In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	
BARRY MAX BURRELL	)	Adversary Proceeding
SANDRA LACY BURRELL	)	
(Chapter 7 Case 90-40838)	)	Number 90-4153
	)	
Debtors	)	
	)	
	)	
	)	
THE PEMBROKE STATE BANK,	)	
E. B. MILES, L. RICHARD LEE,	)	
W. K. POLK and JAMES M. GODLEY	)	
	)	
Plaintiffs	)	
	)	
	)	
	)	
v.	)	
	)	
CREDIT CORPORATION	)	
OF THE SOUTH	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Plaintiffs filed this Adversary Proceeding on September 12, 1990. The parties attempted to settle the matter but were unsuccessful. A hearing was held on Plaintiffs' complaint on July 23, 1992. Pursuant to a Pre-Trial Order entered by this Court on June 11, 1992, the issues at trial were limited to whether or not Defendant has a valid

perfected security interest in certain modular homes by virtue of its floor plan agreement with First Star Homes of Georgia, Inc. Upon consideration of the evidence adduced at trial, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor, Barry Max Burrell, operates a mobile home and modular home sales lot located on Ogeechee Parkway in Savannah. Debtor is an owner and shareholder in this modular home sales business known as First Star Homes of Georgia, Inc. ("First Star"). A large sign which reads "First Star Homes of Georgia" is placed at the entrance to the sales lot. (Transcript p.77).

First Star is a Georgia corporation formed on June 2, 1988. *See* certified copy of Certificate of Incorporation dated June 2, 1988, and attached as Exhibit "A" to Defendant's Brief filed with the Court on September 21, 1992. The parties stipulated at the July 23rd hearing that the corporation was formed prior to the transactions at issue in this adversary proceeding. (Transcript p.4). The parties also stipulated that Burrell was the person responsible for running First Star. (Transcript p.4).

Plaintiffs, Pembroke State Bank, E.B. Miles, L. Richard Lee, W.K. Polk, and James M. Godley, are creditors of the Debtor. The Pembroke State Bank made certain loans to Barry Max Burrell, individually, which were guaranteed by Miles, Lee, Polk, and

Godley. (Transcript p.81). These notes have not yet been paid. If these guarantees are enforced, Miles, Lee, Polk, and Godley, would have claims against the Debtor for any amounts paid. Mr. Lee has worked for Pembroke State Bank for over twenty years and has been on the Bank's Board of Directors. (Lee Deposition p.6). Mr. Miles is President of Pembroke State Bank and a board member, having worked at the Bank for forty-five years. (Miles Deposition p.4). Mr. Polk is a farmer and land developer, who entered the agreement with Burrell primarily to sell land. (Polk Deposition p.6). Mr. Godley is a former employee of Burrell and First Star Homes. (Godley Deposition p.3-4).

Plaintiff, L. Richard Lee, testified at the hearing that The Pembroke State Bank made the loans to Burrell to purchase certain modular homes. (Transcript p.78). The two modular homes at issue here are referred to by the parties as the Black Creek House and the Pembroke House, respectively, and shall be referred to as such in this order.

The obligations to The Pembroke State Bank are evidenced by certain notes. Defendant's Exhibit "4" introduced into evidence at the July hearing is a note for $35,500.00, signed by Barry Max Burrell in favor of Pembroke State Bank.[1] This note is dated January 10, 1990. Defendant's Exhibit "5" is a note in favor of Pembroke State Bank for $35,500.00 signed by Barry Max Burrell as primary obligor and guaranteed by Polk, Miles, and Lee. This note is dated September 25, 1989. Defendant's Exhibit "6" is a note for $8,411.89 in

[1] As many of Plaintiffs' and Defendant's Exhibits at trial were the same, the parties agreed for the Court to use Defendant's copies of the Exhibits, which include Plaintiffs' Exhibits 1-9. Defendant's Exhibits 1-3 are copies of a financing agreement, the UCC-1, and a check for payment of the mobile home. Defendant's Exhibit 4-13, inclusive, correspond to Plaintiffs' Exhibits 1-10. Defendant's Exhibits 14, 15, and 16 were also admitted into evidence. All Exhibits shall be referred to as Defendant's Exhibits.

favor of Pembroke State Bank and signed by Barry Max Burrell and guaranteed by Lee, Miles, and Polk. This note is dated August 1, 1989. Defendant's Exhibit "7" is a note for $39,000.00 signed by Burrell, Polk, and Godley. This note is dated January 10, 1990. According to Lee's testimony at the hearing, the $8,411.89 note was renewed and an additional $27,100.00 advanced for the Black Creek modular home purchase which represents the $35,500.00 note evidenced in Exhibit "5". (Transcript p.74). Exhibit "7" is the January note intended for payment of the Pembroke house. (Transcript p.8). No security agreements are attached to the notes, which appear to be unsecured.[2] *See generally* Transcript pp. 9 and 81. Lee testified that Pembroke State Bank and the other Plaintiffs had no written agreement or security agreement with Burrell and that none of the Plaintiffs checked the UCC records in Chatham County under either Barry Max Burrell or First Star of Georgia, Inc., before the loan was made to Burrell. (Transcript p.80). *See also* Godley Deposition, p.20; Transcript p.9.

Mr. Lee testified that Burrell was to use the loan proceeds from the September note to purchase the Black Creek House, which was to be placed at Black Creek on a lot owned by Lee, Polk, and Miles. (Transcript pp. 75 and 80). Defendant's Exhibit "5" represents the note made for the Black Creek House purchase. According to Mr. Lee, the funds were advanced for the purchase, and then the home was to be placed on the property. The mobile home was delivered and placed on the Black Creek property; however,

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[2] Counsel for Pembroke State Bank argued that the Bank would make an equitable argument that it should be treated as secured. However, the issues for the July 23, 1992, hearing were limited to whether or not Credit Corporation had a valid security interest. I informed the parties that if Credit Corporation's security interest were found to be unperfected, then the Chapter 7 Trustee would be added as a party to pursue any actions for the benefit of the estate.

Defendant, Credit Corporation of the South ("Credit Corporation"), which sold the mobile home, was not paid. (Transcript p.8).

Lee testified that Plaintiffs and Burrell planned to place the modular home on the Black Creek property, sell the home, pay off the note, and divide the proceeds between Plaintiffs and Burrell. (Transcript p.75-76; Transcript p.9). Lee further testified that Pembroke State Bank and the other Plaintiffs had no written agreement setting forth their plans to purchase and later sell the modular home and split the proceeds. (Transcript p.80).

At the hearing, counsel for Credit Corporation asked Lee if he knew that Burrell did not own the home at the time the note was executed. Lee responded first by saying "I thought we all owned it. We paid for it," and "I knew he had it ordered and we were paying for it," but finally agreed that it was correct that he knew that Burrell did not own the home and that Burrell was purchasing it from another entity. (Transcript p.77). Lee admitted that he was familiar with Burrell's business and his ownership of First Star, which Burrell had listed as an asset on a financial statement submitted to Pembroke State Bank. (Transcript p.76-78).

The January 10, 1990, note for $39,000.00 represents funds disbursed to Burrell for the purchase of the Pembroke house. The house was delivered to the First Star lot, but was repossessed by Credit Corporation, which had not been paid by Burrell or First Star. (Transcript p.8). This home was later sold to another person. (Transcript p.56).

Plaintiffs and Burrell had intended to set up the house on property in Pembroke, sell it like the Black Creek house, and split the profits. This agreement to split the profits on the Pembroke House was not put in writing. (Transcript p.9).

Defendant, Credit Corporation of the South, is in the business of selling mobile and modular homes. First Star was a dealer which purchased such homes from Credit Corporation of the South. Credit Corporation argues that it is a secured creditor of First Star Homes, with perfected security interests in the Black Creek House and the Pembroke House. Credit Corporation fervently argues that it dealt with the dealer, First Star, as a corporation and that it is not a creditor of the Debtor, Barry Max Burrell.

Defendant introduced into evidence its Inventory Financing Agreement between Credit Corporation and First Star dated May 30, 1989. *See* Defendant's Exhibit "1". Exhibit "1" also includes the Addendum-Inventory Financing Agreement. This Inventory Financing Agreement grants Credit Corporation a security interest "in all of Dealers' [First Star's] inventory, wherever located, whether new, used or repossessed (including, but not limited to, mobile homes, manufactured homes, modular homes, motorhomes . . .)". The agreement provides that First Star is the dealer "in the business of selling mobile homes at retail sale . . . "

Defendant also introduced into evidence a copy of the UCC-1 financing statement filed in Chatham County on May 30, 1989. *See* Defendant's Exhibit "2". This financing statement was filed under the name First Star Homes of Georgia, Inc., the legal

name of Burrell's business and the party obligated under the security agreement. This filed financing statement properly perfected Credit Corporation's security interest in the inventory of First Star.

Defendant introduced into evidence copies of the invoices for the two modular homes sold to First Star. The invoice prepared for the Black Creek House stated on its face that the home was sold to "Barry Burrell, d/b/a First Star Homes, Inc." The invoice listed the payment terms as C.O.D. *See* Invoice dated September 15, 1989, Defendant's Exhibit "11". The second page of Exhibit "11" appears to be an order form which lists the "Dealer ID" as "Berry Burrell, d/b/a First Star Homes, Inc." Although the Debtor's name is misspelled as "Berry" instead of "Barry", the parties do not dispute that the name used refers to Barry Burrell, the Debtor.

Defendant's Exhibit "12", dated June 20, 1989, the invoice for the Pembroke House, lists the buyer as Barry Burrell, d/b/a First Star, the same names which appear on the other invoice, Exhibit "11". The payment terms on the Pembroke House invoice were listed as net 10 days.

The delivery check sheet, Defendant's Exhibit "14", lists the dealer as First Star Homes on Ogeechee Road and the contact person as "Berry" Burrell. Also part of Exhibit "14" is a warranty service work order which lists the dealer as First Star Homes. Another part of this Exhibit "14" is a parts requisition form which lists First Star Homes as the "retail customer" or purchaser. Several parts requisition forms and warranty service

work orders are included in Exhibit "14" and reflect the same information on dealer and customer.

Defendant's Exhibit "15" is a Bill of Lading which reflects the consignee's name as First Star Homes. Defendant's Exhibit "16" is a "Manufacturer's Statement or Certificate of Origin to a Mobile Home" which is the equivalent of a certificate of title for an automobile. This certificate reflects that title to the home was transferred from Destiny, the manufacturer, to "Berry Burrell, d/b/a First Star Homes, Inc." Mr. Dekle, a former employee of Credit Corporation, testified that Credit Corporation would keep possession of the Certificate of Origin until the buyer paid for the modular home. (Transcript p.53). Credit Corporation provided financing for Destiny Industries, an affiliated corporation, and for the purchasers buying the modular homes. *See* Defendant's Exhibit "13", a check for $55,212.01 from Credit Corporation to Destiny Industries.

Mr. Dale, an employee of Destiny Industries, Inc., the manufacturer, testified that Destiny never sold the modular homes to Barry Burrell individually and did not have a floor plan arrangement with Burrell individually. (Transcript p.38). Mr. Dale further testified that the modular homes were sold to and delivered to First Star Homes, the dealer. (Transcript pp. 40-42). Mr. Dekle also testified that the modular homes were sold to and delivered to First Star, the dealer, and that Credit Corporation had no financing agreements with Burrell individually. (Transcript pp. 45-60). Defendant argues that the testimony, the Certificate of Title, and the other documents considered together show that Credit Corporation was a creditor of First Star only and is properly perfected as to the two modular

homes in issue by filing a UCC-1 under the name of First Star as opposed to Barry Burrell, individually.

Plaintiffs argue that they transacted with Barry Burrell, individually, for the purchase of the modular homes. (Transcript p.76). The January 10, 1990, note for $39,000.00 was signed by Burrell as well as Polk and Godley. The evidence showed that Polk and Godley signed the note primarily for the purpose of guaranteeing the debt to the Bank if Burrell failed to pay. (Transcript p.81). However, Plaintiffs Polk and Godley assert that signing the note also gives them an equitable interest in the Pembroke House as bona fide purchasers for value. Despite these assertions, there are no written agreements which show how the proceeds of the note were to be used or show that Plaintiffs have a security interest in the collateral purchased with these proceeds. (Transcript p.9).

Plaintiffs argue that they were presented with an invoice reflecting the buyer as Barry Burrell, d/b/a First Star Homes. (Transcript p.96). Plaintiffs assert that the invoice was ambiguous and indicated that the modular homes belonged to Barry Burrell and not First Star. However, the evidence showed that Plaintiffs did not rely on the invoice when the notes were made as Plaintiffs did not discover or see the invoice until after the notes were signed and the funds disbursed. Plaintiff Lee admitted that the UCC records were not checked for other security interests in the homes prior to the checks being disbursed. Defendant showed that the invoice listed both Burrell and First Star, which placed Plaintiffs on inquiry notice that creditors of First Star could have a security interest in the modular homes.

Plaintiffs assert that Defendant should have filed a UCC-1 under the name of Barry Burrell in order to have a perfected security interest in the two modular homes. As the UCC-1 was filed only under First Star's name, Plaintiffs argue that the filed financing statement was seriously misleading under the Uniform Commercial Code, O.C.G.A. §11-9-402(7), and ineffective. Plaintiffs demand that the Court declare Defendant's security interests in the two modular homes unperfected.

CONCLUSIONS OF LAW

In the Pre-Trial Order, I limited the issues tried at the July hearing to whether Credit Corporation held a valid perfected security interest in the modular homes.

Under Georgia's version of the Uniform Commercial Code, a security interest attaches when the following three events have occurred:

> 1) . . . [T]he debtor has signed a security agreement which contains a description of the collateral . . .
>
> 2) Value has been given; and
>
> 3) The debtor has rights in the collateral.

O.C.G.A. §11-9-203(1).

Credit Corporation argues that the "debtor" for purposes of attachment and

perfection of its security is First Star not Barry Burrell. Plaintiffs argue that the "debtor" is Barry Burrell and that Credit Corporation is unsecured since it had no security agreement with Barry Burrell and is unperfected by filing its financing statement under the name First Star instead of Barry Burrell.

Weighing all the evidence, I conclude that Credit Corporation dealt only with First Star Homes of Georgia, Inc., the corporate form. Barry Burrell was merely listed on the documents as the contact person and individual responsible for operating First Star.

First, Defendant's security agreement, an Inventory Financing Agreement, shows the debtor as First Star. *See* Defendant's Exhibit "1". This agreement grants Credit Corporation a security interest in First Star's inventory and provides that First Star is the dealer "in the business of selling mobile homes at retail sale . . . ".

First Star as the debtor signed a security agreement describing the modular homes as collateral. This agreement was signed on behalf of First Star by Barry Burrell as officer and owner of First Star. *See also* Transcript p. 45. Kathleen S. Murphy also signed the agreement as an officer and owner of First Star. Barry Burrell signed the agreement for First Star in his representative capacity and nothing indicates he signed the agreement as an individual.

Credit Corporation provided value by selling and delivering the mobile homes to First Star. The Certificates of Origin reflect that the titles to the homes were

transferred to "Berry Burrell, d/b/a First Star Homes, Inc.," although Credit Corporation maintained possession of the certificates. First Star was invoiced for the modular homes and was obligated to pay for them.

Plaintiffs argue that the invoice listed Burrell as the buyer and that they were led to believe Burrell individually purchased the homes. Plaintiffs also argue that listing Burrell on the Certificate of Origin vests title in Burrell. I disagree. The invoice and the Certificate of Origin list the buyer as Barry Burrell, d/b/a First Star Homes, Inc. Both names are listed; however, the reference to Burrell is merely to provide additional information on the owner, contact person, and person responsible for operating First Star. Burrell is not listed as an individual buyer but as the person doing business as First Star, the dealer. The names reflected on the title vest title in First Star only.

Each document reflecting transactions with First Star refers to the business as Barry Burrell, d/b/a First Star Homes of Georgia, Inc., or merely to First Star indicating that First Star, a separate corporate entity, would have an interest in the modular homes. Plaintiff Lee testified that he was aware of Burrell's ownership of First Star. (Transcript pp. 76-78). At all times Credit Corporation did business with First Star in its extension of credit and Destiny Industries sold the homes to First Star. All dealings with Barry Burrell by Credit Corporation and Destiny were in his capacity as a corporate officer.

When the modular homes were delivered according to First Star's requests, First Star as the debtor obtained rights in the collateral. *See* O.C.G.A. §11-9-203(1).

Therefore, Credit Corporation's security interest properly attached to the modular homes delivered to First Star, giving Credit Corporation a security interest in the modular homes. However, the court must determine if the financing statement filed only in the name of First Star, was seriously misleading.

The Uniform Commercial Code, O.C.G.A. Section 11-9-402(1) provides as follows: "A financing statement is sufficient if it gives the names of the debtor and the secured party . . . " Also, Section 9-402(7) of the Georgia version of the Uniform Commercial Code requires that this financing statement must sufficiently show:

> [T]he name of the debtor if it gives the individual, partnership, or corporate name of the debtor, whether or not it adds other trade names or the names of partners . . .

Additionally, O.C.G.A. §11-9-402(8) provides:

> A financing statement substantially complying with the requirements of this Code section is effective even though it contains minor errors which are not seriously misleading.

The Uniform Commercial Code Official Comment 7 to Section 9-402 provides:

> Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of

> individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. However, provision is made in Section 9-403(5) for indexing in a trade name if the secured party so desires.

Usually, the courts interpreting Section 9-402(7) and the "seriously misleading" test, have had to decide whether or not filing in a trade name alone is sufficient notice of a security interest. The binding circuit authority on Uniform Commercial Code Section 9-402(7) is Brushwood v. Citizens Bank of Perry (In re Glasco, Inc.), 642 F.2d 793 (5th Cir. 1981). In Glasco, a 2-1 panel decision, the Fifth Circuit concluded that filing a financing statement under a debtor's trade name as opposed to its legal name was not seriously misleading. The debtor's legal name was "Glasco, Inc." Debtor operated its business under the trade name "Elite Boats, Division of Glasco, Inc." The creditor filed its financing statement under this trade name.

The court in Glasco determined that the proper test was to judge "each case . . . on its own facts with the focus on whether potential creditors would have been misled due to the name by which the debtor was listed in the financing statement." Glasco, 642 F.2d at 796. The court concluded that creditors would not have been misled by this filing as debtor held itself out as "Elite Boats, Division of Glasco, Inc." using only this trade name, which appeared on its checks, stationary, bank accounts, bills, contracts, and telephone listing. The court could not find one instance where the debtor represented itself using its

legal name, Glasco, Inc. Id. *See generally* In re Vital Breathing Products, Inc., 98 B.R. 97 (Bankr. N.D.Ga. 1988).

As enunciated in Glasco, the issue concerns whether "potential creditors" could have been misled. There is no requirement that actual creditors prove reliance on the filed financing statement or lack of one. In re Swati, Inc., 54 B.R. 498 (Bankr. N.D.Ill. 1985). According to the bankruptcy court in In re Simpson Motor Co., 101 B.R. 813 (Bankr. N.D.Ga. 1989) the "standard for perfection, however, is an objective standard based solely upon what strangers to the transaction can and should ascertain from the public record." 101 B.R. at 816. The issue is whether or not a hypothetical reasonably prudent creditor, either secured or unsecured, would have been misled. *See generally* In re McBee, 714 F.2d 1316, 1324 (5th Cir. 1983).

In In re Swati, Inc., the bankruptcy court interpreted the Illinois version of Uniform Commercial Code Section 9-402(7). The debtor's legal name was Swati, Inc., and debtor also did business as King's Plaza Hotel. The creditor filed its UCC financing statement under the trade name King's Plaza Motel, as opposed by King's Plaza Hotel the correct name. The bankruptcy court determined that filing in the trade name, even the correct trade name, was insufficient.

The bankruptcy court emphasized the Uniform Commercial Code Official Comment 7, cited above, which states that trade names are too uncertain and unlikely to be known by creditors searching for prior perfected security interests. The court also cited the

Illinois Code Comment to Section 9-402(7) which states: "Where the debtor is incorporated, the name of the corporation should always be used in the financing statement . . . " Although Georgia has not adopted the Illinois comment, it is persuasive on the issue of whether or not Credit Corporation should have additionally filed a UCC financing statement under Barry Max Burrell. I conclude that such a filing was not necessary. Credit Corporation's filing in the name of First Star, the corporation, was sufficient to perfect First Star's security interest and is not seriously misleading.

Credit Corporation has a valid, properly perfected security interest in both modular homes.[3] As a result, Credit Corporation acted properly in repossessing the Pembroke house when it failed to receive timely payment. Instead of filing under a trade name or name of the owner, Credit Corporation properly filed under the corporate name. As stated in Official Comment 7 to 9-402(7) the Uniform Commercial Code contemplates filing in the name of the partnership and not the name of an individual partner. Similarly here, the Uniform Commercial Code contemplates filing in the name of the corporation and not the name of an individual owner or shareholder. Here, the proper legal name of the corporation was used.

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[3] Defendant asserts that the Black Creek house can be removed from the real property with little damage to the foundation and land. As Plaintiffs own the real property where the house is situated, they have an interest in making sure that the proposed removal does not harm the land. It appears that the best solution would be to sell the home as constructed, pay off Credit Corporation and give the remaining proceeds to Plaintiffs. Plaintiffs are free to assert their interests in the removal or possible sale of the Black Creek house.

ORDER

IT IS HEREBY THE ORDER OF THIS COURT that Defendant, Credit Corporation of the South, has a valid perfected security interest in the two modular homes described above as the Black Creek House and the Pembroke House.

_____
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of November, 1992.