United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
FURRS,
Debtor. No. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 03-1090 S

RICHARDSON & RICHARDSON, INC.,
Defendant.

MEMORANDUM OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's motion for summary judgment and Plaintiff's cross motion for partial summary judgment. Plaintiff is represented by her attorney Davis & Pierce, P.C. (Chris W. Pierce). Defendant is represented by its attorney Calvert & Menicucci, P.C. (Carl A. Calvert and Sean R. Calvert). This is a core proceeding. 28 U.S.C. § 157(b)(2). The Court will grant Plaintiff's Motion and Deny Defendant's Motion.

SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and

sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

FACTS

The parties are in general agreement to the facts. The Court finds as follows:

1. On February 8, 2001 Furrs filed its bankruptcy.

2. Prior to the filing, Defendant performed construction services for the Debtor under specific purchase orders and under contract with Debtor.

3. During the preference period Defendant received payments from the Debtor for construction services performed at the Debtor's stores.

4. On February 4, 2003 the Plaintiff filed this adversary proceeding to avoid preferential transfers to Defendant in the amount of $236,911.37.

5. The payments made by Debtor were in complete or partial satisfaction of debts owed by the Debtor on stores 874, 875, 876, 879, 886, 896, 897, 894 and 905.

6. In addition to the invoices paid by Debtor during the preference period Defendant was owed additional amounts for work at stores 812, 868, 876, 877, 878, 879, 880, 885, 886 and 896 in the total amount of $186,263.18.

7. After the bankruptcy filing Defendant filed claims of liens on stores 812, 868, 874, 876, 877, 878, 879, 880, 885, 886 and 896 in the total amount of $186,263.81.

8. Defendant filed a proof of secured claim, secured by the lien claims, on October 12, 2001. Plaintiff posits that the Defendant is not secured in property of the estate, but this is a legal question rather than a factual question.

9. During the bankruptcy, Debtor assigned stores 874, 875, 876, 877, 878, 879, 885, 886, 896 and 897 pursuant to an Order Approving Asset Purchase Agreement with Fleming Companies, Inc. dated July 3, 2001 (doc 1009). Defendant argues that this transfer was pursuant to 11 U.S.C. § 363. Plaintiff argues that this transfer was pursuant to 11 U.S.C. § 365. This does not create a factual question because the dispute is a legal question.

10. During the bankruptcy the Debtor rejected its leases for stores 812, 868, 880, 894 and 905.

11. All alleged preferential payments made to Defendant, with the exception of $435.33, were made prior to the date on which Defendant would have had to file its claim of lien to secure payments.

12. The lien claims filed by Defendant were timely filed and recorded.

13. Pursuant to Court order (doc 1009) the claim of lien recorded by Defendant on store number 876 in the amount of $172,873.41 has been paid in full and released. This was accomplished by increasing the cure amount to the landlord, and the payment was to the landlord.

14. Pursuant to Court order (doc 1009) the claim of lien recorded by Defendant on store number 879 has been paid in full and released. This also was accomplished by increasing the cure amount to the landlord, and the payment was to the landlord.

15. No other liens have been satisfied or released.

16. Debtor did not own the property or buildings on which the work was performed but instead leased the land and buildings, except for store 885.

CONCLUSIONS OF LAW

1. Plaintiff's complaint is to recover preferential transfers under 11 U.S.C. § 547, which provides:

> Section 547(b) provides:
>
> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition;
> ...
> (5) that enables such creditor to receive more than such creditor would receive if--
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

2. Defendant claims liens by virtue of Sections 48-2-2 and -4, NMSA 1978 (1995 Repl.) which provide in part:

> 48-2-2. Mechanics and materialmen; lien; labor, equipment and materials furnished; definition of agent of owner.
>
> Every person performing labor upon ... or furnishing materials to be used in the construction, alteration or repair of any ... building ... has a lien upon the same for the work or labor done ... or materials furnished...
>
> 48-2-4. [Lien covers improvements and land]
>
> The land upon which any building, improvement or structure is constructed, together with a convenient space about the same ... is also subject to the lien ...

3. Defendant's argument focuses on § 547(b)(5), claiming that it did not receive more than it would have received had it just collected on its lien claims. According to Defendant, it was fully secured because its liens attached to Furr's leasehold interests. Defendant claims that it should be paid in full upon liquidation of the leaseholds.

4. Under New Mexico law, a leasehold is personal property, not real property, even though leases may be treated the same as real property under the real estate conveyancing statutes. Western Sav. & Loan Ass'n v. CFS Portales Ethanol I, Ltd., 107 N.M. 143, 144, 754 P.2d 520, 521 (1988)("A leasehold or a term for years is a chattel, not real property, no matter how long its term.")(citations omitted); New Mexico ex rel. Truitt v. District Court of Ninth Judicial District, Curry County, 44 N.M. 16, 29, 96 P.2d 710 (1939)(A lease for a term of years is a chattel and not real estate in the legal sense. Although statutes may treat leases as real property for the purposes of recording "It does not attempt to convert what was personal property at common law into real estate.") See also Section 47-1-1 NMSA 1978 (1995 Repl.)(The term "real estate" includes leaseholds for the purposes of the real estate conveyance statutes.); Resolution Trust Corp. v. Binford, 114 N.M. 560, 569, 844 P.2d. 810, 819 (1992)("The fact that leaseholds are

personal property, however, does not mean that they cannot be encompassed by the definition of 'real estate' for the limited purposes of the conveyancing statutes.")

5. Under New Mexico law, mechanics' and materialmen's liens attach only to real property, not to a lessee's interest (which is personalty). Boone v. Smith, 79 N.M. 614, 616-17, 447 P.2d 23, 25-26 (1968)(The test of whether a lien attaches to a given article is whether it is a fixture or a permanent part of the building. "[W]here the nature of the article is such that it is not to be permanently attached to the land, it probably remains personalty and not subject to a mechanics' lien."); Post v. Miles, 7 N.M. 317, 34 P. 586, 589 (1893)(The lien attaches to the "structure," and to the land upon which it is "constructed."). See also Sections 48-2-2 and -4 NMSA 1978 (A person performing labor upon or furnishing materials to be used in construction or repair of any building has a lien "upon the same" for the labor and materials. This lien also extends to all or a portion of the land. Even the title of § 48-2-4 "Lien covers improvements and land" suggests that the lien is on the real property.)

6. The Court disagrees with Defendant's argument that its lien attached to Furr's leasehold interests. Defendant cites three cases that it claims cite Sections 48-2-4 and -11 NMSA

1978 (and their predecessor codifications) for the proposition that mechanics' and materialmen's liens attach to leasehold interests. The Court finds that these cases are distinguishable or not supportive of Defendant's position.

The first, Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312, 315 (1937) states:

> Our conclusion is that only the lessee's interest was subject to the lien asserted (see 1929 Comp § 82-204) unless the defendant (the fee owner) permitted his interest to become subject to the lien through failure to post a notice of nonresponsibility as provided by 1929 Comp. § 82-210

This statement is dicta, however, because the only defendant in this case was the fee owner. Furthermore, the central issue of the case was whether a lessee was, as a matter of law, an agent of the owner as found by the trial court.

The second case cited by Defendant is Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.2d 77 (1934). This case does not deal with leasehold interests; rather, it deals with an executory vendor-vendee relationship and the liability of the fee interest when the vendor fails to post a notice of non-liability.

The third case cited by Defendant is Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354 (10th Cir. 1991). The facts of this case involve a lease from the "Miller Group" to Ruidoso Recreation, Inc. The various liens that were filed

in this case, however, were against the fee interest of the Miller Group. The Court never decided whether the liens attached to Ruidoso Recreation's leasehold interest.

Defendant also argues that if the liens may only attach to real property then Section 48-2-11 NMSA 1978, which allows the fee owner to protect its interest from liens by posting a notice of nonresponsibility, is meaningless. But, there are situations other than landlord-tenant to which Section 48-2-11 would apply, e.g., vendor-vendee, co-tenants, life tenants.

7. A bankruptcy claim is secured only to the extent of the value of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a). Debtor did not own any store except for 885, so Defendant's "secured claim" on all the other stores had no value and Defendant's claims were unsecured. Defendant therefore would not be paid in full on its claims in a chapter 7.

8. Debtor transferred its interests in the leases through 11 U.S.C. § 365(f)(2), not § 363(f). See Order finding adequate assurance (doc 1008), Order resulting from Debtor's notice of proposed cure amounts (doc 1009), and Order approving Debtor's assumption and assignment of unexpired leases (doc 1011). Therefore, all the Debtor had to do was comply with the cure and assurance requirements of § 365. Debtor did not need to

comply with § 363 which, arguably, would require payment of Defendant's liens.

9. In its reply brief, Defendant requests leave to file third party complaints against the parties with a current interest in the properties. This Court would lack jurisdiction over this dispute between third party creditors over property which has left the estate. See Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990). This Court can complete its administrative duties without adjudicating that third party claim.

The Court will enter orders granting Trustee's Motion for Partial Summary Judgment and denying Defendant's Motion for Summary Judgment.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 14, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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