

2000

W, Tustian and Snowbird Trust v. Karen H.
Schriever, Deer Credit Services, Brent Madsen,
First District Court : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. TUSTIAN, TRUSTEE, SNOWBIRD TRUST :
Plaintiff/Appellee : BRIEF OF APPELLANT

vs. :

KAREN H. SCHRIEVER : Case No. 20000245-SC
Defendant/Appellant : District Ct. No. 980100263

DEERE CREDIT SERVICES, BRENT MADSEN, FIRST DISTRICT COURT : Argument Priority 15
Defendant/Appellees. :

BRIEF OF APPELLANT

APPEAL IS FROM ENTRY OF SUMMARY JUDGMENT SETTING PRIORITIES TO EXCESS PROCEEDS PURSUANT TO RULE 4-507, UTAH RULES OF JUDICIAL ADMINISTRATION.

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. TUSTIAN, TRUSTEE, SNOWBIRD TRUST	:	BRIEF OF APPELLANT
Plaintiff/Appellee	:	
vs.	:	
KAREN H. SCHRIEVER	:	Case No. 20000245-SC
Defendant/Appellant	:	District Ct. No. 980100263
	:	
DEERE CREDIT SERVICES, BRENT MADSEN, FIRST DISTRICT COURT	:	Argument Priority 15
Defendant/Appellees.	:	

BRIEF OF APPELLANT

LIST OF PARTIES

To the best of Appellant's knowledge, the names of all interested parties appear in the caption of the Brief.

JURISDICTION

Appeal is from the First District Court in and for Box Elder County, State of Utah, the Honorable Clint S. Judkins, presiding.

Appeal is taken to the Supreme Court of the State of Utah pursuant to Utah Code Ann. 78-2-2 and Rule 3(a), Utah Rules of Appellant Procedure, allowing appeal from all final orders and judgments of the District Courts.

Appellant Schriever appeals from 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, Rules of Judicial Admin., entered February 23, 2000 and from the Judgment ordering disbursement of the Excess Proceeds to Deere of the same date.

STATEMENT OF ISSUES FOR REVIEW

(1) Where there was no "fixture filing", did Deere's Purchase Money Security Interest (PMSI) in a manufactured home have priority over Schriever's judgment lien with regard to excess proceeds from a trust deed foreclosure sale?

(2) Did the filing of a UCC-1 financing statement by Deere Credit with the Utah State Department of Corporations covering a manufactured home create a perfected security interest in a building lot to which the home was affixed?

(3) Is an "affidavit of affixture" necessary to "legally affix" a manufactured home to a building lot and does the absence of such excuse Deere from making a fixture filing to perfect a security interest in the fixture?

STANDARD OF REVIEW

This matter was before the Trial Court on Appellees' Motion For Summary Judgment. Because the issues raised are questions of law this Court should give the Trial Court's ruling no deference and review it under a correctness standard. Logan v. Utah Power & Light Co. 796 2d 697 (Utah 1990).

A STATEMENT OF THE CASE

At issue is ownership of excess proceeds from a trust deed foreclosure sale deposited with the Clerk of the First District

Court of Box Elder County. The trial court disbursed the funds to appellee Deere Credit pursuant to Conclusions Of Law which include the following:

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. (R.546)

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. (R. 547)

8. Accordingly, Deere has priority to Excess Proceeds over all other potential claimants. (R.547)

A copy of Findings of Fact, Conclusions of Law and Order Setting Priorities to Excess Proceeds Pursuant to Rule 4-507 is herewith attached as Addendum I. The Court's Judgment awarding excess proceeds to Deere is attached as Addendum 2.

STATEMENT OF MATERIAL FACTS

1. The owner of record of the subject real property was "Pinnacle Financial Services, Inc. d.b.a. Outlook Homes, Inc." an Oregon Corporation hereafter referred to as "Pinnacle."

2. Pinnacle was engaged in the business of selling manufactured homes at a sales lot in Harrisville, Weber County, Utah. It operated the lot under the name "Outlook Homes, Inc."

3. In April of 1996, Appellee, Deere Credit Services filed a UCC-1 financing statement with the Utah Department of Commerce, Division of Corporations evidencing a security interest in Pinnacle's inventory held for sale at any of its locations. The filing lists Pinnacle's address as 1341 Washington Blvd, Ogden, Utah 84404 and does not specifically mention Outlook Homes, Inc. or Outlook's sales lot in Harrisville, Weber County, Utah. (R.364)

4. Deere's UCC-1 filing makes no reference to or claim upon any of Pinnacle's real estate.

5. In October of 1996, Deere extended credit to Pinnacle for the purchase of a certain Moduline manufactured home, serial no. 116366. Deere received the Manufacturer's Statement of Origin (MSO) for the manufactured home. (R. 426).

6. The manufactured home was not held as inventory for sale for any determinable time. The home was placed on a foundation on a building lot owned by Pinnacle near Tremonton, Box Elder County, Utah.

7. At approximately the same time Pinnacle placed the manufactured home on the building lot, Pinnacle borrowed \$35,000.00 from Sodbury LTD. pledging the building lot as security for the loan. A Trust Deed evidencing the obligation was recorded February 14, 1997 at the Box Elder County Recorder's office in Brigham City.

8. Deere Credit was notified, by Pinnacle's agent, in October, 1997 that the manufactured home was no longer on Pinnacle's sales lot in Weber County and had been relocated to real

property in Box Elder County. (Peters Affidavit ¶13 R.446).

9. No Certificate of Title or affidavit of affixture was issued with respect to the manufactured home. (Peters affidavit ¶14 R. 447). The MSO is the only document evidencing ownership of the subject manufactured home. (R.405) The MSO is not of official record with the State of Utah, Weber County where the home was claimed to be inventory, nor Box Elder County where the home was affixed to real estate.

10. Pinnacle defaulted on its obligation to Sodbury, LTD. and on November 26, 1997, the Successor Trustee, under the above referenced Trust Deed, recorded a Notice of Default.

11. On January 6, 1998, Judgment was entered in the District Court of Weber County, State of Utah, Civil No. 970907243, for the principal sum of \$71,168.00, against Pinnacle Financial Services, Inc. dba Outlook Homes, Inc. in favor of appellant Karen Schriever.

12. A Transcript of the Schriever judgment was docketed in the First District Court in Brigham City on January 7, 1998. (R. 212)

13. On March 11, 1998 defendant Schriever obtained a Writ of Execution from the First District court ordering the Box Elder County Sheriff to levy upon and sell the subject property of Pinnacle Financial Service, Inc. dba Outlook Homes, Inc. (R.214). On March 12, 1998 the property was attached by the Box Elder County Sheriff pursuant to Karen H. Schriever's judgment. (R.161)

15. On April 1, 1998 the subject property was sold at public auction at a non-judicial Trust Deed foreclosure sale. The

property was purchased by appellant Karen Schriever. (R.162)

16. Excess proceeds from the Trust Deed foreclosure sale in the amount of \$25,155.56 were deposited by Trustee, Melvin E. Smith, with the Clerk of the District Court of Box Elder County, pursuant to §57-1-29, Utah Code Annotated. (R.164).

17. On the 28th day of April, 1998, Pinnacle's remaining interest in the subject property was sold at a sheriff's sale pursuant to appellant Karen Schriever's Writ of Execution. Pinnacle's interest was purchased by Schriever. (R.507)

18. Neither Pinnacle nor its creditors, including Deere, made any attempt to redeem Pinnacle's interest in the property and on October 29, 1998 a Sheriff's deed was issued. (R. 506)

19. On April 6, 1998, Trustee, Melvin E. Smith, deposited \$25,155.56 as excess proceeds from the trustee's sale with the Clerk of the District Court of Box Elder County. Trustee Smith gave notice of his action to known claimants at the time of the deposit including Deere's counsel Paul W. Werner. (R.122)

20. When the Court Clerk failed to give notice to claimants within 10 days as required under Rule 4-507, Tustian filed a claim, pro-se. Schriever answered and moved for Summary Judgment. Deere refused to answer and on two occasions successfully moved to "quash" Tustian's Complaint. In neither instance did Deere assert any interest in the escrowed funds. (R.14 and R.56).

21. On December 10, 1998, more than nine months after the funds were deposited into court, Deere gave notice of its claim of priority to the excess proceeds from the trustee's sale. (R.255)

ARGUMENT

POINT 1. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT AS A MATTER OF LAW THE FILING OF A UCC-1 FINANCING STATEMENT BY DEERE CREDIT CREATED A PERFECTED SECURITY INTEREST IN THE PROCEEDS FROM A TRUST DEED FORECLOSURE SALE OF A RESIDENTIAL LOT TO WHICH THE COLLATERAL WAS AFFIXED.

The Trial Court's Conclusion Of Law Number 5, states as follows:

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.

By filing a UCC-1 financing statement with the Division of Corporations Deere perfected a security interest in Pinnacle's inventory, however, Deere's agreement with Pinnacle cannot be the basis for a continued perfected security interest in the manufactured home after it was taken out of inventory and attached and sold as an improvement to real property. See Webb v. Interstate Land Corp. 920 P.2d 1187 (Utah 1996).

Deere's UCC-1 filing does not entitle Deere to any rights to excess proceeds from a trustee's sale of real estate. Utah Code Ann. §70A-9-306(3) deals with a secured party's rights "on disposition of collateral or debtor's insolvency. It does not purport to deal with priority of security interests in fixtures.

There was no identifiable sale of Deere's collateral (the Moduline manufactured home) at the Trustee's sale and there is no way possible way to apportion the proceeds of the sale between the real estate and the affixed home.

Priority of security interests in fixtures is addressed specifically under Utah Code Ann. 70A-9-313(7) and 70A-9-314.

POINT 2. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT AS A MATTER OF LAW AN "AFFIDAVIT OF AFFIXTURE" IS REQUIRED TO LEGALLY AFFIX A MANUFACTURED HOME TO A BUILDING LOT AND THE ABSENCE OF SUCH EXCUSED DEERE FROM MAKING A FIXTURE FILING TO PERFECT A SECURITY INTEREST IN THE RESIDENTIAL LOT TO WHICH THE HOME WAS PHYSICALLY AFFIXED.

The Trial Court's Conclusion Of Law Number 7, states as follows:

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 manufacture 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.

Even a cursory reading of Utah Code Ann. §59-2-602(1), discloses that the statute deals only with taxation of mobile homes as improvement to real property. It merely provides a means by which the owner of real property to which a mobile home is permanently affixed may have the mobile home taxed as real property instead of being taxed as "personal property".

The statute does not even purport to identify when a manufactured home is "legally affixed" to a residential lot for purpose of secured interests.

Deere's pleadings throughout the litigation assert that no affixture of the manufactured home occurred in as much as Deere at no time made a "fixture filing". Nonsense. For purposes of

secured interests, Utah Code Annotated 70A-9-313(1)(a) provides:

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

The trial Court erred in concluding that manufactured home was not "legally affixed" to the subject real estate and that Deere could create a secured interest, in the fixture, paramount to appellant Schriever's judgment lien simply by relying on a PMSI. Utah Code Ann. §59-2-602(1) has no application as to priority of security interests in fixtures.

POINT 3. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT AS A MATTER OF LAW DEERE'S CLAIMED PURCHASE MONEY SECURITY INTEREST (PMSI) HAS PRIORITY OVER SCHRIEVER'S JUDGMENT LIEN.

The Trial Court's Conclusion Of Law Number 8, states as follows:

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

Utah Code Annotated 70A-9-313 establishes the priority of security interests in fixtures. It outlines the proper procedure for converting a PMSI to a perfected interest in fixtures. The procedure requires a "fixture filing". In 70A-9-313(1)(b) a "fixture filing" is described as follows:

(b) a "fixture filing" is the filing in the office of the county recorder in each county in this state in which any mortgage on the real estate would be recorded of a financing statement covering goods which are to become fixtures and conforming to the requirements of Subsection 70A-9-402(5);

Subsection 70A-9-402(5) provides that a financing statement filed as a fixture filing under Section 70A-9-313;

...must show that it covers this type of collateral, must recite that it is to be recorded in the real estate records of the county recorder and the financing statement...must contain a legal description of the real estate and must specify the name of the record owner.

Deere had no perfected security interest in the subject real estate and the description of its collateral in its UCC-1 filing makes no claim on Pinnacle's real estate. Furthermore, real estate is not collateral in which a security interest may be perfected by filing in the office or offices of the state Department of Corporations. The only place where one can perfect a security interest in real estate is the office of the County Recorder in the county where the real estate is located.

Utah Code Annotated 70A-9-313(4) provides for priority of a PMSI over a judgment lien only where there has been a fixture filing creating a "perfected security interest" in a fixture as provided in that section. As previously shown, Deere had made no "fixture filing" and had no perfected security interest in the fixture.

Where there has been no fixture filing U.C.A. 70A-9-313(7) provides that a security interest in fixtures "is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor."

Accordingly, any security interest Deere had was subordinate to Schriever's judgment lien.

See also Utah Code Ann. 70A-9-314(3) Accessions. Under Utah's Accessions statute, a security interest in goods which attaches before they are installed in or affixed to other goods does not

take priority over:

- (a) a subsequent purchaser for value of any interest in the whole; or
- (b) a creditor with a lien on the whole subsequently obtained by judicial proceedings.

Appellant Schriever was both. She was a subsequent purchaser for value of the property including the fixture. She bought the whole at the trustee's sale. She was also a creditor with a judgment lien on the entire property.

CONCLUSION

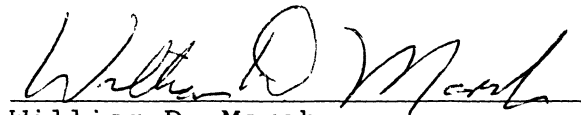
Deere's UCC-1 financing agreement with Pinnacle cannot be the basis for a continued perfected security interest in the subject manufactured home after it was taken out of inventory, affixed to a residential lot and sold at a trust deed foreclosure sale. Deere Credit's failure to make a fixture filing renders any claim it may have to the excess proceeds (\$25,155.56) from the trustee's sale inferior to Appellant Schriever's judgment lien.

The Trial Court's Order setting priorities to excess funds together with its Judgment awarding the excess proceeds to Deere are based upon misconceptions of the law and constitute reversible error.

RELIEF REQUESTED

Appellant Schriever asks that the trial court's Order setting priorities to the excess proceeds together with the Judgment disbursing the excess proceeds from the trustee's sale to Deere be reversed and the matter be remanded to the First District Court with instructions for disbursing the funds to Appellant.

Respectfully submitted this 3rd day of August, 2000.



William D. Marsh,
Attorney for Appellant Schriever

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2000, I caused two true and correct copies of APPELLANT'S BRIEF to be served upon Paul W. Werner and Mark E. Hindley counsel for Deere Credit Services Inc. and two copies upon Alyson Draper counsel for W. Tustian, Trustee, Snowbird Trust. Appellees in this matter, by mailing two copies to each of them, by first class mail with sufficient postage prepaid and addressed as follows:

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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
	)	Case No. 980100263
Defendants.	)	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.

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 judgment, 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. 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. 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.

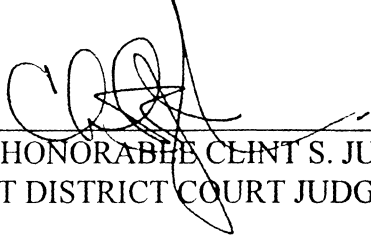
(4) Tustian's cross-motion for summary judgment is denied.

(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.

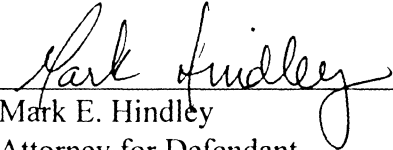
DATED this 23 day of Feb, 2000.



THE HONORABLE CLINT S. JUDKINS
FIRST DISTRICT COURT JUDGE

APPROVED AS TO FORM:

STOEL RIVES LLP



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Attorney for Defendant
Deere Credit Services, Inc.

William D. Marsh
Attorney for Defendant
Karen Schriever

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Tab 2

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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.