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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

In Re:
E.J. BRUNER
Soc. Sec. No. [REDACTED]-5388
and
EILEEN BRUNER
Soc. Sec. No. [REDACTED]-6562,

Debtors.

Case No. 96-40381 (Chapter 12)

GREEN TREE FINANCIAL
CORPORATION,

Appellant,

vs.

FIRST BANK OF SOUTH DAKOTA,
N.A.,

Appellee.

Adversary No. 96-4049

CIV 97-4139

MEMORANDUM OPINION
AND ORDER

Green Tree Financial Corporation appeals the decision of the bankruptcy court holding that First Bank of South Dakota N.A.'s mortgage lien in a manufactured home owned by E.J. and Eileen Bruner, the debtors, is prior and superior to any lien or interest in the manufactured home held by Green Tree. This Court has jurisdiction to consider the appeal under 28 U.S.C. § 158(a)(1). For the reasons stated below, the Judgment of the bankruptcy court is affirmed.

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U.S. BANKRUPTCY COURT
DIST. OF SOUTH DAKOTA

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Green Tree and First Bank presented the legal issues to the bankruptcy court on stipulated facts. In September 1994, the debtors executed a collateral real estate mortgage in favor of Western Bank¹ on real property owned by them. The mortgage contains a clause securing after-acquired property, including fixtures. It was recorded on September 6, 1994. In December, 1994, the debtors purchased a manufactured home from Centennial Homes. Green Tree lent the debtors the funds to purchase the home and the Manufactured Home Retail Installment Contract and Security Agreement (hereafter “sales contract”) was assigned to Green Tree. Pursuant to the sales contract, the debtors promised not to move the home from its original location without Green Tree’s written consent, and not to let anyone else have an interest in it. The debtors and Green Tree executed a “Manufactured Home Landlord’s Waiver” (hereafter “waiver”). Pursuant to the sales contract and the waiver signed by the debtors, they agreed to treat the manufactured home as personal property and not to attach it to the premises or real estate. The waiver stated, in part, “The undersigned [the debtors] shall expressly advise all purchasers or mortgagees of the premises of the fact that said collateral is not a part of the premises.” The debtors did not give First Bank a copy of the waiver.

After the home was delivered to the debtors’ premises on December 22, 1994, a standard wood sill plate was bolted to the top of the home’s eight foot deep concrete foundation walls, covering the entire perimeter of the foundation, just as is done in site-built construction. The two 14 by 67 foot sections of the home were then bolted to the permanent foundation on the real property mortgaged to First Bank. The siding and roofing were completed on site. The cedar siding joints are staggered as in site-built homes, leaving no evidence of a seam between the two sections of the home. Installation of the home was completed on December 29, 1994.

¹First Bank is the successor in interest to Western Bank.

The main floor of the manufactured home contains a kitchen, office, living room, three bedrooms and two bathrooms. There is a factory-built internal stairwell leading from the living room to the basement. The stairs were built on-site. There is also a separate exterior entrance to the basement. The basement has a bedroom, kitchen and pool table. Similar to site-built homes, the basement of the manufactured home has water and sewer lines, a second electrical panel, and furnace heating vents to warm the basement. The process to relocate this home would be the same as for a site-built home.

On January 3, 1995, Green Tree filed a UCC financing statement with the South Dakota Secretary of State and applied for a certificate of title with its lien to be noted thereon from the Department of Revenue. On January 17, 1995, certificate of title for the manufactured home was issued to the debtors, listing Green Tree as the first lienholder. Green Tree did not make a fixture filing pursuant to SDCL § 57A-9-313.

On May 20, 1996, the debtors filed a Chapter 12 petition. On November 1, 1996, First Bank commenced an adversary proceeding against Green Tree seeking a determination that it holds the superior security interest in the manufactured home because Green Tree did not perfect its interest in the home as a fixture. Green Tree answered, asserting affirmative defenses, and filed a third party complaint against debtors, arguing that 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 of the bankruptcy court on March 18, 1997, because it was not timely filed under F.R.Bankr.P. 4007(c).

The bankruptcy court ruled that the manufactured home became a fixture once it was affixed to the debtor's real estate, and that First Bank holds the superior security

interest in the home because Green Tree did not perfect its interest by making a fixture filing pursuant to SDCL § 57A-9-313(4)(a).²

The bankruptcy court applied the test set forth by the South Dakota Supreme Court to determine whether an article is a fixture, and found that the manufactured home became a fixture based on: (1) its annexation to the real property, (2) its adaptability to the use and purpose for which the realty is used and (3) the intention of the debtors in making the annexation. See In re Tax Liability of Diagnostic Medical Systems, Inc., 415 N.W.2d 816, 817-18 (S.D. 1987). The bankruptcy court further held that, although SDCL § 32-3-28 requires perfection of a lien on a manufactured home by noting it on the certificate of title, the home became a fixture and the priority of conflicting liens on fixtures is governed by SDCL § 57A-9-313. See SDCL § 57A-9-302(1)(d). SDCL § 57A-9-313 states that 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 thereafter, SDCL § 57A-9-313(4)(a), or it must obtain the real property encumbrancer's consent, SDCL § 57A-9-313(5)(a). Because Green Tree did not make a fixture filing and it did not ask First Bank to subordinate its mortgage, the bankruptcy court ruled that Green Tree's security interest in the manufactured home is second to that of First Bank's. Finally, the bankruptcy court held

²This statute provides:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate.

that it could not use its equitable powers to give Green Tree's claim priority over First Bank's claim.

Green Tree renews on appeal its argument that the manufactured home is not a fixture and that it did not need to "re-perfect" its security interest in the home by making a fixture filing. Green Tree argues that the debtors' agreements in both the sales contract and the waiver that they would treat the manufactured home as personalty requires a finding that the home is not a fixture. Green Tree also argues that to perfect its security interest in the home, it had to do nothing more than note its lien on the certificate of title as required by SDCL § 32-3-28. Green Tree cites SDCL § 57A-9-302(3)(b), which states that filing a financing statement to perfect a security interest is unnecessary if the law requires perfection by notation of the lien on the certificate of title. First Bank urges affirmance of the bankruptcy court's reasoning and holding.

This Court reviews the bankruptcy court's findings of fact for clear error and its legal conclusions de novo. Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987). Because the matter is presented on stipulated facts, the Court reviews de novo the bankruptcy court's legal conclusions in favor of First Bank.

The Court agrees with the bankruptcy court that the manufactured home became a fixture once it was attached to the debtors' property. The controlling factor in making this determination under South Dakota law is the intent of the party making the annexation. See Metropolitan Life Ins. Co. v. Jensen, 69 S.D. 225, 9 N.W.2d 140, 141 (1943); Matter of Tax Appeal of Logan and Associates, 331 N.W.2d 281, 282-283 (S.D. 1983). "Intention is deduced from the relation of the parties and the circumstances of a particular case." Logan, 331 N.W.2d at 283. All of the circumstances in the present case demonstrate that the debtors intended the manufactured home to be a permanent

accession to their real property. Green Tree has offered nothing to rebut this demonstrated intent. Green Tree's only argument appears to be that the manufactured home remained personal property because the debtors agreed to treat it as such. The debtors' agreement to treat the home as personalty, although some evidence of the debtors' intent, is not binding on the rights of First Bank. See, e.g., In re Reese, 194 B.R. 782, 793 (Bankr.D.Md. 1996) (the parties' intent, as evidenced by a contractual provision, that the goods should remain personalty contradicts the actual nature of the goods and cannot be given effect in characterizing the nature of the goods); Trestle Valley Recreation Area, Inc. v. Armstrong, 45 B.R. 458, 460 (Bankr.D.N.D. 1984) ("The general rule is that while parties may by agreement fix the status of property either as realty or personalty, such agreements have no effect as against third parties without notice."); C.I.T. Financial Services v. Premier Corp., 747 P.2d 934, 937 (Okla. 1987) (agreement between purchaser of mobile home and original purchase money lender that home would not become part of real estate was not binding on subsequent mortgagee, for purposes of determining priority between purchase money lender and mortgagee); Cummings v. Beardsley, 609 S.W.2d 66, 69 (Ark. 1980) (as between the parties to the contract the signs were not fixtures because of the provision in the security agreement which stated the signs would not be considered part of the realty; however, the buyers of the property were not a party to that agreement and the signs were fixtures as to them).

In George v. Commercial Credit Corp., 440 F.2d 551, 553 (7th Cir. 1971), the court, interpreting Wisconsin law, held that a mobile home affixed to real estate was a fixture. See also Fink v. Wemco Corp., 4 B.R. 741 (Bankr.W.D.N.Y. 1980). Other states that have addressed the issue have also found a mobile home to be a fixture. M&M Development Inc. v. LS Monticello J.V. Inc., 190 A.D.2d 392, 599 N.Y.S.2d 137 (1993); Commercial Tp. v. Block 136, Lot 2, 179 N.J.Super. 307, 431 A.2d 862 (1981); Far West Modular Home Sales, Inc. v. Proaps, 604 P.2d 452, 455 (Or. App. 1979); Cf.

Clevenger v. Peterson Construction Co., Inc., 14 Wash.App. 424, 542 P.2d 470, 471 (1975) (certain mobile homes which had not lost their identity as mobile units remained personal property because the axles were left on, they were placed on blocks rather than permanent foundations, and the utility connections were not fixed pipes but flexible hoses which could easily be disconnected). In the present case, the facts show that the debtors used the manufactured home as their personal residence and intended to make the manufactured home a part of their realty. Accordingly, the bankruptcy court correctly held that the home is a fixture. See, e.g., Metropolitan Life Ins. Co. v. Jensen, 69 S.D. 225, 9 N.W.2d 140, 141 (1943) (“...when the external indications show that an article belongs to the realty as an article designed to become a part of it and to be used with it to promote the object to which the realty has been devoted, as between mortgagor and mortgagee, it becomes a part of the realty”).

After finding that the debtors’ manufactured home became a fixture, the bankruptcy court correctly determined that First Bank’s interest in the manufactured home has priority over Green Tree’s lien. State law controls questions concerning the nature and extent of a debtor’s interest in property and the nature and extent of a lien on a debtor’s property. In re Rine & Rine Auctioneers, Inc., 74 F.3d 854, 857 (8th Cir. 1996); In re Pierce, 809 F.2d 1356, 1359 (8th Cir. 1987). Under South Dakota statutes, §§ 32-3-28 and 32-3-41, as they existed in 1994, perfection of a security interest in a manufactured home was required to be accomplished by notation of the lien on the certificate of title. Green Tree argues, as it did below, that it did not need to make a fixture filing to maintain priority over First Bank’s lien after the manufactured home was attached to the real estate because it properly perfected its security interest in the first instance by noting its lien on the certificate of title. However, the Court agrees with the bankruptcy court that SDCL § 57A-9-313 controls which lien has priority in this case.

SDCL § 57A-9-313 is South Dakota's enactment of the section of the Uniform Commercial Code regarding priority of security interests in fixtures. South Dakota law does not exempt manufactured homes from the Uniform Commercial Code. Cf. ENT Federal Credit Union v. Chrysler First Financial Services Corp., 826 P.2d 430, 432 (Co. Ct. App. 1992) (Colo. Sess. Laws § 38-29-125(1) excludes manufactured homes from the provisions of the UCC except for those manufactured homes held as inventory). In addition, South Dakota law does not provide that a security interest perfected by certificate of title notation under SDCL 32-3-28 has priority over a mortgagee of the real property on which it held a lien covering fixtures before the manufactured home became affixed to the property. Cf. Shelter America Corp. v. Ray, 800 P.2d 743, 746 (Okla.App. 1990) (47 O.S.1989 Supp. § 1110(E) expressly provides a security interest perfected by notation on the certificate of title pursuant to the Motor Vehicle Code has priority over the conflicting interest of an owner or mortgagee of real property upon which the mobile home became affixed). In fact, the South Dakota Supreme Court has stated that Chapter 57 and Chapter 32 of the South Dakota Codified Laws should be considered concurrently whenever possible:

In certain particulars including those which relate to this action, Chapter 57-37 relating to secured transactions under the Uniform Commercial Code and Chapter 32-3 relating to registrations, liens and transfers under the motor vehicle code deal with the same subject matter and when statutes are in pari materia they should be considered concurrently whenever possible. If they can be made to stand together, effect should be given to both as far as possible.

* * * * *

Thus, reviewing the history of the enactments, it is not difficult to give reasonable interpretation to all of the provisions in accordance with the rule of pari materia, the object of which is to carry into effect the intention of the legislature and which proceeds upon the supposition that several statutes were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions.

Farmers and Merchants Bank and Trust of Watertown v. Ksenych, 252 N.W.2d 220, 222-223 (S.D. 1977). SDCL § 57A-9-302(1)(d) specifically states that the priority of conflicting liens on fixtures is governed by § 57A-9-313. In order to give effect to both the Motor Vehicle Code and the Uniform Commercial Code, when personalty becomes a fixture, even if a security interest in the personalty was perfected under Chapter 32-3 before it became a fixture, its priority must be governed by § 57A-9-313. Pursuant to that statute, if a creditor wants to protect its secured interest in a fixture from an existing real property mortgagee, it must make a fixture filing within ten days after the property becomes a fixture or obtain the real property encumbrancer's consent. Because Green Tree did not take the steps necessary to protect its interest in the manufactured home as a fixture, First Bank's prior perfected security interest takes precedence.

The cases relied upon by Green Tree in support of its argument that it did not need to make a fixture filing are distinguishable. General Electric Credit Corp v. Nordmark, 68 Or.App. 541, 684 P.2d 1 (1984), involved a priority dispute between a certificate of title lienholder in a mobile home and a subsequent purchaser of the home rather than a prior lienholder like First Bank in the present case. The court stated that notation of the security interest on the certificate of title perfected it against subsequent purchasers; the court did not address priority as against an existing real property mortgagee. In addition, the court specifically noted that no one claimed the mobile home was a modular or prefabricated home as is the home at issue in the present case. The Oregon statute specifically excluded modular and prefabricated homes from the definition of mobile home.

Rock Island Bank v. Anderson, 178 Ill.App. 3d 1068, 534 N.E.2d 200 (1989), another case relied upon by Green Tree, also involved a dispute between a bank (First Federal) which perfected its security interest in a mobile home by notation of its lien on

the certificate of title, and a bank (Rock Island Bank) which almost three years later was given a trust deed to the property on which the home was affixed. The court gave priority to First Federal's security interest in the mobile home which was perfected before Rock Island was given the trust deed to the real property. The court relied in part upon the fact that Rock Island knew a mobile home was already on the property when it obtained the trust deed and it could have discovered First Federal's lien with some investigation. 534 N.E.2d at 202. Based upon the court's reasoning, it is possible, and even likely, that the decision would have been favorable to Rock Island if it would have been the first to obtain a security interest in the debtors' property.

In the present case, unlike in the Nordmark and Rock Island cases, First Bank's security interest in the real property and fixtures was perfected prior to Green Tree's lien on the manufactured home. The significance of perfecting a security interest is that it fixes the priority of the secured creditor as to the collateral in relation to subsequent parties who may later obtain a security interest in the same property. As a policy matter, it is more reasonable to require a party who subsequently obtains an interest in property to make inquiry concerning prior liens than to require a party with a security interest to constantly monitor its interest for subsequent liens. The South Dakota Supreme Court recognized this principle in Rushmore State Bank v. Kurylas, 424 N.W.2d 649, 659 (S.D. 1988): "Priority between conflicting perfected security interests is determined by time of filing or perfection. SDCL 57A-9-312(5). Thus, Bank achieved priority over Kurylas by being the first to file its financing statement." Green Tree was in a position more akin to Rock Island Bank—it could have protected itself by investigating whether a prior lien existed and then by making a fixture filing. As stated by the bankruptcy court in In re Beabout, 110 B.R. 883, 887 (Bankr.S.D.Ill. 1993), to insure its priority as to personal property goods that are to become fixtures, a prudent lender will make double filings of security interests under both provisions applicable to personal property and provisions

governing fixtures. On the other hand, First Bank had already perfected its security interest and there was nothing further it need do.

First Bank relies on In re Beabout, *supra*, in support of its argument that Green Tree's lien is subordinate to First Bank's because Green Tree failed to make a fixture filing. Beabout is more factually similar to the present case than the cases relied on by Green Tree. In Beabout, Farm Credit Bank obtained a mortgage on the debtors' real estate in 1979. In 1983, the Bank of Casey financed the purchase of a mobile home by the debtors and perfected its lien on the mobile home by having the lien recorded on a certificate of title. The debtors placed the mobile home on their real estate. After the debtors filed bankruptcy, the parties agreed that the home had become a fixture. The bankruptcy court held that once the mobile home ceased to be personal property and became a fixture, the provisions governing perfection of security interests in fixtures became applicable and the Bank of Casey was required to make a fixture filing under section 9-313 of the UCC in order to attain priority over Farm Credit Bank as mortgagee of the real estate. See also George v. Commercial Credit Corp., 440 F.2d 581, 554 (7th Cir. 1971) (the effect of the Wisconsin Motor Vehicle Code is not to foreclose the possibility of a mobile home ever becoming a fixture; the provision of the code stating that the method provided for perfecting a security interest in a mobile home is exclusive does not apply to a mobile home once it has become a fixture). The Court finds the reasoning of the Beabout and George courts persuasive and holds that Green Tree was required to make a fixture filing under SDCL § 57A-9-313 in order to attain priority over First Bank as mortgagee of the real estate once the manufactured home became a fixture.

Green Tree's argument that the ruling below was erroneous because the debtors' rights in the property were limited by their agreement with Green Tree that the home

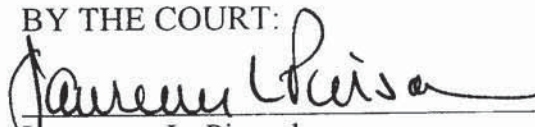
could be removed from the property in the event of default is unsupported by any authority and will be rejected.

Finally, the Court also rejects Green Tree's argument that equity requires Green Tree's lien be given priority so that First Bank will not be unjustly enriched with the value of the manufactured home. As noted by the bankruptcy court, South Dakota law provides Green Tree with a method to obtain priority over First Bank's interest in the manufactured home, and there is no evidence of fraud or other inequitable conduct by First Bank. The bankruptcy court did not err by refusing to exercise its equitable powers to alter the results required by statute. 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). Accordingly, for all of the reasons stated,

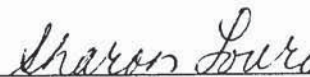
IT IS ORDERED that the Judgment of the bankruptcy court is affirmed.

Dated this 23rd day of September, 1998.

BY THE COURT:


Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
(SEAL) DEPUTY