

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: June 12 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-37390
)	
Jack Wombles and)	Chapter 13
Deborah Wombles,)	
)	Adv. Pro. No. 05-3131
Debtors.)	
)	Hon. Mary Ann Whipple
CitiFinancial Mortgage Company, Inc.,)	
)	
Plaintiff,)	
v.)	
)	
Jack Wombles, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM OF DECISION

CitiFinancial Mortgage Company, Inc., (“Plaintiff”) filed a complaint naming Debtors Jack and Deborah Wombles, the Chapter 13 Trustee, and Superior Federal Credit Union (“Credit Union”) as defendants and seeking a declaration of the rights of the parties with respect to real property known as 1054 Prosperity Road, Lima, Ohio, and a 1996 Commodore 48’ modular home (“Modular Home”) located on that property. Specifically, Plaintiff seeks an order that it has a valid lien against the Modular Home and that

its lien has priority over any lien held by the Credit Union. The Chapter 13 Trustee filed a third-party complaint alleging that Debtor's transfer of title to the Modular Home to their daughter, Susan Wombles, and the lien given to the Credit Union were fraudulent conveyances. However, as a result of a stipulation that Susan Wombles will transfer title to the Modular Home back to Debtors, the Trustee indicates that he will withdraw his fraudulent conveyance claims, which the court construes as a request to dismiss the third-party complaint under Fed. R. Civ. P. 41(a)(1), and (c), made applicable to this proceeding by Fed. R. Bankr. P. 7041.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine the validity and priority of liens are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(K). The parties have stipulated to the facts and evidence upon which the court should base its decision and have submitted briefs in support of their respective positions. This memorandum of decision sets forth the stipulations of fact and constitutes the court's conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that Plaintiff has a valid lien against the Modular Home that has priority over any lien held by the Credit Union.

FACTUAL BACKGROUND

The Credit Union and Debtors both agree with the summary of stipulated facts presented in Plaintiff's brief, with two additions that are included below.

Debtors own real property located at 1054 Prosperity, Lima, Ohio ("the Property"). Jack Wombles acquired the Property in 1995 by land installment contract. In July 1996, Mr. Wombles completed the land installment contract, having paid \$16,000 for the Property, and obtained a deed to the Property. In January 1997, Debtors purchased the Modular Home, financing that purchase with a loan from Greentree Financial Servicing Corporation ("Greentree"). Greentree's lien in the amount of \$43,000 was noted on the original certificate of title for the Modular Home. It is undisputed that the Modular Home was placed on a permanent, concrete foundation at the Property and was connected to the Property via electrical and plumbing connections. On March 13, 1997, two months after Debtors purchased the Modular Home, they borrowed \$74,200 from United Companies Lending ("UCL"), paid off the Greentree loan, and granted UCL

a mortgage on the Property, “[t]ogether with all the improvements now or hereafter erected on the property.” [Pl. Ex. 4]. At the time, the Allen County Auditor’s records included a modular home as a fixture upon the Property. There is no dispute, however, that the certificate of title to the Modular Home has never been cancelled or surrendered to the auditor.

On February 10, 2000, Debtors completed a Uniform Residential Loan Application and obtained a loan from Associates Home Equity Services (“AHES”) in the amount of \$80,854. Debtors were required on the application to list real estate as to type of property and present market value. Debtors listed 1054 Prosperity Road and described it as “single family” valued at \$93,000. [Pl. Ex. 7, p. 3]. Before Debtors completed the application, the Property, “as improved,” was appraised at \$93,000. [Pl. Ex. 6]. On February 10, 2000, Debtors also granted AHES a mortgage on the Property, which mortgage “includes improvements and fixtures now attached.” [Pl. Ex. 8]. Debtors used the proceeds of the AHES loan to pay off the UCL mortgage.

At the time Debtors refinanced with AHES, the Allen County Auditor’s records continued to show the Modular Home as a fixture upon the Property. The title agent who examined the title to the Property at that time relied on those records in determining that the Property was improved by a modular home.

On or about August 2, 2002, Debtors transferred title to the Modular Home to their daughter, Susan Wombles. Susan then borrowed \$20,000 from the Credit Union. The Modular Home was security for the Credit Union loan and on August 21, 2002, a replacement title was issued showing the Credit Union’s lien on the Modular Home. Susan gave \$16,000 of the loan proceeds to Debtors. Debtors agree that after they transferred the Modular Home to Susan, the Allen County Auditor removed it from the real estate tax roles, indicating that the Modular Home was then on the real estate as personal property because it was “sold to daughter.” [Pl. Ex. 17; Doc. # 29, Debtors’ Brief, p. 3].

Plaintiff, successor in interest to AHES, commenced a state court foreclosure action against the Property in May 2003. The complaint did not include a request for replevin of the Modular Home. Debtors answered the complaint but did not oppose Plaintiff’s motion for summary judgment. On February 23, 2004, a Judgment Entry and Decree of Foreclosure and Order of Sale (“Decree”) was filed in the foreclosure case.

After the Decree and before the Sheriff’s sale, Susan Wombles refinanced the Credit Union loan. This refinancing was again with the Credit Union and the Modular Home continued to be used as security for the refinanced loan, with the Credit Union lien being indicated on a replacement title dated July 19,

2004. Susan testified in her deposition that she knew that Plaintiff had a mortgage on the Modular Home and did not believe she had a mortgage loan with the Credit Union because she did not apply for a mortgage loan.

On or about August 9, 2004, Plaintiff filed an Execution in the foreclosure action on the chattels and goods belonging to Debtors, accompanied by a Praecipe specifically requesting execution on the Modular Home. And on September 2, 2004, Debtors filed for relief under Chapter 13 of the Bankruptcy Code.

In their plan, Debtors propose that Plaintiff be treated as secured only as to the land and not the Modular Home. Plaintiff objected and this adversary proceeding was commenced to determine the validity and priority of Plaintiff's lien. The parties have stipulated that if the court finds that Plaintiff has a security interest in the Modular Home, then the Credit Union's lien is junior in priority to the AHES mortgage now held by Plaintiff.

LAW AND ANALYSIS

Plaintiff argues that the Modular Home is a fixture and, as such, is part of the real estate subject to the mortgage granted by Debtors to AHES, its predecessor in interest. Defendants, on the other hand, argue that the Modular Home remains personal property as evidenced by: 1) Debtors' failure to surrender the certificate of title to the Modular Home as is required under Ohio's Certificate of Motor Vehicle statutes; 2) the removal of the Modular Home from the real estate tax rolls by the Allen County Auditor in 2002; 3) the fact that the Modular Home is still capable of being moved from the real property; and 4) Plaintiff's actions taken with respect to the Modular Home, which, according to Defendants are inconsistent with its position that the home is part of the real estate. Whether the Modular Home is a fixture and, if so, the effect on the parties' interests in the home, is determined by reference to applicable state law, which, in this case, is Ohio law. *See Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law").

Under traditional Ohio fixture law, a manufactured home that becomes a fixture loses its status as personal property and becomes part of the real property. *Cluxton v. Fifth Third Bank (In re Cluxton)*, 327 B.R. 612, 615-16 (B.A.P. 6th Cir. 2005); *see also Andover Twp. Bd. of Trustees v. O'Brien*, 159 Ohio App. 3d 231, 238 (2004). A "fixture" is defined as "an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it." *Litton Systems, Inc. v. Tracy*, 88 Ohio St. 3d 568, 572 (2000) (quoting *Teaff v. Hewitt*, 1 Ohio St. 511, 529-30 (1853)). Generally, under Ohio law, personal property that becomes a fixture is subject to any mortgage covering the real estate

to which it is affixed. See *Teaff*, 1 Ohio St. at 525 (stating “the ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties. . .”); *Equitable Fed. Sav. and Loan Assoc. v. Hopton*, 1985 WL 7309, *4 (Ohio App. Oct. 28, 1985) (finding no error in trial court’s determination that creditors’ mortgages constituted security interests in a mobile home that had become a fixture); *Jarvis v. Wells Fargo Fin.*, 310 B.R. 330, 335 (Bankr. N.D. Ohio 2004) (citing *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 52 (1939)).

Teaff sets forth a three-part test for determining whether an item of personal property has become a fixture:

- 1st. Actual annexation to the realty, or something appurtenant thereto.
- 2d. Appropriation to the use or purpose of that part of the realty with which it is connected.
- 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold – this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

Teaff, 1 Ohio St. at 530 (emphasis in original). As fixture law has evolved in Ohio, the first factor of actual annexation “is now regarded as the least important (of the three-part formula of *Teaff*), and slight attachment is sufficient if the other tests are met.” *Masheter v. Boehm*, 37 Ohio St. 2d 68, 73 (1974) (quoting *Holland Furnace Co.*, 135 Ohio St. at 53).

In this case, it is undisputed that the Modular Home was placed on a permanent, concrete foundation and was connected to the Property via electrical and plumbing connections. And it is clear that the Modular Home was appropriated to Debtors’ use of the realty as their residence. The question then is whether Debtors’ intended to make the Modular Home a permanent annexation to the real estate. Initially, the court notes that Debtors had used funds obtained from the UCL loan in March 1997 to pay in full the Greentree loan. Thus, Greentree no longer held the lien originally noted on the certificate of title for the Modular Home. Debtors subsequent application and granting of a mortgage on the Property, including improvements, to UCL for the approximate amount of the value of the land and Modular Home combined, is evidence of Debtors’ intent in 1997 to treat the Modular Home as part of the real estate. See *Cluxton*, 327 B.R. at 615-16. The court further finds such intent existed at the time Debtors granted a mortgage to AHES. On their loan application, Debtors described the real estate as a single family residence and valued the property at \$93,000, the appraised value of the real estate as improved by the Modular Home. Debtors’

intent to treat the Modular Home as part of the real estate is clearly evidenced by their representations in applying for and obtaining the mortgage. The court finds that all three of the *Teaff* factors were met at the time Debtors granted the mortgage to AHES, Plaintiff's predecessor in interest. The Modular Home thus lost its status as personal property and became a part of the real property. As such, it is subject to the mortgage granted to AHES.

Although Debtors do not dispute the fact that the Modular Home was included on the real estate tax roles by the county auditor as early as March 1997 or that they represented to AHES that the real estate included a single family residence, Defendants argue that because Debtors never surrendered the certificate of title to the Modular Home, that it retains its character as personal property. In support of their argument, Defendants rely on Ohio Revised Code § 4505.11(H),¹ which provides that an owner of a manufactured home that will be taxed as real property shall surrender the certificate of title to the county auditor. However, this provision was not in effect in March 1997. In any event, § 4505.11(H) deals only with events relating to the taxation of a manufactured home and not to the criteria for a manufactured home becoming a fixture under Ohio common law. Defendants cite no authority for the proposition that surrendering the certificate of title is necessary to effect the transformation from personal property to real property. *Cf.* 1993 Ohio Op. Atty Gen. No. 93-078 (addressing provisions under the Motor Vehicle Title Act that require the owner to surrender the certificate of title of a manufactured home when it is so altered that it loses its character as a motor vehicle and explaining that "the surrender of the title is the result of the transformation and not . . . the cause of the transformation").

Defendants also rely on the fact that the county auditor removed the Modular Home from the real property tax roles in 2002 after Debtors transferred the certificate of title to the home to their daughter. However, Defendants cite, and the court has found, no authority suggesting that an owner can unilaterally render a mortgage lien voidable or of no effect by simply transferring to a third party a certificate of title to a manufactured home that had previously become a fixture and lost its status as a motor vehicle. To the extent such evidence is offered as evidence that Debtors did not intend to make the Modular Home a permanent accession to the real estate, the court is not persuaded. Rather, the court finds Debtors' representations and conduct in granting the mortgages to UCL in 1997 and to AHES in 2000 to be

¹ Debtors cite Ohio Revised Code § 4504.11. That section being irrelevant to the issues in this case, the court assumes Debtors intended to cite § 4505.11(H).

persuasive evidence of their intent to treat the Modular Home as part of the real estate.

Defendants also rely on this court's decision in *In re Parthemore*, Case No. 04-31487. The court notes that *Parthemore* is not only an unpublished opinion but a decision which the court rendered orally from the bench. Nevertheless, in that case, the court determined that the modular home at issue had not become a fixture and, thus, was not part of the real property. Defendants argue that consistent with the court's ruling in *Parthemore*, because Debtors' Modular Home has the potential to be moved from the Property, it has not become part of the real property in this case. However, Defendants misconstrue the court's ruling in *Parthemore*. In finding that the modular home in *Parthemore* was not part of the realty and noting that almost all homes today are moveable, the court explained that, while the degree of attachment to the land is evidence of intent, it is *not* dispositive. Instead, the court considered several other factors that it found indicated a lack of any intent to make the modular home a permanent accession to the real property, including the buyer/seller relationship of the parties. Moreover, as explained above, even slight attachment to the real property is sufficient if the other *Teaff* factors are met, which the court finds they are in this case. *See Masheter*, 37 Ohio St. 2d at 73.

Finally, Defendants argue that Plaintiff's actions taken with respect to the Modular Home in state court are inconsistent with its position that the home is part of the real estate and that it is now judicially estopped from taking that position in this proceeding. Specifically, Defendants state that Plaintiff's May 5, 2003, foreclosure complaint did not include a request for replevin but that, in August 2004, Plaintiff filed in the foreclosure action an execution on chattels and goods belonging to Debtors as well as a Praecipe to execute on the Modular Home. Defendants contend that the doctrine of judicial estoppel prevents Plaintiff from now asserting that the Modular Home is not Debtors' personal property.

The Supreme Court has explained judicial estoppel as follows: “[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749, (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). “Because the rule is intended to prevent ‘improper use of judicial machinery,’ judicial estoppel ‘is an equitable doctrine invoked by a court at its discretion.’” *Id.* at 750 (citations omitted).

One of the considerations in determining whether to invoke the doctrine is “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment

on the opposing party if not estopped.” *Id.* at 751. In this case, Plaintiff proceeded in its foreclosure proceeding on the theory that the Modular Home was part of the real estate subject to its mortgage as evidenced by the lack of a replevin claim in the foreclosure complaint. It was not until Debtors transferred the certificate of title to their daughter and apparently took the position that the Modular Home was personal property that Plaintiff filed the execution and praecipe with respect to the Modular Home. Proceeding on this alternative theory did not result in an unfair advantage to Plaintiff or unfair detriment to Defendants. The court declines to exercise its discretion to invoke the doctrine of judicial estoppel, finding the doctrine inappropriate in this case.

CONCLUSION

For the foregoing reasons, the court finds that the Modular Home became a fixture and, as such, part of the real property subject to the mortgage held by Plaintiff. In accordance with the parties’ stipulation in the event the court finds that Plaintiff has a security interest in the Modular Home, the court further finds that Plaintiff’s lien has priority over any lien held by the Credit Union. Finally, also in accordance with the parties’ stipulations, the Trustee’s third-party complaint will be dismissed. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.