

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:19-bk-06611-FMD
Chapter 13

Benjamin Ojeda, Jr. and
Nancy Ann Ojeda,

Debtors.

**ORDER SUSTAINING
DEBTORS' OBJECTION TO
CLAIM NO. 5 OF AQUA FINANCE, INC.**

Debtors financed the construction of an inground swimming pool at their home and granted the lender a security interest in the swimming pool. The lender has filed a claim in Debtors' Chapter 13 case, asserting that its claim is secured by the swimming pool. The Court finds that under the Florida Uniform Commercial Code, the swimming pool is neither a "good" nor a "fixture" to which the lender's asserted security interest could attach. Therefore, the lender's claim is unsecured.

Background

On May 8, 2015, Debtors entered into a Retail Installment Contract and Security Agreement (the "Contract") with Penguin Pools ("Contractor") to "purchase" an inground swimming pool (the "Swimming Pool"). Under the Contract, Debtors granted Contractor a security interest in the goods purchased under the Contract, i.e., the Swimming Pool.¹ At some point, the Contract was assigned to Aqua Finance, Inc. ("Creditor"). Evidently, this was the plan all along as the first page of the Contract lists Creditor's name, address, telephone, and fax numbers.²

On August 20, 2015, Debtors signed a Certificate of Completion of the Swimming Pool.³

The Certificate of Completion states that the goods and services sold by Contractor have been "delivered and installed" at real estate owned by Debtors. The parties have stipulated that the Swimming Pool is an inground pool, constructed with building materials such as rebar, concrete, plaster, and coping.

Months later, on January 26, 2016, Creditor filed a Uniform Commercial Code Financing Statement (the "Financing Statement") with the Clerk of Circuit Court for Lee County, Florida.⁴ The Financing Statement lists the collateral as "In Ground Swimming Pool," and states that it "is filed as a fixture filing."⁵

On July 15, 2019, Debtors filed their Chapter 13 bankruptcy petition. Creditor timely filed its claim as a secured claim in the amount of \$50,180.44.

Debtors objected to Creditor's claim, asserting that the Swimming Pool is affixed to their homestead property and that Creditor had not recorded a mortgage.⁶ Creditor responded to Debtors' objection, contending that the Swimming Pool is a fixture and Creditor perfected its security interest when it filed the Financing Statement with the Lee County Clerk of Court.⁷ In reply, Debtors contend that the Swimming Pool is not a fixture because the Contract did not identify any "goods" to which a security interest could attach under the Florida Uniform Commercial Code.⁸

The parties agree that there are no factual issues in dispute, and the matter has been fully briefed.⁹ The Court announced its ruling in open court on March 12, 2020.¹⁰ This order supplements the Court's oral ruling.

Discussion

Section 679.1091(1)(a) of the Florida Statutes, Chapter 679 (Article 9 of the Florida Uniform

¹ Claim No. 5, p. 2.

² Claim No. 5, p. 5.

³ Claim No. 5, p. 10.

⁴ Claim No. 5, p. 11.

⁵ Claim No. 5, p. 12.

⁶ Doc. No. 30.

⁷ Doc. No. 36.

⁸ Doc. No. 38.

⁹ See Doc. Nos. 30, 36, 38, 51, and 57.

¹⁰ Doc. No. 60.

Commercial Code),¹¹ applies to transactions that create a security interest in personal property or fixtures. Section 679.5011 provides that financing statements to perfect security interests in fixtures are filed in the office of the clerk of the circuit court.

Section 679.1021(1)(oo) defines “fixtures” as “goods that have become so related to particular real property that an interest in them arises under real property law.”¹² The parties here concur that the Swimming Pool has “become so related” to Debtors’ home. The issue before the Court is whether the Swimming Pool is a “good” that has, in turn, become a “fixture.”

Under § 679.1021(1)(rr), “goods” are defined as “all things that are movable when a security interest attaches.”¹³ The definition of “goods” includes “fixtures.”

However, § 679.334(1) provides that “[a] security interest does not exist under this chapter in *ordinary building materials* incorporated into an improvement on land.”¹⁴

In *In re Lipke*, the bankruptcy court held that the creditor did not hold a security interest in items such as the lumber, sheet rock, electrical equipment, insulation, and roofing material used to construct the debtor’s home.¹⁵ And in *AUI Const. Grp., LLC v. Vaessen*, in ruling on a subcontractor’s effort to foreclose a mechanic’s lien on a wind tower, the court agreed with the argument in an amicus brief that under the Uniform Commercial Code, “security interests simply do not exist ‘in ordinary building materials incorporated into an improvement on land,’” and because the wind tower was built with “concrete, rebar, electrical conduit, and other ‘ordinary building materials,’ the UCC does not apply.”¹⁶

Here, the parties have stipulated that Contractor used ordinary building materials such as rebar, concrete, plaster, and coping to construct the

Swimming Pool. These materials are similar to the ordinary building materials discussed by the courts in the *Lipke* and *AUI* cases, and as in those cases, a security interest does not exist in them under the Florida Uniform Commercial Code.

Finally, the Financing Statement identifies Creditor’s collateral as “In Ground Swimming Pool.” But when the Swimming Pool was completed, it was no longer moveable, and thus not a “good.” And because the Swimming Pool is not a “good,” it did not become a “fixture,” and cannot be subject to a security interest under Chapter 679.

Two out-of-state cases have held that inground swimming pools are fixtures, but these cases are neither controlling nor persuasive. In *FGB Realty Advisors v. Bennett*, in connection with a summary judgment motion regarding a lien priority issue, a Connecticut state court observed that the parties did not dispute that an inground swimming pool is a fixture.¹⁷ In other words, the court did not decide the legal issue of whether an inground swimming pool is a fixture, or make a finding to that effect, but instead accepted it as an undisputed material fact.

And in *State Bank of Albany v. Kahn*, a case decided over fifty years ago, a New York state court found an inground swimming pool was a fixture.¹⁸ However, as the court helpfully highlighted, at the time, the Uniform Commercial Code did not define the term “fixture.”¹⁹ As discussed above, “fixtures” is now defined in § 679.1021(1)(oo), and the definition requires that the fixture first meet the definition of a “good.”

The Court recognizes that some types of inground swimming pools may meet the definitions of “goods” and “fixtures.” If, hypothetically, a preconstructed pool “shell” was “installed” in a hole dug on land, and then connected to water, power, and filtration equipment, the pool “shell” and the related equipment may meet the definition of a

¹¹ Unless otherwise stated, statutory references refer to Chapter 679 of the Florida Statutes.

¹² Fla. Stat. § 679.1021(1)(oo); U.C.C. § 9-102(41).

¹³ Fla. Stat. § 679.1021(1)(rr); U.C.C. § 9-102(44).

¹⁴ Fla. Stat. § 679.334(1) (emphasis added); U.C.C. § 9-334(a).

¹⁵ 124 B.R. 415, 418 (Bankr. D.R.I. 1991).

¹⁶ 67 N.E. 3d 500, 512 (Ill. App. Ct. 2016).

¹⁷ 44 Conn. Supp. 156, 157 (Conn. Super. Ct. 1995).

¹⁸ 58 Misc. 2d 655, 656 (N.Y. Sup. Ct. 1969).

¹⁹ *Id.*

moveable good that becomes a fixture. But these are not the facts before the Court.

Finally, the Court does not find the cases cited by Creditor in support of its argument that the Swimming Pool is a “good” to be persuasive. First, in *BMC Industries, Inc. v. Barth Industries, Inc.*,²⁰ an eyeglass manufacturer contracted for the design, manufacture, and installation of equipment to automate its production line. Equipment for a production line is vastly different than the construction of an inground swimming pool. Second, in *Propulsion Technologies, Inc., v. Attwood Corp.*,²¹ the court analyzed the definition of goods under the U.C.C., but it was in the context of the court’s determination that unfinished propeller castings were goods. Again, this is vastly different from the construction of a swimming pool. And, third, the bankruptcy court in *In re Alex Castillo*²² determined that “the subject windows were clearly a fixture in this case, and that the UCC fixture filing perfected the fixture lien on the real property when Aqua Finance recorded the UCC Financing Statement in Broward County, Florida.” The Court concurs with the holding in *Castillo*. However, windows are things that are moveable and meet the definition of “goods” under § 679.1021(1)(rr). Moveable windows are also vastly different from an installed inground swimming pool.

Conclusion

Having analyzed the somewhat circular provisions of Chapter 679, the Court finds that the Swimming Pool in this case is not a “good,” and because it is not a “good,” it cannot be a “fixture.” Because the Swimming Pool is neither a “good” nor a “fixture,” the Court concludes that the provisions of Chapter 679 do not apply. Therefore, Creditor does not have a security interest in the Swimming Pool and Creditor’s Claim is not secured.

Accordingly, it is

ORDERED:

1. Debtors’ Objection to Claim No. 5 of Aqua Finance, Inc., is SUSTAINED, and the Claim is DISALLOWED as a secured claim.

2. Creditor’s Claim is ALLOWED as an unsecured claim in the amount of \$50,180.44.

DATED: June 1, 2020.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge

²⁰ 160 F.3d 1322 (11th Cir. 1998).

²¹ 369 F.3d 896 (5th Cir. 2004).

²² No. 19-20156-JKO, Doc. No. 37 (Bankr. S.D. Fla. Jan. 21, 2020).