COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP143 **Cir. Ct. No. 2014CV3185**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DREXEL COMMERCIAL LIMITED PARTNERSHIP, RAWSON COMMERCIAL LIMITED PARTNERSHIP, LEGEND CREEK, LLC, GREENFIELD ESTATES LIMITED PARTNERSHIP, INDIAN CREEK CONDOMINIUM ASSOCIATES, ADAMS COURT, LLC, BOURAXIS PROPERTIES COLLEGE PLAZA, LLC, BOURAXIS PROPERTIES RIVERWOOD PLAZA, LLC, BOURAXIS PROPERTIES LAYTON, LLC AND CARLTON POINT, LLC,

PETITIONERS,

BOURAXIS, LTD.,

PETITIONER-APPELLANT,

RIVERWOOD VILLAGE, LLC,

PETITIONER-RESPONDENT,

V.

REBECCA R. DEMARB,

RECEIVER-RESPONDENT,

PNC BANK, N.A.,

CREDITOR-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Bradley, JJ.

¶1 BRADLEY, J. Bouraxis, Ltd. appeals from an order approving the receivership sale of real estate, including the fixtures in the building, owned by Riverwood Village, LLC, which Bouraxis had been operating as an Omega restaurant. Bouraxis argues the "fixtures" were actually restaurant equipment or trade fixtures that it owned and should have been allowed to remove before the sale, or be paid its monetary value. Because the trial court did not err in finding that the items at issue were fixtures, we affirm.

BACKGROUND

¶2 This case began as a receivership proceeding pursuant to Chapter 128 of the Wisconsin Statutes. The receiver filed a motion to sell the real estate located at 7041 South 27th Street in Franklin, Wisconsin, which had been constructed as a restaurant in August 2000, and was operated as an Omega Burger restaurant at the time it went into receivership. At the time of construction, PNC Bank (the successor to St. Francis Bank) gave a construction mortgage to Riverwood. It is not clear whether the construction mortgage covered the cost of the items in dispute here, but it is clear that the mortgage granted PNC Bank a security interest in "all fixtures, furniture, furnishings, equipment, machinery,

appliances, apparatus and other property of every kind and description now or at any time hereafter installed or located on or used or usable in connection with the Real Property." It is not known when the items at issue were installed, who installed them, or who paid for these items. It is also not known at what point in time Bouraxis started operating the restaurant.

¶3 The asset purchase agreement with the buyer excluded from the sale all equipment owned by Bouraxis, but included fourteen fixtures. Bouraxis objected to the sale because it claimed that eight of those fourteen items listed as fixtures were in fact Bouraxis' restaurant equipment (or trade fixtures). These eight items were:

(1) The thirty-foot front counter and shelving;

(2) A twelve-foot kitchen ventilation system with make-up air and fire suppression system;

(3) A sixteen-foot kitchen hood system with make-up air and fire suppression system;

(4) A four-compartment sink, hard plumbed;

(5) A four-foot kitchen exhaust hood with make-up air and fire suppression system;

(6) A 13 x 8 foot walk-in cooler with remote roof-mounted compressors;

(7) A 15 x 17.5 foot walk-in cooler with remote roof-mounted compressors; and

(8) Indoor furniture including attached booths, but not freestanding tables and chairs.

¶4 PNC Bank, as the mortgage holder, was the secured creditor and would receive the proceeds from the sale. Riverwood was the debtor and Bouraxis was a non-debtor entity.

¶5 The issue for the trial court to decide was whether the eight items listed here were equipment owned by Bouraxis that Bouraxis should have been able to remove before the sale or whether the items were fixtures that should be sold with the real estate.

¶6 At the hearing, three witnesses testified: (1) the receiver, Rebecca DeMarb; (2) the property manager, Marsha McNeil; and (3) Todd Minkin of Fein Brothers, who did an appraisal of the items at PNC Bank's request.

¶7 DeMarb testified:

- She examined everything in the building to determine what items were fixtures that should be sold with the building and what items were equipment that Bouraxis may be "able to assert an interest in."
- She listed the item as a fixture if it was "installed in the building. More than just -- more than just screwed into the wall … truly integral to the building. It either … goes out into the roof or it is built into the building."
- The fixtures "could not be removed without damaging the real estate."

- She did not know if Riverwood or Bouraxis owned the equipment in the building and that is why she separated the equipment from the fixtures; she believed the fixtures "were part of the original construction and therefore owned by Riverwood" because the mortgage and building permit suggested the building was originally constructed to be a restaurant.

- She did not know when Bouraxis began operating the restaurant and there is no lease showing Bouraxis as Riverwood's tenant.

¶8 McNeil testified:

- She works for Ogden Company and was hired by the receiver to manage the property; she has been a commercial property manager for over thirty years.

- She took photographs of all the items in dispute in this matter.

- She described what was in each picture and how each was affixed to the building.

- She testified about how to remove the items in question. As to the front counter, McNeil said "you would need to break it apart to take it out of the property" "[b]ecause it's attached to the floor. It doesn't move. You would have to break it apart."

- As far as removing the walk-in coolers, she said "you would need to pull it apart. You would have to disconnect the compressors that are on the roof. If you take the compressors off the roof, you would have to repair the roof."

- The only item on the list that could be easily removed is the four-compartment sink: "That could be removed and cap the plumbing, and I believe it could be removed without too much damage."

- When asked "Is there any of the other items that could be removed without material damage?", she answered "[N]o."

¶9 Minkin, Bouraxis' witness testified:

- He works for Fein Brothers and has been delivering and installing commercial cooking equipment for over thirty years.

- He did an appraisal for PNC Bank setting the value of the restaurant "equipment" at the property at issue here. He was "asked to go to the restaurant and make a list of all the equipment that was there and put a value to it." He was not aware of the distinction between a fixture and equipment under the law when he did his appraisal.

- He appraised seventy-six items at the property and included everything he thought could be removed, which included the eight items in dispute here.

- He testified how the items in dispute would be removed: (1) uninstalling the front counter would mean removing the floor tile, lifting off the top and then unscrewing the cabinets; (2) the ventilation system would require "a company like us [to] come in and remove or disconnect it from the threaded rod, lower the hood" to remove but would leave all the duct work in place. "We [could] remove the exhaust fan and make-up air fan and … cover those openings with a galvanized roof cover … so water, snow, or things

like that cannot leak into the building."; (3) the sink would involve "disconnecting the drain lines and capping those, disconnecting the water lines that are going to the faucet … probably unscrewing the sink from the wall and then removing the sink from the building."; (4) the walk-in coolers would need to have the stainless steel trim removed first, then "dismantle the walk-in cooler in panels …. Disconnect electrically and disconnect the refrigeration lines from the compressor and remove the compressor from the roof."; and (5) for the booths, the seats would be removed and the "L-brackets that we screw to the booth and to the floor or to the wall" would need to be removed.

- If all these items were removed, it would cause some damage that would cost approximately $2,000-$3,000 to repair.

- He does not know when the items at issue were installed and conceded that all eight items are "affixed in a manner to the building so it can be used."

- Removing these items would not cause structural damage.

¶10 The trial court reviewed the definition of equipment and fixtures in the Uniform Commercial Code, which is found in Chapter 409 of the Wisconsin Statutes. WISCONSIN STAT. § 409.102(1)(i) defines equipment as "goods other than inventory, farm products, or consumer goods" and § 409.102(1)(k) defines fixtures as "goods that have become so related to particular real property that an interest in them arises under real property law." Section 409.102(1)(ks) defines "[g]oods" as "things that are movable when a security interest attaches." The trial court ruled:

> I am satisfied that each of these items … fall within the definition of a fixture. They are an integral part of the restaurant building. They are so related to this real property, they make this real property what it is, that an interest in them arises under real property law.
>
> Can they be removed? Sure. But the fact that they can be removed doesn't mean they are equipment not fixtures.
>
> ….
>
> I'm satisfied that the items at issue here that I've denominated, they're an integral part of this building. They are integrally affixed to the building. They are fixtures. They are not equipment, notwithstanding the fact that they could be removed.
>
> It's not like a table or a chair. You walk in, you pick up the chair, you walk out. It's not like pots and pans. You can pick those up, you can walk out of the building. The items at issue here are affixed to the building. They would have to be removed. There would be some damage involved. These are fixtures. They are not equipment.
>
> And so I am rejecting the objection and all of these items are fixtures.

¶11 The trial court entered an order approving the sale of the real estate including the eight items at issue. Bouraxis appeals from that order.

DISCUSSION

¶12 The issue in this case is whether the trial court erred in finding that the eight items at issue are fixtures. In determining whether a piece of property is a fixture, we consider three factors: "'(1) Actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.'" ***Premonstratensian Fathers v. Badger Mut. Ins. Co.***, 46 Wis. 2d 362, 367, 175 N.W.2d 237 (1970) (citing ***Standard Oil Co. v. La Crosse Super Auto Serv., Inc.***, 217 Wis. 237, 240-41, 258

N.W. 791 (1935)). Although all three factors should be considered, the third factor of intention is viewed as the most important factor. ***Wisconsin Dep't of Revenue v. A.O. Smith Harvestore Prods., Inc.***, 72 Wis. 2d 60, 68-69, 240 N.W.2d 357 (1976). Intention is not subjective, "'but an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put.'" ***Id.*** at 69 (citation omitted). Our review of the trial court's findings will not be overturned unless they are clearly erroneous and we defer to the trial court's assessment on the credibility of witnesses. *See* WIS. STAT. § 805.17(2) (2013-14),[1] ***Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 35, ¶12, 331 Wis. 2d 740, 796 N.W.2d 806

¶13 The trial court discussed the pertinent factors. It found that all of the items in dispute were physically attached to the building. In fact, Bouraxis does not dispute this finding. The trial court also found that each item was used as an integral part of the building allowing it to function as a restaurant. It further found that removing these items would cause damage and result in a change of the character and purpose of the building. Finally, the trial court's findings show that the intention of the party installing these items was to make this building a functioning restaurant. In fact, there is no evidence showing that when these items were installed, whoever installed them intended for them to be removed at a later point in time. The trial court acknowledged that each of these items could in fact be removed but that it would take a substantial amount of effort, would require

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

hiring a restaurant installer to do so, and these items could not simply be picked up and carried out of the building.

¶14 The trial court's findings are not clearly erroneous. The testimony at the motion hearing supports the trial court's decision. DeMarb testified that she went through the building to determine what property was a fixture that was annexed to the building making it integral to the building itself and what property could be easily removed. DeMarb labelled the eight items challenged here fixtures. McNeil testified as to what would be required to remove the items at issue and that with the exception of the sink, removal would cause material damage to the building. Although Minkin testified that each of these items could be removed, removal would require much more than simply picking up an item and carrying it out the door. Minkin testified about the process involved to dismantle, unscrew, and remove each of these items, and that a company like Fein Brothers could be hired to do the removal. Minkin testified that removal of these items would require thousands of dollars of repairs, suggesting that removal would in fact cause damage. Further, the pictures introduced at the hearing also support the trial court's findings that all eight items are affixed to the property and an integral part of allowing the operation of the property as a restaurant. Thus, the trial court's findings that these items were fixtures based on the statutory definitions and the case law, *see* WIS. STAT. § 409.102(1)(i), (k) & (ks); ***Premonstratensian Fathers***, 46 Wis. 2d at 367, are supported by the record.

¶15 Bouraxis, relying on ***Standard Oil***, insists that the eight items were "trade fixtures," and that as a tenant, Bouraxis was entitled to remove the items when the lease ended unless Riverwood could show that material structural damage would result from their removal. *See* ***Standard Oil***, 217 Wis. at 244-45. We disagree.

¶16 In ***Standard Oil***, our supreme court held that a tenant can remove trade fixtures with or without an express agreement when: (1) the tenant temporarily installed the fixtures "for his own use and for the purpose of promoting his business"; (2) there was no intention on the tenant's part "or on the part of anyone that such trade fixtures shall become, as a result of mere annexation, a part of the freehold;" and (3) removal would not cause "material … injury to the freehold." ***Id.*** In ***Standard Oil***, the record clearly showed that the tenant paid for and installed the items at issue (gasoline pumps and storage tanks). An express written agreement in the record documented that these items were only *temporarily* installed; there was no intention to permanently annex them to the real estate; they would be removed at the end of the lease; and no one disputed that they could be removed without material injury to the realty. ***Id.*** at 245.

¶17 The facts in the case before us are much different than the facts in ***Standard Oil***, which distinguishes Bouraxis' case from ***Standard Oil***. First, it is unknown whether Riverwood, Bouraxis, or some other party installed the eight items. It is also unknown who paid for the eight items and who owned the eight items. The trial court assumed, for the purposes of deciding the motion, that Bouraxis owned the items, but there was no proof in the record as to ownership. Second, it is unclear whether these fixtures were the original items installed after the building was completed in 2000 or whether these fixtures were installed at a later time. There is no evidence as to the intent of anyone involved suggesting that these items were *temporarily* installed as trade fixtures that would be removed at the end of the tenancy. Third, we do not know when Bouraxis became the tenant. There is no written lease or testimony indicating at what point in time Bouraxis started operating the restaurant. Finally, there was testimony at the hearing that removing these eight items would cause material damage. Although it is also true

that Bouraxis' witness, Minkin, testified removal would not cause *structural* damage, both DeMarb and McNeil testified that removing the items would cause damage or material damage. Even Minkin admitted that removing these items would cause thousands of dollars in repairs. The trial court, as the factfinder, assesses the credibility of witnesses and we defer to the trial court's determination. *See* ***Cianciola, LLP***, 331 Wis. 2d 740, ¶12.

¶18 We are satisfied that the trial court's findings—that the eight items in dispute here were fixtures that should be sold with the real estate—were not clearly erroneous.

By the Court.—Order affirmed.

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