calendar for July 21, 2010, was Confirmation of Chapter 13 Plan and The Fairville Company, LP's ("Fairville") Objection to Confirmation. (Docket No. 20). Present at the hearing was the Debtor, Craig Black and Anirban Bappa Basu, counsel for the debtor, Jerry Gerald, counsel for The Fairville Company, LP, and Ed Safir, on behalf of the Standing Chapter 13 Trustee. For the reasons set forth below, Debtor's Motion and Amended Motion for Sanctions is **DENIED** and Fairville's Objection to Confirmation is **DENIED AS MOOT**.

Debtor operates EA Trucking & Transport, Inc. ("EA Trucking"), a sub-chapter "S" corporation. On September 28, 2007, Debtor signed a security agreement as president of EA Trucking for the purchase of a 2003 Freightliner Tractor. (Docket Nos. 16 & 20 "Exhibit A"). The agreement lists the debtor as EA Trucking and the secured party as The Fairville Company, L.P. *Id.* Debtor also signed a personal guaranty for the debt owed by EA Trucking to Fairville. (Docket Nos. 16 & 20 Exh. C).

Debtor filed this Chapter 13 case on April 24, 2010. On or about May 22, 2010, Fairville repossessed the 2003 Freightliner Tractor ("Freightliner"). Debtor filed a Motion and Amended Motion for Damages Pursuant to Violation of 11 U.S.C. § 362(k) on June 7, 2010, alleging that Fairville violated the automatic stay when it repossessed the Freightliner. (Docket Nos. 13 & 15). At the hearing, Fairville alleged that it did not violate the automatic stay because the Freightliner is property of EA Trucking and not the debtor and therefore not protected by Debtor's automatic stay.

The issue before the Court is whether Fairville violated the Debtor's automatic stay when it repossessed the Freightliner. For the Freightliner to be protected from repossession by creditors, it must be property of the estate. 11 U.S.C. § 362(a)(3) ("[A] petition filed . . . operates as a stay, applicable to all entities, of . . . any act to obtain possession of *property of the estate*." (emphasis added)). Section 541(a)(1) provides a broad definition of what constitutes the bankruptcy estate: "all legal and equitable interests owned by debtor at the commencement of the case." 11 U.S.C. § 541(a)(1). Debtor alleges that the Freightliner is property of the estate because he executed a guaranty agreement with Fairville and has the right to redemption. Fairville alleges that the Freightliner is not property of the estate because the security agreement is signed by the Debtor as president of his closely held corporation, EA Trucking and it is titled in the name of EA Trucking (Docket No. 20, Exh. B).

At the hearing, Debtor cited *Dierkes v. Crawford Orthodontic Care, P.C. (In re Dierkes)* to support his position that the Freightliner is property of the estate. No. 05-06022, slip op. (Bankr. N.D.Ga. filed Mar. 17, 2005). In *Dierkes*, the plaintiff debtor instituted the subject adversary proceeding seeking the turnover of property that was repossessed pre-petition by the defendant. *Id.* at 1. The issue before the Court was whether the plaintiff had an interest in the repossessed equipment and furnishings at the time that he filed his petition and thus these items became property of the estate upon filing or whether the creditor held the interest since it had repossessed the items pre-petition. *Id*. at 2. In that case, no material facts were in dispute. *Id.* Plaintiff had signed a promissory note and security agreement for the purchase of the property. *Id*. The parties did not allege that the plaintiff signed as an officer of a corporation or other limited liability business structure. *See id.* The facts in the present case starkly contrast with *Dierkes* because whether the debtor signed the security agreement on behalf of his corporation is a significant issue of contention and materially relevant as to whether the Freightliner is property of the estate. Particularly significant is the fact that, unlike *Dierkes*, here the debtor signed the security agreement as president of his corporation, not as an individual as in *Dierkes*. Therefore, *Dierkes* is not dispositive in this case.

Fairville cited *In re Penn* to support its position that the Freightliner is not property of the estate. No. 09-14624, slip op. (Bankr. N.D.Ga. filed April 2, 2010) (Drake, J.). In *Penn*, the matter was before the court on creditor's Motion to Validate Foreclosure Sale or, in the Alternative, For Relief from or Annulment of Stay Ab initio. *Id.* at 1. There, the debtor alleged that the property was property of the estate because it was owned by a limited liability company, of which the debtor was the sole owner. *Id.* at 4. The court rejected this theory because "[a] separate legal entity that is established to hold property is considered a separate legal entity for that purpose and, should that

legal entity desire bankruptcy protection, it must file its own petition." *Id.* (*citing Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007)). Here, Debtor created EA Trucking as a separate legal entity, and it is in this legal entity's name that the Freightliner is titled. Similar to *Penn*, if Debtor wishes the Freightliner to be subject to bankruptcy protection afforded by the automatic stay, then EA Trucking must file its own petition.

At the hearing, Fairville cited a Southern District of Georgia bankruptcy opinion for the proposition that "the mere fact that [the debtor] is the sole shareholder in his wholly-owned corporation would not have been sufficient to pierce the corporate veil for the purpose of seeking to satisfy the corporation's debts by using [the debtor's] individual assets. Similarly, there is no justification for allowing [the debtor] to 'reverse pierce' the corporate veil." *Bruce v. Cit Group, Inc.* (*In re Bruce*), No. 02-2032, slip op. (Bankr. S.D.Ga. filed July 29, 2002) (*citing Hogan v. Mayor & Aldermen of Savannah*, 320 S.E.2d 555, 557-58 (Ct.App.Ga. 1984)). Fairville also cited a case in which the chapter 13 debtors were sole shareholders in a corporation and were guarantors of the corporate note between the corporation and the creditor, which was secured by real property. *Coastal Bank of Georgia v. Camden Mills, Inc. et al* (*In re Camden Mills, et al*) No. 03-20846, slip op at 2 (Bankr. S.D.Ga. filed September 16, 2003). The real estate was titled in the name of the corporation, not the individual debtors. *Id.* at 4. The court found that the real estate was not property of the debtors' estate because "[i]t is well established in Georgia that a corporation and its shareholders are separate and distinct entities unless the corporate veil is pierced . . . [and] the fact that the [debtors] are sole shareholders in the corporation does not entitle . . . personal creditors . . . to reach corporate assets." *Id.* at 5. Although the Debtor did not argue to "reverse pierce" the corporate veil, the Court finds that, like *Bruce* and *Camden Mills*, the mere fact that the Debtor owns EA Trucking does not entitle the Debtor's personal creditors to reach EA Trucking & Transport,

Inc.'s assets.

The Court also finds instructive *In re Johnson*. 2010 Bankr. LEXIS 1393 (Bankr. D.S.C. May 6, 2010). In *Johnson*, the creditor filed a motion for relief from the automatic stay on the grounds that the property was not property of the estate. *Id.* at *5. There, the creditor held a note secured by a security interest in a dump truck that was owned by a corporation. *Id.* at *2. This corporation was owned by the debtor's brother and was formed for the purpose of purchasing and operating the dump truck. *Id*. at *4. The debtor had executed a guarantee to the creditor under the note. *Id*. at *3. The creditor repossessed the dump truck over four months after the debtor filed an individual, voluntary petition under chapter 13 of the United States Bankruptcy Code. *Id.* The debtor alleged that this violated her automatic stay because she had possessory interest in the truck. *Id.* at *5. The court rejected the debtor's assertions because the dump truck was titled in the name of the corporation and the guaranty of the note merely provided the creditor with an alternate means of collection in the event that the corporation was unable to fulfill its obligations under the note. *Id.* at *11. The dump truck was not property of the estate because "the mere execution of a guaranty itself does not necessarily provide a guarantor with a legal or possessory interest in collateral securing the loan that is guaranteed." *Id.* Similarly, here, Debtor's guaranty on the Freightliner is insufficient to establish a legal interest in the Freightliner that would make the Freightliner property of the estate.

Because the security agreement was executed between EA Trucking and Fairville, the Freightliner is titled in the name of EA Trucking & Transport, Inc., and Debtor merely executed a guaranty on the note, Debtor has failed to establish a legal interest in the Freightliner. And because Debtor failed to establish a legal interest in the Freightliner, it is not property of the estate and is not subject to protection by Debtor's automatic stay. Accordingly, it is

ORDERED that Debtor's Motion for Sanctions is **DENIED**.

IT IS FURTHER ORDERED that Fairville's Objection to Confirmation is **DENIED AS MOOT**.

The Clerk shall serve a copy of this Order upon Debtor, Debtor's counsel, counsel for Fairville Company, LP, and the Chapter 13 Trustee.

END OF DOCUMENT