

U.S. DISTRICT &
BANKRUPTCY COURTS

97 APR 30 PM 1:58

FILED DEPOSITORY IDAHO
Cameron S. Burke, Clerk

DOUGLAS WERTH
BLAINE COUNTY PROSECUTING ATTORNEY

VALENCIA J. BILYEU
Special Prosecutor
Civil Division
650 Main Street, 2d Floor
Boise, ID 83702
(208) 364-2300

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re SAWTOOTH ENTERPRISES, INC. dba)
THE BUCKIN' BAGEL,)
)
)
)
Debtor(s).)

Case No. 96-03050 ACH
**MEMORANDUM IN SUPPORT
OF MOTION TO DECLARE
THAT SALE OF PERSONAL
PROPERTY DID NOT DIVEST
BLAINE COUNTY'S LIEN**

Blaine County, Creditor, moves this Court for an Order declaring its personal property liens intact. The motion comes before the Court in order to clarify Blaine County's lien status so that the County may pursue collecting the taxes owed. This motion is based on Local Bankruptcy Rules 2002.1 and 2002.2, and 11 U.S.C. 363(b)(1) and (f).

On November 27, 1996, Debtor Sawtooth Enterprises, Inc. (dba The Buckin' Bagel) filed a bankruptcy under Chapter 11. Notice of the Bankruptcy was not provided to Creditor Blaine County (hereinafter "County"). (Affidavit of Vicki Dick at 1.) At that time, Debtor owed the County personal property taxes in the amount of \$637.38. (Dick Aff. at 1). On December 24, 1996, Debtor filed a Motion for Entry of Order Approving

MEMORANDUM IN SUPPORT OF MOTION TO DECLARE THAT SALE OF
PERSONAL PROPERTY DID NOT DIVEST BLAINE COUNTY'S LIEN- PAGE 1

76

Sale of Property Free and Clear of Liens & Notice of Hearing. The County was not included on Debtor's Notice of Service (Exhibit A) and, once again, the County received no notice. (Dick Aff. at 1) On January 13, 1997, a hearing regarding the sale of the personal property was held before the Court. The County, not having received notice of the hearing, was not present. On January 23, 1997, a Court Order was issued which enabled all of the personal property owned by Debtor to be sold to Timothy Wells free and clear of liens and interests. At that time of sale the personal property taxes owed included \$637.38 plus late charge and interest for 1996. (Dick Aff. at 2). The County received no notice of the order. (Dick Aff. at 1.)

A. The County Was Denied Due Process

The sale was conducted pursuant to Local Bankruptcy Rule 2002.1, and 11 U.S.C. 363(b). Rule 2002.1 states, "A sale pursuant to Section 363(b), including a sale free and clear of any interest of an entity other than the estate, is initiated by notice and is subject to LBR 2002.2." The Local Rule requires that notice be given by mail to "all creditors." LBR 2002.2. 11 U.S.C. 363(b) requires notice and a hearing. Section 363(b)(1) states that estate property may be sold other than in the ordinary course of business only after "notice" appropriate in the circumstances.

The purpose behind mandatory prior notice is to satisfy the constitutional requirement of the due process clause of the Fifth Amendment to the United States Constitution. Due process requires that notice be given to a creditor whose property rights are being affected so that the creditor may have its day in court. *In re Fauchier*, 71 B.R. 212, 215 (9th Cir. BAP 1987). To comply with due process requirements, notice must be given that is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). The County received no notice of the bankruptcy, the motion for sale, or the order allowing the sale of the personal property.

Moreover, even *if* Blaine County had received notice of the motion for the sale of the property, the County would have been led to believe that its interest was protected. Debtor's motion stated that the "personal property *is being sold subject to* the any [sic] *personal property taxes on that property.*" Debtor's Mot. Entry of Order Approv. Sale of Property Free and Clear of Liens & Not. of Hr'g, p. 5 (emphasis added).

However, Blaine County did not receive notice. The notice given by Sawtooth Enterprises was not reasonably calculated to apprise the County of the pendency of the action and clearly did not afford the County an opportunity to present objections. As a result, the County was denied due process.

B. Idaho Law Requires Personal Property Tax to be Sold Upon Sale

The Motion for Entry of Order by Debtor was based on 11 U.S.C. Section 363(f)(1). That section states, "The trustee may sell property under subsection (b) or (c) of the section free and clear of any interest in such property of an entity other than the estate, *only if . . . applicable nonbankruptcy law permits sale of such property free and clear of such interest.*" 11 U.S.C. Section 363(f)(1) (emphasis added).

The nonbankruptcy law of the state of Idaho does not permit personal property to be sold free and clear of taxes. The Idaho Code requires that upon selling personal property, the taxes owed, both the current year and those taxes due and owing, shall be paid to the tax collector. The Idaho Code states:

Whenever any person, firm or corporation owning any personal property shall desire to remove the personal property from the county *or sell or repossess the property* before all property taxes due and payable including the current year's taxes have been paid upon the personal property, *the property taxes shall be paid to the tax collector upon demand . . .*

Idaho Code § 63-1014(1). In fact, in the strongest possible reflection of its intent, the Legislature has made it a criminal offense to sell personal property taxes:

It shall be a misdemeanor for any person, firm or corporation to move from the county or sell or repossess

any personal property or manufactured home without the payment of the current year's property taxes or without paying property taxes due and owing, and upon conviction the person, firm or corporation shall, in addition to any penalty which the court may impose, pay to the tax collector a sum not in excess of double the amount of property tax which was collectible on the property removed or sold or repossessed, together with all costs and late charges provided for in this chapter. The excess sum shall be collected by the tax collector in the same manner as the original property tax.

Idaho Code § 63-1014(2). In accordance with Idaho law, since the sale of personal property to Tim Wells occurred on January 23, 1997, the 1996 personal property taxes were owed to the Blaine County *upon sale*.

Based on the foregoing argument, the County respectfully requests the Court to declare that the sale of personal property to Tim Wells did not divest the County of its lien in the property and that the County may now proceed to collect the 1996 and 1997 personal property taxes.

DATED this 30th day of April, 1997.

DOUGLAS WERTH
Blaine County Prosecuting Attorney

By: Valencia J. Bilyeu
Valencia J. Bilyeu
Special Prosecutor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of April, 1997, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DECLARE SALE OF PERSONAL PROPERTY DID NOT DIVEST BLAINE COUNTY OF ITS LIEN, to the following person(s) by the following method:

Joseph M. Meier
Cosho, Humphrey, Greener & Welsh
815 West Washington
Boise Idaho 83702

Hand Delivery
 U.S. Mail
 Certified Mail
 Telecopy (FAX)

Stephen Drake
Moffatt, Thomas, Barrett, Rock & Fields
101 South Capitol
Boise, Idaho 83701

Hand Delivery
 U.S. Mail
 Certified Mail
 Telecopy (FAX)

Bernie R. Rakozy
Bankruptcy Trustee
824 West Franklin
Boise Idaho 83702

Hand Delivery
 U.S. Mail
 Certified Mail
 Telecopy (FAX)

Alice VanNewkerk