

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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June 17, 1997

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Subject: **First Bank of South Dakota, N.A. v. Green Tree
Financial Corporation (In re E. John and Eileen
Bruner)**; Adversary No. 96-4049;
Chapter 12; Bankr. No. 96-40381

Dear Counsel:

The matter before the Court is a lien priority dispute instituted by First Bank of South Dakota against Green Tree Financial Corporation. The issue presented is which party has the superior lien on a manufactured home situated on real property mortgaged by Debtors to First Bank. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that First Bank has the superior lien interest in the manufactured home on Debtors' real property because Green Tree did not timely perfect its secured interest in the home with a fixture filing.

SUMMARY OF MATERIAL FACTS. The parties have stipulated to the material facts. First Bank holds a mortgage on John and Eileen Bruner's real property. The mortgage was recorded on September 6, 1994. The mortgage contains a clause securing after-acquired fixtures.

In December 1994, the Bruners obtained a two-piece manufactured home from Centennial Homes. Green Tree lent the Bruners funds to purchase the home. When delivered to the Bruners, the manufactured home contained an opening for an internal stairwell. The manufactured home was placed on a basement foundation on the real property mortgaged to First Bank. The units were bolted to the foundation and joined together. The siding and

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roofing were completed on site. The process for moving the home now would be the same as for a site-built home.

The Bruners signed a "Manufactured Home Landlord's Waiver" on December 19, 1994 - - before they purchased the home - - that stated the home would not be attached to the "premises" and that they would advise mortgagees of that fact. The Bruners did not give First Bank a copy of that waiver. All the other paper work that the Bruners executed for Centennial Homes and Green Tree was completed after the building was delivered and while placement of it on the foundation was being completed. The Contract and Security Agreement provided that the home would not be attached to any real estate and that it would always be treated as personal property. According to the Contract and Security Agreement, the Bruners also agreed that they would not let anyone else have an interest in the home. Green Tree is listed as the first lien holder on the modular home's certificate of title that was issued January 17, 1995, after the home was affixed to the realty. Green Tree did not make a fixture filing pursuant to S.D.C.L. § 57A-9-313.

On May 20, 1996, the Bruners (Debtors) filed a Chapter 12 petition. First Bank commenced this adversary proceeding against Green Tree on November 1, 1996 seeking a determination that it holds the superior security interest in the modular home because Green Tree did not perfect its interest in the modular home as a fixture. Green Tree answered the complaint and also filed a third party complaint against Debtors on November 25, 1996, arguing its claim against Debtors should be declared non dischargeable for fraud if First Bank prevails on its complaint. Green Tree's third party dischargeability complaint against Debtors was dismissed by Order entered March 18, 1997 because it was not timely filed under F.R.Bankr.P. 4007(c).

First Bank and Green Tree submitted the original complaint to the Court on stipulated facts and briefs. First Bank claims that Green Tree's secured interest in the manufactured home is inferior to its mortgage because Green Tree did not timely perfect its secured interest in the home as a fixture. Green Tree raised several defenses that will be discussed in turn below.

DISCUSSION. The first issue is whether the manufactured home became a fixture when it was placed on Debtors' real property. The Court concludes that the home did become a fixture.

When determining whether a piece of personalty becomes a fixture, the Court must consider: (1) its annexation to the real property: whether actual or constructive; (2) its adaptability to

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the use and purpose for which the realty is used; and (3) the intention of the party making the annexation. *In re Tax Liability of Diagnostic Medical Systems, Inc.*, 415 N.W.2d 816, 817-18 (S.D. 1987).

The intention of the party with regard to making the article a permanent accession to the realty is the controlling criterion. . . . The other tests derive their chief value as evidence of such intention. . . . Intention is deduced from the relation of the parties and the circumstances of a particular case.

Id. at 818 (quoting *In re Tax Appeal of Logan and Associates*, 331 N.W.2d 281, 282-83 (S.D. 1983)). Here, it is clear that Debtors intended to affix the manufactured home to the realty. S.D.C.L. § 43-33-1. The permanent nature of the affixation, the construction of a basement foundation, and their request that the home manufacturer include an inside opening for a stairwell all manifest that intention. Once in place, it could not be readily moved like a mobile home. While Debtors may have signed boilerplate language to the contrary in their agreement with Green Tree, their actions and the result of their actions speak louder and result in the manufactured home becoming a fixture. *In re Reese*, 194 B.R. 782, 791-92 (Bankr. D. Md. 1996).

Under S.D.C.L. ch. 32-3, manufactured homes are titled by the manufacturer or dealer when sold. Under S.D.C.L. § 32-3-28, a lien on the manufactured home can be noted on the title. Green Tree contends that because it properly noted its lien on the title, it has a perfected secured interest regardless of the fact that the home became a fixture when it was placed on the realty. Thus, the second issue is whether the placement of Green Tree's lien on the manufactured home's title protected that lien from the mortgage interest that First Bank had on the real property.

Green Tree relies on S.D.C.L. § 57A-9-302, which states, in part:

(3) The filing of a financing statement otherwise required by this chapter is not necessary or effective to perfect a security interest in property subject to:

(b) a certificate of title statute of this state under the law of which indication of a security interest on the certificate of title is required as a condition of perfection;

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(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this chapter, and a security interest in property subject to the statute can be perfected only by compliance therewith . . . in other respects the security interest is subject to this chapter.

Green Tree, therefore, claims that it did not need to "re-perfect," so to speak, its secured interest after the manufactured home became a fixture to protect its lien from First Bank's real property mortgage. The Bank counters that § 57A-9-313 controls.

The Court concludes that Green Tree reads § 57A-9-302(3) too broadly. While § 57A-9-302(3) does not require a creditor to use two different methods to perfect a secured interest in personalty covered by a lien-title statute, § 57A-9-302(1)(d) specifically states that the priority of conflicting liens on fixtures is governed by § 57A-9-313. When subsections 302(3), 302(4), and 302(1)(d) of § 57A-9-302 are read in harmony, it is clear that a creditor must look to § 57A-9-313 to protect the priority of its lien on personalty that becomes a fixture. Accordingly, once Debtors' manufactured home became a fixture, Green Tree no longer could rely on its lien on the certificate of title to protect its secured interest from competing secured interests. *Shelter America Corp. v. Ray*, 800 P.2d 743 (Okla. Ct. App. 1990)¹.

Section 57A-9-313's provisions are clear. If a creditor wants to protect its secured interest in a fixture from an *existing* real property mortgagee, it must make a fixture filing before the property becomes a fixture or within ten days after, S.D.C.L. § 57A-9-313(4)(a), or it must obtain the real property encumbrancer's consent. S.D.C.L. § 57A-9-313(5)(a). Here, Green Tree never made a fixture filing and it did not ask First Bank to subordinate its mortgage to Green Tree's purchase money security interest. Therefore, Green Tree's security interest in the manufactured home is second to that of First Bank's.

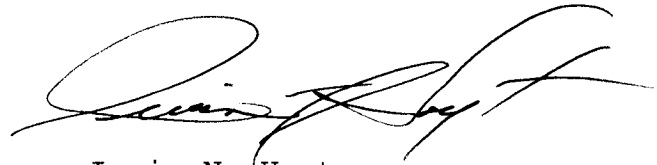
¹ Oklahoma has revised its lien perfection statutes to better protect creditors who finance purchases of mobile and manufactured homes. See Okla. Stat. tit.47, § 1110(E) (1996), as discussed in *Ray*, 800 P.2d 743. South Dakota's current statutes on this issue reflect Oklahoma's statutes *before* they were revised.

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The final issue is Green Tree's equitable argument that First Bank should not reap a windfall. The Court acknowledges that First Bank did not bargain for this particular house in its security agreement with Debtors and that the value of Green Tree's secured claim will be diminished or eliminated if the value of the realty and house will not support both claims. However, the Court cannot use its equitable powers to alter the results imposed by statute. See *Hoagland v. Beabout (In re Beabout)*, 110 B.R. 883, 888 (Bankr. S.D. Ill. 1990); *Otoe County National Bank v. Easton (In re Easton)*, 882 F.2d 312, 315 (8th Cir. 1989) (a bankruptcy court's broad equitable powers must be exercised consistent with the Bankruptcy Code); and *Harmon v. United States*, 101 F.3d. 574, 581-84 (8th Cir. 1996) (discussion of liens in bankruptcy generally and in Chapter 12 particularly). There has been no showing of fraud or other inequitable conduct by the Bank that would warrant the application of equitable subordination under 11 U.S.C. § 510(c)(1) to raise Green Tree's claim above First Bank's. See *Tokheim v. Geiger (In re John W. Van Dyke)*, Bankr. L88-01173S, Adversary No. 95-5010KS, slip op. (Oct. 2, 1995) (Hoyt, C.J., sitting by designation) (general discussion on equitable subordination). Further, Green Tree had the means to protect its lien under S.D.C.L. § 57A-9-313.

Counsel for First Bank shall prepare a judgment in compliance with these findings and conclusions.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

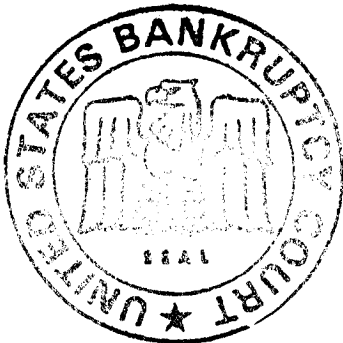
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: [Signature]
Date: 06-17-97

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 17 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota



Case: 96-04049 Form id: 122 Ntc Date: 06/17/97 Off: 4 Page : 1
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