

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Curtis Allan Flint,

Debtor(s).

C/A No. 21-00702-HB

Chapter 7

**ORDER DENYING MOTION FOR
RELIEF FROM STAY**

THIS MATTER is before the Court on the Motion for Relief from Stay filed by Creditor Robert T. Hackl.¹ Chapter 7 Trustee Michelle L. Vieira objected.² Present at the April 7, 2022, hearing were Hackl and his counsels, W. Harrison Penn and Steven Edward Buckingham, Trustee’s counsel Christine E. Brimm, and Debtor Curtis Allan Flint and his counsel, Larry Lee Plumlee. Hackl and Flint testified and the Court received exhibits into evidence. The parties filed post-hearing briefs.³ After careful consideration of the pleadings, evidence, and applicable law, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052,⁴ and denies the Motion for Relief from Stay.

FINDINGS OF FACT

At all relevant times, Hackl has possessed a stock certificate labeled Number 5 (“Certificate No. 5”), which lists him as the owner of 220 shares of Greencroft, Inc. The bylaws of Greencroft, Inc. require certificates representing shares to be signed by the president or a vice president and the secretary or an assistant secretary. Before commencement of the above-captioned bankruptcy case, Certificate No. 5 was not signed by any party. Hackl testified Greencroft, Inc. changed its

¹ ECF No. 47, filed Mar. 7, 2022.

² ECF No. 50, filed Mar. 21, 2022.

³ ECF No. 69, filed Apr. 18, 2022; ECF No. 70, filed Apr. 25, 2022.

⁴ Made applicable to this contested matter by Fed. R. Bankr. P. 9014.

name to Augusta Grill, Inc., it is the “same entity,” and Augusta Grill, Inc. is organized as an S Corporation. Augusta Grill, Inc. operates a restaurant by the same name.

On December 31, 2013, Flint, Hackl, and Ned Clay, Jr. executed a Stock Purchase Agreement. The Stock Purchase Agreement states:

[Hackl] is the beneficial and legal owner of 220 shares of the outstanding common stock of Augusta Grill, Inc. (the “Corporation”) . . . [Flint] desires to purchase, and [Hackl] desires to sell, all of [Hackl’s] right, title and interest in and to One Hundred Twenty (120) of the shares of common stock of the Corporation (the “Stock”) upon the terms and conditions set forth in this Agreement. After giving effect to the proposed transfer, [Hackl] shall own 100 shares, [Flint] shall own 120 shares, and Clay shall own 180 shares of the Corporation.

The Stock Purchase Agreement further provides “[Flint] agrees to purchase from [Hackl], and [Hackl] agrees to sell and transfer to [Flint] the Stock,” and “the Stock will be transferred free and clear of any liens, encumbrances or claims of any type.” In exchange for the stock, Flint agreed to pay to Hackl \$220,000.00 “paid by delivery of a promissory note with an eight (8) year term . . .” according to a payment schedule. The Stock Purchase Agreement provides it “constitutes the complete understanding of the parties with regard to the subject matter hereof” and may not be modified except in writings signed by the parties. That same day, a Shareholder Agreement for Augusta Grill, Inc. was executed. The Shareholder Agreement includes terms regarding the ownership and disposition of shares of Augusta Grill, Inc., including that Flint, Hackl, and Clay, are the only owners of its 400 shares, and was signed by Flint, Hackl, and Clay.⁵

Flint executed a promissory note for \$220,000.00 in favor of Hackl (“Flint Note”). The Flint Note provides:

As security for the payments under this Note, [Flint] hereby unconditionally and absolutely make, transfer, deliver and assign unto [Hackl], its successors, heirs, representatives, and assigns, and grants to [Hackl] security interest in, all right, title and interest of [Flint] in and to the Stock described in Exhibit A attached hereto. [Flint] and [Hackl] shall cause a UCC1 Financing Statement to be filed with the

⁵ Clay signed as President of Augusta Grill, Inc. and as a shareholder.

South Carolina Secretary of State. [Flint] shall deliver the stock certificates evidencing such Stock to [Hackl] to be held by [Hackl] until this Note is paid in full. [Hackl] agrees to terminate the security interest hereinabove granted upon payment in full of the Note.

Exhibit A to the Flint Note describes the collateral as “Stock of Augusta Grill, Inc. represented by Certificate No. 3.” Certificate No. 3 was never created or issued and, therefore, Flint never delivered such certificate to Hackl. On August 20, 2015, a UCC-1 Financing Statement was filed with the South Carolina Secretary of State describing Hackl’s collateral as “All Stock of August [sic] Grill, Inc. owned by [Flint].” No continuation statement was filed, and the financing statement lapsed on August 20, 2020.

On March 15, 2021, Flint filed a voluntary petition for Chapter 7 relief. On his petition, Flint listed “Augusta Grill” as a business name he used in the last 8 years. Under “non-publicly traded stock and interests in incorporated and unincorporated businesses . . .” in Schedule A/B, Flint disclosed a 30% ownership interest in “Augusta Grill, Inc. – It is pledged as a security for a loan” with a current value of \$0.00 for the portion he owns.⁶ Schedule D listed Hackl with a \$130,000.00 claim secured by “Stock of Augusta Grill.”⁷ In his Statement of Financial Affairs, Flint responded “yes” to the question, “within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?” and listed “Augusta Grill, Inc” and checked the box for “an officer, director, or managing executive of a corporation.”⁸ Despite disclosing a 30% ownership interest elsewhere in his schedules, Flint failed to check the box for “an owner of at least 5% of the voting or equity securities of a corporation” on the Statement of Financial Affairs.

⁶ ECF No. 19, filed May 10, 2021.

⁷ *Id.*

⁸ ECF No. 23, filed May 18, 2021.

On September 27, 2021, Hackl filed a proof of claim in the amount of \$130,000.00 for the unpaid balance on the Flint Note, claiming a security interest in Flint's shares of Augusta Grill, Inc. with a value of \$65,000.00 as of the petition date.⁹ The claim asserts the security interest is perfected by Hackl's possession of a stock certificate representing Flint's shares and attached a copy of the Flint Note and appraisal of a "30% equity ownership interest held by Curtis A. Flint in the business enterprise known as Augusta Grill, Inc." The claim also attached a sworn declaration of Hackl stating that: in 2013 he sold Flint 90¹⁰ shares of his personal stock in Augusta Grill, Inc. for \$220,000.00, which represented 30% of ownership in the company; consistent with the agreement of the parties, he has remained in continuous possession of stock certificates representing Flint's shares to secure Flint's obligation; he is a secured party with respect to Flint's stock in Augusta Grill, Inc.; and Flint made some payments toward the Flint Note, but owed Hackl \$130,000.00 as of the petition date.

Hackl filed this Motion on March 7, 2022, seeking relief from the automatic stay to pursue his remedies under state law, including liquidating collateral for payment of the outstanding balance of the Flint Note. The Motion also states Hackl sold Flint 90¹¹ shares of his personal stock in "Augusta Grill," which represented 30% ownership in the company, for \$220,000.00. Hackl asserts Flint was to "pay for the shares of stock sold to him" in periodic installments over several years. To secure Flint's obligation, the parties agreed Hackl would remain in possession of "the stock certificates representing the shares purchased by [Flint]" until Flint paid the balance of the purchase price. Hackl asserts his security interest in Flint's shares is perfected pursuant to S.C.

⁹ Claim No. 1-1.

¹⁰ This figure appears to be a typographical error, as the parties do not dispute 120 shares are at issue here.

¹¹ This also appears to be a typographical error.

Code Ann. § 36-9-313(a) because he remained in possession of “Certificate No. 3 representing the 30% stock of Augusta Grill, Inc.” As stated above, Certificate No. 3 was never issued.

At the hearing, Hackl testified he “assumed” and it was his “impression” Flint made payments on the Flint Note through distributions received as a benefit of his ownership interest, and the last time he received payment was 2018 or 2019. Hackl also testified that he believed Flint would have all rights and obligations of a shareholder upon execution of the 2013 agreements but would not “get” or “have” the 120 shares until he paid the Flint Note in full. Hackl testified he did not execute any stock certificate to assign or transfer shares to Flint. Flint testified that he believed to have an ownership interest in Augusta Grill, Inc., but was not entitled to a stock certificate until he paid the Flint Note in full. Some insight into these interpretations, which conflict with the governing documents, may be explained by Hackl’s testimony that when he, Flint, and Clay made agreements, they first “agree to something and then to make it legal, we hire attorneys to fill it out [and] draft it up so it’s done correctly.”

Hackl asserts that despite the collateral description in the Flint Note as “Stock of Augusta Grill, Inc. represented by Certificate No. 3,” he has a security interest in Flint’s shares generally, not just those represented by the non-existent Certificate No. 3. He also argues the parties intended for Hackl to hold the shares sold to Flint until the Flint Note was paid in full, and consequently Hackl’s Certificate No. 5 for Greencroft, Inc., represents both Hackl and Flint’s shares in Augusta Grill, Inc. Because he remained in continuous possession of Certificate No. 5, Hackl asserts his security interest is perfected.

The Trustee objects to stay relief, arguing Hackl does not have a valid or perfected security interest in any collateral to secure payment of the Flint Note. Consequently, Hackl’s claim is unsecured and any shares Flint has in Augusta Grill, Inc. are property of the estate the Trustee may

utilize for payment of claims. The Trustee also initiated an adversary proceeding seeking: declaratory relief that Hackl does not have a secured interest or a perfected secured interest; avoidance of Hackl's asserted interest and preservation of such interest for the benefit of the estate; and disallowance of the secured portion of Hackl's proof of claim.¹² Hackl's Answer "denies that 120 shares were transferred to [Flint]" and that Hackl received payment of the \$220,000.00 purchase price.¹³

DISCUSSION AND CONCLUSIONS

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(G) and the Court may enter a final order.

I. ATTACHMENT OF SECURITY INTEREST

A "security" is defined by the Uniform Commercial Code ("UCC"), in relevant part, as "an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer," "which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer," is one of a class, and is a medium for investment. S.C. Code Ann. § 36-8-102(a)(15). A "certificated security" is represented by a certificate, whereas an "uncertificated security" is not. S.C. Code Ann. § 36-8-102(a)(4), (18).

Under the South Carolina Business Corporation Act, shares in a corporation are not required to be represented by certificates. *See* S.C. Code Ann. § 33-6-250(a). If utilized, a corporate share certificate must, at a minimum, state on its face: the name of the issuing corporation and that it is organized under South Carolina law; the name of the person to whom the certificate is issued; and the number and class of shares the certificate represents. S.C. Code Ann. § 33-6-250(b). The

¹² *Vieira v. Hackl*, Adv. Pro. No. 22-80015-HB (Bankr. D.S.C. Apr. 1, 2022).

¹³ *Id.* at ECF No. 4, filed May 2, 2022.

certificate must also be signed by two officers designated in the bylaws or by the board of directors.
S.C. Code Ann. § 33-6-250(d)(1).

“A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.”
S.C. Code Ann. § 36-9-203(a).

[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) value has been given;
- (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) one of the following conditions is met:
 - (A) the debtor has authenticated a security agreement that provides a description of the collateral. . . ;
 - (B) the collateral is not a certificated security and is in the possession of the secured party under Section 36-9-313 pursuant to the debtor’s security agreement;
 - (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 36-8-301 pursuant to the debtor’s security agreement; or
 - (D) the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents and the secured party has control under Section 36-7-106, 36-9-104, 36-9-105, 36-9-106, or 36-9-107 pursuant to the debtor’s security agreement.

S.C. Code Ann. § 36-9-203(b).

Regarding certificated securities, “registered form” under § 36-9-203(b)(3)(C) means the security certificate¹⁴ specifies the person entitled to the security and the transfer of the security is registered on the issuer’s books or the certificate so states. S.C. Code Ann. § 36-8-102(a)(13). “Delivery” of a certificated security occurs when the secured party acquires possession of the security certificate. S.C. Code Ann. § 36-8-301(a)(1). Additionally, a security certificate may

¹⁴ “Security certificate” means a certificate representing a security. S.C. Code Ann. § 36-8-102(a)(16).

represent shares owned by two different parties if a partial interest in the certificate is transferred by indorsement,¹⁵ to the extent of the indorsement. S.C. Code Ann. § 36-8-304(b).

Regarding control of investment property¹⁶ governed by § 36-9-203(b)(3)(D), a secured party has control of a certificated security in bearer form if the certificated security is delivered to the secured party, and control in registered form if the certificated security is delivered to the secured party and either the certificate is indorsed to the secured party or in blank by an effective indorsement, or the certificate is registered in the name of the secured party, upon original issue or registration of transfer by the issuer. *See* S.C. Code Ann. §§ 36-9-106(a), 36-8-106(a)-(b). A secured party has control of an uncertificated security if either the uncertificated security is delivered to the secured party, or the issuer has agreed that it will comply with the secured party's instructions without further consent of the registered owner. *See* S.C. Code Ann. §§ 36-9-106(a), 36-8-106(c). Delivery of an uncertificated security occurs when the issuer registers the secured party as the registered owner either upon original issue or registration of transfer. S.C. Code Ann. § 36-8-301(b)(1).

There appears to be no dispute that Augusta Grill, Inc. is a corporation with shares representing ownership interests therein. The records of Augusta Grill, Inc. clearly indicate Hackl transferred ownership of 120 shares to Flint in 2013. The Flint Note, executed for the purchase price, was consideration for the shares transferred under the Stock Purchase Agreement and Hackl's own Motion and proof of claim assert a security interest in a 30% interest of Augusta Grill, Inc. owned by Flint when this case was filed. Accordingly, the issue before the Court is whether

¹⁵ "Indorsement" means "a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it." S.C. Code Ann. § 36-8-102(a)(11).

¹⁶ "Investment property" includes "a security, whether certificated or uncertificated." S.C. Code Ann. § 36-9-102(a)(49).

Hackl has an enforceable security interest in the shares of Augusta Grill, Inc. that Flint owned when the bankruptcy was filed. The Court concludes he does not under any possible avenue of the applicable law.

The Flint Note may constitute a security agreement authenticated by Flint with a collateral description for the shares represented by Certificate No. 3. However, such agreement is ineffective to grant Hackl a security interest under § 36-9-203(b)(3)(A) because Certificate No. 3 does not exist. Second, § 36-9-203(b)(3)(B) is inapplicable, as there is no collateral other than a certificated security that could be in Hackl's possession under S.C. Code Ann. § 36-9-313. Hackl's interest also could not have attached by possession pursuant to § 36-9-203(b)(3)(C). Since Certificate No. 3 does not exist, it cannot be in registered form nor delivered to Hackl. There is no evidence Certificate No. 5 was ever indorsed, and Hackl testified he never completed any stock certificate to assign or transfer shares to Flint. Therefore, Certificate No. 5 cannot encompass both Hackl and Flint's shares pursuant to § 36-8-304(b). Even if indorsed, Certificate No. 5 is not a valid prepetition certificated security because it was not signed by two officers of Augusta Grill, Inc. as required by S.C. Code Ann. § 33-6-250(d)(1).

Finally, Hackl does not have control over Flint's shares under § 36-9-203(b)(3)(D). Hackl cannot have control over Certificate No. 3 because it does not exist, and it is immaterial whether he has control over Certificate No. 5 because it does not represent Flint's shares. Assuming Flint's shares constitute uncertificated securities, Hackl does not have control over them because: (1) they were not delivered to Hackl because there is no evidence Augusta Grill, Inc.'s books and records registered Hackl as the owner of Flint's shares; and (2) there is no evidence or that Augusta Grill, Inc. agreed to comply with Hackl's instructions regarding Flint's shares without further consent of Flint. *See* S.C. Code Ann. §§ 36-8-106(c), 36-8-301(b). Instead, the Stock Purchase Agreement

states that Flint will own the 120 shares and the Shareholder Agreement recites that Flint is a shareholder.

II. PERFECTION OF SECURITY INTEREST

Even if a generous interpretation of the collateral description in the Flint Note is adopted to grant Hackl a security interest in any shares Flint owns, it is unperfected. “[A] security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 36-9-310 through 36-9-316 have been satisfied...[and] when it attaches if the applicable requirements are satisfied before the security interest attaches.” S.C. Code Ann. § 36-9-308(a). Ordinarily, a financing statement must be filed to perfect a security interest. S.C. Code Ann. § 36-9-310(a). However, the filing of a financing statement is not necessary to perfect a security interest in a certificated security that is otherwise “perfected by delivery of the security certificate to the secured party under Section 36-9-313[.]” S.C. Code Ann. § 36-9-310(b)(7). Under S.C. Code Ann. § 36-9-313(a), “[a] secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 36-8-301.” As noted above, delivery of a certificated security to a secured party occurs when the secured party acquires possession of the security certificate. S.C. Code Ann. § 36-8-301(a)(1).

A financing statement covering “All Stock of August [sic] Grill, Inc. owned by [Flint]” was filed, but lapsed on August 20, 2020. Therefore, any prior perfection is no longer effective. Perfection by delivery of a security certificate under S.C. Code Ann. § 36-9-313(a) is not possible because Certificate No. 3 was never created. Further, delivery of Certificate No. 5 under § 36-9-313(a) is ineffective to perfect an interest in Flint’s shares because that certificate was not indorsed and is not a valid prepetition security certificate.

III. RELIEF FROM STAY

The Court shall grant relief from stay on request of a party in interest for cause, including the lack of adequate protection, or the debtor does not have an equity in the property at issue and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(1)-(2). The party requesting relief from stay has the initial burden of proving cause exists for such relief, including lack of adequate protection and lack of equity in the property. *See* 11 U.S.C. § 362(g); *In re Toomer*, C/A No. 10-07273-JW, 2011 WL 8899488, at *2 (Bankr. D.S.C. Oct. 5, 2011) (citing *In re Davis*, C/A No. 10-2249-JW, 2010 WL 5173187, at *2 (Bankr. D.S.C. Oct. 12, 2010)).

The filing of a bankruptcy petition “creates an estate” comprised of, with certain exceptions not relevant here, “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Consequently, Flint’s shares in Augusta Grill, Inc., are property of the bankruptcy estate. The trustee’s powers provided by the Bankruptcy Code include:

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). “In short, the Trustee stands in the shoes of a judicial lien creditor whose lien arose on the petition date, and as such can avoid any transfer of property of the debtor or any obligation that is voidable by a judicial lien creditor.” *Rhiel v. Wells Fargo Fin. Acceptance (In re Fields)*, 351 B.R. 887, 890 (Bankr. S.D. Ohio 2006) (citation omitted). While § 544 “gives the Trustee the status of a hypothetical lien creditor...[the] exercise of such power and its extent are governed entirely by the applicable state law.” *In re McCormick*, 669 F.3d 177, 180-81 (4th Cir. 2012) (quoting *Havee v. Belk*, 775 F.2d 1209, 1218-19 (4th Cir. 1985)). Under South Carolina law, a judicial lien creditor has priority over an unperfected interest in personal property. S.C. Code Ann. § 36-9-317(a)(2).

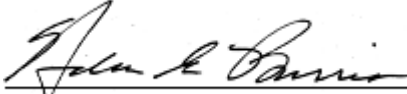
The claimed security interest is the target of the Trustee's pending avoidance action and may benefit creditors of this estate. Although Hackl questions the market value or marketability of the estate's interest, Hackl's own evidence indicates the value may be as much as \$65,000.00.¹⁷ Pursuant to the foregoing, Hackl has not met his burden to show that the relief requested under § 362(d)—that he be allowed to proceed as a secured creditor to pursue his rights in Flint's shares in Augusta Grill, Inc., pursuant to state law and the Shareholder Agreement—is warranted.

IT IS, THEREFORE, ORDERED that the Motion for Relief from Stay filed by Creditor Robert T. Hackl is denied.

**FILED BY THE COURT
05/05/2022**



Entered: 05/05/2022


Chief US Bankruptcy Judge
District of South Carolina

¹⁷ If an estate asset is burdensome to the estate or is of inconsequential value and benefit to the estate, the trustee may move or, upon request of a party in interest, be ordered to abandon property of the estate pursuant to 11 U.S.C. § 554.