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IN THE SUPREME COURT OF FLORIDA

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WALLING ENTERPRISES, INC.,

Petitioner,

vs.

CASE NO. 81,126

WILLIAM J. MATHIAS, ROBERT L. CHANDLER AND DAVID W. OHNSTAD,

Respondents.

______________________________ /

On Questions of Great Public Importance Certified by the District Court of Appeal of Florida, Fifth District

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ANSWER BRIEF OF RESPONDENTS MATHIAS, CHANDLER AND OHNSTAD

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PREFACE

Petitioner, Walling Enterprises, Inc. (hereafter referred to as "Walling Enterprises") is a landlord claiming a landlord's lien under §83.08, Fla. Stat. (1991) against an alcoholic beverage license owned by Chobe Investments, Inc. (hereafter referred to as "Chobe"). Respondents William J. Mathias, Robert L. Chandler and David W. Ohnstad (hereafter referred to as the "investor group") are the successors in interest to a lender, Citizens National Bank of Leesburg (hereafter referred to as "Citizens"), which loaned money to Chobe secured by a lien on the beverage license. The investor group claims its interest in the beverage license in its capacity as successor to Citizens as owner of the consensual lien granted to Citizens by Chobe.

STATEMENT OF THE FACTS AND CASE

The investor group generally agrees with the statement of the facts and case contained in the initial brief of Walling Enterprises, except for one area which requires clarification. In the last paragraph on page 2 of its brief, Walling Enterprises indicates that it sued Chobe first, then the investor group sued Chobe shortly after that. In fact, this action was brought against Chobe by the investor group to recover the assets of Chobe which had been pledged to Citizens as security for the loan. Walling Enterprises then intervened in this same suit, rather than bringing an independent action.

Except for this one point, the investor group adopts the statement of facts in the Walling Enterprises initial brief and therefore will not set forth a separate statement of facts in this brief.

SUMMARY OF ARGUMENT

An alcoholic beverage license is an intangible which lacks form, location or substance, and therefore cannot be said to be property usually kept on the leased premises under §83.08, Fla. Stat. (1991) so as to extend the landlord's lien under that statute to the beverage license. The cases holding to the contrary fail to recognize the nature of the beverage license as a general intangible, and confuse the certificate evidencing the license with the license itself, which is an incorporeal asset of the holder.

If the landlord's lien does reach an alcoholic beverage license under which such beverages are sold on the leased premises, then the landlord must file that lien with the Division of Alcoholic Beverage and Tobacco (hereafter referred to as the "Division") in order for the lien to be enforceable, because under §561.65, Fla. Stat. (1991), because such filing is a requirement of the statute in order to perfect a lien or security interest which may be enforceable against the license. The statutory language is all encompassing and does not create any exception for landlord's liens, nor does it suggest that the legislature intended the courts to create such an exception where none was provided in the statute.

Since there is nothing in §561.65 governing the relative priorities of competing liens against beverage licenses, that priority is determined according to common law which specifies that the order of creation of the liens establishes their priorities.

ARGUMENT

I.

A STATUTORY LANDLORD'S LIEN UNDER §83.08, FLA. STAT. (1991) DOES NOT REACH AND ENCOMPASS A TENANT'S ALCOHOLIC BEVERAGE LICENSE.

This point was not briefed or argued below because of several cases which held that despite its incorporeal nature, an alcoholic beverage license was nonetheless a type of "property" which could be brought onto leased premises and usually kept there by the tenant, so as to support a landlord's lien on the license to secure the payment of rent. *Yarbrough v. Villeneuve*, 160 So.2d 747 (Fla. 1st DCA 1964); *G.M.C.A. Corporation v. Noni, Inc.*, 227 So.2d 891 (Fla. 3d DCA 1969). However, the question was raised by the specially concurring opinion of Judge Sharp of the District Court of Appeal, in the decision giving rise to these certified questions. *Mathias v. Walling Enterprises, Inc.*, 609 So.2d 1323 (Fla. 5th DCA 1992). In her opinion, Judge Sharp analyzed the nature of an alcoholic beverage license, along with the wording of §83.08, Fla. Stat. (1991), which grants the landlord a lien on the tenant's property usually kept at the premises. She also considered the reasoning of the *Yarbrough* and *G.M.C.A.* cases, and concluded these cases were wrongly decided and that the landlord's lien does not extend to an alcoholic beverage license. Judge Sharp's opinion is cogent, persuasive, and correct.

In *Yarbrough*, the court quoted at length from prior cases holding that alcoholic beverage licenses were not property. For example:

> * * * (O)ur Supreme Court observed it has repeatedly held that no property right vests in the recipient of a beverage license issued under the laws of this state, but the right to sell intoxicants is merely a privilege. In quoting with approval from its former decision in the First Presbyterian Church case the Court said: " '[A]

> (beverage) license is not property in a constitutional sense' and since 'it confers no right or estate or vested interest it would seem to follow that it is at all time revocable at the pleasure of the authority from which it emanates." ' " In the Davidson case the Third District Court of Appeal held that: "while the liquor business is a legitimate business protected by law as are other businesses * * * such a license is not a vested right, and it can be subjected to further regulation or even revocation, at the pleasure of the legislature" 160 So.2d 747, at 748.

Based on these citations, the court correctly concluded that a beverage license was not "property" in the constitutional sense. Curiously, the court then went on, despite the clear authority it cited to the effect that a beverage license was not property, to hold that it was enough like property to be subject to the landlord's lien because it had a value in excess of the license fees exacted by the State as a condition of its issuance. One factor mentioned by the court in its decision was the statutory requirement to post the license on the premises under §561.23, Fla. Stat. (1991), which remains in effect today. However, the true basis of the decision appears to be the court's feeling that because the license had value, and because it could be transferred and mortgaged under the applicable statutes, it was enough like property that it should be subjected to the landlord's lien. In effect, the court seems to have made a policy decision that the landlord should have a lien on the beverage license, then implemented that decision by declaring it to be the law even though the license is not property and only property may be subject to the statutory landlord's lien.

In *G.M.C.A.*, the court did not even speak to the issue of whether the license could be subject to the landlord's lien, it simply cited *Yarbrough* for that proposition. Thus, to date the authorities on the question of whether a beverage license issued by the State of Florida may be subject to a landlord's lien consist of one case which cited but ignored authorities indicating that

such a license was not "property" and another which did not even discuss the question but merely relied on the previous case as authority for the proposition. Neither case analyzed the issue as thoroughly as Judge Sharp. Careful analysis compels the conclusion that Judge Sharp's opinion on this question is the correct one.

At the time the *Yarbrough* case was decided, the Uniform Commercial Code had not yet been adopted in Florida. When the landlord's lien in *G.M.C.A.* arose in 1962, the UCC likewise had not yet come into being. That code was first enacted in Chapter 65-254, Laws of Florida. Upon its enactment, the UCC became the governing law concerning the nature of particular kinds of personal property and interests in personalty. The UCC specifically excludes from its filing requirements any lien of a landlord for payment of rent. §679.104(2), Fla. Stat. (1991). However, its classifications of property would still apply to render a beverage license a "general intangible" under §679.106, Fla. Stat. (1991). As a general intangible, the license is without form or substance. It is nothing more than an abstract concept which we use to describe the various rights granted by the State to the holder of the license, in this case to sell alcoholic beverages. Such a formless concept cannot be said to be property which a tenant could bring onto leased premises and keep there. Instead, it is no more tangible than accounts receivable, a concept used to describe the tenant's right to receive payment from those owing the tenant money. Accounts receivable have value, are transferrable, and can be pledged as collateral for a loan, all factors used by the *Yarbrough* court to justify its decision, but are not considered "property" so as to be subject to a landlord's lien.

The decision of *United States v. McGurn,* 596 So.2d 1038 (Fla. 1992) specifically recognizes that a beverage license is an intangible, issued as a matter of privilege rather than

right. The decision even recognizes that a beverage license is different from other general intangibles because it is strictly regulated by the State, which has "total control of its use." The regulatory scheme provides for how a license is acquired, how it is transferred, how it is encumbered, and how one holding an encumbrance against it must perfect and enforce that encumbrance. Arguably, without these statutory provisions as to conveyance and encumbrance, the license could not be transferred or encumbered, just as a license to operate a motor vehicle may not be transferred. Judge Sharp's opinion does nothing more than apply the appropriate legal principles to the beverage license, consistent with its characterization in *McGurn* as an intangible, leading to the inescapable conclusion that such a license is not property of the type usually kept at leased premises so as to be subject to the landlord's lien.

The majority below, like the *Yarbrough* court, relied in part on the fact that the physical certificate evidencing the license must be posted at the premises. From this the court concluded that the license was property usually kept at the premises. This ignores the very real distinction between the license itself, consisting of the bundle of rights granted by the State to the holder of the license, and the certificate which is only evidence of the licensee's rights. It is true that the certificate, as a piece of paper, is property of the tenant usually kept at the premises. It does not follow, however, that the right of a landlord to a lien on this piece of paper carries with it the rights the paper represents. Such a concept would convert a beverage license certificate into a kind of bearer instrument, exercisable by anyone in physical possession of it, when without doubt the laws governing such licenses provide to the contrary.

Mere physical possession of the certificate evidencing the license carries with it no rights. Instead, any transfer must be approved by the State, after the filing of an application, and is

subject to being rejected. That a landlord may take possession of the certificate is of no consequence unless an application is filed for transfer of the license itself to the landlord, or the license is otherwise transferred in accordance with the law, as by a foreclosure under §561.65, Fla. Stat. (1991). The physical certificate is valuable only to the licensee named on it, not to the landlord or anyone else. Thus, the landlord may exercise his lien and take possession of the physical certificate, but by doing so the landlord acquires only a piece of paper, not the right to sell alcoholic beverages. That right is an intangible, incorporeal right and is the essence of the license itself, as opposed to the certificate. The license itself, unlike the certificate, cannot be subject to a landlord's lien because as an intangible, it lacks the requisite form and substance to permit it to be brought onto the premises and kept there by the tenant. There is no basis to distinguish in this regard between an alcoholic beverage license on the one hand, and other intangibles such as accounts receivable or other choses in action on the other hand. All of these intangibles may be the subject of a consensual lien or security interest, and may be rights against which a judgment could be enforced, but are not subject to the much more limited landlord's lien, based as it is on the concept that the property to which it applies must be property brought onto the leased premises and kept there by the tenant.

There are other licenses issued by the State which are vital to the operation of a business in a leased premises, which must be posted there, such as cosmetology licenses, or real estate broker's licenses, but no one would argue that a landlord could succeed to the rights of the holders of these licenses in the event of a default in payment of rent. The beverage license should not be treated any differently.

For these reasons, the first certified question should be answered in the negative.

II.

IN ORDER TO "PERFECT" A STATUTORY LANDLORD'S LIEN IN AN ALCOHOLIC BEVERAGE LICENSE, THE LANDLORD MUST FILE THE LIEN WITH THE DIVISION UNDER §561.65, FLA. STAT. (1991), AND THE ORDER OF FILING IS IRRELEVANT TO THE RELATIVE PRIORITIES OF THE LANDLORD'S LIEN AND THAT OF A COMPETING CREDITOR BECAUSE PRIORITY IS DETERMINED BY ORDER OF CREATION

If the Court determines the beverage license to be property which may be subject to a landlord's lien, the question then becomes whether the landlord must file that lien with the Division in order for it to be enforceable, and whether the landlord must file first in order to assert priority over a competing creditor with a lien on the same license.

Historically, the landlord did not have to file anywhere to perfect a lien on the tenant's property at the premises. *Lovett v. Lee,* 141 Fla. 395, 193 So. 538 (1940). Under the UCC, this exemption from the filing requirement to perfect the landlord's lien was continued statutorily. §679.104(2), Fla. Stat. (1991). From the enactment of the UCC through 1981, when §561.65 was amended to make the filing of a lien on a beverage license mandatory, that statutory exemption kept this question from arising because during that interval, consensual liens on beverage licenses were perfected by filing under the UCC and the landlord was not required to file in order to perfect against a consensual lien.

The Court has held in *McGurn* that in 1981, filing with the Division under §561.65 became the sole manner of perfecting a security interest in a beverage license. That being the case, the UCC no longer has any application to such liens, which are to be filed and enforced in accordance with §561.65. The language of the statute is mandatory in requiring that:

> 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 shall, within 90 days of the date of creation of the lien or security interest, record the same with the division on or with forms authorized by the division, which forms shall require the names of the parties and the terms of the obligation. * * * §561.65(4), Fla. Stat. (1991).

The language chosen by the legislature to express its intent is all encompassing. It applies not only to security interests, like the one held by the investor group in the case at bar or the landlord in *McGurn* (who presumably acquired the security interest to improve on the more limited landlord's lien), it also applies to a "lien." Since the term "security interest" has come to refer to any consensual lien on personalty, the legislature must have intended to broaden the meaning of the statute by using the word "lien" as well. Some of the interests to which this term could apply are judgment liens, execution liens, tax liens, and landlord's liens. Certainly the legislature intended for more than just security interests to be filed under the statute, otherwise the word "lien" would be mere surplusage, and one of the fundamental rules of statutory construction is that each word is to be given meaning so that no word in a statute is rendered surplusage. By using the word "lien" in the statute as amended in 1981, the legislature evidenced its intent to require ***all*** liens on beverage licenses to be filed with the Division, not just those falling within the definition of a security interest.

It is also interesting to note that the drafters of the UCC felt it necessary to include within that code a specific exemption from its filing requirements for landlord's liens. The presence of that exemption, codified in the UCC, indicates clearly that without such a specific exemption, the landlord would have to file. Otherwise, the exemption would be useless surplusage, again in violation of the rules of statutory construction. It therefore follows that if the exemption had to

be codified in the UCC, and it is not found anywhere within §561.65, the legislature did not intend for landlords to be exempt from the filing requirements for liens on beverage licenses. By its terms, §561.65 applies to ***all*** liens, including the landlord's lien, and there is no basis whatsoever to imply that the legislature intended to exempt landlords from the statute's requirements. The UCC exemption shows that the legislature recognized the need to exempt landlords from certain filing requirements and knew how to do so when it wished. That it did not do so in §561.65 indicates that landlords, like all other lienholders, must file with the Division in order to have an enforceable lien on a beverage license.

The focus then shifts to the question of how to determine the relative priorities of conflicting liens in beverage licenses. §561.65 is silent on this issue. Unlike the UCC, this section provides no rules for deciding which of two or more liens on the same collateral should take precedence. In the absence of any such statutory rules, the lien which first comes into being should prevail, so long as that lien is filed with the Division within the 90 days allowed for that purpose after its creation. This was the rule at common law and should apply in the absence of statutory law to the contrary. *Richardson Tractor Co. v. Square Deal Machinery & Supply Co.*, 149 So.2d 388 (Fla. 2d DCA 1963). Whether or not notice on the part of one lienholder concerning the other's rights in the collateral should alter this rule is not material to the resolution of the issue in the case at bar because the lien of the investor group was created several days prior to the date on which the lien of Walling Enterprises arose, and insofar as appears on the face of the record, the notice issue is a toss up.

The investor group lien was created when Chobe borrowed money from Citizens on August 28, 1986, and at that same time granted a security interest to Citizens in the beverage

license. The earliest date on which the Walling Enterprises lien could have arisen would be September 1, 1986, when rent first was payable under the lease between Chobe and Walling Enterprises, and arguably the lien did not arise until September 4, 1986, when Chobe commenced operations in the leased premises. The investor group lien was clearly first in time, and under the common law rule, should be first in right as well. It should be noted that the investor group lien was appropriately perfected by filing with the Division on September 19, 1986, well within the 90 days allowed for that purpose, and again on February 6, 1987, a mere three days after the Division issued the permanent license to Chobe on February 3, 1987.

Walling Enterprises attempts to assert a priority in the beverage license superior to that of the investor group on two grounds: (a) the statement in the license application indicating that the premises where the business of Chobe was to be operated would be leased from Walling Enterprises; and (b) the failure of Citizens to record its lien with the Division within 15 days, which Walling Enterprises claims deprives it of priority because that is the period allowed for relation back of a perfected purchase money security interest under the UCC.

As to the first ground, at best the application, when viewed as a contest between competing liens, is a draw. While the application to transfer the license to Chobe, filed August 27, 1986, does show Walling Enterprises to be the landlord of the premises where the licensed business was to be operated, it also showed clearly in Section III, Paragraph 5(B) that there would be loans of $120,000.00 on the business, at the very least imparting inquiry notice to anyone viewing the application to look into those loans to see what security might have been pledged for them. Walling Enterprises pointed out below that the interest of Citizens was not disclosed in Section III, Paragraph 7 of the application, however that paragraph did not ask for

the names of mortgagees against the license, it asked for mortgagees of the business, a different concept entirely. Furthermore, on August 27 when the application was filed, there was no mortgage on the license or the business, it did not come into being until August 28, and the portion of the question in the application dealing with mortgages and security interests is present in its temporal focus, not prospective, it does not ask about contemplated or future mortgages, only existing ones. Finally, even if one accepts the argument of Walling Enterprises in its brief that the application imparts actual or constructive knowledge of its landlord's lien, inquiry would have disclosed that lien could not arise before September 1, 1986, when rent was first due under the lease, leaving a window of opportunity for anyone who took a lien on the license before that date to obtain priority over the landlord's lien. This is in fact what occurred, the investor group lien was created on August 28 before the landlord's lien arose. Any notice Citizens may have had that Walling Enterprises would have a lien on the license beginning September 1, 1986, could not affect the priority of a lien created before that date, since the Walling Enterprises lien did not yet exist.

The second point put forth by Walling Enterprises, that the investor group lien was not perfected within 15 days of its creation, is an attempt to intermingle unrelated UCC concepts with the perfection scheme established by the legislature under §561.65. The argument apparently is that while the investor group lien was created on August 28, the Walling Enterprises lien arose on September 1 or 4, before perfection of the investor group lien on September 19, and that because more than 15 days elapsed between the creation of the investor group lien and its perfection, the perfection does not relate back to the creation date and the intervening landlord's lien obtains priority. This is based on the concept of relation back of a purchase money security

interest under the UCC, §679.312(4), Fla. Stat. (1991). There are three problems with this analysis. First, Walling Enterprises never filed its lien with the Division, so regardless of whether its argument might otherwise have been correct, its lien is not now enforceable due to that failure to file.

Second, even if the UCC applies to this transaction, nothing at all in the statutes, the legislative history or elsewhere indicates that the legislature intended for the 90 day period allowed for filing under §561.65 to be shortened to 15 days for purchase money security interests. The UCC and Chapter 561 are separate statutes, and absent any indication to the contrary they would be construed together so that one filing a purchase money security interest in a beverage license would have to file with the Secretary of State within 15 days to achieve the relation back of perfection to creation, but would be allowed the full 90 days to file under §561.65.

The most important defect in this line of reasoning is that it ignores the effect of the *McGurn* decision, in which the Court determined that the UCC did not apply to the perfection of liens against beverage licenses, and that the sole means of perfecting such a lien would be under §561.65. Indeed, this argument was one reason for the Court's holding in *McGurn*, which stated that to hold otherwise would require resolution of conflicts between the UCC and §561.65. The case at bar demonstrates the wisdom of that statement in *McGurn*. By eliminating the UCC from application to liens on beverage licenses, the Court left the issue of priority as to liens on beverage licenses to be resolved under the common law rule of first in time, first in right, subject only to the requirement that each and every lien be filed within 90 days of its creation in order to be enforceable against the license. This comports with the holding in *Richardson* to the effect that the lien first created takes precedence unless it is inherently defective or is destroyed by

some act of its holder. Failure to register a lien with the Division is certainly an act of the holder of a lien on a beverage license which would destroy its viability.

The common law applies whenever there is no statute to the contrary. §2.01, Fla. Stat. (1991). Since §561.65 does not provide a means to determine the relative priorities of liens against beverage licenses, the common law rule should be used to do so, and under that rule, the investor group lien clearly is the first lien. The second certified question should be answered in the affirmative as to its first part, the second part should be answered by saying that order of creation, not filing, is the relevant point under the governing common law, and this case should be remanded to the trial court for proceedings consistent with the opinion of the Fifth District Court of Appeal, which directed entry of judgment in favor of the investor group, granting it a first priority lien on the license.

CONCLUSION

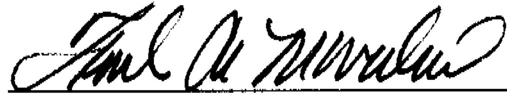
The landlord's lien under §83.08, Fla. Stat. (1991) extends only to property of the tenant brought onto the leased premises and ordinarily kept there. A beverage license issued by the State of Florida is an intangible, and as such is not property which is capable of being brought onto or kept on the leased premises. The certificate evidencing the license is but a scrap of paper and does not constitute the license itself, the latter being a bundle of rights bestowed on the holder by the State and the former being only the physical manifestation of those rights. Naked possession of the certificate grants the holder absolutely no rights whatsoever, so that even if the landlord acquires that piece of tangible property from the tenant, nothing is gained by it. Therefore, the landlord's lien cannot extend to the intangible beverage license.

§561.65 is mandatory in nature and requires all liens to be filed with the Division not later than 90 days after the creation of the lien, failing which the lien is not enforceable against the beverage license. No exception is made for landlord's liens, and the presence of such an exception in the UCC for its filing requirements indicates that first, such a statutory provision is necessary for the exception to exist, and second that where there is no such statutory exemption, the landlord must file a lien like any other lienholder. This interpretation is buttressed by the use of both of the terms "security interest" and "lien" in the statute. The common law rule of first in time, first in right should govern the relative priorities of competing liens in the same license, since there are no statutory rules to the contrary, so long as each lien is filed with the Division.

For these reasons, the first certified question should be answered in the negative, and as to the second certified question, it is moot if the answer to the first is negative; otherwise, its first part should be answered in the affirmative and the second part should be answered by holding

that order of filing with the Division has no bearing on priority, which is governed by order of creation as long as both liens are filed within 90 days of their respective creations.

Respectfully submitted,



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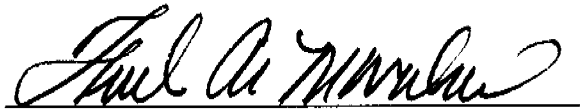
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail this 19th day of March, 1993, to Robert E. Austin, Jr., Post Office Drawer 490200, Leesburg, Florida 34749-0200, and to Chobe Investments, Inc. in care of Jon Bainter, 368111 North CR 44A, Eustis, Florida 32726, and to John B. Fretwell, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida, 32399-1007.



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