

2000

Karen H. Schriever v. Deere Credit Services Inc. : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN H. SCHRIEVER,

Appellant,

v.

DEERE CREDIT SERVICES, INC.

Appellee.

**BRIEF OF APPELLEE DEERE
CREDIT SERVICES**

Docket Number 20000245-SC

District Ct. No. 980100263

Argument Priority No. 15

APPEAL FROM THE FIRST DISTRICT COURT IN AND FOR BOX ELDER
COUNTY, JUDGE CLINT S. JUDKINS

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KAREN H. SCHRIEVER,	:	
	:	
Appellant,	:	
	:	BRIEF OF APPELLEE DEERE
	:	CREDIT SERVICES
	:	
v.	:	
	:	Docket Number 20000245-SC
DEERE CREDIT SERVICES, INC.	:	District Ct. No. 980100263
	:	
	:	Argument Priority No. 15
Appellee.	:	
	:	

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PARTIES

Pursuant to Rule 24(a) of the Utah Rules of Appellate Procedure, the following are parties to this appeal:

Karen H. Schriever as Appellant.

Deere Credit Services, Inc. as Appellee.

Contrary to Appellant's statement of the parties, "H. Tustian" (a reference to Mr. Owen Tustian who was a party before the trial court) is not a party to this appeal. Mr. Tustian did not file a notice of appeal to be an appellant and because the trial court declared that Schriever has priority over Mr. Tustian to the funds at issue in this appeal, Mr. Tustian is not an appellee. Accordingly, Schriever and Deere Credit are the only parties to this appeal.

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JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

A. Statement of Issues

1. Did the district court correctly determine that Appellee Deere Credit Services' ("Deere") perfected purchase money security interest ("PMSI") in the modular home (the "Modular Home") attached to the proceeds from the sale of the Modular Home?
2. Did the district court correctly determine that no fixture filing was necessary to maintain Deere's perfected PMSI in the Modular Home because Deere had perfected its security interest by filing a UCC-1 covering the Home?
3. Did the district court correctly determine that Deere was not required to file a fixture filing to maintain its perfected security interest in the Modular Home because the Home was not legally affixed to real property?

B. Standard of Review

Deere agrees that summary judgment is a question of law to be reviewed for correctness. The appeals court need only determine: (1) whether the district court erred in applying the governing law, and (2) whether the district court correctly held that there were no disputed issues of material fact. Glover ex rel. Dyson v. Boy Scouts of America, 923 P.2d 1383, 1385 (Utah 1996).

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the priority of the parties' claims over approximately \$25,000 in excess proceeds derived from a trustee's sale of a Modular Home (the "Excess Proceeds"). The trustee sold the Home to satisfy a deed of trust executed by Pinnacle Financial Services, Inc. ("Pinnacle"). It is undisputed that at the time of the sale Deere Credit Service, Inc. ("Deere") held a perfected purchase money security interest ("PMSI") in the Modular Home. Despite this, Appellant Karen H. Schriever ("Schriever") argued to the district court that as a judgment lienor of Pinnacle she had priority to the Excess Proceeds over Deere. In support of her contention, Schriever asserted that when the Modular Home was affixed to real property, Deere failed to maintain its perfected security interest in the Modular Home by not making a fixture filing.

The district court rejected Schriever's argument. Relying on Utah Code Ann. § 70A-9-313(4)(d), the court held that Deere was not required to file a fixture filing to maintain its security interest in the Modular Home because Deere had already perfected its interest in the Home in its UCC-1 filing. Alternatively, the district court held that no fixture filing was required because the Modular Home was not legally affixed to real property under Utah Code Ann. § 59-2-602 for purposes of maintaining a security interest. Accordingly, the district court held that Deere had priority over Schriever to the Excess Proceeds. This appeal followed.

B. Procedural History

On April 20, 1998, William Tustian filed a Complaint against Schriever and Deere seeking to establish priority to the Excess Proceeds. (R. 1-13.) Schriever filed a Notice of Interest in the Excess Proceeds on November 12, 1998. (R. 233.) Deere filed a Notice of Interest in the Excess Proceeds on December 8, 1998. (R. 233.) On June 10, 1999, the district court heard oral argument from the parties and determined that the parties' pleadings would be considered as cross-motions for summary judgment. (R. 541-42.) The Court granted a request that the parties be able to submit supplemental memoranda. (R. 542.) The district court, Judge Clint S. Judkins, presiding, heard oral argument and entered an order granting Deere's cross-motion for summary judgment, granting in part Schriever's cross-motion for summary judgment, and denying Tustian's cross-motion for summary judgment. (R. 550.) A copy of the district court's Findings of Fact and Conclusions of Law is attached hereto as Exhibit A. A copy of the district court's judgment is attached as Exhibit B.

C. Disposition in the District Court

The district court held that (1) Deere perfected a PMSI in the Modular Home by filing its UCC-1; (2) because there was no sale of the Modular Home prior to the trustee's sale, Deere's perfected PMSI continued in the Modular Home until the Modular Home was sold by the trustee; (3) after the trustee's sale, Deere's perfected security interest attached automatically to the proceeds of the sale of the Modular Home; (4) Deere was not obligated to file a fixture filing to maintain its perfected security interest in the

Modular Home because Deere had already perfected its interest in the Modular Home in its UCC-1 filing; and (5) Deere was not obligated to file a fixture filing to maintain its interest in the Modular Home because the Home was not legally affixed to real property under Utah law. (R. 546-547.)

STATEMENT OF FACTS

A. Undisputed Facts

The following facts are undisputed:

1. Pinnacle Financial Services, Inc., operating under the name of Outlook Homes and/or Outlook Homes, Inc. (“Pinnacle”) was engaged in the business of selling manufactured homes and related goods. (R. 542 at ¶ 1; R. 443, Aff. of Kevin Peters (“Peters Depo.”), at R. 444.)
2. On or about April 12, 1996, Deere and Pinnacle entered into an agreement pursuant to which Deere agreed to finance Pinnacle’s acquisition of manufactured homes. The terms of the parties’ agreement were memorialized in two principal documents, the “Inventory Security Agreement and Power of Attorney–Manufactured Homes” and an accompanying “Terms Schedule” (collectively, the “Credit Agreement”). (R. 543 at ¶ 2; R. at 415-423; R. 443, Peters Aff., at R. 444-45.)
3. In accordance with the terms of the Credit Agreement, Pinnacle granted Deere a purchase money security interest in, among other things, all inventory of Pinnacle, together with all attachments to and proceeds of such inventory (the “Collateral”). (R. 543 at ¶ 3; R. at 416; Peters Aff., at R. 445; R. 443.)

4. On or about April 15, 1996, Deere filed with the Utah Department of Commerce, Division of Corporations and Commercial Code, a UCC-1 financial statement evidencing its security interest in the Collateral. (R. 543 at ¶ 3; R. 443, Peters Aff., at R. 445; R. 459-60.)

5. Following execution of the Credit Agreement and financing statement, Deere extended credit to Pinnacle for the acquisition of various manufactured homes, including the Modular Home at issue in this case. (R. 543 at ¶ 543; R. 443, Peters Aff., at R. 445; R. 461.)

6. Moduline Industries, the manufacturer of the Modular Home, delivered the Manufacturer's Statement of Origin ("MSO") to Deere, as the lien holder, to hold as evidence of ownership. (R. 543-44 at ¶ 4; R. 443, Peters Aff., at R. 445-46; R. 462.)

7. After Pinnacle's purchase of the Modular Home, Pinnacle moved the Home from its sales office to real property owned by Pinnacle located at 10025 North 6800 West, Tremonton, Utah (the "Tremonton Property"). (R. 544 at ¶ 7; R. 443, Peters Aff., at R. 446; R. 463.)

8. At the time of the transfer of the Modular Home to the Tremonton Property, Pinnacle executed a trust deed with respect to the Property in favor of Sodberry Ltd. (the "Sodberry Trust Deed"). (R. 544 at ¶ 8; R. 427-29.)

9. In October 1997, Pinnacle defaulted on its obligations arising under the Credit Agreement, including payment for the Modular Home, in the approximate amount of \$42,000. Pinnacle also defaulted on its obligations to Sodberry Ltd. On November 26,

1997, the successor trustee under the Sodberry Trust Deed filed a Notice of Default with the Box Elder County Recorder. (R. 544 at ¶ 9.)

10. On January 7, 1998, Schreiver filed an abstract of judgment, purported to have been entered on January 6, 1998. (R. 212.)

11. On April 1, 1998, the Property, with the Modular Home, was sold at a trustee's sale pursuant to Utah Code Ann. § 57-1-28. (R. 544 at ¶ 10; R. 270-73.) Before the trustee's sale of the Property, Pinnacle had not sold the Modular Home.

12. After satisfying Pinnacle's obligations arising under the Sodberry Trust Deed and pursuant to Utah Code Ann. § 57-1-29 and Rule 4-507 of the Utah Code of Judicial Administration, the trustee deposited with the Clerk of the First Judicial District Court of Box Elder County the Excess Proceeds arising from the sale of the Property in the amount of \$25,155.56, and notified the court clerk of potential claimants to the Excess Proceeds. (R. 544 at ¶ 11; R. 270-73.)

13. In order to preserve and assert its claim to the Excess Proceeds, Deere timely submitted a Notice of Claim for the Excess Proceeds. (R. at 545; R. 233.)

14. Before the trustee's sale of the Property, Pinnacle had not sold the Modular Home. Deere continues to hold the original MSO, no one has contacted Deere to request transfer of the MSO, no discussion of a sale was made during the course of Deere's Business Relationship with Pinnacle, no notices have been received by Deere, and no certificate of title or affidavit of affixture has been issued with respect to the Modular Home. (R. 544-45 at ¶ 12; R. 443, Peters Aff., at 446-48.)

15. As of December 10, 1998, Deere's claim against Pinnacle, secured by its perfected security interest in Pinnacle's Collateral—the Modular Home and its proceeds—is approximately \$145,922.64, excluding costs and attorneys' fees permitted under Paragraph 12.6 of the Credit Agreement. (R. 443, Peters Aff., at 448.)

16. On February 23, 2000, the district court, Judge Clint S. Judkins, presiding, entered an order and judgment in Deere's favor on Deere's claim of priority in the Excess Proceeds. (R. at 541-52; see Exs. A & B.) This appeal followed.

B. Response to Schriever's Statement of Facts

1. Schriever's Fact No. 3. The fact that Deere's UCC-1 lists Pinnacle's address as 1341 Washington Blvd, Ogden and mentions neither Outlook Homes nor Outlook's sales lot is irrelevant to this action. It is undisputed that Pinnacle was doing business as Outlook Homes. (R. 443, Peters Aff., at R. 444.) Indeed, Schriever's own Notice of Claim states that Pinnacle Financial Services was doing business as Outlook Homes. (R. 207.)

2. Schriever's Fact No. 6. Schriever cites to no evidence for the proposition that the Modular Home "was not held as inventory for sale for any determinable time." There is nothing in the record to suggest that the Modular Home was anything but inventory purchased under the Credit Agreement. Moreover, Schriever cites to no evidence for the proposition that the "home was placed on a foundation." There is nothing in the record to suggest that the Modular Home was physically affixed to the property near Tremonton, Utah.

3. Schriever's Fact No. 20 & 21. Schriever claims that Deere did not "assert any interest" in the Excess Proceeds in its motions to quash Mr. Tustian's Complaint, suggesting that Deere was required to do so. Schriever's suggestion is wrong. The proper procedure for determining priority over excess proceeds is to file a "Notice of Claim" pursuant to Rule 4-507 of the Utah Rules of Judicial Administration. Deere filed its Notice of Claim on December 8, 1998. (R. 233-38.) Schriever filed a notice of claim on November 12, 1998. (R. 207-11.)

SUMMARY OF ARGUMENT

The district court properly held that Deere had priority to the Excess Proceeds over Schriever for three reasons. First, Deere held a perfected security interest in the Modular Home, and after the trustee's sale of the Home, Deere's perfected PMSI attached automatically to the proceeds of the sale of the Home. Second, no fixture filing was required for Deere to maintain its security interest in the Modular Home regardless of affixture, because Deere had already perfected its interest in the Modular Home in its UCC-1 filing. Third, even assuming the Modular Home were physically affixed to real property, no fixture filing was required for Deere to maintain its perfected security interest in the Modular Home, because the Home was not legally affixed to real property under Utah Code Ann. § 59-2-602. Accordingly, the district court properly determined that Deere has priority over Schriever for the Excess Proceeds.

ARGUMENT

I. The District Court Correctly Held that Under Utah Code Ann. § 70A-9-306(3) Deere's Perfected PMSI in the Modular Home Attached to the Proceeds of the Trustee's Sale of the Modular Home.

In her brief, Schriever concedes that Deere obtained a perfected PMSI under Utah Code Ann. § 70A-9-302(3)(b) when it filed its UCC-1. (Schriever's Br. at 7.) Moreover, it is undisputed that the Modular Home was never sold prior to the trustee's sale. Accordingly, Schriever does not attack the district court holding that Deere perfected PMSI in the Modular Home continued in the Home until the Home was sold by the Trustee on April 1, 1998. (R. 546 at ¶ 3-4.)

Instead, Schriever argues that once the Modular Home was attached to the Tremonton Property, Deere's perfected PMSI ended. Schriever is wrong. If Deere were claiming that it currently had a perfected security interest in the Modular Home itself, and had Pinnacle sold the Modular Home, the sale might have extinguished Deere's security interest in the Home. Id.¹ However, Pinnacle never sold the Modular Home.² Instead,

¹ Lien filings for mobile homes (and other vehicles subject to § 41-1a-501) which are held as inventory are governed by § 41-1a-601(2) which states that "[s]ecurity interests in inventory consisting in part of vehicles subject to registration under this chapter, that are held for sale by a person in the business of selling goods of that kind, shall be perfected under Section 70A-9-302" Utah Code Ann. § 41-1a-601(2). Under Section 70A-9-302(1), "[a] financing statement must be filed to perfect all security interests." This is exactly what Deere did to secure its security interest in the Modular Home.

² Schriever concedes that the only existing evidence of ownership of the Modular Home (prior to the trustee's sale) is the MSO, which is in Deere's possession. (Schriever's Opening Br. at 5, ¶ 9.) The MSO is a prerequisite to obtaining a certificate

the trustee under the Sodberry Trust Deed sold the Modular Home and deposited the Excess Proceeds with the Court. The Excess Proceeds from a trustee's sale now stand in the place of the Modular Home as collateral. It is in the Excess Proceeds, not in the Modular Home itself, which Deere now has a perfected security interest. Section 70A-9-306(3)(b) of the UCC sets forth the rules for maintaining a perfected security interest in proceeds. This provision states:

The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but ceases to be a perfected security interest and becomes unperfected after ten days after receipt of the proceeds by the debtor unless

....

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds.

Utah Code Ann. § 70A-9-306(3)(b).

The term “proceeds” is defined as “whatever is received upon the sale, lease, exchange, collection, or other disposition of collateral.” Utah Code Ann. § 70A-9-306(1). Thus, after the disposition of secured goods, this provision operates to protect the security interest on the resulting proceeds automatically for ten days, and indefinitely thereafter if “a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds.” Id. § 70A-9-306(3)(b).

Applying Section 70A-9-306(3)(b) to this case, Deere clearly maintained a continuously perfected security interest in the Excess Proceeds. The Excess Proceeds

of title. Utah Code Ann. §§ 41-1a-508, -509, - 710.

arose out of the trustee's sale of the Modular Home and therefore constitute "proceeds" under Utah Code Ann. § 70A-9-306(1). Deere's perfected security interest in the Excess Proceeds continues because Deere's UCC-1 statement covered the original collateral (i.e., the Modular Home as inventory) and the Excess Proceeds are cash proceeds that were readily identifiable and held in the district court's trust account. Accordingly, the district court properly held that under Utah Code Ann. § 70A-9-306(3)(b), Deere's security interest attached to the Excess Proceeds after the trustee's sale and remained continuously valid. (R. 546 at ¶ 5.)

II. The District Court Correctly Rejected Schriever's Argument that Deere Was Required to File a Fixture Filing to Maintain Its Perfected Security Interest in the Modular Home.

Schriever principal objection to the district court's order is her belief that once the Modular Home became affixed,³ Deere lost its perfected security interest in the Modular Home because Deere did not file a fixture filing. Therefore, according to Schriever,

³ Schriever assumes that the Modular Home was physically affixed to property. However, this fact is disputed. In fact, there is nothing in the record suggesting that the Modular Home was physically affixed. Because this fact is disputed, it was not a basis for the the district court's ruling. Indeed, this disputed fact is immaterial to the resolution of this case because, as the district court properly determined, the statutory priority rules favor Deere over Schriever regardless of physical affixture. (R. 546-47 at ¶¶ 6-7.)

Even if this court were persuaded by Schriever's legal argument, Schriever is not entitled to the request she seeks (namely to have the district court disburse the funds to Schriever, see Schreiver Opening Br. at 11) because there is no evidence of physical attachment to real property. In fact, the Trustee described the Modular Home as "personalty." (R. 271 ("John Deere . . . may claim some interest in the excess proceeds as a secured creditor with a security interest in personalty located on the property."))

Deere's failure to file a fixture filing renders any claim it may have to the Excess Proceeds inferior to Appellant Schriever's judgment lien.

Even assuming the Modular Home was physically affixed to the Tremonton Property, Schriever's argument fails for two reasons: (1) Deere was not required to file a fixture filing to maintain its perfected security interest in the Modular Home because Deere had already perfected its interest in the Home in its UCC-1 filing; and (2) Deere was not required to file a fixture filing because the Modular Home was not *legally* affixed to real property under Utah law for purposes of maintaining security interests.

A. Under Utah Code Ann. § 70A-9-313(4)(d), No Fixture Filing Was Required to Maintain Deere's Perfected PMSI in the Modular Home Because Deere Had Already Perfected Its Interest in Its UCC-1 Filing.

In arguing that Deere should have filed a fixture filing, Schriever ignores Utah Code Ann. § 70A-9-313(4)(d). This section states:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer . . . of the real estate where:

. . . .

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter.

Id. (emphasis added).

This statute is clear: a security interest in a good which is perfected "by any method" will have priority over any subsequent legal or equitable lien even though the

good later becomes physically affixed to land without having to file a fixture filing.⁴

According to the UCC commentators:

[P]riority based on precedence in filing or recording is preserved, but there is no requirement that . . . the prior filing of the fixture security interest [i.e., a fixture filing] must be in the real estate records. . . . Thus, even a prior filing in the chattel records [i.e., a UCC-1] protects the priority of a fixture security interest against a subsequent judgment lien.

Uniform Commercial Code, § 9-313, cmt 4(c) (emphasis added) (Exhibit H). Other authorities have reached the same conclusion. See William D. Hawkland, et al., Uniform Commercial Code Series § 9-313:05 (Exhibit F) (“[T]here is no additional requirement that the security interest in fixtures be perfected as a fixture filing Thus, so long as the fixture financier perfects his interest in any manner permitted under Article 9, he will prevail against lien creditors.”); 4 James J. White & Robert S. Summers, Uniform Commercial Code § 33-10(c), at 346 (4th ed. 1995) (“The drafters of 9-313(4)(d) believed that the trustee in bankruptcy, like the ordinary judgment creditor, was not a reliance creditor and thus should be subordinated to any secured creditor who had perfected by any method, i.e., a personalty filing in the Article 9 files or a fixture filing in the real estate records.”).

The case law applying section 9-313(d)(4) also recognizes that no fixture filing is required to maintain a perfected security interest under section 9-313(4)(d). For example,

⁴ This is consistent with the other relevant portions of the UCC. See Utah Code Ann. § 70A-9-313(2) (“A security interest under this chapter . . . may continue in goods which become fixtures.”); id. (“A filing which is made in the proper place in this state continues effective even though the . . . collateral or its use . . . is thereafter changed.”).

in In re Lucero, 203 B.R.322, 324-25 (10th Cir. BAP 1996), a bankruptcy trustee sought to avoid a previously perfected lien on a debtor's mobile home by arguing (like Schriever) that the holder of the lien should have filed a fixture filing. The Tenth Circuit Bankruptcy Appeals Panel rejected this argument by recognizing that section 9-313(4)(d) exempts previously perfected secured parties from having to file a fixture filing.⁵ Similarly, in In re Allen, 221 B.R. 232 (S.D. Ill. 1998), the court stated:

In the majority of fixture priority disputes, the security interest must be perfected by filing a financing statement in the real estate records-- known as a "fixture filing" . . . --in order to prevail over a preexisting or subsequently recorded interest in the real estate. However, under § 9-313(4)(d), when the conflicting real estate interest is a judgment lien acquired after perfection of the fixture security interest, such perfection need not be by filing in the real estate records, but may be by any method permitted by [Article 9].

Id. at 233-34 (emphasis added).

Thus, the clear language of Utah Code Ann. § 70A-9-313(4)(d), the applicable case law, and the commentators' analysis of this section all point to one conclusion: that Deere did not have to file a fixture filing to maintain its security interest in the Modular Home. Instead, because Deere had previously perfected its security interest in the Modular Home, Deere's security interest remained perfected regardless of affixture.

⁵ The BAP also noted that the parties' arguments of whether the mobile home had become attached "overlook the most relevant provisions of . . . state law," referring specifically to section 9-313(4)(d). 203 B.R. at 324. This Court should recognize that the arguments of affixture by the parties in this case are of secondary importance behind the application of section 9-313(4)(d).

Accordingly, this Court should affirm the district court's Judgment awarding Deere the Excess Proceeds.

B. Deere Was Not Required to File a Fixture Filing Because the Modular Home Was Not Legally Affixed to Real Property Under Utah Code Ann. § 59-2-602.

Deere was also not required to file a fixture filing under Utah Code Ann. § 59-2-602 because this section draws a distinction between *physical* and *legal* affixture. This statute states:

[A]ny person owning a manufactured home or mobile home and owning the real property to which the manufactured home or mobile home is permanently affixed who seeks to have the manufactured home or mobile home qualify as an improvement to real property may file an affidavit of affixture with the county recorder of the county in which the real property is located.

Utah Code Ann. § 59-2-602(1) (emphasis added.) Thus, under this provision, a mobile or manufactured home may be physically affixed to land, but still not qualify as a legal fixture to the land. To qualify as a legal fixture, this section requires an owner to file an affidavit of affixture. Here, it is undisputed that no affidavit of affixture was filed. (See Schriever's Opening Br. at 5, ¶ 9 ("No . . . affidavit of affixture was issued with respect to the [Modular Home].).) Thus, the Modular Home, even if physically affixed, was not legally affixed for the Mobile Home "to qualify as an improvement to real property." Utah Code Ann. § 59-2-602(1).

Schriever argues that Section 59-2-602 deals only with taxation of manufactured homes, and therefore, does not purport to identify when a manufactured home becomes

“legally affixed” for purposes of secured interests. Schriever’s argument ignores the plain language of Section 59-2-602. Indeed, the Utah Code specifically provides that:

Upon recording of the affidavit of affixture and the receipt of surrender [i.e., the MSO or the title], the manufactured home or mobile home is for all purposes an improvement upon real property. A lien on the manufactured home or mobile home shall be perfected in the manner provided for the perfection of a lien on real property.

Utah Code Ann. § 59-2-602(5) (emphasis added).

In other words, under Utah law, it is only at that time an owner files an affidavit of affixture that a party must make a fixture filing to maintain a perfected interest in a manufactured home. Applying Sections 59-2-602(1) & (5) in this manner dovetails perfectly with Section 70A-9-313(4)(d) discussed above. In this case, no affidavit of affixture was ever filed by Pinnacle, or any other party. Therefore, the Modular Home did not qualify as a legal fixture to land. Because the Modular Home never became legally affixed to land, Deere was not required to file a fixture filing to maintain its perfected PMSI.⁶

In sum, the resolution of this case is straightforward: Deere obtained a perfected PMSI in the Modular Home by filing a UCC-1. Deere’s perfected PMSI continued until the trustee’s sale of the Home, at which time Deere’s security interest attached

⁶ Schriever cites to Webb v. Interstate Land Corp., 920 P.2d 1187 (Utah 1986) in his argument that Deere should have filed a fixture filing. However, Webb does not help Schriever. Webb is simply a restatement of Utah Code Ann. § 70A-9-313(1)(a) and (b). The Webb court did not address Utah Code Ann. § 70A-9-313(4)(d) nor § 59-2-602, nor did the Court have a reason to do so. Thus, Webb is inapplicable to this case.

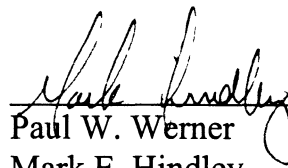
automatically to the proceeds of that sale under Utah Code Ann. § 70A-9-306(3)(b). Accordingly, Deere has priority to the Excess Proceeds over all judgment lienors, including Schriever. Even assuming that the Modular Home was physically affixed to real property, Deere was not required to file a fixture filing to maintain its PMSI. Under Utah Code Ann. § 70A-9-313(4)(d), no fixture filing was necessary because Deere had already perfected its interest in the Modular Home in its UCC-1 filing. Moreover, under Utah Code Ann. § 59-2-602, no fixture filing was required because the Modular Home was not *legally* affixed to real property. Therefore, the district court properly established Deere's priority over Schriever to the Excess Proceeds.

CONCLUSION

For the foregoing reasons, Deere respectfully submits that this Court affirm the district court's decision awarding Deere the Excess Proceeds.

Respectfully Submitted this 4 day of October, 2000.

STOEL RIVES LLP



Paul W. Werner
Mark E. Hindley
Attorneys for Appellee
Deere Credit Services

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of October, 2000, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE DEERE CREDIT SERVICES** to be delivered by U.S. mail, postage prepaid to the following:

William D. Marsh
One Utah Center, Suite 900
201 South Main Street
Salt Lake City, Utah 84111

Alyson Draper
Nalder Stratford & Draper LC
2404 Washington Blvd. Suite 1020
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Tab A

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Attorneys for Deere Credit Services, Inc.

FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

W. TUSTIAN, TRUSTEE/ SNOWBIRD TRUST,)	
)	FINDINGS OF FACT,
Plaintiff,)	CONCLUSIONS OF LAW, AND
)	ORDER GRANTING DEERE
vs.)	CREDIT'S CROSS-MOTION FOR
)	SUMMARY JUDGMENT
KAREN SCHRIEVER, WILLIAM MARSH,)	SETTING PRIORITIES TO
DEERE CREDIT SERVICES, INC., BRENT)	EXCESS PROCEEDS PURSUANT
MADSEN, FIRST DISTRICT COURT,)	TO RULE 4-507
)	
Defendants.)	Case No. 980100263
)	Judge Clint S. Judkins
)	
)	
)	
)	

This dispute involves the priority of excess proceeds from a trustees sale of property that are held by this Court (the "Excess Proceeds"). The parties to the dispute include Deere Credit Services, Inc. ("Deere"), William Tustian ("Tustian"), and Karen Schriever ("Schriever").¹ On

¹ On April 20, 1998, Tustian, filed a complaint against Schriever and Deere for the Excess Proceeds. William Marsh, Brent Madsen, and the First District Court were also named as Defendants in the complaint. These latter parties, however, have made no claim for the Excess Proceeds and are hereby dismissed from the suit with prejudice.

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June 10, 1999, this Court heard oral arguments from the parties and determined that the parties' pleadings would be considered as cross-motions for summary judgment.² The Court granted Tustian's request that the parties be able to submit supplemental memoranda. On December 30, 1999, after the parties had submitted their supplemental memoranda, this Court held another hearing to give counsel an opportunity to argue their respective positions.

Having fully considered the parties' memoranda, affidavits, and exhibits, and having heard the argument of counsel, the Court finds that there is no genuine issue as to any material fact and, as a matter of law, grants Deere's cross-motion for summary judgement, grants in part and denies in part Schriever's cross-motion for summary judgment, and denies Tustian's cross-motion for summary judgment.

NOW, THEREFORE, the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds that there is no genuine issue as to the following facts:

A. Deere's Security Interest in the Modular Home

1. Pinnacle Financial Services, Inc., a Utah corporation which operated under the trade name of Outlook Homes and/or Outlook Homes, Inc. ("Pinnacle/Outlook"), was engaged in the business of selling manufactured homes and related goods.

² Neither Schriever nor Tustian filed a notice of claim as required under Rule 4-507 of the Utah Rules of Judicial Administration. Nevertheless, this Court will treat Tustian's and Schriever's pleadings as notices of claim under Rule 4-507.

2. On or about April 12, 1996, Deere and Pinnacle/Outlook entered into an agreement pursuant to which Deere agreed to finance Pinnacle/Outlook's acquisition of manufactured homes. The terms of the parties' agreement was memorialized in two principal documents, the "Inventory Security Agreement and Power of Attorney -- Manufactured Homes" and an accompanying "Terms Schedule" (collectively, the "Credit Agreement").

3. Pursuant to the Credit Agreement and in order to secure performance of its obligations under the Credit Agreement, Pinnacle/Outlook granted Deere a purchase money security interest in, among other things, all inventory of Pinnacle/Outlook, together with all attachments to and proceeds of such inventory (the "Collateral"). On or about April 15, 1996, Deere duly filed with the Utah Department of Commerce, Division of Corporations and Commercial Code, a UCC-1 financing statement evidencing its security interest in the Collateral.

4. From time to time following the execution of the Credit Agreement and financing statement, Deere extended credit to Pinnacle/Outlook for the purchase of various manufactured homes, including its purchase of a certain Moduline modular home, serial no. 116366 (the "Modular Home") from Moduline Industries, Inc., in October 1996 as part of its inventory.

5. Moduline Industries prepared and submitted an invoice for the purchase of the Modular Home directly to Deere, as the financing lender for the purchase. The invoice identifies Pinnacle/Outlook as both the party purchasing and receiving the Modular Home and Deere as the financing lender.

6. Moduline Industries also forwarded the original Manufacturer's Statement of Origin (the "MSO") to Deere, as the lien holder, to hold as evidence of ownership.

7. Pinnacle/Outlook moved the Modular Home from its sales offices to real property owned by Pinnacle/Outlook located at 10025 North 6800 West, Tremonton, Utah (the "Property").

B. The Trustee's Sale of the Modular Home

8. At the time of or following the transfer of the Modular Home to the Property, Pinnacle/Outlook executed a trust deed with respect to the Property in favor of Sodberry Ltd. (the "Sodberry Trust Deed").

9. In October, 1997, Pinnacle/Outlook defaulted on its obligations arising under the Credit Agreement, including payment for the Modular Home in the approximate amount of \$42,000. Pinnacle/Outlook also defaulted on its obligations to Sodberry Ltd., and on November, 26, 1997, the successor trustee under the Sodberry Trust Deed filed a Notice of Default with the Box Elder County Recorder.

10. On April 1, 1998, the Property and the Modular Home were sold pursuant to a trustee's sale under Utah Code § 57-1-28.

11. After satisfying Pinnacle/Outlook's obligations arising under the Sodberry Trust Deed and pursuant to Utah Code § 57-1-29 and Rule 4-507 of the Utah Code of Judicial Administration, the trustee (i) deposited the Excess Proceeds with the Clerk of the First Judicial District Court of Box Elder County from the sale of the Property in the approximate amount of \$25,155.56, and (ii) notified the Court Clerk of potential claimants to the Excess Proceeds.

12. Before the trustee's sale of the Property, Pinnacle/Outlook had not sold the Modular Home. Deere continues to hold the original MSO, no one ever contacted Deere to request transfer of the MSO, no discussion of a sale was made during the course of Deere's

business relationship with Pinnacle/Outlook, no notice of sale has been received by Deere, and no certificate of title or affidavit of affixture has been issued with respect to the Modular Home.

13. In order to preserve its claim to the Excess Proceeds, Deere timely submitted a Notice of Claim for the Excess Proceeds.

14. As of December 10, 1998, Deere's claim against Pinnacle/Outlook, secured by its perfected security interest in Pinnacle/Outlook's Collateral, including the Modular Home and its proceeds, was approximately \$145,922.64, including \$42,179.00 for the Modular Home but excluding costs and attorneys' fees as permitted under Paragraph 12.6 of the Credit Agreement.

C. Other Claims to the Excess Proceeds

15. Tustian asserts that he is entitled to the Excess Proceeds because he, as trustee of the Snowbird Trust, accepted an assignment of the entire interest in October 1998, accepted a quit claim deed on January 2, 1998, and filed a mechanic's lien on February 10, 1998.³

16. Schriever asserts that she is entitled to the Excess Proceeds as a judgment lienor because she obtained a judgment against Pinnacle/Outlook for \$71,168.00 on January 6, 1998. The judgment was entered in the Second District Court of Weber County, State of Utah, Civil No. 970907243.

³ Tustian abandoned his mechanic's lien claim in his supplemental memorandum.

CONCLUSIONS OF LAW

Based upon the above undisputed facts, the Court hereby makes the following conclusions of law:

1. Summary judgment is appropriate when the record before the Court shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

2. The facts material to the parties' cross-motions for summary judgment are not disputed by the parties; there are no genuine issues of material fact that preclude the entry of summary judgment on Deere's cross-motion; and the cross-motions are thus ripe for disposition as a matter of law.

3. Under Utah Code Ann. § 70A-9-302(3)(b), Deere perfected a purchase money security interest ("PMSI") in the Modular Home on April 15, 1991 by filing its UCC-1.

④ 4. Because there was no sale of the Modular Home prior to the trustee's sale, Deere's perfected PMSI continued in the Home until the Home was sold by the Trustee on April 1, 1998.

⑤ 5. After the trustee's sale, Deere's perfected PMSI continued in the proceeds of the sale of the Modular Home under Utah Code Ann. § 70A-9-306(3)(b) because Deere's UCC-1 covered the original collateral and the proceeds, which are held by this Court, are identifiable cash proceeds. Accordingly, Deere's perfected PMSI in the Excess Proceeds has priority over Schriever's and Tustian's claims.

6. Deere was not obligated to file a fixture filing in order to maintain its perfected PMSI. Under Utah Code Ann. § 70A-9-313(4)(d), Deere's perfected security interest remained

perfected regardless of affixture. See, e.g., In re Lucero, 201 B.R. 322, 324-25 (10th Cir. BAP 1996); In re Allen, 221 B.R. 232 (S.D. Ill. 1998); see also Utah Code Ann. § 70A-9-313(2) & 401(3).

7. Alternatively, even assuming the Modular Home were physically affixed to the Property, Deere was not obligated to file a fixture filing because the Home was not legally affixed to the Property. Under Utah Code Ann. § 59-2-602(1), an affidavit of affixture must be filed for a mobile or manufactured home to be considered legally affixed. Because no affidavit of affixture for the Modular Home has been filed by any party, it was not legally affixed and therefore no fixture filing was necessary to maintain Deere's perfected PMSI in the proceeds of the sale of the Modular Home.

8. Accordingly, Deere has priority to the Excess Proceeds over all other potential claimants.

8. Utah Code Ann. § 70A-9-314(3) does not render Deere's perfected PMSI inferior to Schriever's judgment lien because it has no application to the facts of this case.

9. If some Excess Proceeds remain after Deere has satisfied its claim against Pinnacle/Outlook, Schriever has priority to those Proceeds over Tustian. In reaching this conclusion, the Court adopts the rationale articulated in Schriever's memoranda.

10. Schriever is a prevailing party relating to the Order to Show Cause and, as such, is entitled to collect its attorneys fees against Tustian. Schriever's collection of attorneys fees shall be limited to only those fees expended in connection with the Order to Show Cause relating to Tustian's re-depositing the Excess Proceeds with the Court.

11. Any conclusion of law inappropriately designated as a finding of fact is incorporated herein by this reference.

NOW THEREFORE, based upon the above undisputed facts and conclusions of law, and good cause appearing therefor, the Court hereby orders as follows:

(1) Deere's cross-motion for summary judgment is hereby granted. Deere has priority to the Excess Proceeds over all other claimants, including Schriever and Tustian.

(2) The Clerk of this Court shall immediately release the Excess Proceeds to Deere Credit toward satisfying Deere Credit's perfected purchase money security interest ("PMSI") in the Moduline modular home, serial no. 116366 (the "Modular Home").

(3) Schriever's cross-motions for summary judgment is denied in part as it relates to priority over Deere and is granted in part as it relates to priority over Tustian. Schriever has priority to the Excess Proceeds over Tustian. Accordingly, if Excess Proceeds remain after Deere satisfies its perfected PMSI, the Clerk of Court shall release those remaining Excess Proceeds to Schriever.

(4) Tustian's cross-motion for summary judgment is denied.

(5) Schriever's motion for attorneys fees against Tustian is granted. The award of attorneys fees will be limited only to those fees Schriever expended in connection with the Order to Show Cause relating to Tustian's re-depositing the Excess Proceeds with the Court. Schriever is hereby required to submit a attorney fee affidavit pursuant to Rule 4-505 of the Utah Rules of Judicial Administration.

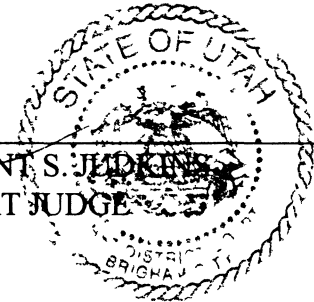
(6) A Judgment which dismisses this action in its entirety with prejudice shall be entered.

IT IS SO ORDERED.

DATED this 23 day of Feb, 2000.

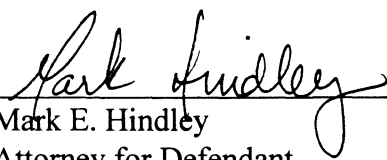


THE HONORABLE CLINT S. JUDD
FIRST DISTRICT COURT JUDGE



APPROVED AS TO FORM:

STOEL RIVES LLP



Mark E. Hindley
Attorney for Defendant
Deere Credit Services, Inc.

William D. Marsh
Attorney for Defendant
Karen Schriever

NALDER, STRATFORD & DRAPER, LC

Alyson Draper
Attorney for Plaintiff
William Tustian


CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of February, 2000, I served the within
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEERE
CREDIT'S CROSS-MOTION FOR SUMMARY JUDGMENT SETTING PRIORITIES
TO EXCESS PROCEEDS PURSUANT TO RULE 4-507** by causing it to be mailed, postage
prepaid, a full and correct copy thereof addressed to:

Alyson Draper
Attorney At Law
2404 Washington Blvd.
Ogden, Utah 84401

William D. Marsh
One Utah Center, Suite 900
201 South Main Street
Salt Lake City, Utah 84111

Brent Madsen
2176 McPherson Canyon Road
Grace, Idaho 83241

_____

Tab B

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Telephone: (801) 328-3131

Attorneys for Deere Credit Services, Inc.

FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

W. TUSTIAN, TRUSTEE/ SNOWBIRD TRUST,)	
)	
Plaintiff,)	JUDGMENT
)	
vs.)	Case No. 980100263
)	
KAREN SCHRIEVER, WILLIAM MARSH,)	Judge Clint S. Judkins
DEERE CREDIT SERVICES, INC., BRENT)	
MADSEN, FIRST DISTRICT COURT,)	
)	
Defendants.)	
)	
)	
)	
)	
)	

On _____, 2000, this court entered an order (1) granting Deere Credit Services, Inc.'s ("Deere") cross-motion for summary judgement on its claim that it has priority over all other potential claimants to certain excess proceeds from a trustees sale funds deposited in this court (the "Excess Proceeds"); (2) granting Karen Schriever ("Schriever") cross-motion for summary judgment on her claim that she has priority over William Tustian ("Tustian") to the Excess Proceeds; (3) denying Tustian's cross-motion for summary judgment, and (4) awarding Schriever

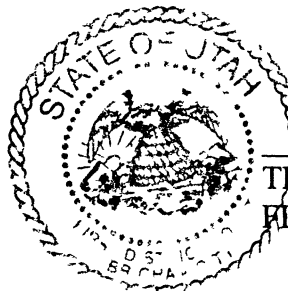
a portion of her attorney's fees. Having resolved all issues relating to the parties respective claims to the Excess Proceeds, and finding no just reason for delaying entry of judgement with regard to all claims,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

- (1) That final judgment is entered in Deere's favor and against Schriever and Tustian on Deere's claim of priority in the Excess Proceeds.
- (2) That final judgment is entered in favor of Schriever and against Tustian on Schriever's claim of priority in the Excess Proceeds over Tustian.
- (3) That Tustian take nothing.
- (4) That Schriever recover from Tustian her attorneys fees expended in connection with the Order to Show Cause relating to Tustian's re-depositing the Excess Proceeds with the Court.
- (5) That, after disbursement of the Excess Proceeds, this matter be dismissed in its entirety on the merits and with prejudice.¹

IT IS SO ORDERED.

DATED this 23 day of Feb, 2000.

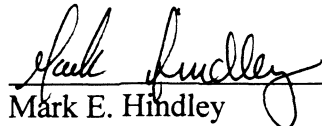



THE HONORABLE CLINT S. JUDKINS
FIRST DISTRICT COURT JUDGE

¹ The named "defendants" are not actual defendants. Instead, they are claimants to the Excess Proceeds under Rule 4-507 of the Rules of Judicial Administration.

APPROVED AS TO FORM:

STOEL RIVES LLP



Mark E. Hindley
Attorney for Defendant
Deere Credit Services, Inc.

William D. Marsh
Attorney for Defendant
Karen Schriever

NALDER, STRATFORD & DRAPER, LC

Alyson Draper
Attorney for Plaintiff
William Tustian

SS3

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of February, 2000, I served the within
JUDGMENT by causing it to be mailed, postage prepaid, a full and correct copy thereof
addressed to:

Alyson Draper
Attorney At Law
2404 Washington Blvd.
Ogden, Utah 84401

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