

**In re PIKNIK PRODUCTS CO.
346 B.R. 863 (Bankr. M.D. Ala. 2006)**

DWIGHT H. WILLIAMS, JR., Bankruptcy Judge.

Crouch Supply Company (“Crouch”) filed this adversary proceeding against Piknik Products Company, Inc. (“Piknik”) seeking a declaration of the respective rights of the parties in equipment called a “Juicy Juice System” located at Piknik’s plant in Montgomery, Alabama. Crouch claims title to the property. Alternatively, Crouch contends that it has a lien on the property superior to other liens.

Wachovia Bank (“Wachovia”) intervened and filed an answer to the complaint. Piknik filed an answer to the complaint, which was later amended. Both Wachovia and Piknik generally deny the allegations of the complaint.

On May 10, 2006, Crouch and Wachovia filed cross motions for summary judgment. Piknik filed a response joining the motion of Wachovia and opposing that of Crouch. These motions for summary judgment are now before the court for decision....

Facts

On or about May 2, 2005, Crouch made a proposal to sell and install the Juicy Juice System at Piknik’s Montgomery, Alabama facility. Crouch contends that Piknik signed and returned the proposal. Crouch, however, has lost the executed agreement. Piknik denies signing the proposal.

Crouch attached an unexecuted copy of the proposal to its motion for summary judgment. The proposal provides, *inter alia*, 1) for the sale and installation of the Juicy Juice System for a total price of \$369,865, exclusive of certain miscellaneous costs such as taxes, permits, and freight; 2) for a 35% down-payment; 3) for the seller’s retention of title pending payment in full; and 4) for the contract to be governed and construed by the laws of the State of Texas.

On May 26, 2005, Piknik paid Crouch \$129,452.75, which represented the 35% down-payment.

The proposal implies a July 2005 projected delivery date. The majority of the system was delivered and bolted to the floor. Crouch contends that the system has not been fully installed and is not operational. The parties agree that the Juicy Juice System, while bolted to the flooring, is not a fixture and could be removed from Piknik’s facility without harming the realty.

On September 23, 2005, Crouch filed an affidavit of lien in the probate court of Montgomery County, Alabama.

Wachovia has a security interest in essentially all of Piknik's personal property including equipment and fixtures. Wachovia first perfected the security interest in 1995 by filing a UCC-1 financing statement with the Alabama Secretary of State. That filing remains continuous to date.

Piknik filed a chapter 11 petition for relief in this court on September 29, 2005.

Conclusions of Law

.... In this case, the parties dispute whether Piknik executed the agreement.... This disputed fact, however, is not material because the legal result is unaffected. The court will consider the motions for summary judgment assuming that there was an executed written agreement between the parties, that the contract formed by that agreement is governed by Texas law, and that the contract provides for Crouch to retain title to the goods until fully paid.

At issue here are the respective rights of the parties in the Juicy Juice System. As stated above, Crouch claims title to the property. Alternatively, Crouch contends that it has a lien on the property superior to other liens, namely the lien of Wachovia. Crouch advances three arguments in support of these contentions.

First, Crouch claims title to the property under the following provision of the contract: "Seller retains title to the equipment until full payment is made...." Because Crouch has not been paid in full, Crouch argues that Piknik has no interest in the property and that the property is not part of the bankruptcy estate. The court disagrees.

Texas law provides that a "retention or reservation by the seller of the title ... in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." TEX. BUS. & COM. CODE ANN. § 2.401(a) (2005). Therefore, in spite of the reservation of title language, Piknik has title to the property subject to the security interest of Crouch. When Piknik filed chapter 11, the property became part of Piknik's bankruptcy estate pursuant to 11 U.S.C. § 541. Crouch no longer has title to the property.

Next, Crouch contends that it has a purchase-money security interest ("PMSI") in the property with priority over Wachovia's competing security interest. Texas law accords priority to a PMSI as long as the PMSI is perfected within 20 days after the debtor "receives possession" of the collateral.⁴ TEX. BUS. & COM. CODE ANN. § 9.324. It is undisputed that Crouch did not file a financing statement within 20 days after delivery of the Juicy Juice equipment.

However, Crouch contends that the time for perfection of its security interest has not yet run. Citing to the holding in *In re Master Services, Inc.*, 172 F. App'x 697 (8th Cir. 2006), Crouch argues that the debtor "receives possession" on the date that the equipment becomes fully

⁴ Actually, Texas law dictates the application of Alabama law regarding perfection of a security interest in this equipment: "While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral." TEX. BUS. & COM. CODE ANN. § 9.301(2). However, Alabama law regarding priority of a purchase-money security interest is similar to that of Texas. See ALA. CODE § 7-9A-324(a) (2001).

operational, and that because installation of the Juicy Juice System is not complete, the time has not yet run for perfection of its security interest.

The Official Comments to § 9.324 aid the court in defining when a debtor receives possession of collateral...

Normally, there will be no question when “the debtor receives possession of the collateral” for the purposes of subsection (a). However, sometimes a debtor buys goods and takes possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor’s location. Under those circumstances, the buyer “takes possession” within the meaning of subsection (a) when, after an inspection of the portion of the goods in the debtor’s possession, it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole.

TEX. BUS. & COM. CODE ANN. § 9.324 cmt. 3 (2002).

Here, the majority of the Juicy Juice System was delivered to Piknik’s Montgomery, Alabama facility around July 2005. The equipment comprising the system was actually bolted to the facility floor. Under these circumstances, it is clear that a potential lender would conclude that Piknik had acquired an interest in the Juicy Juice System.

Crouch’s reliance upon *Master Services* is misplaced. In that case, the PMSI creditor installed equipment at the buyer’s facility, and the equipment was fully operational. The first payment, however, was not due until after the installation was complete. The seller argued that the debtor did not receive possession of the equipment until the date the first payment was due. In rejecting the seller’s argument, the court did not make the extent of operative completeness a condition for possession under the Uniform Commercial Code. Instead, the court merely noted that the equipment in the case before it was fully operational. The court, however, made clear that the test for receipt of possession under § 9.324 is the impression of a potential lender regarding the debtor’s interest in the property. *Master Services*, 172 F. App’x at 700. Obviously, the fact that the equipment was fully operational would strengthen a prospective lender’s impression that the buyer had an interest in the equipment. However, it is only a factor to be considered, and it is not the standard prescribed by the statute.

Finally, Crouch claims a materialman’s or mechanic’s lien in the Juicy Juice System arising under ... Alabama law.

.... Crouch does not specify the statute under which it claims a lien, but two are implicated.

First, ALA. CODE § 35-11-210 provides a lien in favor of a mechanic or materialman for work done to realty or for the enhancement of realty. Crouch cannot claim under this statute because the work and materials that it supplied to Piknik did not benefit the realty.

Second, ALA. CODE § 35-11-110 provides, *inter alia*, for a mechanic’s lien favoring those who contribute labor or material to the production, manufacture, or repair of personal property.

The statute, however, expressly provides that such lien is subordinate to any prior perfected security interest under Article 9 of the Uniform Commercial Code unless the prior perfected secured party authorized the contribution. Because Wachovia's properly perfected security interest under Article 9 predates Crouch's September 23, 2005 effort to create a mechanic's lien, Wachovia's lien enjoys priority

Conclusion

The result here appears harsh. This court sympathizes with Crouch. Crouch sold Piknik equipment worth more than \$350,000 in May 2005 for which it was paid only \$129,452.75. A mere four months later, Piknik filed a petition under chapter 11, and Crouch now finds itself in the position of an unsecured creditor with little hope of receiving any distribution on its claim. Yet, Crouch failed to properly perfect a lien as provided by law, and this court's sympathy must give way to that reality....