

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
SHANE & ROBIN BENNETT, ) CASE NO. BK01-81050  
)  
Debtors. ) A01-8096  
\_\_\_\_\_)  
GOTHENBURG STATE BANK & TRUST )  
COMPANY, )  
) CH. 12  
Plaintiff, )  
vs. )  
)  
SHANE & ROBIN BENNETT; and )  
GREENPOINT CREDIT LLC, )  
)  
Defendants. )

MEMORANDUM

By stipulation of the parties, this adversary proceeding was submitted to the court on affidavit evidence and oral and written argument. Steven P. Vinton represents Gothenburg State Bank, Donald G. Furlow represents GreenPoint Credit, and P. Stephen Potter represents the debtors. The dispute between Gothenburg State Bank ("the Bank") and GreenPoint Credit is limited to the validity, extent, and priority of liens held by each on the debtors' manufactured home. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

Decision

The manufactured home became a "fixture" when permanently affixed to the real estate. The Bank's real estate lien, represented by its deed of trust, has priority over the personal property security interest claimed by GreenPoint.

Facts, Law, and Discussion

The Bank claims a superior perfected security interest in

the home by virtue of a real estate deed of trust which includes all fixtures attached to the real estate. GreenPoint asserts that it holds a perfected purchase money security interest in the home as a result of the notation of its lien on the home's certificate of title.

The home at issue is a 1998 Schult Lakewood manufactured home, 28' by 61', purchased new by the debtors in October 1997 from a dealer in North Platte, Nebraska. The house came with air conditioning, as well as a range, refrigerator, and dishwasher. The price of the house was \$86,500; the debtors paid ten percent as a down-payment and financed the remaining \$77,850 over thirty years at eight percent interest. The Bank advanced \$22,450 to the debtors to purchase and install the home. The County Clerk of Lincoln County, Nebraska, issued a certificate of title for the home on October 31, 1997, on which the lien of GreenPoint's predecessor in interest was noted.

Allowing the home to become part of any real estate without the seller's consent is an event of default under the installment sales contract; however, the debtors informed the home's seller, at the time of purchase, of their intention to permanently affix the house to their real property as their primary and permanent residence. The purchase contract identified the planned location of the house.

The home was transported in two sections to the debtors' ranch in rural Gothenburg, Nebraska. There, the two sections were bolted together and the house was placed over and attached to a poured concrete basement and foundation. It was attached to water lines, underground electrical and telephone lines, and a complete plumbing system, including septic tank. The roof, hinged for transport, was raised and fixed. Shingles, cedar siding, and interior drywall were installed. A deck was later added along two sides of the house.

The Bank's appraiser describes the home as "United Builders' Code ("UBC") approved," which the appraiser states is typically of higher quality than a mobile home. The appraiser also stated that a UBC home is more likely than a mobile home to be permanently installed, in part because a UBC home lacks a steel frame to which wheels and a tongue could be attached to tow it.

The debtors and the Bank's appraiser indicate that to be moved from its location, the house would either have to be split in half, unfastened from the foundation, and placed on a

trailer, or it would have to have steel beams placed underneath it to support it as it is removed from the foundation. Moving it would decrease its value to approximately \$44,000.

The Bank and its predecessor in interest have loaned money to the debtors since the mid-1990s, as represented by a number of promissory notes. Those notes are secured by liens on debtors' real estate and crops, livestock, equipment, vehicles, and other assets. The Bank's security interest in real estate is represented by two deeds of trust with future advance clauses, one recorded in March 1997 and the other recorded in August 2000. Neither deed of trust was taken as part of the home purchase transaction in October 1997, although as noted above, the Bank did advance a total of \$22,450 in connection with the purchase and installation of the house pursuant to the future advances clause of the 1997 deed of trust. The Bank asserts that it considered the house a fixture on the property at the time it took the second deed of trust, and relied on the absence of other liens of record at the time it extended additional credit to the debtors.

In Nebraska, a home such as this is defined as a mobile home under the motor vehicle registration statutes. As such, it may be issued a motor vehicle certificate of title. Security interests in a mobile home are to be noted on that title. The statutory provisions governing certificates of title

shall apply to motor vehicles, commercial trailers, and semitrailers required to be registered under sections 60-301 to 60-306 and all cabin trailers defined in section 60-614 whether or not any such cabin trailer is required to be registered under sections 60-301 to 60-306.

Neb. Rev. Stat. § 60-102.

A "cabin trailer" is defined as

a trailer or semitrailer which is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, whether used for such purposes or instead permanently or temporarily for the advertising, sale, display, or promotion of merchandise or services or for any other commercial purpose except transportation of property for hire or transportation of property for distribution by a private carrier. Cabin trailer shall not mean a trailer or semitrailer which is permanently attached to real

estate. There shall be three classes of cabin trailers:

(1) Camping trailer . . . ;

(2) Mobile home which shall include cabin trailers more than one hundred two inches in width or more than forty feet in length; and

(3) Travel trailer . . . .

Neb. Rev. Stat. § 60-614.

The housing unit at issue is 28 feet wide and 61 feet, 4 inches long. It was titled shortly after the date it was purchased.

Under Nebraska U.C.C. law as it existed at the time this home was purchased, and until July 2001, the characterization of mobile or manufactured homes moved to a building site was unclear. Buyers, sellers, and lenders were left to wonder whether such homes were personal property or real property for the purpose of perfecting a security interest in them.

With the 1999 and 2000 revisions of U.C.C. Article 9, effective July 1, 2001, the Unicameral clarified the status of security interests in manufactured homes. Under this recently enacted statute, if the holder of a purchase-money security interest in a manufactured home as defined in Neb. U.C.C. § 9-102(53) perfects the security interest by noting it on the certificate of title, that security interest has priority over a conflicting interest of an encumbrancer or owner of the real property on which the home is placed. Neb. U.C.C. § 9-334(e)(4) (Michie 2000). This statute became effective July 1, 2001, as to transactions occurring after that date.

Therefore, if Article 9 in its current form were to apply to the present case, it appears that GreenPoint's lien is properly noted on the certificate of title and would take priority as a fixture filing over competing security interests in the real estate. The Official Comment to § 9-334, at paragraph 10, states that under the new rule regarding priority of security interests in manufactured homes, "a security interest in a manufactured home that becomes a fixture has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is perfected under a certificate of title statute . . . ."

However, this case must be decided under the "pre-revision" version of Article 9. The transactions at issue here - the purchase of the manufactured home and the perfection of a security interest therein, and the filing of the Bank's deeds of trust - occurred in 1997 and 2000. This bankruptcy case was filed April 19, 2001. All of those events occurred prior to the operative date of the Article 9 revisions. The law is clear that statutes covering substantive matters in effect at the time of the transaction govern the transaction, not later enacted statutes. Darnall v. Petersen, 592 N.W.2d 505, 511 (Neb. Ct. App. 1999) (declining to apply 1992 U.C.C. Article 3 amendments to 1989 transaction) (citing Battle Creek State Bank v. Haake, 255 Neb. 666, 587 N.W.2d 83 (1998) and Northern Bank v. Pefferoni Pizza Co., 555 N.W.2d 338 (Neb. Ct. App. 1996)).

The priority of liens on the debtors' property depends on whether the home became a fixture and therefore subject to the real estate rules regarding lien perfection, or remained personal property and subject to the perfection requirements of the motor vehicles certification statute.

"Fixtures" are goods that have become so related to particular real property that an interest in them arises under real property law. Neb. U.C.C. § 9-102(41) (Michie Supp. 2001).

Three factors are considered when determining whether an item has become a fixture: (1) actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Metropolitan Life Ins. Co. v. Reeves, 389 N.W.2d 295, 296-97 (Neb. 1986) (quoting Bank of Valley v. United States National Bank of Omaha, 341 N.W.2d 592, 594-95 (Neb. 1983)).

The third prong of the test, focusing on the party's intent, is generally given the most weight. Reeves, 389 N.W.2d at 297; Bank of Valley, 341 N.W.2d at 595.

The Bank's evidence as to the debtors' intent is convincing. They informed the seller of their intent to make the unit their permanent home. The debtors make clear that they intended, before they ever purchased this home, to make it their permanent residence on their land in rural Lincoln County. They dug a basement, poured a foundation, installed a complete plumbing system, ran underground electrical lines, and established an

underground telephone line connection to the main line two miles away. See Affid. of Shane Bennett (Fil. #10).

In addition, after moving the home to the site and making it fit for habitation, the debtors constructed a wooden deck on two sides of the house, poured a sidewalk, installed concrete steps, and fenced in the house yard.

The Bank's appraiser opines that the house was placed on the real estate in such a manner that it would become a permanent improvement on the property. See Affid. of Ronald W. Roberts at ¶ 4 (Fil. #13). Moreover, Mr. Roberts notes that the home is UBC-approved, and such a home "is typically of higher quality than a HUD home, and in my experience is normally installed to become a permanent addition to the real estate." Id.

It is abundantly clear from the evidence that this house cannot simply be hitched to a truck and moved. Moving this house would necessitate detaching it from its foundation and utility lines and disassembling it. I find as a fact that the house is a permanent accession to the real estate.

GreenPoint has provided affidavit evidence from two of its employees and the manufactured-home dealer noting that at the time the house was sold to the debtors, at the time the debtors signed the retail installment contract, and at the time GreenPoint's predecessor perfected its security interest on the certificate of title, the housing unit was personal property and not in any way affixed to real property. GreenPoint asserts that it should not be penalized for relying on its perfected security interest instead of constantly monitoring the fixture status of its collateral.

GreenPoint's argument, however, flies in the face of reality. It is unreasonable to think this home could have or should have remained personal property. There is no evidence before the court that this house could have been used as a home in a manner other than the way the debtors are using it, in other words, by attaching it to the real estate.

Moreover, because of the nature of this type of home, in that it is sold in two halves and put together on-site and therefore is not "mobile" as that term is generally used, GreenPoint or its predecessor in interest should have known that the home was likely to be "affixed" to real estate, and therefore could have taken steps to make a fixture filing or

obtain a subordination agreement from the Bank in order to protect its interest.

GreenPoint may have a breach of contract claim against the debtors because they attached the house to real estate without the financing company's permission, but the triggering of an event of default under the contract does not give rise to or affect GreenPoint's lien priority status.

Separate order to be entered.

DATED: May 2, 2002

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice provided by the Court to:

\*Steven P. Vinton, Atty. for Plaintiff  
P. Stephen Potter, Atty. for Debtors  
Don Furlow, Atty. for GreenPoint Credit  
United States Trustee  
Richard Lydick, Chap. 12 Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

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COMPANY, )  
) CH. 12  
Plaintiff, )  
vs. )  
)  
SHANE & ROBIN BENNETT; and )  
GREENPOINT CREDIT LLC, )  
)  
Defendants. )

ORDER

IT IS ORDERED Gothenburg State Bank holds a perfected lien in the debtors' home, which has become a fixture permanently attached to the real estate, and such lien takes priority over that of GreenPoint Credit.

See Memorandum entered this date.

DATED: May 2, 2002

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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