THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2017-001943

Circuit Court Case No. 2016-CP-42-04147

ABB, Inc., and BFP, LP, a/k/a
Bullington Family Partnership, ... Respondents,

v.

Integrated Recycling Group of SC,
LLC, John Murphy Armstrong, Jr.,
and Michael T. Armstrong, ... Appellants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY RESPONDENTS

Respondents ABB, Inc., and BFP, LP, a/k/a Bullington Family Partnership (collectively, "Creditors") move to dismiss this appeal of a summary judgment granted Creditors in a debt collection action. Appellants', Integrated Recycling Group of SC, LLC's (the "Debtor") and John Murphy Armstrong, Jr., and Michael T. Armstrong, the members of Debtor (collectively, the "Armstrongs"), sole grounds for appeal is that Debtor's landlord's lender has priority to one piece of collateral securing the debt. Appellants' argument provides no valid basis for an appeal.

STATEMENT OF FACTS

Appellants have admitted that Debtor owes Creditors principal of $1,145,717.06 and interest of $75,267.00. Email from Richard Stewart to Judge Cole dated August 4, 2017. (R. p. 259). Creditors accepted these calculations and the Court entered a Final Order and Judgment against Debtor of $1,221,984.06 on August 23, 2017. (R. p. 1).

The record shows that this appeal is simply the latest chapter in Appellants' long history of attempting to delay paying their debt to Creditors. After filing bankruptcy earlier in 2011, on October 27, 2011, Creditors and Appellants entered into a Debt Settlement Agreement, which was approved and given an Effective Date of November 10, 2011, by the United States Bankruptcy Court for the District of South Carolina in Bankruptcy Case No. 11-03117-jw (the "Loan Agreement"). Affidavit of Bryan Bullington filed April 13, 2017 (the "Bullington Affidavit"), at ¶ 3, Exhibit A (R. pp. 125-146). Pursuant to the Loan Agreement, on October 27, 2011, Debtor gave Creditors a Promissory Note in the principal amount of $1,400,000.00, with interest at the rate of four percent (4.00%) per annum, with principal and interest being due and fully payable on or before November 9, 2016. Bullington Affidavit at ¶ 4, Exhibit B (the "Loan") (R. pp. 148-150).

To secure the Loan, on October 27, 2011, Debtor and the Armstrongs signed, among other things, a Continuing Pelletizer Security Agreement (the "Pelletizer Agreement") granting Creditors a security interest in that certain 60 Ton Air Cooled Pelletizing Machine/Cooler, Model #NGR105VSP, Series #Q02028 (the "Pelletizer"). Bullington Affidavit, ¶ 7, Exhibit D (the Pelletizer is included in the definition of the "Collateral") (R. pp. 170-191).

Debtor defaulted on the Promissory Note by failing to make timely payments for August 2016, September 2016, October 2016, and November 2016. Bullington Affidavit ¶ 10. (R. p. 215). On November 10, 2016, the entire principal balance of the Promissory Note came due, but

Debtor failed to pay. Bullington Affidavit ¶ 13. (R. p. 215). Debtor has made no payments on the indebtedness due Creditors since November 10, 2016. Bullington Affidavit ¶ 15. (R. p. 216). As a result of Debtor's failure to pay the indebtedness when due, Debtor is in default of the loan documents. Bullington Affidavit ¶ 15. (R. p. 216).

The Appellants' sole argument to the Circuit Court was that their landlord – Armstrong-Cowpens LLC – gave a mortgage in 2002 to a third-party lender that included "fixtures," that the Pelletizer is a fixture, and that Creditors failed to perfect their security interest in the Pelletizer because they did not file a UCC-1 before 2011. Transcript of Hearing at 9, lines 2-12. (R. p. 257, lines 2-12).

The argument that Creditors did not file a UCC-1 covering the Collateral until 2011 is contradicted by the public records. As shown by the Record, in connection with lending the purchase money to Appellants for the Collateral in 2006, Plaintiffs did file a UCC-1 financing statement on July 31, 2006. Reply Affidavit ¶ 7, Exhibit C. (R. pp. 239, 247-248).

Appellants raise a new argument on appeal, *i.e.*, that there was a lapse in Creditors' UCC filings. Contrary to this argument, the record shows that the UCC-1 did not lapse but was subsequently renewed in 2009, 2011 and 2016. Bullington Affidavit ¶ 7, Exhibit D ("Continuing Pelletizer Security Agreement"), pp. 6-7 ("The Secured Party has a valid and perfected Security Interest in the Collateral, as evidenced by that certain UCC-1 Financing Statement attached hereto as **Exhibit B**, and that certain UCC-1 Financing Statement, as continued and assigned to the Secured Party, attached hereto as **Exhibit C** (together, the "UCC Statements").") (R. p. 175-176), sub-Exhibit B (UCC-3 Continuation Statement filed January 14, 2009) (R. p. 189), and Exhibit E (UCC-3 Continuation Statements filed November 2011 and November 2016) (R. pp. 203-212); Reply Affidavit ¶ 7 (R. pp. 239, 247-248).

Finally, the Collateral and Pelletizer are not "fixtures," but rather are personal property that can be removed from the real property without damaging it. Reply Affidavit of Bryan Bullington filed July 28, 2017 (the "Reply Affidavit"), ¶ 6. (R. p. 238). Because the Collateral is personal property, it is not a "fixture" covered by the third-party lender's mortgage in any event.

ARGUMENT

I. Appellants lack standing to raise a third-party lender's priority to the Pelletizer portion of the Collateral securing the debt due Creditors.

Appellants argue that their landlord's lender has priority to one piece of Collateral, the Pelletizer. The third-party lender who Appellants claim has priority to the Pelletizer, however, is not a party to this action. Instead, if it has in place the proper filings, that lender will either receive notice of the sale of the Pelletizer or any rights to it will be unimpaired by such sale. S.C. Code Ann. § 36-9-611.

In any event, Appellants have no standing to raise the third-party lenders' priority to the Pelletizer. "In order to have standing...a party must have a personal stake in the subject matter of the lawsuit." *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 96, 326 S.E.2d 395, 404 (1985); *see also Furman Univ. v. Livingston*, 244 S.C. 200, 204, 136 S.E.2d 254, 256 (1964) (holding a party has no standing to sue for a refund of taxes in which it has no financial interest). Moreover, to support standing, such personal stake must not be "too contingent, hypothetical, [or] improbable." *Duke Power Co.*, 284 S.C. at 98, 326 S.E.2d at 405.

Appellants have submitted no evidence of any "personal stake" in their landlord's lender's priority to the Pelletizer. Any claimed interest in this issue would be "too contingent, hypothetical, and improbable" to support standing. Therefore, Appellants' appeal should be dismissed.

II. Creditors maintained their priority to the Pelletizer.

Even if they had standing to raise the issue, Appellants' argument that their landlord's third-party lender has priority is factually wrong. Appellants' argument at the hearing was premised on the assumption that Creditors did not file a financing statement before 2011. (R. p. 257, lines 2-8). As demonstrated by the Reply Affidavit, in connection with lending the purchase money to Appellants for the Collateral in 2006, Plaintiffs did file UCC-1 financing statements on July 31, 2006. Reply Affidavit ¶ 7, Exhibit C (R. pp. 239, 248).

Appellants raise a new argument on appeal, *i.e.*, that there was a lapse in Creditors' UCC filings. This argument was not raised to the Circuit Court in either their answers or at the hearing, see Transcript of Hearing at 9, lines 2-12 (R. p. 257, lines 2-12), and therefore is not preserved for review. *Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) ("An issue not raised before the trial court will not be addressed on appeal."); *Talley v. S.C. Higher Educ. Tuition Grants Cmte.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) ("It is an axiomatic rule of law that issues may not be raised for the first time on appeal.").

Moreover, Creditors never admitted a lapse, nor does the record reflect any such lapse. In fact, the record shows that the UCC-1 was subsequently renewed in 2009, 2011 and 2016. Bullington Affidavit ¶ 7, Exhibit D ("Continuing Pelletizer Security Agreement"), pp. 6-7 ("The Secured Party has a valid and perfected Security Interest in the Collateral, as evidenced by that certain UCC-1 Financing Statement attached hereto as **Exhibit B**, and that certain UCC-1 Financing Statement, as continued and assigned to the Secured Party, attached hereto as **Exhibit C** (together, the "UCC Statements").") (R. p. 175-176), sub-Exhibit B (UCC-3 Continuation Statement filed January 14, 2009) (R. p. 189), and Exhibit E (UCC-3 Continuation Statements filed November 2011 and November 2016) (R. pp. 203-212); Reply Affidavit ¶ 7 (R. pp. 239, 247-248).

III. The Pelletizer remained personal property and did not become a "fixture" covered by the third-party lender's mortgage.

Finally, Appellants are wrong that the Pelletizer is a "fixture" covered by the third-party's lender's mortgage. A fixture is "generally defined as 'an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it.' By mere affixation the chattel does not become a fixture." *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 72, 248 S.E.2d 916, 917-18 (1978). The Court in *Creative Displays* noted that the test for determining whether an item remains personal property or becomes a fixture as: "(1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties." *Id.*

As in *Creative Displays,* there is no basis for determining that the Pelletizer ceased to become personal property and instead became a fixture. Appellants introduced no evidence that the Pelletizer was permanently attached so as to become "part and parcel" of the "soil." The Pelletizer was a piece of equipment that was purchased and moved to the real estate and likewise can be removed without damaging it. Reply Affidavit at ¶ 7 (R. p. 239). Further, the intent of the parties was that it not become a fixture, because Debtor was a tenant and granted Creditors a security interest in the equipment. Bullington Affidavit, ¶ 7, Exhibit D (R. pp. 170-191) (granting Creditors a security interest in the Pelletizer). Finally, Debtor was a tenant, not the owner of the realty, and its relationship with Creditors was that of debtor-creditor. (R. pp. 219, 221, 230). In other words, just like *Creative Displays,* where the "nature and content of the lease require a determination that the sign remained personalty," the nature and content of the Pelletizer Security Agreement required that the Pelletizer remain personal property.

In fact, *Creative Displays* and other authorities hold that, so long as a tenant's personal property can be removed from the land – even where removal causes some damage – it remains personal property and does not become a fixture:

> When land is taken under the power of eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected .... A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property.... This is simply because personal property, unlike fixtures, can be removed from the condemned premises.

Creative Displays, 272 S.C. at 72-73, 248 S.E.2d at 918.

The cases cited by Appellants actually support Creditors, because Debtor is not an owner of the real estate, but only a tenant of the mortgagor. "[B]etween landlord and tenant, there is a presumption that the tenant, by annexing fixtures, did so for his own benefit and not to enrich the freehold, and the law accordingly construes the tenant's right to remove his annexations liberally, except where removal may materially injure the freehold." *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993) (holding HVAC system was a fixture because "removal of the air conditioning system caused substantial material damage"); *see also In re South Atlantic Packers Association, Inc.*, 30 B.R. 836, 839 (Bankr. D.S.C. 1983) ("when property is placed on leased premises for trade purposes, it may remain personal by implication if the lessor neither paid for the property nor its installation; otherwise, the lessor would be unjustly enriched.").

It was uncontested that the Pelletizer can be removed from the real property without damaging it. Reply Affidavit at ¶ 6 (R. p. 238). Accordingly, the Pelletizer does not fall within the legal definition of a "fixture" to which the landlord's third-party lender's mortgage applies.

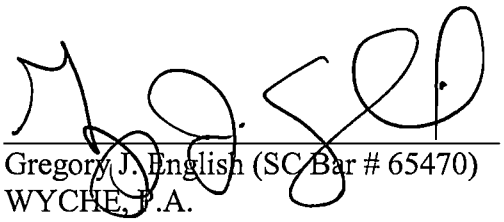
Creative Displays, 272 S.C. at 72-73, 248 S.E.2d at 918; *see also South Carolina Dept. of Highways and Public Transportation v. Najma Records, Inc.*, 288 S.C. 169, 170-71, 341 S.E.2d 649, 650-51 (Ct. App. 1986) (holding that, even though equipment "was attached by bolts, screws and wooden encasements, which were also attached by bolts and screws," equipment was not a fixture where it "was removed, and there is no evidence ... of physical damage to the equipment because of its removal.").

CONCLUSION

Appellants admit both the fact and the amount of Debtor's liability to Creditors. Further, Appellants do not question the validity of Creditors' security interest in the Collateral or the Pelletizer. Their appeal solely concerns their landlord's third-party lender's alleged priority to the Pelletizer, which they have no standing to raise. Moreover, Appellants raise new arguments that were not preserved for review and are wrong both factually and legally, because there was no failure to file or renew financing statements and the Pelletizer was not a fixture.

For the foregoing reasons, Respondents request that the Court dismiss the appeal and affirm the Circuit Court's Final Order and Judgment.

Respectfully submitted,



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July 25, 2018

ABB, Inc., and BFP, LP, a/k/a
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CERTIFICATE OF SERVICE

I hereby certify that I have this date caused to be served by U.S. Mail, first class postage prepaid, the **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY RESPONDENTS** upon counsel for Appellants, addressed as follows:

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