



IT IS ORDERED as set forth below:

Date: October 08, 2010

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 05-86834-WLH
)	
SOUTHERN BOWLING, INC.)	CHAPTER 7
)	
Debtor.)	JUDGE WENDY L. HAGENAU
_____)	
)	
JORDAN E. LUBIN,)	
)	
Plaintiff,)	
)	
v.)	ADV. PROC. NO. 09-06045
)	
GEORGIA COMMERCE BANK,)	
)	
Defendant.)	
_____)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Cross-Motions for Summary Judgment filed by Defendant Georgia Commerce Bank (“GCB”) and Plaintiff Jordan Lubin, as Trustee of the Debtor captioned above (“Trustee”). The issue presented is the adequacy of a foreclosure advertisement run by GCB to foreclose on certain pin setters and bowling alley lanes in which

GCB was granted a security interest. The Court concludes: (1) the foreclosure advertisement was sufficient to foreclose on and convey title to the real property described in the advertisement and any improvements or fixtures thereon, but insufficient to foreclose on or convey any other property which may have been described in the Security Deed; (2) the record before the Court is not sufficient to allow the Court to determine if the pin setters and bowling alley lanes are fixtures; (3) as the parties have agreed, the issue of damages is an issue of fact to be tried before the Court.

FACTS

The following facts are undisputed by the parties.

On January 22, 2004, Southern Bowling, Inc. borrowed \$550,000 from GCB to purchase an existing bowling alley located at 1067 Veterans Memorial Highway, Mableton, Cobb County, Georgia (the "Bowling Alley"). To evidence the loan, Southern Bowling executed a promissory note to GCB in the original principal amount of \$550,000.00 (the "Note"), which was secured by (1) a deed to secure debt ("Security Deed") filed on January 27, 2004 and recorded at Deed Book 13921, Page 1313, Cobb County Records; and (2) a security agreement ("Security Agreement") dated January 22, 2004. GCB recorded a UCC financing statement ("Financing Statement") with the Clerk of Superior Court, Cobb County on January 27, 2004 at UCC No. 033200400901.

Southern Bowling defaulted on the Note and then filed a Chapter 7 bankruptcy petition on December 30, 2005. (Case No. 05-86834, Docket No. 1). On January 10, 2006, GCB filed a Motion for Relief from Stay. (Case No. 05-86834, Docket No. 8). The Court entered an Order Granting Relief from Stay to GCB on March 13, 2006. (Case No. 05-86834, Docket No. 19).

The Relief from Stay Order stated:

the automatic stay is hereby modified to permit [GCB] to exercise all of its state law remedies with respect to its collateral consisting of real property and personal

property located at 1067 Veterans Memorial Highway, Mableton, Georgia, including a sale under power to be conducted in April 2006...

Id.

GCB advertised the foreclosure sale for four (4) weeks in March, 2006. The foreclosure advertisement (“Foreclosure Advertisement”) states in pertinent part, “. . . there will be sold at public outcry . . . the following described property: All that tract or parcel of land lying and being in Land Lot 1296 and 1297 of the 19th District, 2nd Section of Cobb County, Georgia, as more particularly described on Exhibit ‘A’ attached hereto . . .”. The Foreclosure Advertisement immediately recites, “Exhibit ‘A’ (Legal Description of 1067 Veterans Memorial Highway, Mableton, Georgia) [a metes and bounds description follows]. *See* Exh. 2 to Complaint. The Foreclosure Advertisement does not state that personal property will be sold at the foreclosure sale. Acting as attorney in fact under the Security Deed, GCB through, its agent, conducted the foreclosure sale on April 4, 2006, bidding in its entire debt. GCB filed a deed under power memorializing the foreclosure sale (the “Deed Under Power”) on April 19, 2006, at Deed Book 14317, Page 3306, Cobb County Records, conveying to GCB the “land” as described in Exhibit A, which is only a metes and bounds description.

After the foreclosure sale, GCB took possession of the Bowling Alley, including personal property. GCB sold the foreclosed property to Picture Frame Depot, Inc. on or about November 30, 2004, which changed the use of the property to a picture frame store. The bowling lanes were sold to Paulding Bowling Lanes for \$20,000.00 and the pin setters to AMF Corporation for \$18,000.00.

On January 29, 2009, the Trustee filed the present adversary proceeding, arguing that, based on the language in the Foreclosure Advertisement, Security Deed, and Security

Agreement, the foreclosure conveyed only real estate and not personal property in the Bowling Alley to GCB. Asserting claims under 11 U.S.C. § 542 and state law, the Trustee sought to have:

- (1) GCB account for the Disputed Items (as defined therein);
- (2) GCB turn over and return the Disputed Items;
- (3) GCB pay damages, in an amount to be determined at trial, based upon
 - (i) as to any Disputed Item that is returned, any decline in value of that property since the foreclosure sale; and
 - (ii) as to any Disputed Item that is not returned, the value of that property measured either at the foreclosure sale or now; whichever value is higher.

(Complaint).

PROCEDURAL BACKGROUND

On September 3, 2009, GCB filed a Motion for Summary Judgment. (Docket No. 6). Thereafter, on September 23, 2009, the Trustee filed a Cross-Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment. (Docket No. 7). In turn, GCB filed a Response to the Trustee's Motion for Summary Judgment (Docket No. 8) and the Trustee filed a sur-reply to GCB's Response (Docket No. 9). On April 1, 2010, Judge Brizendine, who was originally assigned the case, held a status conference on the matter. After the status conference, both parties filed supplemental briefs to address questions raised by the Court. (Docket Nos. 10 and 11). The adversary proceeding was later assigned to the undersigned, who has now reviewed the pleadings, the status conference transcript, and the Cross-Motions for Summary Judgment and accompanying and supplemental materials.

ISSUES

The issues raised by the parties in their Cross-Motions for Summary Judgment are:

1. Was the Foreclosure Advertisement of GCB sufficient for GCB to foreclose on personalty that is not a fixture?

2. Assuming the answer to question number 1 is no, are the pin setters and lanes included within the property advertised and sold through the GCB foreclosure? (This issue has been paraphrased as, “are the pin setters and lanes fixtures?”)

3. Assuming the Trustee prevails in the answer to number 1 and number 2 above, what are the appropriate damages owed to the Trustee?

The parties do not dispute that this matter is a core proceeding and that jurisdiction lies in this Court.

ADEQUACY OF THE ADVERTISEMENT

The Security Deed granted to GCB a security interest in

“all of the following described land and interests in land, estates, easements, rights, improvements, personal property, fixtures, equipment, furniture, furnishings, appliances and appurtenances (collectively, the “Premises”):

a. All those certain tracts, pieces or parcels of land more particularly described in the Exhibit A attached hereto and by this reference made a part hereof (the “Land”).

b. All of Borrower’s right, title and interest in and into all buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, and all ... fixtures ... and all other furnishings, furniture, fixtures, machinery, equipment, appliances, vehicles ... building supplies and materials, books and records, chattels, inventory, accounts, farm products, consumer goods, general intangibles and personal property of every kind and nature whatsoever now or hereafter owned by Borrower and located in, on or about, or used or intended to be used with or in connection with the use, operation or enjoyment of the Premises ... all of which are hereby declared and shall be deemed to be fixtures and accessions to the Land and a part of the Premises ... and which shall be deemed to be a portion of the security for the indebtedness herein described and to be secured by this Deed. The location of the above described collateral is also the location of the Land.

Items (c) and (d) in the granting clause include easements and rights of way as well as all income, rents, issues, profits and revenues of the Premises. The Order Granting GCB Relief from the Stay permitted GCB to foreclose on both the real and personal property which was

granted to it as collateral under the Security Deed. GCB, therefore, had a security interest in both real and personal property and had authority to foreclose on both real and personal property. The question, however, is whether GCB in fact foreclosed on both real and personal property.

The adequacy of a foreclosure advertisement must be determined under Georgia law, since foreclosure is a state law remedy. O.C.G.A. § 44-14-162(a) requires that “the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff’s sales in the county in which such real state or a part thereof is located ...” The Georgia Code requires, for sheriff sales, that an advertisement:

shall give a full and complete description of the property to be sold, making known the names of the plaintiff, the defendant, and any person who may be in the possession of the property. In the case of real property, such advertisement shall include the legal description of such real property and may include the street address of such real property, if available, but provided that no foreclosure shall be invalidated by the failure to include a street address or by the insertion of an erroneous street address.

O.C.G.A. § 9-13-140(a). The purpose of this Georgia Code section is to require that foreclosure advertisements “give such a description of the property ... as shall best enable the public to understand what particular property is to be offered for sale.” *Collier v. Vason*, 12 Ga. 440 (1853). What is considered a “full and complete” description of property advertised “must always depend on the *location and particular character* of that property.” *Id.* (emphasis in original). However, the Georgia Court of Appeals and the Georgia Supreme Court have held that a foreclosure advertisement describing only realty by metes and bounds “includes all improvements that are ‘a part of the realty’”. *National Community Builders, Inc. v. Citizens & Southern National Bank*, 232 Ga. 594, 596 (1974).

In this case, the Foreclosure Advertisement states that the property to be sold is “[a]ll that tract or parcel of land lying and being in Land Lot 1296 and 1297 of the 19th District, 2nd

Section of Cobb County, Georgia as more particularly described on Exhibit ‘A’ attached hereto and incorporated herein.” Exhibit A then proceeds to give the metes and bounds description of the real property only. The Foreclosure Advertisement nowhere mentions personal property of any variety.

As set forth above, “Land” is a defined term under the Security Deed. The language of the Foreclosure Advertisement is consistent with the definition of “Land” in the Security Deed and tracks the language of the metes and bounds description of the Land in Exhibit A to the Security Deed. As set forth above, the defined term “Land” is included within the collective term “Premises” in the Security Deed. *Id.* “Premises” includes all the interests in the land, plus “estates, easements, rights, improvements, personal property, fixtures, equipment, furniture, furnishings, appliances and appurtenances.” *Security Deed* at 1. As the Trustee notes, GCB could have substituted the word “Premises” for “Land” or used various other defined terms from the Security Deed to have advertised the sale of a broader category of property, but it did not do so. Instead, the description in the Foreclosure Advertisement was limited to the legal description of the Land.

It is important to note also that the Security Deed specifically permitted GCB to foreclose on less than all of the property granted it in the Security Deed. The Security Deed states as follows:

If a Default shall have occurred and same is continuing, Lender, at its option may sell the Premises or any part of the Premises at one or more public sale or sales ... At any such public sale, Lender may execute and deliver to the purchaser a conveyance of the Premises or any part of the Premises ... In the event of any sale under this Deed by virtue of the exercise of the powers herein granted, or pursuant to any order in any judicial proceeding or otherwise, the Premises may be sold as an entirety or in separate parcels and in such manner or order as Lender in its sole discretion may elect, and if Lender so elects, Lender may sell the personal

property covered by this Deed at one or more separate sales in any manner permitted by the Uniform Commercial Code of the State of Georgia ...

Security Deed at § 2.07(a). Since GCB had authority to sell just the land without the personal property or any other part of the defined term “Premises”, and the language of the Foreclosure Advertisement indicates that only the “Land” is being sold, any third party would not be on notice that personal property (or any other portion of the Premises) was being sold.

The Supreme Court of Georgia, however, instructs, in the *National Community Builders, Inc.* case, that, even if only the metes and bounds description of the real estate is included in a foreclosure advertisement, such sale necessarily includes all improvements. 232 Ga. at 596. Thus, the Court holds as matter of law that GCB’s foreclosure was sufficient to foreclose on and convey title to the real property described in the Foreclosure Advertisement and any improvements or fixtures thereon, but insufficient to foreclose on or convey any other property which may have been granted to GCB as collateral in the Security Deed.¹

FIXTURES

Having determined that the Foreclosure Advertisement was sufficient to have conveyed title to only the real property and any improvements or fixtures thereon, each party asked the Court to find as a matter of law that the pin setters and lanes are or are not fixtures or improvements that are included within the foreclosure sale. The Court concludes that this remains a disputed issue of fact and that a trial on this issue must be held.

Fixtures are defined in O.C.G.A. § 44-1-6 as follows:

- (a) Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it.

¹ Because GCB bid in the entire amount of its debt at the advertised foreclosure sale, GCB no longer had the option to conduct a subsequent personal property only foreclosure sale under the Uniform Commercial Code.

(b) Machinery which is not actually attached to the realty but is movable at pleasure is not a part of the realty.

(c) Anything detached from the realty becomes personalty instantly upon being detached.

The courts have developed three (3) factors to be considered in analyzing whether an object is personalty or realty: (i) the degree to which the object has become integrated with or attached to the land; (ii) whether there is unity of title between the personalty and the realty at the time the object allegedly became part of the land; and (iii) the intention of the parties with regard to the status of the object. *See Walker v. Washington (In re Washington)*, 837 F.2d 455, 456-57 (11th Cir. 1988). The parties do not dispute that the pin setters and lanes could be removed from the building without it suffering “essential injury” since the items were subsequently removed and sold separately. Similarly, the parties do not dispute that there is unity of title between the personalty and the realty. However, the parties dispute, and there is conflicting evidence on, the intent of the parties with respect to whether the pin setters and bowling lanes are fixtures.

In the first instance, the Security Deed states that all personal property is intended by the parties to be fixtures and part of the realty. The Security Deed in granting clause (b) grants GCB a security interest in many categories of personal property, including inventory, accounts, general intangibles, trade names, and logos, and provides “all of which are hereby declared and shall be deemed to be fixtures and accessions to the Land”. In keeping with this definition, GCB filed a UCC-1 Financing Statement, checking the box that it is a fixture filing. The UCC-1 fixture filing attaches the same listing as contained in the Security Deed and includes the same “declaration” that all are fixtures.

Contemporaneously with the Security Deed, the parties also executed a Security Agreement with respect to items of personal property. The Court notes that the execution of a

security agreement is not by itself indicative of a contrary intent by the parties as to the treatment of the personalty as fixtures. Parties are entitled to protect their rights on alternative theories, and they could certainly have executed a security agreement reflecting that the parties' intent in the security deed governed but, in the event of a contrary finding by a court, the parties were executing a security agreement out of an abundance of caution. However, in this case, the parties went further and actually provided in paragraph 11 of the Security Agreement a warranty from the Debtor "that all Equipment which constitutes a part of the Collateral is personalty and is and will be affixed to real estate, but will not be considered by the parties hereto a 'fixture' or part of such real estate". This language does not provide alternative theories of recovery, but is a directly conflicting statement as to the intent of the parties with respect to the items included within Equipment. It appears from the exhibits to the Security Agreement that Equipment under the Security Agreement includes the pin setters and lanes, which are at issue here. Therefore, the Court is faced with conflicting evidence of the parties' intent as to whether the pin setters and lanes are personalty or realty.

The Georgia courts are clear that, if there is a question as to the intent of the parties on this issue, it is for the jury or trier of fact. In *Babson Credit Plan, Inc. v. Cordele Production Credit Association*, the parties had agreed that the property at issue would remain personalty, but then the UCC financing statement was filed as a fixture filing. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga.App. 266, 267-69 (1978). The court noted that where "the intention of the parties is shown by the contract, which is unambiguous," such intent is binding. *See id.* at 268 (citing *Smith v. Odom*, 63 Ga. 499 (1879), *Power v. Garrison*, 141 Ga. 429 (1914), *Armour v. Block*, 147 Ga. 639 (1918)). Where there is a question as to intent, however, it is an issue for the trial judge as the trier of fact. *See Babson Credit Plan, Inc.*, 146 Ga.App. at 269

(citing *Sawyer v. Foremost Dairy Prods.*, 176 Ga. 854 (1933), *Kirkland v. Morris*, 233 Ga. 597 (1975), Pindar, *Georgia Real Estate Law & Procedure* §10-12)). See also *Pease & Elliman Realty Trust v. Gaines*, 160 Ga.App. 125, 129 (1981) (“[E]ven though the security agreement stated the collateral would not lose its identity as personalty, the UCC financing statement designated the collateral as fixtures,” thus, creating an issue of fact). Although this Court is also the finder of fact in this case, the record before the Court consists only of the conflicting contractual provisions. The record does not contain any other evidence as to the intent of the parties. The record before the Court is not sufficient to allow it to make a finding on intent, and, thus, a trial on this issue will need to be held.

Finally, although the parties initially raised the possibility of a grant of summary judgment as to the value of the pin setters and lanes, the parties appear to have agreed that this is an issue of fact to be tried before the Court.

CONCLUSION

In conclusion, the Court finds as a matter of law that the Foreclosure Advertisement of GCB was sufficient to enable GCB to foreclose on and convey the real property described therein and the improvements or fixtures thereon. The parties’ Cross-Motions for Summary Judgment are therefore GRANTED to that extent and DENIED as to all other portions. The parties are directed to submit a joint pre-trial order no later than November 17, 2010, the form of which will be sent to the parties.

END OF DOCUMENT