

IN THE SUPREME COURT, STATE OF FLORIDA

CASE NO. 66,416

ITT INDUSTRIAL CREDIT COMPANY,

Petitioner,

vs.

EDWARD V. REGAN, ETC.,

Respondent.

FILED

SID J. WHITE

FEB 8 1985

CLERK, SUPREME COURT

By

Chief Deputy Clerk

THIS IS AN APPEAL FROM THE FIRST
DISTRICT COURT OF APPEAL OF A
QUESTION OF GREAT PUBLIC IMPOR-
TANCE UNDER RULE 9.030(a) (2) (A)
(v).

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STATEMENT OF THE CASE AND DISPOSITION IN THE LOWER TRIBUNAL WITH
REFERENCE TO PAGES IN THE APPENDIX

Filed with this Brief is an Appendix. Reference to the Appendix will be indicated as follows: (App. " ")

In the Circuit Court of Duval County, Florida a mortgage foreclosure action was filed. The Mortgagee was foreclosing a real estate mortgage and a security agreement on personal property located in Duval County. The subject of the foreclosure action was a Holiday Inn in Jacksonville. The Defendants were the owners of the hotel and various suppliers of equipment, a tenant in the hotel, and the Department of Revenue among others. This Petitioner was a Defendant who provided all of the computer equipment for running the hotel.

The Plaintiff and Respondent herein filed a Complaint and ITT, Petitioner herein, filed an Answer and moved for Summary Judgment. The trial court granted ITT's Motion for Summary Judgment. (App. "A")

The Mortgagee appealed to the District Court of Appeal, First District. The District Court issued an opinion on June 21, 1984 affirming the trial court's decision. (App. "B") That decision upheld the trial court based upon International Harvester Credit Corporation v. American National Bank of Jacksonville, 296 So2d 32 (Fla 1974). The "debtor's equity" concept was the basis for the First District upholding the trial court.

Subsequently, Appellant filed a MOTION FOR REHEARING OR CLARIFICATION and on October 26, 1984 the First District Court issued an OPINION ON MOTION FOR REHEARING OR CLARIFICATION. (App. "C")

Subsequently, the Mortgagee filed a MOTION OF APPELLANT FOR EXTRAORDINARY RELIEF based upon discovering a legislative reference to the International Harvester case. Thereafter, the First District Court on December 19, 1984 issued an OPINION ON MOTION FOR EXTRAORDINARY RELIEF (App. "D") deferring to the suggested legislative intent and certifying to the Supreme Court a question of great public importance under Rule 9.030(a)(2)(A)(b) as follows:

"Does the protection afforded purchase money creditors under the "debtor's equity" concept of International Harvester survive the enactment of Chapter 78-222, Laws of Florida?".

The Petitioner filed a NOTICE TO INVOKE DISCRETIONARY JURISDICTION of the Supreme Court and this court directed in its BRIEFING SCHEDULE for the filing of Petitioner's Brief on the merits.

STATEMENT OF THE FACTS INCLUDING NATURE OF THE CASE, WITH
REFERENCE TO PAGES OF THE APPENDIX

On or about October 31, 1979 a limited partnership called Jacksonville Hotel, Ltd. was formed for the purpose of starting and running a Holiday Inn in downtown Jacksonville, Florida. The limited partnership gave the Barnett Bank of Jacksonville, N.A. a Promissory Note, Mortgage, and Security Agreement liening their real and personal property. According to the Complaint of the Respondent/Mortgagee those documents were recorded in Official Records Volume 4998, beginning at Page 190, of the Public Records of Duval County, Florida.

The Mortgage and Security Agreement both contained the following paragraph relating to what assets were liened. See Appendix "E" for a photocopy of the page of the MORTGAGE AND SECURITY AGREEMENT containing the following paragraph. The remaining portions of the Respondent/Mortgagee's Complaint and attachments are not relevant and therefore this one page is in the Appendix.

"(B) All buildings, structures, and improvements of every nature whatsoever now or hereafter situated on the Land, and businesses operated thereon or therefrom, and the business assets thereof, including without limitation all franchises and licenses, and all fixtures, machinery, equipment and personal property of every nature whatsoever now or hereafter owned by the Mortgagor and located in, on or used or intended to be used in connection with or with the operation of said Land, buildings, structures or other improvements, including all extensions, additions, improvements, betterments, renewals and replacements to any of the foregoing; and all of the right, title and interest of the Mortgagor in any such personal property or fixtures subject to a conditional sales contract, chattel Mortgage or similar lien or claim together with the

benefit of any deposits or payments now or hereafter made by the Mortgagor or on its behalf."

On or about March 18, 1980 ITT INDUSTRIAL CREDIT COMPANY entered into a financing arrangement with the limited partnership for the purpose of financing a computer system to be used in the hotel. This cost approximately \$278,640.00. ITT filed its UCC-1 financing statement with the Secretary of State on May 27, 1980. The financing statement covered the computer equipment described in ITT's leasing-financing documents.

On May 22, 1980 the Barnett Bank of Jacksonville, N.A., assigned its Note, Mortgage and Security Agreement to the Respondent.

Subsequently, the limited partnership defaulted on its obligations and the Respondent filed its mortgage foreclosure action.

ISSUE

"DOES THE PROTECTION AFFORDED PURCHASE MONEY CREDITORS UNDER THE "debtor'S EQUITY" CONCEPT OF INTERNATIONAL HARVESTER SURVIVE THE ENACTMENT OF CHAPTER 78-222, LAWS OF FLORIDA?"

ARGUMENT ONE OF LEGISLATIVE LANGUAGE APPEARING IN A PREAMBLE

It appears that after the Supreme Court of Florida issued its decision in International Harvester Credit Corp. v. American National Bank Of Jacksonville, 296 So2d 32(Fla 1974) that the Legislature in 1978 set forth in Senate Bill number 417 that it was unhappy with the Florida Supreme Court. That unhappiness was set forth in the preamble and whereas of that Senate Bill. (App. "F") What the Legislature did was simply add a sentence at the end of Section 679.312(4). That statutory section reads as follows:

"(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter. Failure to so perfect shall cause the priority of said purchase money security interest to be determined under Subsection 5."

"A preamble to a statute is an introductory or prefatory clause, following the title and preceding the enacting clause, explanatory of the reasons for its enactment and the objects sought to be accomplished. It is not an essential or effective part of an act and can not enlarge or convert powers, or cure inherent defects in the statute" 49 Fla Jur 2d, Statutes, Section

59, Preamble, Page 73. While the Legislature appears to be expressing its disapproval of the International Harvester case in the preamble of Chapter 78-222, F.S. the actual law that it passed does not appear to reverse the "debtor's equity" concept.

This is true since both the Mortgagee in his appeal and ITT in its Answer Briefs never discovered the Legislature's displeasure by reading and interpreting the above statute. Apparently the Mortgagee stumbled across Senate Bill number 417 by accident since he raised it for the first time by means of a MOTION FOR EXTRAORDINARY RELIEF after the First District had issued its second opinion clarifying and upholding the trial court. ITT likewise was surprised and very taken back by the discovery of Senate Bill number 417. Therefore, two competent law firms acting professionally and vigorously on behalf of their clients were not put on notice that the "debtor's equity" concept as expressed in International Harvester was possibly repealed by Section 679.312.

Article 3, Constitution of the State of Florida, Section 6, states that the enacting clause of every law shall read: "be it enacted by the Legislature of the State of Florida:" and thereafter shall follow the law. Therefore, the "WHEREAS" and the intent expressed therein is simply dicta unless codified after the enacting clause. While the Legislature may have intended to negate the debtor equity concept in Florida it failed to carry that forward into the law of the state.

There is a general rule of law called the "test of vagueness" which applies in reviewing laws. Chapter 78-222 violates the vagueness principle since reasonable and competent citizens can not refer to that law and with reasonable clarity and certainty ascertain their rights.

ARGUMENT TWO REGARDING CONSTITUTIONAL AND EQUITABLE PRINCIPALS

Article 1, Constitution of the State of Florida, Section 9 Due Process, states that no person shall be deprived of life, liberty or property without due process of law. Inherent in due process is that a person be given reasonable and adequate notice of the laws that control aspects of his life and livelihood. When a law fails to put one on notice of what is required of him then the law, not the citizen, is at fault and must be declared unconstitutional.

Chapter 78-222, as it amended Section 679.312 (3), (4), (5) is void as relates to repealing the "debtor's equity" concept as long established in the state of Florida and enumerated in International Harvester.

ARGUMENT THREE REGARDING PLACE OF FILING

It is clear in the record from the trial level to the appellate level that the Mortgagee filed in the county of Duval County and has relied upon that county filings to assert priority over ITT. ITT has filed its financing statement with the Secretary of State. This is a fundamental error by the Mortgagee and this court could simply dispose of this case by acknowledging the fact that as regards equipment the proper place of filing is with the Secretary of State as provided and required by Section 679.401(1)(c).

Therefore, there is no conflict of security interest since the Mortgagee filed in the wrong place and there is only one good and sufficient filing and that is ITT's.

ARGUMENT FOUR FOR REASONABLE CONSTRUCTION
OF BUSINESS DOCUMENTS

It is basic law in Florida that a purchase money security interest takes priority over conflicting security interest to the extent of the consideration given. Cheves v. First National Bank, 83 So 870 (Fla 1920). The fundamental fairness of that concept has held throughout our judicial history as shown by the fact that purchase money mortgages are given precedence over prior outstanding final judgments, homestead interest, and mechanic's liens. Cheves v. First National Bank, 83 So 870 (Fla 1920); Porter v. Teate, 17 Fla. 813 (Fla 1880); National Title Insurance Company v. Mercury Builders, Inc., 124 So2d 132 (Fla 3rd DCA 1960). Therefore, the status of "purchase money interest" and the "debtor equity concept" runs throughout the entire legal history of this state and is well known to all attorneys and business people.

With the above statement as a starting point then it is logical to review the security agreement paragraph that is relevant to this law suit. That paragraph reads as follows:

"(B) All buildings, structures, and improvements of every nature whatsoever now or hereafter situated on the Land, and businesses operated thereon or therefrom, and the business assets thereof, including without limitation all franchises and licenses, and all fixtures, machinery, equipment and personal property of every nature whatsoever now or hereafter owned by the Mortgagor and located in, on or used or intended to be used in connection with or with the operation of said Land, buildings, structures or other improvements, including all extensions, additions, improvements, betterments, renewals and replacements to any of the foregoing; **and all of the right, title and interest of the Mortgagor in any such personal property or fixtures subject to a conditional sales contract, chattel Mortgage or similar lien or claim**

together with the benefit of any deposits or payments now or hereafter made by the Mortgagor or on its behalf." (Bold print added by Petitioner)

The first two thirds of the above paragraph states in general language that the Security Agreement attaches to all the assets of the hotel including "equipment and personal property of every nature whatsoever now or hereafter owned by the Mortgagor...". Obviously that is very inclusive and one would think that nothing would need to be added.

However, the last third of the paragraph must have some legal significance and the court can not assume it is just redundant. The only logical answer, given legal understanding of the debtor equity concept, is that the first two thirds of the paragraph relates to those items which the hotel owned outright and the last third relates to the "debtor equity" that the hotel may have in financed collateral.

It is logical and reasonable to believe that the paragraph was written by an attorney cognizant of the fact that there was a difference between fully owned assets and assets subject to a purchase money security interest. Obviously, the Barnett Bank attorneys who drafted the mortgage and security agreement were well aware of Florida law and their knowledge and intent should be recognized. Therefore, it is apparent that this paragraph should be interpreted consistent with general legal understanding and that the last third of the paragraph was intended simply to put a lien on the debtor's equity in after acquired property subject "... subject to a conditional sales contract, chattel mortgage or similar lien or claim".

ARGUMENT FIVE SHOWING PRACTICAL BUSINESS USE OF THE
SECURITY AGREEMENT AND THE RELEVANT PARAGRAPH

The hotel was constantly buying equipment and other personal property. Much of those items were paid for in full or paid for on open account in a short period of time. However, there is a separate category of items which the business community and this court can take cognizance. These are expensive assets which must be financed. The practical question that arises is whether or not a Mortgagee wishes to be contacted each and every time one of its debtors desires to finance a piece of equipment.

The last third of the relevant paragraph is saying that the Mortgagee does not want to be contacted when people are buying equipment and that the bank acknowledges that it will only have a lien on the debtor's equity. In this manner purchase money security interest need not be concerned with the first mortgage and can sell their goods, take back their security interest, without any concern about the first Mortgagee. Therefore, the paragraph is obviously written with that business practicality in mind.

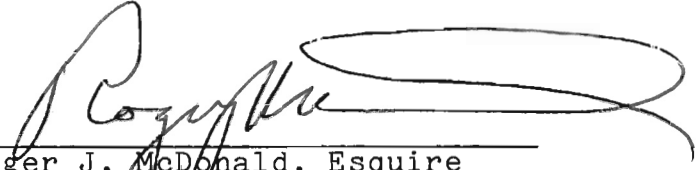
CONCLUSION AND REQUEST FOR PRECISE RELIEF SOUGHT

The Legislature has failed in its attempt to pass a law that would repeal the "debtor's equity" concept in Florida. Constitutional requirements of due process, notice, and vagueness are all violated and therefore the Legislative Amendment is unconstitutional.

The paragraph in the Security Agreement drafted by the Mortgagee clearly shows an intent to accept the "debtor equity" concept. This case could narrowly be decided by the Supreme Court on the idea that these parties dealt with that in mind and therefore the constitutionality of the statute does not need to be reached.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Robert C. Gobelman and Jerry J. Waxman, 1500 American Heritage Building, Jacksonville, Florida 32202 and the original and seven (7) copies of this Brief have been filed with the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 this 7th day of February, 1985.



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