

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
	)	
ROBIN S. CRONEBAUGH,	)	CASE NUMBER 05-62376
	)	
Debtor.	)	ADV. NO. 06-6104
<u>JOSIAH L. MASON,</u>	)	
	)	JUDGE RUSS KENDIG
Plaintiff,	)	
v.	)	
	)	<b>MEMORANDUM OF OPINION</b>
ROBIN S. CRONEBAUGH, et al.,	)	<b>(NOT INTENDED FOR</b>
	)	<b>PUBLICATION)</b>
Defendants.	)	

Cross-motions for summary judgment, and the related responses and replies, are now before the court for consideration. Plaintiff, the chapter 7 trustee, filed a complaint on June 10, 2006 seeking to determine the extent, validity and priority of liens against a cottage owned by debtor. On August 30, 2006, the parties filed a stipulation of fact, agreed that the remaining dispute is a question of law, and thereafter submitted briefs. At issue is the validity of Defendant First Merit Mortgage Corporation's (hereafter "First Merit") secured interest in the cottage. Trustee argues that First Merit does not have a valid and perfected security interest in the cottage, while First Merit contends it does hold a valid and perfected security interest in the cottage which is not subject to avoidance under the trustee's strong arm powers.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). Venue in this district and division is proper pursuant to 28 U.S.C. § 1409. The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

**FACTS**

As stated above, the issue in this adversary proceeding centers on the validity of First Merit's purported security interest a four room cottage owned by debtor. The cottage is located on land leased from Lake Galion Association, Inc.. Debtor does not own, and has never owned, the real estate, but is a lessee of the land. The following facts are derived from

the stipulation of facts filed by the parties on August 30, 2006.

On or about July 20, 1995, Steven R. Thomas (hereafter "Thomas"), debtor's ex-husband, entered into a lease agreement with Lake Galion Association, Inc. for property commonly known as 2297 E. Lake Galion. The lease was recorded in the Crawford County records on July 21, 1995. On August 16, 1995, James D. Songer and Carolyn J. Songer sold Thomas a four room cottage located on the leased land. The bill of sale for the cottage was also filed in the county records. Four years later, on October 1, 1999, Thomas issued a bill of sale for the cottage, and assigned his interest in the lease, to Debtor. Both transactions between Thomas and Debtor are recorded in the county records.

Following the transfer from Thomas, Debtor obtained a loan from Defendant First Merit and executed a mortgage in favor of First Merit. The mortgage was recorded on November 9, 1999 and identifies the cottage as collateral, but does not include the leasehold interest as collateral. In connection with the loan to Debtor, First Merit also filed a UCC-1 financing statement with the Crawford County Recorder. The UCC-1 financing statement was not renewed. First Merit did not file a financing statement with the State of Ohio. The mortgage to First Merit has not been released or satisfied. Debtor filed a chapter 7 petition on April 29, 2005 and received a discharge on August 31, 2005.

### ARGUMENTS

The trustee contends that First Merit does not have a perfected security interest in the cottage. According to trustee, the cottage is personal property and perfection is governed by the applicable Uniform Commercial Code (hereafter "UCC") rules which require filing a financing statement with the local county recorder and the State of Ohio. Trustee posits that First Merit's interest in the cottage was never perfected because the UCC statement was not filed with the Ohio Secretary of State, nor was the financing statement renewed. Further, trustee argues that the mortgage is of no effect because debtor does not have title to the real estate. As far as First Merit's argument that the cottage is a fixture, and the mortgage operates as a valid fixture filing, the trustee disagrees. According to the trustee, the parties intended, and consistently treated, the cottage as personalty. Further, the statute upon which First Merit relies was enacted after the recording of the mortgage and is therefore does not apply to the mortgage filing.

First Merit, on the other hand, argues that under Ohio statutory law, a mortgage filed as a fixture filing can perfect a secured interest in the cottage. First Merit contends that the cottage is a fixture, claiming that personal property can become a fixture regardless of the intent of the parties. Under new laws enacted in 2001, a mortgage on a fixture is valid until released, satisfied or expired. Since the mortgage has not been released or satisfied, and has not expired, First Merit contends it is still valid. Finally, First Merit urges the court to find that even if the mortgage was defectively executed, it is still valid between the parties under Ohio law.

## LAW AND ANALYSIS

### **I. Standard of review**

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

To succeed on a motion for summary judgment, movant must demonstrate each of the elements of its claim. R.E. Cruise, Inc. v. Bruggeman, 508 F.2d 415, 416 (6<sup>th</sup> Cir. 1975). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, Adickes v. S.H.Kress & Co., 398 U.S. 144, 158-59 (1970), and all reasonable inferences are to be drawn in favor of the non-moving party. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986). When “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,” the court should grant a motion for summary judgment. Id. at 587.

### **II. Applicable law**

The question of what law applies is slightly more complex because the law changed between the date of the transactions, 1999, and the date the bankruptcy was filed, 2005. So in addition to understanding the law in 1999, it is also necessary to review the 2001 changes in the law to determine the impact, if any, of the 2001 changes on the 1999 filings.

#### **A. The Financing Statement Filed with the County Recorder**

##### **1. Personal Property**

On November 9, 1999, First Merit filed a UCC-1 financing statement with the Crawford County Recorder. *See* Stip. of Facts, ¶ 7. As outlined by Trustee in his motion for summary judgment, if the cottage is personal property, perfection in 1999 was governed by the UCC filing requirements set forth in Ohio Revised Code §§ 1309.38 and 1309.40. Under these sections, in order to perfect a security interest, a financing statement was to be filed in both the appropriate county and state office and renewed before the expiration of five years.

Defendant admits that the financing statement was not filed with the secretary of state, *id.*, and does not contend that the financing statement was renewed. Since it is clear that the filing was incomplete or, alternatively, that the filing expired and is no longer valid, First Merit failed to properly perfect any interest it had in the cottage as personal property.

Additionally, First Merit is unable to avail itself of the 2001 changes to the law. As trustee points out, as of July 1, 2001, a financing statement filed to perfect an interest in personal property only needs to be filed with the secretary of state. However, First Merit did not file a financing statement with the secretary of state, nor was a renewal filed. Thus, if the cottage is personal property, First Merit cannot rely on its financing statement to support perfection of its security interest.

## 2. Fixture(s)

First Merit argues that the financing statement filed with the Crawford County Recorder was a fixture filing filed in accordance with the law in existence at the time of the filing. In 1999, the law provided, in applicable part:

- (A) In this section and in the provisions of sections 1309.38 to 1309.43 of the Revised Code referring to fixture filing, unless the context otherwise requires:
- (1) Goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law.
  - (2) A 'fixture filing' is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of division (E) of Section 1309.39 of the Revised Code.

Ohio Revised Code § 1309.32.<sup>1</sup> First Merit's position is that the cottage was a fixture and the filing of the financing statement with the recorder operated as a fixture filing to perfect its interest in the cottage. The trustee contends that the cottage was not a fixture, resulting in the inapplicability of O.R.C. § 1309.32.

Before discussing whether the cottage is a fixture, the court will look at the effectiveness of the financing statement. Assuming, for the moment, that the cottage was a fixture, the question focuses on whether the financing statement remained effective through the date of filing of this case. Pursuant to O.R.C. § 1309.40, a financing statement is

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<sup>1</sup> This provision has been amended and renumbered as Ohio Revised Code § 1309.334 effective July 1, 2001.

effective for five years. In order for a financing statement to be effective longer, a continuation statement must be filed prior to a lapse in the effectiveness of the financing statement. O.R.C. § 1309.40(B); *see also* LB Folding Co. v. Gergel-Kellem Corp., 94 Ohio App.3d 511 (Ohio App. 8 Dist. 1994). Thus, in order to maintain the effectiveness of the financing statement, First Merit needed to file a continuation statement in 2004. First Merit did not file a continuation statement, resulting in a lapse of the financing statement. Thus, even if the cottage is a fixture, the financing statement had expired and First Merit's security interest was not perfected, via the financing statement, when this case was filed.

Although many changes occurred in 2001, including the repeal, through amendment and renumbering, of the Ohio Revised Code sections cited above, the renewal requirements did not change. Ohio Revised Code sections 1309.515 (A), (C) and (D), which became effective on July 1, 2001, maintained the five-year effectiveness of a financing statement unless a continuation statement is filed to extend the effective period. Consequently, First Merit cannot avoid the finding that the financing statement lapsed in 2004. The lapse means that First Merit cannot rely on the financing statement as perfection of its security interest in the cottage—even if the cottage was a fixture.

## **B. The Mortgage Filed with the County Recorder**

### **1. Personal property and the leasehold interest**

First Merit recorded a mortgage with the Crawford County Recorder on November 9, 1999. *See* Stip. of Facts, para. 6. Trustee presents the first argument with regard to the mortgage, alleging that a mortgage cannot perfect a security interest in personal property. Pl's M. Summ. J., p. 4. The crux of Trustee's argument is that perfection of personal property must be accomplished through the applicable UCC rules governing personal property. Defendant does not contest this point, instead arguing that the mortgage operated as a fixture filing. Thus, there is not dispute that security interests in personal property must be perfected in accordance with the UCC rules, as adopted by the Ohio legislature, and outlined above. Further, since Debtor does not have an ownership interest in the lot, but holds only a leasehold interest, the mortgage is not a valid lien against the real property. *See* Mason v. Pryor (In re Pryor), 215 B.R. 362 (Bankr. N.D. Ohio 1997).

### **2. Fixture(s)**

It is First Merit's position that the mortgage perfects its interest in the cottage because the mortgage was intended as fixture filing under Ohio Revised Code § 1309.502. Trustee points out that this provision was enacted in 2001, almost two years after the mortgage was recorded. By the terms of the statute, however, this fact is immaterial:

- (C) A record of a mortgage is effective, from the date of the recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

- (1) The record indicates the goods or accounts it covers;
- (2) The goods are or are to become fixtures related to the real property described in the record, or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
- (3) The record satisfies the requirements for a financing statement contained in this section other than an indication that it is to be filed in the real property records; and
- (4) The record is duly recorded.

O.R.C. § 1309.502(C). Thus, if the mortgage qualifies as a fixture filing, it would be deemed effective on the date it was filed, November 9, 1999. Further, in accordance with O.R.C. § 1309.515(G), it would be remain effective until the mortgage was “released or satisfied of record or its effectiveness otherwise terminates as to the real property.”

As Defendant aptly points out, one of the requirements under the statute is that the “goods are or are to become fixtures related to the real property described in the record . . . .” Fixtures are defined as “goods that have become so related to particular real property that an interest in them arises under real property law.” O.R.C. § 1309.102(41). Defendant contends that the cottage is a fixture. Def.’s Mot. Summ. J. at 7. If true, First Merit can rely on its mortgage as a valid and perfected security interest superior to the Trustee’s position. See O.R.C. § 1309.102; 11 U.S.C. § 544; Cluxton v. Fifth Third Bank (In re Cluxton), 327 B.R. 612 (B.A.P. 6<sup>th</sup> 2005). Whether an item of property is a fixture is a question of state law. See Jarvis v. Wells Fargo Financial (In re Jarvis), 310 B.R. 330 (Bankr. N.D. Ohio 2004) (citing Butner v. United States, 440 U.S. 48, 54 (1979); In re Shelton, 35 B.R. 505, 508 (Bankr. E.D. Va. 1983)). Thus, it is necessary to turn to Ohio law.

The Ohio Supreme Court enunciated the pertinent test to determine whether an item is a fixture. See Teaff v. Hewitt, 1 Ohio St. 511, 527 (1853). Although myriad cases have offered further explanation and definition of the Teaff test, the basic three part test remains at the center of the inquiry. See, e.g. Canton Financial v. Pritt, 2002 WL 263968 (Ohio App. 9 Dist. 2002) (unpublished) (citing Mansheter v. Boehm, 37 Ohio St.2d 68 (1974)). Under Teaff,

- 1st. Actual annexation to the realty, or something appurtenant thereto.
- 2d. Application 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. In addition to the three basic considerations, the Ohio Supreme Court also permits consideration of other factors, including:

[t]he nature of the property; the manner in which it is annexed to the realty; the purpose for which the annexation is made; the intention of the annexing party to make the property a part of the realty; the degree of difficulty and extent of any loss involved in removing the property from the realty; and the damage to the severed property which such removal would cause.

Canton Financial v. Pritt, 2002 WL 1263968 (Ohio App. 9 Dist. 2002) (unpublished) (citing Mansheter v. Boehm, 37 Ohio St.2d 68 (1974)). The analysis is complicated by the fact that “the same article may be a fixture under certain circumstances and a chattel under others, and that there could be such a difference in the same article as between vendor and vendee, landlord and tenant, heir and executor, or tenant for life and remainderman.” Roseville Pottery, 149 Ohio St. at 95. Consequently, the parties’ relationship is important and determination of whether a fixture is created requires case-by-case review.

Although the parties reference the test, neither party satisfactorily addresses the test. There is no application of relevant facts to each prong of the test. Instead, Trustee argues the intent prong and Defendant posits that the degree of attachment can overcome intent. The briefs are devoid of any discussion of the second prong. Further, the parties have failed to develop a good record for the court’s application of the test to the facts. For example, defendant states that the cottage is on a concrete slab, but this fact is not contained in the stipulation of facts nor is it supported by any evidence.

The degree of attachment is not only important to the first prong under Teaff, but to Defendant’s general argument that the degree of attachment can supplant intent:

[I]f the articles which are annexed to realty become so absorbed within it by virtue of the method and degree of annexation, and their adaptability to the use of the realty, their identity as personalty may be said to be destroyed and they become fixtures, regardless of the intention of the parties.

First Fed. S. & L. Assn. of Willoughby, 216 N.E.2d 396, 398-99 (Ohio Com. Pl. 1965).

[P]ersonal property annexed to real still retains its character, if the parties so intend in annexing it, unless it has become so absorbed or merged into the realty that its identity as personalty is lost, or it cannot be removed without practically destroying it.

East Ohio Building & Loan Co. v. Holland Furnace Co., 48 Ohio App. 545, 551 (1934).

Without understanding the foundation of the cottage, and any other evidence of attachment, it is unclear how to arrive at a decision as to the level of annexation. Clearly, a question of fact exists as to prong one.

As mentioned previously, the second prong requires a review of the use of the property. The Roseville Pottery court elucidated on the focus under prong two: '[t]he decisive test of appropriation is whether the chattel under consideration in any case is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted.' Funtime, Inc. v. Wilkins, 105 Ohio St.3d 74 (2004) (citing Zangerle v. Republic Steel Corp., 144 Ohio St. 529, paragraph four of syllabus (1945)); *see also* Roseville Pottery, 149 Ohio St. at 95 (stating "a primary distinction between a fixture and a chattel . . . is that a fixture is accessory to the use of the real estate as such, where as a chattel is accessory to the particular business conducted on the real estate.") Again, neither party offered any elucidation of this prong.

The third Teaff prong requires consideration of the intent of the parties. Jarvis v. Wells Fargo Financial (In re Jarvis), 310 B.R. 330 (Bankr. N.D. Ohio 2004) (citing Masheter, 37 Ohio St.2d 68)); Harbor Island Ass'n, Inc. v. Kaiser, 1994 WL 204289 (Ohio App. 6 Dist. 1994) (unpublished). Trustee argues this prong is of primary importance, while Defendant, relying on First Fed. and East Ohio, argues that items may become fixtures regardless of the parties' intent. In addition to any intent expressed by agreement,

an intent to create a fixture also has an objective component in that for a chattel to be found to be a fixture, it must be affixed to the realty in such a manner that it will indicate to all persons dealing with the realty that it was the intention and purpose of the owner of the chattel to make it a permanent attribute of the realty.

Jarvis, 310 B.R. at 336 (citing Holland Furnace Co. v. Trumbull Sav. & Loan Co., 135 Ohio St. 48 (1939); East Ohio Building & Loan Co. v. Holland Furnace Co., 48 Ohio App. 545 (1934)). Intent to create a fixture must "'affirmatively and plainly appear' as a result of some positive act." Harbor Island, 1994 WL 204289, \*5 (citing Zangerle v. Republic Steel, 144 Ohio St. at 529).

On the other side, however, Defendant indicates that the cottage is taxed as realty. *See* Def.'s Br. in Opp. To Pl.'s M. Summ. J., p. 3 and Exh. A. Further, the court notes that this case is distinguishable from the majority of cases cited by the parties or referenced herein: this case involves a disjunction of ownership: the party who owns the fixture is not the legal owner of the real estate.

### CONCLUSION

The parties have failed to explain the interplay of facts to the test, however,



particularly where attachment is concerned. Thus, the court must conclude that a question of fact remains. For this reason, the trustee's motion for summary judgment is denied, in part, in accordance with this decision. Defendant's motion for summary judgment is denied in its entirety.

The court shall issue an order in accord with this decision.

**/s/ Russ Kendig**

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RUSS KENDIG  
United States Bankruptcy Judge

**MAR 12 2007**

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