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IN THE SUPREME COURT OF FLORIDA

WALLING ENTERPRISES, INC.)
)
Petitioner,)
)
vs.)
)
WILLIAM J. MATHIAS, ROBERT)
L. CHANDLER and DAVID W.)
OHNSTAD,)
)
Respondents.)
_____)

CASE NO. 81,126

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

INITIAL BRIEF OF PETITIONER WALLING ENTERPRISES, INC.

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ORIGINAL

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PREFACE

Petitioner, Walling Enterprises, Inc. ("Walling"), is a landlord claiming an interest in a liquor license. Respondents William J. Mathias, Robert L. Chandler and David W. Ohnstad ("the investor group") are successors-in-interest to a creditor, Citizens National Bank ("Citizens"), and claim an interest in the liquor license superior to Walling.

STATEMENT OF THE CASE AND OF THE FACTS

On May 30, 1986, Chobe Investments, Inc. ("Chobe") entered into a lease agreement with Walling for premises located at 733-A North 14th Street, Leesburg, Florida to be used as a restaurant and lounge. The lease provides for a term beginning when business commenced. Notwithstanding, rental payments were to begin not later than September 1, 1986.

On August 27, 1986, Chobe purchased alcohol beverage license number 45-00054 4-COP ("the license").

On August 27, 1986, Chobe filed the requisite application for transfer and re-issuance with the Division of Alcoholic Beverages and Tobacco. Since the application did not "on its face disclose any reason for denying an alcoholic beverage license," a "temporary initial license" was issued to Chobe pursuant to Section 561.181, Florida Statutes.

The application shows the location address of the license as the leased premises and Walling as the landlord (R. 169-170).

On August 28, 1986, Chobe executed a security agreement in favor of Citizens designating the license as collateral.

On September 4, 1986, Chobe began doing business under the license at the leased premises.

On September 9, 1986, Citizens filed a financing statement describing the license with the Secretary of State.

On September 19, 1986, Citizens recorded its security agreement with the Division of Alcoholic Beverages and Tobacco.

On February 3, 1987, the license was "issued" to Chobe pursuant to Section 561.19, Florida Statutes.

On February 6, 1987, Citizens again recorded its security agreement with the Division of Alcoholic Beverages and Tobacco.

After several changes of investors, the capital stock of Chobe was sold to Jon and Susan Bainter. (R. 108). The sale included an assignment of the lease, and an assumption of the Chobe loans at Citizens. (R. 153). Chobe failed to make the first rental payment and each rental payment thereafter. Chobe also failed to make payments on the Citizens loans. (R. 110). Since the members of the investor group had personally guaranteed the Citizens loans, they resolved their obligations to Citizens and were assigned the collateral for the loans. (R. 109).

Walling sued Chobe to recover both the premises and the rents due under the lease. Shortly thereafter, the investor group sued Chobe. Chobe sought protection from the bankruptcy court; Walling and the investor group were granted relief from the automatic stay. Walling and the investor group each moved for summary judgment. After hearing on the motions for summary judgment, the lower tribunal ruled, among other things, that Walling's interest in the alcoholic beverage

license was superior to that of the investor group. (R. 182). The district court reversed. Mathias v. Walling Enterprises, Inc., 609 So.2d 1323 (Fla. 5th DCA 1992). The district court denied Walling's motion for rehearing, but certified the case as one which passes on questions of great public importance:

- I. DOES A STATUTORY LANDLORD'S LIEN PURSUANT TO SECTION 83-08(2) POTENTIALLY REACH AND ENCOMPASS A TENANT'S LIQUOR LICENSE?
- II. IN ORDER TO "PERFECT" A STATUTORY LANDLORD'S LIEN IN A LIQUOR LICENSE, MUST A LANDLORD FILE WITH THE DIVISION PURSUANT TO SECTION 561.64(4); AND TO HAVE PRIORITY OVER A COMPETING CREDITOR WHO HAS FILED, MUST THE LANDLORD HAVE FILED FIRST?

609 So. 2d at 1333. This review ensued.

SUMMARY OF ARGUMENT

Under Florida law, a landlord's statutory lien for rent can attach to a lessee's liquor license without the necessity of the landlord's filing with the Division of Alcoholic Beverages and Tobacco. Here, even though the landlord did not itself file with the Division, the lessee did. Notice of the landlord's potential lien fully appears in the application for transfer of the license filed with the Division. The only interest that could be deemed to have been retroactively perfected would be a purchase money security interest filed with the Division within fifteen days of its creation.

ARGUMENT

I.

A STATUTORY LANDLORD'S LIEN PURSUANT TO SECTION 83.08(2) POTENTIALLY REACHES AND ENCOMPASSES A TENANT'S LIQUOR LICENSE.

The district court correctly concluded:

Florida law has recognized that a landlord's statutory lien for rent under section 83.08(2) can attach to a lessee's liquor license located on the leased premises. G.M.C.A. Corporation v. Noni, Inc., 220 So. 2d 891 (Fla. 3d DCA 1969); Yarbrough v. Villeneuve, 160 So. 2d 747 (Fla. 1st DCA 1964). In Yarbrough, the court held that a liquor license is subject to the attachment of a landlord's lien, and stated that while a beverage license is but the grant of a privilege and is not property in the constitutional sense, it has been recognized and considered to be property in a commercial sense, citing House v. Cotton, 52 So. 2d 340 (Fla. 1951) and Kline v. State Beverage Department of Florida, 77 So. 2d 872 (Fla. 1955). The court in Yarbrough reasoned that because the statute creating a landlord's lien for rent provides that such lien shall attach to all property of the lessee kept on the property, and because vendors must display their licenses in conspicuous places on their licensed premises, the statutory landlord's lien attached to the license. Yarbrough, 160 So. 2d at 748.

We reject the argument that conceptually a liquor license does not have a "location" because it lacks substance and form and, therefore, it cannot be "brought onto" the leased premises. As in Yarbrough, a liquor license must be located in a conspicuous place in order for a business to lawfully open its doors to sell regulated alcoholic

beverages. This requirement prevents a licensee from exercising the privilege of selling alcoholic beverages at two or more locations, and persons involved in the commercial sale of alcoholic beverages know and understand this requirement. Because the commercial world is aware of the need and real value of the physical license to the licensee, the license itself has a possessory value even though it is a "general intangible." Consequently, the physical license, while it is located on the leased premises, can be subject to a statutory landlord's lien, which lien is in essence a possessory one. (District court's footnotes omitted.)

609 So. 2d at 1324.

According, the first question should be answered in the affirmative.

II.

IN ORDER TO "PERFECT" A STATUTORY LANDLORD'S LIEN IN A LIQUOR LICENSE, A LANDLORD IS NOT REQUIRED TO FILE WITH THE DIVISION PURSUANT TO SECTION 561.64(4); AND TO HAVE PRIORITY OVER A COMPETING CREDITOR WHO HAS FILED, THE LANDLORD IS NOT REQUIRED TO HAVE FILED FIRST.

As the district court observed:

Historically, possessory liens such as a landlord's lien or a pledge did not have to be recorded in order to have priority over a subsequently acquired security interest or lien. See Lovett v. Lee, 141 Fla. 395, 193 So. 538 (1940); Spellman v. Beeman, 70 Fla. 575, 70 So. 589 (1915); United States v. S.K.A. Associates, Inc., 600 F.2d 513 (5th Cir. 1979). The UCC recognizes this historic exception to the

recording requirement. See e.g. §§ 679.104 and 679.305, Fla. Stat. (1991). Section 679.104 not only exempts a landlord's lien from the requirement of recording, but such section also exempts certain enumerated non-possessory liens from this requirement.

Chapter 81-158, section 21, Laws of Florida, does not suggest that the legislature intended to abrogate this historic distinction between possessory and non-possessory liens when it enacted section 561.65(4). The purpose of recording is to place subsequent lienors and holders of security interests on notice of the prior lien or security interest. Section 83.08(2) puts such subsequent lienors and holders of security interests on notice that a debtor's landlord has a lien upon the lessee's property superior to any lien acquired subsequent to the bringing of the property upon the leased premises. Failure to record a landlord's lien may very well abrogate the requirement of section 561.65(1) that the Division notify the lienholder of any pending revocation or suspension proceedings because notice from the Division is only required to lienholders who have recorded their liens pursuant to section 561.65(4).

The Florida Supreme Court's decision in [United States v. McGurn, [596 So. 2d 1038 (Fla. 1992)]] does not affect the statutory landlord's lien. McGurn dealt exclusively with a landlord's contractual security interest upon a lessee's alcoholic beverage license. A contractual security interest is broader in scope than a statutory landlord's lien in that a contractual security interest not only encompasses the alcoholic beverage license while it is located on the leased premises, but such interest follows the license in the event it is transferred to another location. In order to have such a perfected contractual security interest, recording is essential. This would not be true of a possessory statutory landlord's lien which only attaches to the alcoholic beverage license during its presence upon the leased premises.

In other words, section 561.65(4) only changed the place of recording liens and security interests in liquor licenses which were required to be recorded in order to be perfected from the Secretary of State to the Division. Section 561.65(4) does not purport to affect possessory liens which did not require recording in order to be perfected. (District court's footnotes omitted).

609 So. 2d at 1326.

The only license involved herein is number 45-00054 4-COP. That is the license which Chobe purchased, which was transferred to Chobe, which is subject to Walling's statutory landlord's lien, and which is subject to the Citizens security interest.

As of September 19, 1986, when Citizens recorded its security agreement with the Division of Alcoholic Beverages and Tobacco, Walling's statutory landlord lien had already attached to the license.

Section 561.32(1)(a), Florida Statutes, provides:

When a licensee has made a bona fide sale of the business which he is so licensed to conduct, he may obtain a transfer of such license to the purchaser of the business, provided the application of the purchaser is approved by the division in accordance with the same procedure provided for in ss. 561.17, 561.18, 561.19 and 561.65.

In Ronta, Inc. v. City of Fort Lauderdale, 153 So. 2d 35, 36 (Fla. 2d DCA 1963), the court, referring to Section 561.32, stated:

It would appear from previous decisions of the Supreme Court of this State [see: Dade County v. Overstreet, Fla. 1952, 59 So. 2d 862; Hunter v. Solomon, Fla. 1954, 75 So. 2d 803] that the judicial interpretation of the statute has not been to make any transfers void ab initio, but merely void at the election of the State Beverage Director in the event of some infirmity either in the proposed new location or proposed new owner.

Here, the transfer of the license was complete on August 27, 1986, when Chobe's predecessor-licensee transferred the license to Chobe, subject to disapproval after the appropriate investigation.

The "temporary license", as referred to by the district court, was a "temporary initial license" and a statutory right for the transferee of the license, Chobe, to conduct business pending investigation of the application. See Sections 561.181, 561.19 and 561.32, Florida Statutes.

Even though there is no requirement that a landlord file with the Division in order to "perfect" its statutory lien, notice of Walling's potential lien appears in the application for transfer of the license filed with the Division on August 27, 1986. That application provides in part:

* * *

YES NO

- G. Does applicant rent, lease or sublease the property? X
- H. If answer to G. is yes, is anyone else listed as lessee or sublessee who is not on the application? X
- I. If applicant rents, leases or subleases give the following:

Name of landlord: Buz Walling, Walling Enterprises

Address of landlord: 731 North 14th Street,
Leesburg, FL 34748

How long is agreement for and what is the landlord paid as rent?

3 years with option on 3 years at
\$2,750.00 a month.

* * *

(R. 170).

In any event, Walling's statutory landlord's lien attached to the license when the "temporary initial license" was brought on the premises and business began.

The Citizens security interest cannot be given retroactive priority over the statutory landlord's lien. Even if the Citizens security agreement were considered to be a purchase money security interest, Citizens did not perfect that interest within the time allowed by Sections 679.301(2) and 679.312(4), Florida Statutes. To take priority over the statutory landlord's lien of Walling, the Citizens security agreement had to be filed with the Division of Alcoholic Beverages and Tobacco within fifteen days after Chobe received possession of the license. See Sections 679.301(2) and 679.312(4), Florida Statutes. This was not done. There is no provision for retroactive perfection of a security interest under Section 561.65(4), Florida Statutes. Only when the time requirements of Section 679.301(2), Florida Statutes, are met, can there be retroactive perfection and an intervening lien displaced.

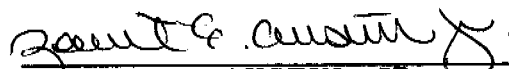
Accordingly, both parts of the second question should be answered in the negative.

CONCLUSION

Petitioner Walling respectfully submits that its statutory landlord's lien attached to license number 45-00054 4-COP before Citizens

perfected its security interest by proper filing with the Division of Alcoholic Beverages and Tobacco and that its statutory landlord's lien is entitled to priority over the Citizens security interest assigned to the investor group.

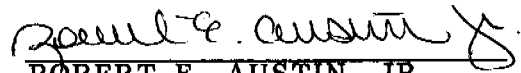
Respectfully submitted:


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CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished to Fred A. Morrison, McLin, Burnsed, Morrison, Johnson & Robuck, 1000 West Main Street, Leesburg, Florida 34749-1357; to Chobe Investments, Inc. in care of John 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 by mail this 9th day of March, 1993.


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