AUG 31 1978
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| FIDELITY BANK & TRUST, | ) | |
| Appellant, | ) | Filed August 31, 1978 |
| vs. | ) | |
| WALTER C. WOHLFORD and MARY WOHLFORD, | ) | 534<br>2-60544 |
| Appellees. | ) | |

Appeal from Dubuque District Court - Karl Kenline, Judge.

Plaintiff appeals trial court's ruling awarding defendants damages on their cross-petition of plaintiff's replevin action. - Reversed and remanded.

Marc W. Casey, of Moss & Heims, Dyersville, for Appellant.

Reynolds, Kenline, Breitbach, McCarthy, Clemens & McKay, of Dubuque, and Thomas J. Gilloon, Dyersville, for Appellees.

Submitted to Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Fidelity Bank and Trust appeals the trial court's ruling that it was not entitled as a secured party to replevin its debtor's car wash equipment. The bank appeals also the damages awarded to the debtor's landlord, defendants Walter C. and Mary Wohlford, for wrongful seizure. We reverse and remand.

The sole issue in replevin is who has the right of possession of the property on the date the action commences. Rick v. Boegel, 205 N.W.2d 713, 716 (Iowa 1973). First Fidelity's action commenced when the Wohlfords were served with an original notice on August 28, 1972. Rule 48, Rules of Civil Procedure 1971. The sheriff seized the bank's collateral under the writ of replevin on the same date.

Our review is for correction of errors at law only. Rule 4, Rules of Appellate Procedure, and § 643.2, The Code 1971. The issues on appeal concern the debtor's bankruptcy, the Wohlford's contractual lien provided in their lease with the debtor and the Wohlford's claim to a § 570.1, the Code 1971, landlord's statutory lien.

I. Bankruptcy of the Debtor: The trial court erred in ruling that the bank was not entitled to possession of the car wash equipment because the debt out of which the bank's claim to the collateral arose was discharged in bankruptcy. Blotcky v. Silberman, 225 Iowa 519, 525, 281 N.W. 496, 498 (1938) dealing with a similar problem ruled:

> ....one holding a secured claim against a bankrupt is not bound to file formal proof of claim in the bankruptcy court, or to come into the bankruptcy proceedings at all, but he may rely upon his security and enforce it otherwise.

Upon its debtor's default, First Fidelity seeking to rely upon its security commenced this replevin action. This it was entitled to do under its security agreement and § 554.9503, The Code 1971. Blotcky makes it clear the bankruptcy proceedings did not operate to prevent First Fidelity from seizing its collateral by replevin in August 1972 or retaining it after bankruptcy was filed in 1973.

II. Contractual Lien Theory: The trial court granted the Wohlfords $1800 in damages without specifying whether the contractual landlord's lien in their lease with the debtor or the § 570.1 statutory landlord's lien entitled them to recovery. Recovery under the two lien theories should have been determined separately since the contractual landlords' lien pled is subject to the provisions of Article 9 of the

U.C.C. § 554.9102(2), The Code 1971. In contrast, the § 570.1 statutory lien, argued at trial by the parties and, therefore, tried by consent, Goss v. Johnson, 243 N.W.2d 590, 594 (Iowa 1976), is specifically excluded from the operation of Article 9. Section 554.9104(b), The Code 1971. It is subject to the provisions of chapter 570, The Code, and applicable case law.

The fact the bank knew, or should have known of the Wohlford's interest in the car washing equipment at the time it made its loan, as the trial court found, would not necessarily preclude its security interest from prevailing over the Wohlford's contractual landlords' lien. Article 9 of the Code does not focus upon what the creditors know or should have known in determining such a conflict. Rather, it reflects the deeply rooted common-law idea of a race of diligence among creditors. Section 554.9312(5)(b), Example 2 following Comment 4. Priorities among conflicting security interests in the same collateral are to be determined by who filed first, if both parties filed; if one party filed or if neither party filed, by who perfected first; and if neither party perfected, by which security interest attached first.

Here both parties failed to file. The car washing equipment is the type of collateral in which a security interest may be perfected by the secured party taking possession of it. Sections 554.9305, 554.9105(1)(f) and 554.9109(2). Neither § 554.9305 nor any other section of Article 9 defines possession. See Iowa Code Comment to § 554.9203(1)(a). Section 554.1103 provides that all general principles of contract and commercial law not explicitly displaced by the Code supplement its provisions. The cases predating § 554.9305 which deal with circumstances where actual possession of collateral or goods is retained yet the rights of the debtor and the creditor have changed focus upon: "... the object of a record is to impart notice. The change of possession which would make a record unnecessary should be such as to impart notice." Smith v. Champney, 50 Iowa 174, 176 (1878). Dysart Savings Bank v. Weinstein, 152 Iowa 260, 132 N.W. 18 (1911) suggests that the change of possession need not necessarily involve removal from the premises but may only mean a change which is reasonably practicable under the circumstances considering the nature and character of the collateral.

The trial court found the car washing equipment was already on the leased

premises when the bank executed the note and made the loan. It was at that time apparently and actually in the debtor's possession.

> 'Possession' is used throughout Article 9 in establishing the filing scheme, in permitting debtors to retain use of collateral, and in providing perfection through means other than filing, such as through the secured party's taking possession. The ostensible ownership exercised through possession is demonstrated through simple physical control. One who controls the collateral possesses it, and leads others to believe it is his.

In re Automated Bookbinding Services, Inc., 471 F.2d 546, 552 (4th Cir. 1972).

The trial court erred in failing to make a finding of fact as to whether the Wohlfords seized possession of the debtor's car washing equipment in such a fashion as to perfect their lien under §§ 554.9305, 554.9105(1)(f) and 554.9109(2).

If both security interests remained unperfected, then § 554.9312(5)(c), The Code 1971, dictates the bank's claim has priority since its interest attached first. Under § 554.9204(1), The Code 1971, attachment occurred when the note and security agreement were executed and the bank loaned the debtor $2500. At that time the debtor already had rights in the proffered collateral which it could subject to the security interest. The landlords' security interest "attached" by terms of the lease agreement upon the debtor's default in rent. This default occurred several months after the bank security interest had already attached. Therefore, in this replevin contest, if the trial court finds two unperfected security interests, the bank's security interest, attaching first, prevails. This would give the bank the superior right to possession of the collateral when this action commenced as against the landlords' contractual lien.

III. Statutory Lien Recovery: On the § 570.1 question, the Wohlford's failed to establish that they had acted to secure the right of possession before August 28, 1972 by bringing an action to enforce their statutory lien as provided by § 570.5, The Code. Under Remington Typewriter Co. v. McArthur, 145 Iowa 57, 60, 123 N.W. 760, 761 (1909), a landlord must take appropriate legal action to enforce his statutory lien before he has a right to possession of his tenant's personalty for defaults in rent obligations. The trial court erred in granting any relief based on a §570.1 theory of recovery.

IV. Relief on Appeal: This case commenced in 1972; the parties have had a full, and fair opportunity to present evidence as to the priority of claims and the

damages issues. Universal C.I.T. Credit Corp., v. Jones, 227 N.W.2d 473, 479 (Iowa 1975) ruled in such circumstances a remand for determination by the trial court on the record already made is proper. On remand, if it is found the landlords' contractual lien prevails, the value of this interest on the date the replevin action commenced must be determined. The Wohlfords' recovery shall be no greater than this value or the $1800 judgment ordered by the trial court since the landlords made no cross-appeal for a greater damages recovery under their contractual lien.

This case is reversed and remanded for further proceedings in accordance with this opinion.