Signed
047

No. 77,390

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 24 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

UNITED STATES OF AMERICA,

Appellant

v.

KENNETH R. McGURN, et ux.,

Appellees

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN (202) 514-3361
DAVID ENGLISH CARMACK (202) 514-2933
KENNETH W. ROSENBERG (202) 514-1919
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D. C. 20044

Of Counsel:

KENNETH W. SUKHIA
United States Attorney

TABLE OF CONTENTS

CITATIONS

Cases:

Page

Cases (cont'd):

Statutes:

Miscellaneous:

IN THE SUPREME COURT OF FLORIDA

No. 77,390

UNITED STATES OF AMERICA,

Appellant

v.

KENNETH R. McGURN, et ux.,

Appellees

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SUMMARY OF THE ARGUMENT

Where the federal tax lien is concerned, priorities are a matter of federal law. The Federal Tax Lien Act provides that a "holder of a security interest" takes priority over the federal tax lien, until notice of the tax lien is properly filed. The certified question turns on whether the McGurns qualified as "holders of a security interest."

Under Section 6323(h) of the Internal Revenue Code, a "security interest" exists when, inter alia, the interest "has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation * * *." The McGurns contend that their interest was so protected because they filed it in accordance with Fla. Stat. § 561.65, providing for filing interests in liquor licenses with the Division of Alcoholic Beverages and Tobacco. We contend, however, that the McGurns' interest was not so protected because they did not also file a

financing statement with the Secretary of State under the Florida Uniform Commercial Code, which requires such filing to perfect a security interest in such "general intangibles" as liquor licenses.

There is no dispute that the McGurns failed to perfect their interest under the UCC. Their argument--that filing under the UCC was unnecessary because Fla. Stat. § 561.65 supplanted the filing requirement of the UCC to give them a security interest against a subsequent judgment lien creditor arising out an unsecured obligation--is not supported by the language of the statute, by the legislative history, or by accepted canons of statutory construction. The filing requirements of the Florida UCC plainly apply to perfection of a security interest in a liquor license, and it is this Court's duty to harmonize the statutes and give each a reasonable field of operation. Thus, Fla. Stat. § 561.65 can only be read as establishing that dual filing is required to perfect a security interest in a Florida liquor license. Accordingly, the recording of the McGurns' security interest with the Florida Division of Alcoholic Beverages and Tobacco pursuant to Fla. Stat. § 561.65 was not sufficient under Florida law to perfect that interest against a subsequent judgment lien.

ARGUMENT

THE RECORDING OF THE McGURNS' SECURITY INTEREST WITH THE FLORIDA DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO PURSUANT TO FLA. STAT. SECTION 561.65 WAS NOT SUFFICIENT UNDER FLORIDA LAW TO PERFECT THAT INTEREST AGAINST A SUBSEQUENT JUDGMENT LIEN

A. Introduction--the role of Florida law in determining priorities of the federal tax lien and competing liens

While state law determines the nature and extent of a taxpayer's interest in property, federal law determines the priority of liens asserted against a taxpayer's property in competition with the federal tax lien. E.g., United States v. National Bank of Commerce, 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985); United States v. Pioneer American Insurance Co., 374 U.S. 84, 88, 83 S.Ct. 1651, 10 L.Ed.2d 770 (1963) ("it is a matter of federal law when a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien"); Aquilino v. United States, 363 U.S. 509, 514, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960); United States v. Security Trust & Savings Bank, 340 U.S 47, 49, 71 S.Ct. 111, 95 L.Ed. 53 (1950) ("effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question"). Sections 6321 through 6323 of the Internal Revenue Code (26 U.S.C.), as amended by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, set forth the rights of private creditors with respect to the federal tax lien.

Internal Revenue Code Section 6323(a) provides that the federal tax lien is not valid, until notice thereof is properly filed under Section 6323(f), against, inter alia, a "holder of a security interest." Code Section 6323(h)(1) defines "security interest" as--

> any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

The resolution of the certified question turns on the requirement of Section 6323(h)(1) that a security interest must have "become protected under local law against a subsequent judgment lien arising out of an unsecured obligation * * *."

B. Under Florida law, dual filing is required to perfect a security interest in a liquor license

Florida law provides the following with regard to perfection of security interests in liquor licenses:

> 561.65. Mortgagee's interest in license
>
> * * * *
>
> (4) In order to perfect a lien or security interest in a spirituous alcoholic beverage license which may be enforceable against the license, the party which holds the lien or security interest, within 90 days of the date of creation of the lien or security interest, shall record the same with the division on or with forms authorized by the division * * *.
>
> * * * *

Fla Stat. § 561.65. The McGurns complied with the requirements of that statute by timely filing their security agreement with the Florida Division of Alcoholic Beverages and Tobacco.

The Florida UCC by its terms also applies here. The chapter on secured transactions applies "[t]o any transaction (regardless of form) which is intended to create a security interest in personal property * * * including * * * general intangibles * * *." Fla. Stat. § 679.102(1)(a). As the McGurns recognize (Br. 11), a Florida liquor license is a "general intangible" for purposes of the UCC. In re Coed Shop, Inc., 435 F. Supp. 472, 473 (N.D. Fla. 1977); see Bogus v. American National Bank of Cheyenne, 401 F. 2d 458, 460-461 (10th Cir. 1968) (same as to Wyoming liquor license); Paramount Finance Co. v. United States, 379 F. 2d 543, 544-545 (6th Cir. 1967) (same as to Ohio liquor license); Gibson v. Alaska Alcoholic Beverage Control Board, 377 F. Supp. 151, 153-154 (Alaska 1974) (same as to Alaska liquor license); see also Fla. Stat. § 679.106 ("'[g]eneral intangibles' means any personal property * * * other than goods, accounts, contract rights, chattel paper, documents and instruments"). Thus, it is plain that the McGurns' security interest is subject to the Florida UCC.

UCC Section 9-302, as adopted in Florida, provides that "[a] financing statement must be filed to perfect all security interests," with certain exceptions not applicable here. Fla. Stat. § 679.302. Florida UCC Section 9-401 sets out the filing requirements for perfecting a security interest:

679.401. Place of filing; erroneous filing; removal of collateral

(1) The proper place to file in order to perfect a security interest is as follows:

(a) [Not applicable]

(b) [Not applicable]

(c) In all other cases, by filing in the office of the Department of State.

* * * *

Fla. Stat. § 679.401. Filing under that provision perfects the security interest against a subsequent lien creditor. Fla. Stat. § 679.301(1)(b) (UCC Section 9-301(1)(b)). Protection against a subsequent lien creditor under the latter provision is equivalent to being "protected * * * against a subsequent judgment lien" under Section 6323(h)(1). Texas Oil & Gas Corp. v. United States, 466 F.2d 1040, 1048 n.8 (5th Cir. 1972), cert. denied, 410 U.S. 929, 93 S.Ct. 1367, 35 L.Ed.2d 591 (1973); Dragstrem v. Obermeyer, 549 F.2d 20, 25 (7th Cir. 1977); Nevada Rock & Sand Co. v. United States, 376 F. Supp. 161, 169 (Nev. 1974). The McGurns did not file their security agreement in the office of the Department of State.

The interplay of the two filing statutes is the focus of this appeal. The McGurns contend that their filing under § 561.65 alone was sufficient to perfect their interest against a subsequent judgment lien creditor. (Br. 9-16.) We contend that the interest was not so perfected because the McGurns failed to file also with the Secretary of State.

First, the legislative history of § 561.65(4) does not support the McGurns' theory. § 561.65(4) was enacted in 1981. Fla. Laws 1981, ch. 81-158, § 21. The legislative history of the bill containing the provision simply states,

> The bill provides that in order to perfect an obligation against a liquor license, it must be filed with the division within 90 days of its creation. Current law does not require such filing in order to perfect a lien.

CS/SB's 1034 and 987, Florida Senate Staff Analysis and Economic Impact Statement, June 11, 1981 (updated), at 3. Thus, the legislative history does not indicate that filing under this provision was intended to supplant the filing requirement of the UCC, or that this provision was intended to be the sole filing requirement for perfection of a security interest in a liquor license.

Moreover, the only court which has addressed this issue held squarely that dual filing is required. In In re Seville Entertainment Complex of Pensacola, Inc., 79 B.R. 491 (Bkrtcy. N.D. Fla. 1987), a creditor claimed that it had a properly perfected security interest in the debtor's liquor license. The creditor had filed its lien, however, only with the Secretary of State under Section 679.401, and not with the Division of Alcoholic Beverages as required by Section 561.65. The court held that the interest was not properly perfected because "dual filing was required." 79 B.R. at 493.

The McGurns cite Fla. Stat. § 561.65(5) and (6), which provide procedures whereby a lien on a liquor license may be foreclosed, the license sold, and the proceeds distributed. (Br.

9, 13.) Section 561.65(6) provides that the proceeds of such a sale "shall be paid, first, to the lienholder or lienholders in the order of date of filing * * *." The McGurns assert that, under this statute, they would be paid before a subsequent judgment lien creditor. (Br. 10-11, 14.) The McGurns also contend that this statute cannot be reconciled with Section 679.301(1)(b), p. 5 supra, which grants priority to a lien creditor over an unperfected security interest. (Br. 13-14, 15.) As support for their contentions, the McGurns cite the maxims of statutory construction preferring the more recent and more specific of two conflicting statutes. (Br. 14-17.)

The McGurns' argument is premised on the theory that the two filing statutes conflict, rather than overlap. Section 561.65 does not state as much, and we submit that there is no reason to read that meaning into it. Indeed, such a construction would mean that in enacting Fla. Stat. § 561.56, the Florida legislature repealed by implication the UCC perfection provisions, at least insofar as liquor licenses are concerned. Fla. Stat. § 671.1-104 states, however, that no part of the Florida Code "shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided." In this regard, this Court stated in Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249, 250 (Fla. 1987):

> It is well settled in Florida that the courts will disfavor construing a statute as repealed by implication unless that is the only reasonable construction. * * * The courts' obligation is to adopt an interpre-

> tation that harmonizes two related, if conflicting, statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force.

(Citations and footnote omitted.) The United States Supreme Court has similarly stated, "[w]e must read the statutes to give effect to each if we can do so while preserving their sense and purpose." Watt v. Alaska, 451 U.S. 259, 267, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981); accord 2A Sutherland Statutory Construction, § 51.02 (1984 rev.) ("[s]tatutes for the same subject * * * are construed to be in harmony if reasonably possible").

Section 561.65 may be read harmoniously with the dual filing requirement; "the date of filing" may reasonably be construed as referring to the earliest date upon which both the required filings have been made. Section 561.65(6) is thus reconcilable with the requirements for perfection under the Florida UCC.

Thus, the maxim that the more recently-enacted of two conflicting statutes controls does not apply here. The rule against repeal by implication is overcome only "where there exists a positive repugnancy between the two acts." State of Florida v. Board of Public Instruction of Escambia County, 113 So. 2d 368, 370 (Fla. 1959); accord Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986) ("[o]nly if the two statutory provisions present such an inconsistency as cannot be harmonized or reconciled will the latest expression of legislative will prevail"), citing Tribune Co. v. School Board of Hillsborough County, 367 So. 2d 627 (Fla. 1979), and Askew v. Schuster, 331

So. 2d 297 (Fla. 1976); 49 Fla. Jur. 2d, Statutes § 174, p. 208 (1984).

Accordingly, Section 561.65 does not support the McGurns' position that filing under it alone is sufficient notwithstanding the additional filing requirement of the Florida UCC. Indeed, contrary to their assertion (at Br. 17), upholding the dual filing requirement is the only way that this Court can fulfill its "duty to adopt a scheme of statutory construction which harmonizes and reconciles two statutes and to find a reasonable field of operation that will preserve the force and effect of each." Floyd v. Bentley, supra, 496 So. 2d at 864; Palm Harbor Special Fire Control District v. Kelly, supra, 516 So. 2d at 250.

CONCLUSION

For the foregoing reasons, the recording of the McGurns' security interest with the Florida Division of Alcoholic Beverages and Tobacco pursuant to Fla. Stat. § 561.65 was not sufficient under Florida law to perfect that interest against a subsequent judgment lien.

Respectfully submitted,

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN (202) 514-3361
DAVID ENGLISH CARMACK (202) 514-2933
KENNETH W. ROSENBERG (202) 514-1919
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

KENNETH W. SUKHIA
United States Attorney

MAY 1991

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on counsel for the appellees on this 23d day of May, 1991, by mailing four copies thereof, with postage prepaid, properly addressed to her as follows:

Linda C. McGurn, Esquire
P.O. Box 2900
Gainesville, Florida 32602

Gary R. Allen

GARY R. ALLEN
Attorney