IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:	§	
	§	
HYDRO-ACTION, INC.	§	Case No. 01-10209
	§	
	§	
Debtor	§	Chapter 7

MEMORANDUM OF DECISION

Before the Court for consideration are a Motion for Relief from Stay filed by Storagequip.com and an objection filed by Daniel J. Goldberg, Chapter 7 Trustee, to the secured proof of claim #48 filed by Storagequip.com. A hearing was held on these matters on November 18, 2003, with each party appearing and presenting argument. At the conclusion of the hearing, the parties were provided with the opportunity to submit supplemental briefing and, upon receipt of such briefing, the Court took the matters under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Factual Background

In August of 2000, Hydro-Action, Inc. (the "Debtor") began negotiating with Storagequip.com (the "Claimant") for the purchase of a conveyor belt system. The Debtor had previously purchased a simpler system from the Claimant, and now needed a

[1] This Court has jurisdiction to consider these matters pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(a). The Court has the authority to enter a final order in these contested matters since they constitute core proceedings as contemplated by 28 U.S.C. §157(b)(2)(A), (B), (G), and (O).

more complex system in order to facilitate the movement of large fiberglass tanks at Debtor's factory. The Claimant, after obtaining various component parts from different suppliers,[2] delivered the components in late December 2000, performed on-site fabrication and welding work, and then completed the installation of the conveyor belt system in January 2001. The Debtor had informed the Claimant that the system was to be financed through General Electric Credit Corporation, Amerilease, or some other source. However, no lease-purchase financing materialized and the Claimant remained unpaid as of the February 2, 2001 date upon which the Debtor filed its Chapter 11 petition.

On June 21, 2001, during the pendency of the Chapter 11 case, the Claimant filed a Motion for Relief from Stay asserting that it was entitled to secured creditor status under the Texas lien laws. On August 1, 2001, a stipulation pursuant to FED. R. BANKR. P. 4001 was submitted to the Court in settlement of the Motion for Relief from Stay. In this stipulation, the Claimant and the Debtor, acting in the capacity of a Chapter 11 debtor-in-possession, agreed that the Claimant held a secured claim in the amount of $146,383.67. Objections to the approval of that stipulation were timely filed by the Debtor's primary lender, SouthTrust Bank, and by the Official Committee of Unsecured Creditors. Upon hearing of the motion to approve the stipulation, the objecting parties withdrew their objections and an agreed order signed by the Debtor-in-Possession, SouthTrust Bank, the Committee, and the Claimant was submitted. On December 12, 2001, the Court entered

[2] *See* Exhibits D-A, D-B, D-C, D-D, and D-E.

the agreed order approving the stipulation.[3]

On May 27, 2003, the Debtor's bankruptcy proceeding was converted to a case under Chapter 7 of the Bankruptcy Code, and Daniel Jacob Goldberg (the "Trustee") was appointed to serve as the Chapter 7 trustee. On July 31, 2003, the Claimant filed its Motion for Relief from Stay seeking relief under §362(d) of the Bankruptcy Code in order to foreclose upon its asserted lien on the conveyor belt system.[4] The Trustee objected to the stay motion on the ground that no such lien existed in favor of the Claimant. Thereafter, on September 23, 2003, the Trustee filed a corresponding objection to claim #48 filed by the Claimant, again on the ground that Storagequip was not entitled to a secured status,[5] and additionally asserting that even if the Claimant was entitled to a

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[3] Such order specifically stated that:

It is, therefore, ORDERED, that said Bankruptcy Code (sic) 4001 written stipulation shall be, and is hereby APPROVED.

It is further, ORDERED, that Storage Equip.com (sic) shall be a secured creditor in the Chapter 11 proceeding herein in the amount of $146,383.67.

It is further, ORDERED, that Storage Equip.com's (sic) claim shall be secured by Debtor's conveyor belt system as described in Storage Equip.com's Motion for Relief from Automatic Stay.

It is further, ORDERED, that Storage Equip.com's (sic) lien shall be a second lien, inferior to the perfected first lien in Debtor's conveyor belt system held by SouthTrust Bank.

[4] 11 U.S.C. §362(d)(2) states as follows:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

[5] The Trustee has not challenged the amount of the debt owed to the Claimant. In fact, the Trustee's objection to proof of claim no. 48 states that "[t]he Proof of Claim of Storage Equip.com (sic)

constitutional lien, such lien could be avoided under the Trustee's strong-arm powers under 11 U.S.C. §544.[6] The Court held a joint hearing on these issues on November 18, 2003.

Discussion

A proof of claim, if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, constitutes *prima facie* evidence of the validity and amount of that claim, FED. R. BANKR. P. 3001(f), and is deemed allowed unless a party in interest objects under 11 U.S.C. §502(a). A proof of claim, however, does not qualify for that *prima facie* evidentiary effect if it is not executed and filed in accordance with the Bankruptcy Rules. *See First Nat'l Bank of Fayetteville v. Circle J. Dairy (In re Circle J Dairy, Inc.)*, 112 B.R. 297, 300 (W.D. Ark. 1989). Rule 3001 generally sets forth the requirements for filing a proof of claim, and one of those requirements states that:

> when a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

FED. R. BANKR. P. 3001(c).

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should be allowed as a general unsecured claim in the amount of $146,383.67. Moreover, the $146,383.67 amount is further supported by the two price quotes provided to the Debtor by Storagequip which aggregate to $146,383.67. *See* Ex. D-E and pages number 16-20.

[6] To set the proper predicate for the reconsideration of these issues, the Trustee filed a motion on October 17, 2003, asking the Court to reconsider the December 12, 2001 order pursuant to 11 U.S.C. §502(j). In the absence of a timely objection, the Court granted this motion for reconsideration on November 12, 2003. Thus, the Court's December 12, 2001 order approving the Rule 4001 stipulation does not govern the legitimacy of Storagequip's secured status.

Likewise, if a creditor claims a security interest in property of the debtor, Rule 3001(d) requires the creditor to accompany his proof of claim with evidence that the creditor perfected a security interest.

Hence, the burden of persuasion under the bankruptcy claims procedure always lies with the claimant, who must comply with FED. R. BANKR. P. 3001 by alleging facts in the proof of claim that are sufficient to support the claim. If the claimant satisfies these requirements, the burden of going forward with the evidence then shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. *See Lundell v. Anchor Const. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1041 (9th Cir. 2000); *Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (B.A.P. 2d Cir. 2000). This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, *see In re Lenz*, 110 B.R. 523, 525 (D. Colo. 1990); by the presentation of legal arguments based upon the contents of the claim and its supporting documents, *see In re Circle J Dairy*, 112 B.R. at 300; or by the presentation of pretrial pleadings, such as a motion for summary judgment, in which evidence is presented to bring the validity of the claim into question, *see In re Frontier Airlines, Inc.*, 112 B.R. 395, 399-400 (D. Colo. 1990). If the objecting party meets these evidentiary requirements, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence. *See In re*

Consumers Realty & Development Co., 238 B.R. 418 (B.A.P. 8th Cir. 1999); *In re Alleghany International, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992). If, however, the claimant fails to allege facts in the proof of claim that are sufficient to support the claim, *e.g.*, by failing to attach sufficient documentation to comply with FED. R. BANKR. P. 3001(c), the claim is not automatically disallowed; rather, it is merely deprived of any *prima facie* validity which it could otherwise have obtained. *See In re Los Angeles Int'l Airport Hotel Assoc.*, 196 B.R. 134, 139 (B.A.P. 9th Cir. 1996).

In the present case, the Claimant failed to attach any type of supporting documentation to its proof of claim, nor did it even cite the Texas Constitution as the basis for its secured status. Instead, the Claimant simply filed a one-page secured proof of claim. Consequently, its claim is not entitled to any *prima facie* validity. Thus, from the outset, the Claimant must bear the burden of persuasion to establish, by a preponderance of the evidence, the validity of its $146,383.67 secured claim. *See In re Los Angeles Int'l Airport Hotel Assoc.*, 196 B.R. at 139.

Storagequip asserts that it is entitled to a lien pursuant to Art. XVI, §37 of the Texas Constitution, which states as follows:

> Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefore; and the Legislature shall provide by law for the speedy and efficient enforcement of said Liens.

In examining the jurisprudence interpreting the asserted Texas constitutional lien, it is clear that the constitutional lien for mechanics, artisans and materialmen "exists independently and apart from any legislative act." *See Ralph M. Parsons Co. v. South Coast Supply Co. (In re A&M Operating Co.)*, 182 B.R. 997, 1000 (E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996); *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 267 (Tex. 1975). Therefore, it is clearly distinct from the statutory lien provided under the Texas Property Code.[7] *See Apex Financial Corp. v. Brown*, 7 S.W.3d 820, 830 (Tex. App. — Texarkana 1999, no pet. h.); *see also Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896); *San Antonio Bank & Trust Co. v. Anel, Inc.*, 613 S.W.2d 55, 58 (Tex. Civ. App. — Texarkana 1981, writ ref'd n.r.e.) ["The constitutional liens exist to provide relief for the laborer who is not compensated and, who, for one reason or another, does not meet the requirements of perfection of the statutory mechanic's and materialman's liens."]. Moreover, Texas courts have consistently held the Texas constitutional lien to be self-executing. *Ball v. Davis*, 118 Tex. 534, 543, 18 S.W.2d 1063, 1066 (1929). ["Those coming within the terms of the constitutional provision are not compelled to take any steps to fix the liens as between themselves and the owners."]. This self-executing aspect of the constitutional lien is viewed as "vital because it translates into the chief advantage over statutory liens: the lien-holder does not need to give notice or record his lien; his protection is automatic." *See A&M Operating*, 182 B.R.

[7] *See* TEX. PROP. CODE ANN. §53.001 et seq. (Vernon 1995 & Supp. 2004).

at 1000. Though this type of constitutional protection is unique among the fifty states,[8] its scope is not boundless and it becomes incumbent upon the party claiming the status to prove that it comes within the confines of the constitutional provision.

The language of TEX. CONST. art. XVI, §37 provides two clear prerequisites. First, the protection is available only to a party who qualifies as a "mechanic," an "artisan," or a "materialman." *See A&M Operating*, 182 B.R. at 1001-02 ["These words were chosen carefully by the constitution's framers in order to grant a wide scope of protection to Texas workers."]. Secondly, even if a party can fulfill one of those definitions, it may obtain a constitutional lien under §37 only if it makes or repairs an "article" or "building." *See Ball,* 118 Tex. at 534, 18 S.W.2d at 1067 [holding that a well casing does not constitute a building or an "article made" and therefore concluding that its provider did not qualify for a constitutional lien].

The Court must first determine whether the Claimant qualifies as either a "mechanic," an "artisan," or a "materialman" under Texas law. Texas courts have defined a mechanic as "a person skilled in the practical use of tools, a workman who shapes and applies material in the building of a house or other structure mentioned in the statutes; a person who performs manual labor." *Warner Memorial Univ. v. Ritenour*, 56 S.W.2d 236, 236-37 (Tex. Civ. App. — Eastland 1933, writ ref'd); *A&M Operating*, 182

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[8] As stated by the *A&M Operating* court, "the constitutions of only seven other states make reference to mechanic's liens, and only Texas' has been declared self-executing, making our constitutional lien unique among the fifty states." *See* 182 B.R. at 1000 (*citing* M.K. Woodward, *The Constitutional Lien on Chattels in Texas*, 28 TEX. L. REV. 305, 308-09 (1950)).

B.R. at 1002. Similarly, Texas courts have defined an artisan as "one skilled in some kind of mechanical craft; one who is employed in an industrial or mechanic art or trade," or "[o]ne trained for manual dexterity in some mechanic art or trade; a handicraftsman; a mechanic." *See Warner Mem'l Univ.*, 56 S.W.2d at 237. As noted in *In re Enron Corp.*, "[t]his definition suggests that an artisan is akin to a mechanic." *See* 295 B.R. 190, 195 (Bankr. S.D.N.Y. 2003) [examining the Texas constitutional lien, and stating that "the use of tools and the performance of manual labor, both hallmarks of a mechanic, are significant factors in determining whether an individual is an artisan"]. Finally, a materialman has been defined as "a person who does not follow the business of building or contracting to build homes for others, but who manufactures, purchases or keeps for sale materials which enter into buildings [or articles] and who sells or furnishes such material without performing any work or labor installing or putting them in place." *See A&M Operating*, 182 B.R. at 1002 (*citing Huddleston v. Nislar*, 72 S.W.2d 959 (Tex. Civ. App. — Amarillo 1934, writ ref'd)); *see also Enron*, 295 B.R. at 196-97.

The evidence in this case establishes that approximately twenty Storagequip workers spent roughly six weeks at the Debtor's location during December 2000 and January 2001, working seven days a week to create and install the conveyor belt system for the Debtor. It is uncontested that the conveyor belt system was not merely delivered, but rather came into existence only as the Claimant's staff utilized their skill to align certain appropriated parts and to fabricate others in order to create the conveyor system. Without the utilization of its workers who were skilled in the practical use of tools in

furtherance of the Claimant's business and who in this instance shaped, arranged, and applied the various components through a significant amount of skill and manual labor, the conveyor belt system would have never been constructed on the Debtor's premises. While the use of mechanics in one's business does not guarantee the availability of a constitutional lien in favor of an employer's action,[9] the Claimant's activity in this instance, in which it received a project objective from the Debtor and then proceeded to craft a mechanical device through the use of its skilled and manual workforce to achieve that objective, reflects the type of skill-based enterprise which the constitutional lien provision was designed to protect. Accordingly, the Court concludes that the Claimant qualifies as a "mechanic" for purposes of art. XVI, §37 of the Texas Constitution.[10]

However, the constitutional lien is granted to such a mechanic solely if it is

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[9] See, *Enron,* 295 B.R. at 197-98:

> [E]mploying workers who might be eligible for a Constitutional Lien on an individual basis would not be sufficient to make [the lien claimant] as a company either an artisan or a materialman. . . . Therefore, the Court must look to the overall operations of [the lien claimant] when determining whether it qualifies as an artisan or materialman, as opposed to looking solely towards the activities of its [employees]. Even if certain of [the lien claimant's employees] would qualify as artisans or materialmen, [the lien claimant] as an entity does not.

[10] Because of the nature of the Claimant's operations, it also likely qualifies as an "artisan" under the given definitions. As has been recognized,

> the use of the term "handicraftsman" in the definition of an artisan further supports the proposition that a key component in determining whether an individual or an entity qualifies as such for the purposes of the Constitutional Lien is the use of manual dexterity or skill with the hands in pursuing a relevant occupation. Merriam-Webster's Collegiate Dictionary defines a handicraftsman as "a person who engages in a handicraft: artisan." Merriam-Webster's goes on to define a handicraft as, "manual skill; an occupation requiring skill with the hands."

Enron, 295 B.R. at 196.

Because a higher level of "manual dexterity or skill with the hands" was required to complete this project, the evidence further supports the characterization of the Claimant as an artisan.

engaged in the manufacturing or repairing of an "article" or "building." In determining whether the conveyor belt system constitutes an "article made" for purposes of the constitutional lien, the Court is mindful of the guidance provided by the Supreme Court of Texas in this context:

> The words used in the Constitution are to be given their usual and ordinary signification, unless, of course, they are technical words; or, as the rule is sometimes stated: Since the Constitution is an instrument adopted by the people generally before it has any vitality, the words employed are to be interpreted as the people generally understood them.

See Ball, 118 Tex. at 544-45, 18 S.W.2d at 1067 [specifically discussing the Texas constitutional lien]; *see also In re Enron Corp.*, 295 B.R. 190, 194 (Bankr. S.D.N.Y. 2003); M.K. Woodward, *The Constitutional Lien on Chattels in Texas*, 28 TEX. L. REV. 305, 309-10 (1950).

The term "articles made" is not a technical term; hence, the Court must interpret this language according to its usual and ordinary definition. An article is commonly defined as "a member of a class of things" and as "a thing of particular and distinctive kind." *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 63 (1979). Similarly, Black's Law Dictionary defines an "article" as a "particular object or substance, a material thing or a class of things." *See* BLACK'S LAW DICTIONARY 111 (6th ed. 1990). Moreover, the term "made" has been defined as "[p]roduced or manufactured artificially" and as "put together of various ingredients." *See* BLACK'S LAW DICTIONARY 950 (6th ed. 1990) WEBSTER'S NEW COLLEGIATE DICTIONARY 684 (1979).

Under these usual definitions, the conveyor belt system clearly constitutes an "article made." It cannot be reasonably disputed that a conveyor belt system is a particular type of object or thing. It is uncontested that the conveyor belt system did not come into existence until such time as the Claimant appropriated the various component parts, aligned the components in the proper manner, and performed some amount of on-site fabrication, ultimately producing the conveyor system on the Debtor's worksite. The current situation is thus easily distinguishable from that addressed by the Texas Supreme Court in the *Ball* decision, wherein the court held that a well casing did not constitute an "article made" merely because it had been installed in a well. *See* 118 Tex. at 545, 18 S.W.2d at 1067 ["The well casing was well casing before it was placed in the well, and was well casing afterwards. Nothing has been made in the usual and ordinary meaning of the word 'made.'"]. Rather, the lien claimant in the present case took a substantial number of component parts and fashioned a comprehensive system where none had previously existed which was designed to facilitate the movement of large fiberglass tanks within the Debtor's factory. Thus, on its face, it appears as though the conveyor belt system constitutes an "article made" for purposes of Article XVI, §37.

Yet the Trustee argues that the availability of the constitutional lien on "articles made" was severely limited by the decision of the Supreme Court of Texas in *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 267 (Tex. 1975). The text of the *Whirlpool* decision does in fact state that "[t]hose cases which have upheld constitutional liens on 'articles made' have been limited to articles fabricated under specifications for

the purchaser rather than articles manufactured for sale on the open market." *See* 517 S.W.2d at 267. The *Whirlpool* court thereafter proceeds to characterize its holding as follows:

> We hold that the constitutional lien on manufactured chattels is available to the manufacturer only upon articles made especially for a purchaser pursuant to a special order and in accordance with the purchaser's plans or specifications.

Id. at 268.

Naturally, the Trustee seizes upon this language and argues that because there is no evidence that the Claimant manufactured the conveyor belt system pursuant to a special order or that the Debtor supplied any specifications to the Claimant concerning the system, the Claimant is not entitled to claim a constitutional lien under the Texas Constitution. Furthermore, the Trustee claims that *Whirlpool* specifically excludes the Texas constitutional lien from any manufacturer who offers its goods to the general public without reference to the construction of an identifiable chattel. A careful examination of *Whirlpool*, however, reveals that the Trustee has misinterpreted its applicability to the current situation.

In *Whirlpool,* the Whirlpool Corporation originally manufactured and then supplied to the owner of an apartment complex, *inter alia*, 77 refrigerators and 86 electric ranges. *See* 517 S.W.2d at 267. There was no evidence that Whirlpool performed any type of installation work or other manual labor after the appliances were delivered; therefore, the *Whirlpool* case only involved the third type of constitutional lien claimant,

a materialman.[11] *See, e.g., Huddleston*, 72 S.W.2d at 962 [defining materialman as "a person who does not follow the business of building or contracting to build homes for others, but who manufactures, purchases or keeps for sale materials which enter into buildings [or articles] and who sells or furnishes such material *without performing any work or labor installing or putting them in place*"]; *see also Enron*, 295 B.R. at 196-97. After the owner of the apartment complex failed to pay the purchase price, the Whirlpool Corporation claimed entitlement to a constitutional lien. It was thus *in the context of a materialman's claim* that the Texas Supreme Court stated that "constitutional liens on 'articles made' have been limited to articles fabricated under specifications for the purchaser rather than articles manufactured for sale on the open market." *Id*. This statement interpreted in context makes sense. A materialman should not be entitled to claim a constitutional lien upon some article manufactured by him unless the article was either "made especially for a purchaser pursuant to a special order and in accordance with the purchaser's plans or specifications," *see id*. at 268, or was "sold out of general inventory to be incorporated into a particular building or chattel." *See A&M Operating*, 182 B.R. at 1004. A contrary holding might, as recognized by the *Whirlpool* court, impose a constitutional lien upon "every sale of goods by a manufacturer." *See* 517 S.W.2d at 268.

However, the Claimant in the current dispute is not merely a materialman. Rather,

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[11] This fact was later recognized by the Fifth Circuit in *A&M Operating*. *See* 182 B.R. at 1002 ["The leading case on materialmen is *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1975)."].

it clearly assumed the role of mechanic and/or artisan and tendered a significant amount of skilled work in the assembly and fabrication of the conveyor belt system. This is not, therefore, a case in which a manufacturer-vendor seeks the imposition of a constitutional lien merely for the sale of a pre-existing chattel out of its existing inventory. The Trustee has asserted no valid justification for limiting, in the context of mechanics and/or artisans, the availability of the constitutional lien only to those who perform skilled manual labor on specially manufactured chattels. Hence, the Court concludes that the limitation of the constitutional lien to specially ordered articles as expressed in *Whirlpool* is inapplicable to the current mechanic/artisan situation[12] and, based solely upon the language of Art. XVI §37, the Claimant possesses a valid constitutional lien upon the conveyor belt system.

However, Texas courts, in looking beyond the literal language of Art. XVI, §37 to identify more specifically the parties for whom the constitutional lien was intended, have recognized three (3) additional limitations upon the availability and/or effectiveness of such a lien. First, the constitutional lien available under Art. XVI, §37 is designed for, and is only available to, a party in contractual privity with the owner of the property in question. *See First Nat'l Bank of Paris v. Lyon-Gray Lumber Co.*, 194 S.W. 1146 (Tex. Civ. App. — Texarkana 1917), *aff'd*, 110 Tex. 162, 217 S.W. 133 (1919). Therefore, the constitutional lien is never available to a subcontractor. *Da-Col Paint Mfg. Co. v.*

[12] *A&M Operating*, which also involves a materialman claiming a Texas constitutional lien, is also distinguishable on a similar basis. *See* 182 B.R. at 1002 ["This case, however, concerns the third category, materialmen."].

American Indemnity Co., 517 S.W.2d 270, 273 (Tex. 1974); *see also A&M Operating*, 182 B.R. at 1000-01 ["The Texas Supreme Court (in its affirmance of *Lyon-Gray Lumber Co.*) . . . apparently view(ed) a privity requirement as essential to balance the vital need of small businesses to be paid, with the necessity of guarding unsuspecting property owners from hidden liens acquired by someone with whom the owner has not conducted business."]. Secondly, "[a] corollary of the privity rule is that the constitutional lien can only be applied against a debtor who owns the article or building" to which the lien will attach. *A&M Operating*, 182 B.R. at 1001. Finally, because of its unique, self-executing nature and to avoid surprising purchasers with unrecorded constitutional liens, Texas courts have further restricted the validity of the constitutional lien by making it ineffective against a subsequent bona fide good faith purchaser for value without notice. *See Wood v. Barnes*, 420 S.W.2d 425, 429 (Tex. Civ. App. — Dallas 1967, writ ref'd n.r.e.), *cited in A&M Operating*, 182 B.R. at 1001.

In the present case, the Claimant has established by a preponderance of the evidence that it was in contractual privity with the Debtor, and that the Debtor owned the conveyor belt system upon which the constitutional lien is asserted. The evidence establishes that the Debtor contacted the Claimant regarding the acquisition of the system and, though the Debtor did not submit any written specifications to the Claimant regarding the composition of the conveyor belt system, it did specify precisely what it wished for that prospective system to accomplish. The Claimant then designed the system specifically to fulfill the Debtor's needs and, once all the necessary components

were gathered, the system was installed on the Debtor's premises. The fact that the Claimant, at the Debtor's insistence, agreed to send its initial work invoices to Amerilease[13] rather than directly to the Debtor does not alter the fact that the Debtor initiated and directed the procurement of the conveyor belt system from the Claimant. The Debtor was clearly the owner of the system because Amerilease never had a contractual obligation to purchase the conveyor belt system, nor did it ever tender any funds to Storagequip for the purchase of the system. This conclusion is buttressed by the fact that, prior to and since the bankruptcy filing, the conveyor belt system has always been located on the Debtor's premises and has always been in the possession, custody, and control of either the Debtor or its trustee.

As to the effectiveness of the lien against a subsequent bona fide purchaser for value without notice,[14] the Trustee has asserted that he is entitled to such a status under 11 U.S.C. §544(a) and therefore should be permitted to avoid the constitutional lien, particularly since such a right is bestowed "without regard to any knowledge of the trustee."[15] However, the Trustee's rights under §544(a)(3) are limited to those of "a bona

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[13] Although the testimony describing the role of Amerilease in this transaction is sketchy, it appears that Amerilease is one of several companies which had been utilized by the Debtor as a source of financing for various projects through some type of lease-purchase agreement. However, even if the lease-purchase transaction had been accomplished with Amerilease, such fact would not necessarily preclude a determination that the Debtor was, in fact, the owner of the property. *See In re Triplex Marine Maintenance, Inc.*, 258 B.R. 659 (Bankr. E.D. Tex. 2000).

[14] As stated earlier, the chattel has not been sold nor has it ever left the Debtor's premises. No party, other than the Trustee, has asserted any right as a bona fide purchaser.

[15] 11 U.S.C. §544 provides, in relevant part, that:

fide purchaser *of real property*." Unlike those cases allowing a trustee to utilize §544(a) to avoid the Texas constitutional lien, *see, e.g., McEvoy v. Ron Watkins, Inc.*, 105 B.R. 362, 365 (N.D. Tex. 1987) *and Great Southwest Supply Co. of Texas v. Ernest and Assoc., Inc. (In re Ernest and Assoc., Inc.)*, 59 B.R. 495, 498 (Bankr. W.D. Tex. 1985), the property upon which the constitutional lien is claimed in the present case is personal property rather than real property (or the improvements thereon). Consequently, whatever avoidance rights the Trustee might exercise as a bona fide purchaser of real property are inapplicable to the constitutional lien claimed upon this chattel.[16]

Nor may the Trustee prevail under any power granted to him under §544(a)(1) as a "hypothetical judgment lien creditor." Several cases have held that a constitutional mechanic's lien "is superior to a prior recorded deed of trust lien where the improvements

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> (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 —
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> > (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;
> > . . .
> > (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

[16] Furthermore, even if the Trustee were to argue that the conveyor belt system became a fixture and thus a part of the real property (and the evidence contradicts such a finding), the Trustee could still not prevail because §544(a)(3) specifically excludes fixtures from the Trustee's avoidance rights.

made can be removed without material injury to the land and preexisting improvements, or to the improvements removed." *See, e.g., American Amicable Life Ins. Co. v. Jay's Air Conditioning & Heating, Inc.*, 535 S.W.2d 23, 25 (Tex. Civ. App. — Waco 1976, writ ref'd n.r.e.) (*citing Whirlpool*, 517 S.W .2d at 269). In the present case, there was uncontroverted testimony from Jim Brown, the President and CEO of the Claimant, that the conveyor belt system could be removed from the building without damaging the property. Given the fact that, in the absence of an agreement by the Claimant to the contrary,[17] the Claimant's constitutional lien is superior to a prior recorded deed of trust lien and the recognition that a prior recorded deed of trust lien would be deemed superior in right to a subsequent judgment lien,[18] the Trustee's status as a hypothetical judgment lien creditor avails him nothing with respect to the senior priority accorded to the constitutional mechanic's lien held by the Claimant. *See, e.g.,* M.K. Woodward, *The Constitutional Lien on Chattels in Texas*, 28 TEX. L. REV. 321, 324-30 (1950) ["It is believed that the constitutional lien, though unrecorded, is superior to the subsequently

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[17] *See supra,* note 3 regarding the entry of the Rule 4001 stipulation in which the Claimant agreed that its constitutional lien "shall be a second lien, inferior to the perfected first lien in Debtor's conveyor belt system held by SouthTrust Bank."

[18] *See West Trinity Properties, Ltd. v. Chase Manhattan Mortg. Corp.*, 92 S.W.3d 866, 869 (Tex. App. — Texarkana 2002, no pet. h.) ["Chase produced summary judgment evidence showing it possessed a valid first mortgage lien on the property owned by the (debtors). This lien was secured by a deed of trust recorded in May 1997. The summary judgment evidence also shows that West Trinity's interest in the property, if any, derives from its purchase at the March 7, 1999, sheriff's sale based on the foreclosure of Greene's judgment lien. *Without proof to the contrary, a judgment lien is junior and subject to all equities in existence at the time of the judgment. See Mercer v. Bludworth,* 715 S.W.2d 693, 697 (Tex. App. — Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled in part on other grounds by Shumway v. Horizon Credit Corp.,* 801 S.W.2d 890, 894 (Tex. 1991)."] (emphasis added).

acquired liens of creditors."].

The Court therefore concludes that the Claimant, Storagequip.com, possesses a lien against the conveyor belt system owned by the Estate by virtue of Article XVI, §37 of the Texas Constitution which is not subject to avoidance by the Trustee in this case. Accordingly, the Claimant has satisfied its ultimate burden of persuasion of establishing the existence of a secured claim against this Estate, and the Trustee's objection to that secured claim shall be denied.[19]

In regard to the motion for relief from the automatic stay filed by the Claimant, Storagequip.com, the evidence established a *prima facie* case for stay relief in favor of the Claimant under §362(d)(1).[20] *See generally, In re Kowalsky,* 235 B.R. 590, 594-95 (Bankr. E.D. Tex. 1999) and the cases cited therein ["To establish a *prima facie* case for cause due to a lack of adequate protection, a movant must initially demonstrate that it holds a claim, secured by a valid, perfected lien upon estate property and that a decline in the value of its collateral is either occurring or is threatened, against which the creditor is precluded from protecting its interests due to the existence of the automatic stay."]. Therefore, the burden shifted to the Trustee, as the respondent, to prove that the collateral is not declining in value or that the secured creditor's interests are adequately protected.

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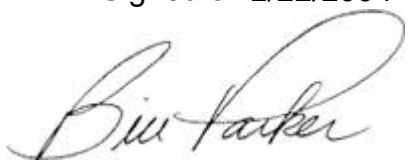
[19] The Trustee's objection only challenged the existence of a properly perfected lien against the conveyor belt system and, thus, no evidence was tendered to the Court regarding the value of the system or the effect of the Claimant's agreed subordination of its lien to SouthTrust Bank. Therefore, the Court does not reach such issues.

[20] *See supra* note 4 for the text of §362(d).

Id. The Trustee offered no such evidence at the hearing. Accordingly, just cause exists for the termination of the automatic stay in favor of the Claimant under §362(d)(1).[21]

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[22] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. Separate orders as to each contested matter shall be entered which are consistent with this opinion.

Signed on 1/22/2004



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BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE

cc: Thomas J. Sibley, Atty for Claimant **Fax: (409) 838-4741**
John Mayer, Atty for Trustee **(via electronic notice)**

[21] Therefore, the Court need not reach the Claimant's arguments under §362(d)(2).

[22] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.