UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GREGORY C. MILBY
RENEE M. MILBY

CASE NO. 02-64360

Debtors

Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is a cross-motion filed on March 19, 2003, by American General Financial Services, Inc., f/k/a American General Finance, Inc.("AGF").[1] AGF requests that the Court vacate its Order of November 12, 2002, voiding AGF's lien on a 1993 Honda Accord owned by Gregory and Renee Milby ("Debtors") based on improper service

[1] Pursuant to an Amendment of the Articles of Incorporation of American General Finance, Inc., adopted by resolution as of May 10, 2002, by its Board of Directors, its corporate name was changed to American General Financial Services, Inc., effective October 14, 2002. *See* Exhibit A, attached to Supplemental Affirmation in Support of AGF's Cross Motion, filed May 12, 2003.

pursuant to Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Opposition to the motion was filed by the Debtors on March 26, 2003.

The Debtors had filed a motion on January 29, 2003, seeking contempt against AGF pursuant to § 524(a)(2) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). The Debtors' motion, as well as AGF's cross-motion, were originally scheduled to be heard on April 1, 2003, in Syracuse, New York, at the Court's regular motion term. At that time, Debtors' counsel advised the Court they were withdrawing their motion. The Court adjourned AGF's cross-motion to May 6, 2003, when the Court heard oral argument on behalf of both parties on the issue of whether AGF's cross-motion had been properly served on the Debtors and whether the Debtors' original motion pursuant to Code § 522(f), filed on October 17, 2002 ("October 2002 motion"), had been properly served on AGF. The matter was submitted for decision on May 6, 2003.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. § 1334(b), 157(a), 157(b)(1) and 157(b)(2)(A), (B), (K) and (O).

FACTS

Debtors filed a voluntary petition pursuant to chapter 7 of the Code on July 23, 2002. AGF was listed as a creditor of the Debtors as follows:

American General Finance
Kimbrook Village Square Plaza
8395 Oswego Road
Baldwinsville, NY 13027-8310

AGF acknowledges having received notice of the filing at its Williamsport, Pennsylvania office on or about September 19, 2002. *See* Affidavit of Wendy Lou Baker ("Baker"), Bankruptcy Specialist for AGF, sworn to March 14, 2003, attached as Exhibit E of Affirmation of Susan R. Katzoff, dated March 18, 2003.

Debtors' October 2002 motion pursuant to Code § 522(f)(1) sought to avoid AGF's lien on their 1993 Honda Accord, which the Debtors had claimed as exempt. According to the Debtors' Certificate of Service, the October 2002 motion was served on the chapter 7 trustee and on AGF at the address listed above by first class mail on October 16, 2002. No opposition to the October 2002 motion was filed and the Court signed an Order on November 12, 2002, granting the relief sought.[2] On or about December 31, 2002, AGF sent a letter to the Debtors asking that they apprize it of the Debtors' intentions regarding the vehicle. *See* Exhibit D of Declaration of Stewart Weisman, Esq. ("Weisman Declaration"), filed on behalf of Debtors on March 26, 2003. Allegedly, in response to that letter, AGF was provided with a copy of the Order of November 12, 2002, of which it was unaware.[3]

AGF contends that it was never served with the Debtors' October 2002 motion. AGF

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[2] While the Court has serious concerns whether Code § 522(f)(1) provides a statutory basis for avoiding a lien on an automobile. However, in view of the fact that there was no opposition to the Debtors' motion, the Court granted the relief sought. *See In re Lorson*, 1997 WL 702982 (Bankr. M.D. Pa.) (citations omitted).

[3] According to Debtors' counsel, the envelope, in which the letter of December 31, 2002 from AGF was mailed, was postmarked January 9, 2003, the same day the November 12th Order was faxed to AGF's Baldwinsville office.

argues that the Court lacked personal jurisdiction to avoid its lien based on the provision set forth in Fed.R.Bankr.P. 7004(b)(3), which requires that service on a corporation be made on an "officer, a managing or general agent or any other agent authorized by appointment or by law to receive service of process . . . ."

Debtors contend that they were unaware that AGF was a corporation. The notice of the October 2002 motion was sent to the address which appeared on the billing statements sent to the Debtors. *See* Exhibit B of Weisman Declaration. The billing statement, dated May 22, 2002, is from "American General Finance" and the portion of the statement to be returned with payment lists the address which appears on the Debtors' schedule. "American General Finance" appears five times on the front of the statement. According to AGF, its corporate status is indicated on the reverse side of the statements. *See* Exhibit C of Supplemental Affirmation of Susan R. Katzoff, Esq., dated May 9, 2003. Headed "Address Corrections," it requests that AGF be contacted if there are any questions concerning the Debtors' account and states, "To ensure the proper handling of your inquiry, please do not write on this coupon. Send your inquiry directly to American General Finance, Inc., P.O. Box 3212, Evansville, IN 47731-3212." *Id.* The letterhead on the letter sent to the Debtors by Baker on behalf of AGF on or about December 31, 2002, identifies "American General Financial Group." *See* Weisman Declaration at Exhibit D. The full name, "American General Finance, Inc.," and its address in Williamsport, Pennsylvania, is listed in small print at the bottom of the letterhead. AGF also directs the Court's attention to the Security Agreement executed by Renee Milby in connection with the loan for the automobile, dated May 22, 2001, on which the secured party is identified as "American General Finance, Inc." at the Baldwinsville, New York address listed above. *See* Exhibit A of Affirmation of Susan R. Katzoff, Esq., dated March 28, 2003.

ARGUMENTS

AGF maintains that it was not properly served with the notice of the Debtors' October 2002 motion to avoid its lien on October 17, 2002, or the Order granting the Debtors' motion on November 12, 2002, because service did not include AGF's corporate status and was not mailed to the attention of an officer or any other agent authorized to receive service of process as required by Fed.R.Bankr.P. 7004. It is AGF's contention that as a result of improper service of process the Court did not have *in personam* jurisdiction over AGF, rendering the Order void.

The Debtors sets forth four arguments in opposition to AGF's cross-motion. *See* Attorney's Reply Declaration in Opposition to Motion to Vacate Order, filed May 13, 2003.[4] Initially, they argue that the cross-motion should be denied because they were not served with it, and it was served on less than fifteen days notice and without a "Notice of Motion" in violation of Local Rules 9013-1 and 9013-4. *Id.* Second, they assert that AGF has not provided a copy of the Certificate of Title showing that it has a security interest in the 1993 Honda. *Id.* Third, Debtors contend that pursuant to §§ 130(1)(b) and 133 of the New York General Business Law ("NYGBL") AGF had an obligation to disclose its corporate status when dealing with consumers such as the Debtors.[5] *Id.* In this regard, the Debtors direct the Court's attention to the caption of the billing statements sent to the Debtors, as well as to a picture of AGF's "storefront" with

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[4] The Court agreed to submit the matter for decision on May 6, 2003. The Court would not normally consider any papers filed after the submission date. However, because both AGF and the Debtors filed supplemental materials on May 12, 2003, and May 13, 2003, respectively, the Court has given them consideration.

[5] This was not an argument made by the Debtors at the time the matter was submitted for decision.

the words "American General Finance" on the front of the building. It is the Debtors' contention that AGF should be deemed an individual for purposes of service. Finally, Debtors contend that a search for "American General Finance" at the New York State Department of State website reveals no active corporate entities with names beginning with American General Finance, based on a search performed by them on May 4, 2003. *Id.*

DISCUSSION

Service of the Cross-Motion

Debtors contend that AGF's cross-motion was not served on them personally and was served on their attorney on less than 15 days notice. According to AGF's certificate of service filed on March 19, 2003, it originally served its opposition to the Debtors' motion for contempt, as well as its cross-motion, on Debtors' counsel, Stewart Weisman, Esq., on March 18, 2003. On April 11, 2003, AGF filed a certificate of service indicating that a Notice of Cross-motion was served on April 11, 2003, on Debtors' counsel, the chapter 7 trustee and the Office of the United States Trustee. A Notice of Amended Cross-motion was served on April 18, 2003, on the same three entities.

Rule 9013-1(a) of the Local Rules of this Court require that motions be served at least 15 days before the return date of the hearing unless otherwise specified in the Federal Rules of Bankruptcy Procedure. Local Rule 9013-1(c)(1) requires that answering papers in opposition be filed and served so as to be received no later than three business days before the return date of the motion. In this case, AGF timely filed its opposition to the Debtors' motion for contempt and also elected to include its cross-motion with said opposition. This Court recognizes that it is

usually impossible to comply with the 15 day notice requirement of Local Rule 9013-1(b) when one wishes to assert a cross-motion in response to a motion unless the original movant files and serves its motion more than 15 days before the hearing date. The Court has made it a practice to adjourn the original motion in order to allow the original movant an opportunity to respond to a cross-motion if requested. In this case, the original motion was heard on April 1, 2003, at which time the Debtors withdrew their motion. In view of the Debtors' objection to the timeliness of AGF's cross-motion, the Court simply adjourned it to May 6, 2003, at which time the Court heard oral argument from both parties. Thus, the Court finds no basis to dismiss AGF's cross-motion on the basis of untimeliness.

Debtors also assert that the cross-motion was served only on their counsel and not on them personally. Fed.R.Bankr.P. 9014(b) requires that a motion be served in the manner provided for service of a summons and complaint by Fed.R.Bankr.P. 7004. Fed.R.Bankr.P. 7004(b)(9) requires that the Debtors be served and, if represented by an attorney, their attorney be served as well. There is no provision in the bankruptcy rules addressing service of a cross-motion. At the heart of any assertion by a party that it was not properly served is the issue of whether there was sufficient notice to satisfy constitutional due process requirements whereby a party is afforded an opportunity to be heard before being deprived of property or liberty. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

In this case, there is no question that Debtors' counsel was served with a copy of AGF's opposition to the Debtors' motion, as well as with its cross-motion. The Debtors suffered no prejudice from the fact that they were not personally served. Debtors' counsel was present in Court on April 1, 2003, and opposed AGF's cross-motion on May 6, 2003. The Court has given due consideration to the arguments made by Debtors' counsel both orally and in various written

declarations and memoranda of law filed on their behalf. They certainly have not been deprived of any rights or interests without legal representation despite the fact that they themselves were not served with a copy of AGF's cross-motion. Therefore, the Court finds no basis for denying AGF's cross-motion on these grounds.

Service of Debtors' October 2002 Motion

Fed.R.Bankr.P. 4003(d) provides that "[a] proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014." As discussed above, Fed.R.Bankr.P. 9014, applicable to contested matters, requires that a motion be "served in the manner provided for service of a summons and complaint by Rule 7004." Fed.R.Bankr.P. 7004(b)(3) allows for service by first class mail to be made upon a domestic corporation by mailing a copy of the motion to the attention of an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process.

As one court recently noted, "the special and 'comparatively lenient' procedure of service by mail in bankruptcy cases requires parties to strictly comply with Rule 7004, thus protecting due process rights while still allowing bankruptcy matters to proceed expeditiously."[6] *In re Lancaster*, 2003 WL 109205 at *3 (Bankr. D. Idaho); *see also In re Schoon*, 153 B.R. 48,

[6] In the Court's view, this position is not contrary to the Court's approach in allowing AGF's cross-motion to stand despite its failure to serve the Debtors. As the original motion was that of the Debtors, they certainly were aware that the potential existed that it would create a contested matter should AGF oppose it. AGF, in opposing the Debtors' motion and filing its own cross-motion, directed its papers to the Debtors' attorney whose signature appeared on the original motion. There is no dispute that the Debtors and their attorney were aware of AGF's opposition and its cross-motion.

49 (Bankr. N.D. Calif. 1993) (noting that "[n]ationwide service of process by first class mail is a rare privilege which can drastically reduce the costs and delay of litigation. As a privilege, it is not to be abused or taken lightly.").

In *Lancaster* the debtors sought to avoid several liens on their residence pursuant to Code § 522(f)(1)(A). Service of their motion was made on five different creditors: J.R. Finance Co.; Johnson Rountree 2;Coeur d'Alene Credit Bureau, c/o Romer Brown, Attorney at Law; ACS, Inc. of Idaho, and North Idaho Credit Corp. *Id.* at *1. None of the entities appeared, however, and the court entered an order denying the debtors' motion. *Id.* at *3. The court found the service insufficient because the motion had not been directed "to the attention of an officer, a managing or general agent" or any other authorized agent of any of the entities. *Id.* at *2.

In *Schoon* the debtors also sought to avoid a lien on their residence pursuant to Code § 522(f)(1). The motion was served on "Homeowners Lumber Co., Inc., Attn: President . . . ." *See Schoon*, 153 B.R. at 48. The court found the method of service failed to meet the requirements of Rule 7004(b)(3), declining to equate service on an "office" as the same as service on an "officer" for purposes of the rule. *Id.* at 99; *but see In re C.V.H. Transport, Inc.*, 254 B.R. 331, 332-33 (Bankr. M.D. Pa. 2000) (noting that other courts have not interpreted Fed.R.Bankr.P. 7004(b)(3) as strictly).

In *C.V.H. Transport* the summons and complaint were served by certified mail, addressed to "an officer, manager or general agent, or any other agent authorized by appointment or by law to receive service of process Associates Commercial Corporation." *Id.* at 332. The court concluded that the service was sufficient even though no one person was specifically identified by name for service. *Id*. at 334. It then indicated that "[s]hould the document fail to timely reach the proper party [under those circumstances], through no fault of their own, Federal Rule of Civil

Procedure 60(b)(6) certainly paves the way for a defendant to expeditiously move to set aside judgment." *Id.*

In this case, the Debtors served their motion on what is arguably AGF's trade name. A trade name has no separate legal existence and is without procedural capacity or status to sue or be sued. *See Trombley v. Allstate Insurance Co.*, 640 So.2d 815, 817 (La. App. 3d Cir. 1994); *see also Brizendine v. Continental Casualty Co.*, 773 F.Supp. 313, 315 (N.D. Ala. 1991) (indicating that service on a trade name was improper and insufficient); *Little Shoppe Around the Corner v. Carl*, 80 Misc.2d 717, 718 (N.Y. Co. Court, 1975) (discussing the fact that "the rule that a judgment on the merits is binding on the parties to the litigation assumes the existence of such parties (citation omitted). There must be existence in law as well as existence in fact, since a party to an action other than a governmental unit must be a natural person or a corporation (citation omitted) except as provided specifically by law for partnerships [ ] and for unincorporated associations [ ].").

In *Kroetz v. ATF-Davidson Co.*, 102 F.R.D. 934 (E.D.N.Y. 1984), the plaintiff's complaint was served on ATF-Davidson Co., a trade name used by White Consolidated Industries. The process server went to the offices of ATF-Davidson Co. and served an individual identified as a company vice president. White Consolidated Industries answered the complaint, asserting *inter alia* that the court lacked personal jurisdiction. The court declined to dismiss the complaint, finding that despite the fact that it had been misidentified in the complaint's caption, the summons and complaint provided sufficient notice to the defendant that it was being sued, as evidenced by the fact that it had answered the complaint. *Id.* at 937.

In the matter before this Court, there is no indication that AGF received notice of the Debtors' motion seeking to avoid its lien on the vehicle. The motion was granted on default. In

this case, it should have been clear to Debtors' counsel that the entity being served with the motion was not a natural person. At a minimum, Debtors' counsel should have determined whether it was a legal entity that could be sued and who was an officer or agent for purposes of serving the motion.[7] Indeed, a phone number for contacting AGF appears on the billing statement sent to the Debtors. *See* Exhibit B of Weisman Declaration.

Debtors' attempt to shift the Court's focus to NYGBL § 1301(b) and 133, arguing that under state law AGF had an obligation to disclose its corporate status to consumers such as the Debtors. NYGBL § 130(1)(b) requires the filing with Office of the Secretary of State of a certificate setting forth the name or designation under which business is carried on or conducted or transacted, its corporate name, the location including number and street, if any, of its principal place of business in the state, etc. *See* NYGBL § 130(1)(b) (McKinney's 1988 & Supp. 2003). It further provides at § 130(9) that any person or persons that fails to comply or "who knowingly makes a false statement in a certificate filed thereunder shall be guilty of a misdemeanor."

NYGBL § 130 was enacted to

> allow claimants in small claims courts to recover on judgments rendered by such courts when the defendant has been named in its trade or assumed name and not in its true legal name. Since most companies are known by assumed or trade names an unwary claimant often will bring suit in that name.

See McKinney's N.Y.S. Session Laws (Pamph.Ed. No. 3, A-288, 5/8/79).

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[7] The Court takes judicial notice of the fact that the Debtors obtained avoidance of a lien on household goods and furnishings held by Wells Fargo Financial Service, Inc. by an order also dated November 12, 2002. According to the certificate of service, Debtors served their motion on the corporate entity without specifying an officer, etc. It appears that the Debtors' failure to identify an officer or agent of AGF by name was not necessarily the result of a search in the records of the Department of State which revealed no corporate entity with the name "American Finance Company," as Debtors' counsel would have the Court believe.

NYGBL § 133 states that "[n]o person, firm or corporation shall, with intent to deceive or mislead the public, assume, adopt or use as, or as part of a corporate, assumed or trade name, for advertising purposes or for the purposes of trade, or for any other purpose, any name . . . which may deceive or mislead the public." It goes on to state that "[w]henever there shall be an actual or threatened violation of this section, an application may be made to a court or justice having jurisdiction to issue an injunction . . . to enjoin or restrain such actual or threatened violation . . . ." NYGBL § 133 (McKinney's 1988 & Supp. 2003).

There has been no evidence submitted to the Court to indicate that AGF was not in compliance with NYGBL §§ 130 and 133 on October 16, 2002, when the Debtors' motion was served on "American General Finance." Moreover, even if the Court had been presented with such evidence, it certainly is not the appropriate forum for addressing compliance with these two particular state statutes. As noted above, NYGBL § 130(9) and § 133 provides that noncompliance with the statute will result in a finding of a misdemeanor and under appropriate circumstances an injunction may be issued against an entity found to be misleading the public. These are not remedies over which this Court has any jurisdiction, however.

It would appear that AGF made use of a trade name on its billing statement and apparently on its storefront; however, in executing its agreement with Renee Milby, it clearly identified itself as American General Finance, Inc. Furthermore, as is commonly the case when dealing with consumers, AGF also provided a separate address from that used for billing purposes on its statement mailed to the Debtors. It requested that inquiries be directed to American General Finance, Inc., P.O. Box 3212, Evansville, IN 47731-3212. Certainly, at a minimum Debtors' counsel should have directed the motion to the attention of, for example, the president of the company, even if after reasonable inquiry it was unable to obtain the name of

particular officer or agent eligible to accept service of their October 2002 motion.

Under these circumstances, the Court concludes that service of the Debtors' motion was ineffective and the Court lacked personal jurisdiction over AGF, thereby rendering its Order of November 12, 2002, void.[8] *See In re Maloni*, 232 B.R. 727, 731 (1st Cir. BAP 2002). Accordingly, the Court will vacate its Order of November 12, 2002, and will allow the Debtors to renew their motion, upon appropriate service, seeking to avoid AGF's lien on the vehicle.

Based on the foregoing, it is hereby

ORDERED that AGF's cross-motion seeking vacatur of the Court's Order of November 12, 2002, is granted; it is further

ORDERED that the Debtors file and serve a notice of motion and motion within thirty (30) days of the date of this Order in the event that they wish to pursue avoidance of AGF's lien on the Debtors' 1993 Honda Accord.

Dated at Utica, New York

this 25rd day of July 2003

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STEPHEN D. GERLING

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[8] Debtors argued that AGF should have challenged the Court's Order by filing a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure. Debtors assert that insufficiency of service of process is not a basis for seeking relief from an order of the Court. However, Fed.R.Civ.P. 60(b)(4), cited by AGF in its memorandum of law filed on March 31, 2003, specifically provides for relief from an Order that is determined to be void. To deny the relief sought by AGF because it failed to identify Rule 60(b)(4) as a basis for the relief it sought would be to elevate form over substance under these circumstances where it was responding to Debtors' motion for contempt. *See Maloni*, 282 B.R. at 732 (noting that since an order avoiding judicial liens was found void based on the bankruptcy court's lack of jurisdiction, relief under Fed.R.Civ.P. 60(b)(4) was mandatory).

Chief U.S. Bankruptcy Judge