UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

MARK T. CUTRONA and
SANDRA R. CUTRONA

Case No. 92-12709 K

Debtors

This is a Chapter 13 case in which the creditor, Security Pacific Financial Services of NY, Inc. (Security Pacific), has filed a $6,532.54 proof of claim asserting that the claim is secured by real estate having an $85,000 value. The Debtors object to the claim of security, alleging that the claim should be allowed as an unsecured claim only. The matter has been argued and briefed, and the facts appear to be simple, and without dispute. Security Pacific is the Assignee of Allied Builders, Inc. which provided the financing for $7,000 worth of aluminum siding, foil and foam insulation, and trim, applied to the Debtors' home. The Debtors granted Allied a security interest in those goods. Security Pacific as Assignee filed a U.C.C.-1 in the appropriate County Clerk's Office. (The Court presumes this filing was accomplished in a timely fashion, since timeliness has not been placed at issue.)

Security Pacific characterizes the submitted issue as follows:

> Whether or not a loan, made with the intention that it be secured by goods - stipulated by the parties to be siding for the Petitioners' home, the purchase of which was the express purpose of the loan - and secured by a filing of a perfected U.C.C.-1 form to this effect, is a secured loan for the purpose of determining the percentage due the respondent Creditor in the Chapter 13 Bankruptcy Filing. The issue will turn on whether the secured goods are fixtures and have thereby been transformed into inseparable parts of the realty.

The Debtors' formulation is as follows:

> The issue was whether aluminum siding installed on the Debtors' home becomes a fixture to the real estate. If so, the claim became unsecured since the U.C.C.-1 filing does not perfect a security agreement in real estate. In the alternative, if aluminum siding does not become a fixture, the second issue remains as to the value of the aluminum siding to be paid through the Debtors' Plan.

Both sides have argued to the Court that the issue is governed by New York U.C.C. § 9-313. The Court assumes that they are correct, and makes the following findings and conclusions.

Security Pacific did not effect a "fixture filing" as defined in New York U.C.C. § 9-313, because its filing did not describe the real estate nor did it request indexing in the real estate records, as required by New York U.C.C. §§ 9-313(1)(b) and 9-402(5). But even if a fixture filing had been duly made, then this still would not grant the lienor a lien on the real estate. As stated in the case of *Dry Dock Savings Bank v. DeGeorgio*, 305

N.Y.S.2d 73 (Sup. Ct., Nassau Cty., 1969) (a case offered by both parties as the only New York case addressing the nature of siding as a fixture), the lien that a security holder has on fixtures is "a superior lien, but not on the proceeds of the sale [of the property upon foreclosure]. He merely has the right to remove the goods after posting security to repair any damage. This may turn out to be a somewhat Pyrrhic victory, giving the lienor a pile of dubious scrap not worth the labor of getting it off the house, repairing nail holes, etc. In other words, it may hurt the mortgagee [or owner] without doing the lienor any corresponding good. However, that is something for the parties to consider and beyond the control of the Court." Id. at 75. Hence, Security Pacific is clearly incorrect in claiming a security interest in real estate, and this would be true even if Security Pacific had accomplished a "fixture filing."

The question remains as to whether it has a security interest in the siding in place on the house. To answer this we first determine the legal status of these Debtors. Assuming that a Chapter 13 Debtor may assert the status of a Trustee for purposes of claims objections resting on the Trustee's "strong arm powers" under 11 U.S.C. § 544,[1] the Trustee's hypothetical lien creditor status under 11 U.S.C. §§ 544(a)(1) and (2) could not defeat

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[1]See, for example *In re Boyette*, 33 B.R. 10 (Bankr. N.D. Tex. 1983); but contrast *In re Perry*, 131 B.R. 763 (Bankr. Mass. 1991).

Security Pacific's lien because New York U.C.C. § 9-313(4)(d), added in 1977, was intended to, and did, preserve "a fixture security interest so filed against invalidation by a Trustee in bankruptcy." Official Comment to U.C.C. § 9-313. Furthermore, the Trustee's status as a hypothetical bona fide purchaser of the debtor's real estate under 11 U.S.C. § 544(a)(3) expressly denies the Trustee that status as to fixtures. It must be concluded, therefore, that the filing of this Chapter 13 case has no effect on Security Pacific's lien. Its lien status is the same in this case as it was as between Security Pacific and the Debtors outside bankruptcy, and that status is defined by § 9-313.

Under U.C.C. § 9-313(2) resort to analysis regarding what constitutes a "fixture" need not be had if it is clear that the goods are "ordinary building materials incorporated into an improvement on land," for such materials are expressly stated to be outside the scope of any security interest that may be created pursuant to Article 9 of the Uniform Commercial Code.[2] It is fair to say that much confusion surrounds the matter of "fixtures" because observers sometimes fail to recognize that the term "fixture" applies only to goods that fall within a certain range of affixation to real estate. Goods that are barely affixed and are

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[2]§ 9-313(2) states: "A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land."

readily portable are, generally, merely "goods" and not "fixtures." Goods that are so materially integrated into the structure that they are "bricks and lumber" or akin thereto, are also not "fixtures;" they are part of the real estate and any security interest therein exists only until they became so incorporated, at which point the security interest is lost. The range in between these extremes is the realm of "fixtures," for most purposes (although there may be surprising results in particular settings, particularly commercial settings). To say that certain materials are not "fixtures" may be to say, on the one hand, that they are simply "goods" and may be subject to a proper filing in the U.C.C.-1 records, if any filing is even necessary. On the other hand it may mean that they have lost their character, either as goods or as fixtures, and have become real estate, as to which no lien may be acquired or maintained under any provision of Article 9 of the Uniform Commercial Code; for liens on real estate one turns to the law of mortgages, mechanics liens, and the like.

Thus, U.C.C. § 9-313(2) recognizes a categorical distinction between "ordinary building materials" and "fixtures." As to ordinary building materials that have been incorporated into a structure that itself is part of the land, one need not examine the cases that have determined whether goods have become "fixtures."

The only New York case on the subject of siding, the *Dry Dock* case, held that whether such siding became fixtures presented triable issues of fact, and in dictum it offered suggestions as to the lines of factual inquiry that might be pursued: would there be any walls to the building if the siding were removed; would the building be substantially destroyed by removal of the siding; what was the intention of the parties; etc. Under that dictum, the parties have made offers of proof regarding what one would find if the gutters, trim, siding, etc. were to be removed today from these Debtors' residence.

The *Dry Dock* case was decided in 1969. At that time, and until the 1972 amendments to the U.C.C., the pertinent provision of § 9-313 was subsection "(1)," which stated:

> The rules of this section do not apply to goods incorporated into a structure <u>in the manner of lumber, bricks, tile, cement, glass, metal work and the like</u> and no security interest in them exists under this Article unless the structure remains personal property under applicable law ..." U.C.C. Reporting Service, "Code Text" ¶ 9313, pp. 147-148.

The Official Comment to the 1972 Official Text does not explain the reason for the textual change. However, it is clear that the *Dry Dock* Court's reference to "goods like lumber and bricks" was not an effort to define "ordinary building materials;" it was a mere paraphrasing of the statute then before it.

Today, this Court asks itself how the highest Court of the State might construe the more recent version of the statute. I find that ordinary aluminum siding, soffits, insulating board, gutters, and trim, (like that at issue) marketed to homeowners to prolong the life of their home, eliminate the need for painting and add value to their home, are "ordinary building materials" when installed on an owner-occupied residence.[3]

Today's holding does not require Security Pacific to achieve the impossible in obtaining security when it finances such home improvements. That mortgages are available to lenders similarly situated is evidenced in such cases as *In re David and Susan Reed*, No. 91-13500 (Bankr. W.D.N.Y. 1992).

In sum, then, the Debtors' motion objecting to Security Pacific's claim must be granted for two reasons. First, Security Pacific claims a lien in the real estate, and no filing under the Uniform Commercial Code could provide a lien on real estate, even as to fixtures. As importantly, the materials in question are "ordinary building materials," and any U.C.C. security interest in them ('fixture filing" or not) is lost once they have become incorporated into an improvement on real estate. The claim of

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[3]The Court will leave to an appropriate case the question of whether the same result would appertain if similar materials are installed in a different context. Thus, for example, when siding that is applied to an otherwise ordinary building to achieve a visually distinct appearance, consistent with the color scheme or design scheme of a franchise or chain, the result may be entirely different.

Security Pacific will be allowed only as an unsecured claim.

SO ORDERED.

Dated: Buffalo, New York
November 24, 1992

U.S.B.J.