

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

In re:

SHUANNEY IRREVOCABLE TRUST,
Debtor.

CASE NO.: 11-31887-WSS

CHAPTER: 11

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SHUANNEY IRREVOCABLE TRUST

Plaintiff,

v.

ADV. PRO. NO.: 12-03026-WSS

BEACH COMMUNITY BANK ,

Defendant.

_____ /

This matter is before the Court on Beach Community Bank's Motion for Summary Judgment on Counts 3, 4, and 5 of the Debtor's Second Amended Complaint (Doc. 98). After due consideration of the pleadings, evidence, briefs, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

On December 1, 2011 the Debtor, Shuaney Irrevocable Trust, filed for Chapter 11 relief. On May 29, 2012 the Debtor filed a Complaint (the "First Complaint") (Doc. 1) against Beach Community Bank ("Beach") comprising of two counts: (Count 1) the avoidance of the registration of Beach as the owner of certain bonds pursuant to 11 U.S.C. § 547; and (Count 2) declaratory relief that the Debtor is entitled to a credit of \$11,500,000 against debt owed from the Debtor to Beach. The Court entered an order granting Beach partial summary judgment as to

Count 1 (the “Summary Judgment Order”) (Doc. 33) on December 5, 2012. On February 25, 2013, the Debtor filed a Second Amended Complaint against Beach and Regions Bank (“Regions”) (Doc. 72-1) containing five counts that requested the following: (Count 1) the avoidance of the registration of Beach as the owner of certain bonds pursuant to 11 U.S.C. § 547; (Count 2) declaratory relief that the Debtor is entitled to a credit of \$11,500,000 against debt owed from the Debtor to Beach; (Count 3) declaratory relief that Beach violated Fla. Stat. §§ 679.610, 679.611, and 679.613, and the reinstatement of the Debtor as owner of certain bonds; (Count 4) declaratory relief that Beach does not hold a perfected security interest on certain bonds; and (Count 5) declaratory relief that all the indebtedness owing from the Debtor to Beach is satisfied on account of a commercially unreasonable disposition by Beach. Count 1 of the Debtor’s First Complaint and Count 1 of the Second Amended Complaint are nearly identical in that both Counts request the same relief pursuant to the same section in the Bankruptcy code. Since this Court has already rendered a judgment on Count 1 of the Debtor’s First Complaint in the Summary Judgment Order, this Court finds that Count 1 of the Second Amended Complaint is moot and will not be further addressed. On April 10, 2013, Beach moved for this Court to grant summary judgment on Counts 3, 4, and 5 (Doc. 98); accordingly, this Court will address such Counts.

Prior to filing for Chapter 11 relief, the Debtor acquired an interest in Governmental Facilities Leasing Corporation 1997 Series B Revenue Bonds identified as Bond No. RB-1 and Bond No. RB-2 (collectively the “B-Bonds”) on July 30, 1997. Regions, as successor in interest to AmSouth Bank, is the Indenture Trustee under a certain Indenture of Trust dated July 1, 1997 by and between Governmental Facilities Leasing Corporation as Issuer and AmSouth Bank as Trustee. On April 30, 2009, the Debtor entered into a loan agreement with Beach in which the

Debtor originally borrowed the principal amount of \$9,638,000. In conjunction with the loan, the Debtor and Beach entered into a security agreement providing that the Debtor “transfers, pledges and assigns to [Beach] Bank, and grants, and conveys to [Beach] Bank security, title to, a security interest in, and a lien upon, the [B-Bonds].” *See* Security Agreement, Doc. 24 at 15. On May 14, 2009, Beach received physical possession of the B-Bonds and has continued to hold possession of the B-Bonds either in Beach’s office or through their attorney, Yancy Langston. At some point after the loan and security agreement were executed, the Debtor defaulted on its obligation. Because of such default and at the request of Beach, Regions changed the registered owner of the B-Bonds from the Debtor to Beach on November 2011.

CONCLUSIONS OF LAW

Summary judgment is only appropriate when the evidence in the record gives rise to no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056. The party moving for summary judgment has the burden to establish that there are no genuine issues of material fact that should be decided at trial. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once that burden is satisfied, the non-moving party must “go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Hines v. Marchetti*, 436 B.R. 159, 164 (Bankr. M.D. Ala. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, at 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotations omitted)). There is a genuine issue of fact when the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Count 3

The Debtor argues that it is the lawful owner of the B-Bonds because of Beach's supposed violation of the Florida Uniform Commercial Code.¹ The Debtor alleges that Beach violated the Florida Uniform Commercial Code by engaging in a commercially unreasonable disposition when Beach directed Regions to designate Beach as the owner of the B-Bonds on November 2011.

If a secured party wishes to dispose of collateral, then the party must conform to certain requirements. Section 679.610 of the Florida Statutes provides that “[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable.” Furthermore, a secured party is required to provide particular notifications upon disposing of collateral. Fla. Stat. §§ 679.611 and 679.613. These requirements do not apply to every action involving a secured party and its collateral; rather, the Florida Statutes limit the applicability of the requirements contained in Chapter 679 to only “dispositions” as defined in Fla. Stat. § 679.619(3), which provides that “[a] transfer of record or legal title to collateral to a secured party . . . is not itself a disposition of collateral under this chapter.”

In this case, Beach merely caused Regions to designate Beach as the registered owner of the B-Bonds. Although Beach is a secured party pursuant to the security agreement between Beach and the Debtor on April 30, 2009, a plain reading of Fla. Stat. § 679.619(3) shows that the registration of Beach as owner was not subject to the sale and notification requirements of Fla. Stat. §§ 679.610, 679.611, and 679.613 simply because Beach's actions did not rise to the meaning of a “disposition” as contemplated in Chapter 679 of the Florida Statutes. Given that the registration of Beach as the owner of the B-Bonds does not fall under the meaning of a

¹ Chapters 670-680 of the Florida Statutes may be cited as the “Uniform Commercial Code.” Fla. Stat. § 671.101(1).

“disposition” as defined Fla. Stat. § 679.619(3), Beach has committed no violation of the Florida Uniform Commercial Code. Accordingly, this Court denies the Debtor’s request for declaratory relief that the registration of Beach as the owner of B-Bonds is void and of no legal effect.

Count 4

The Debtor asserts that Beach does not hold a perfected security interest in the B-Bonds and that the November 2011 registration of Beach as the owner of the B-Bonds by Regions was in violation of the Florida Uniform Commercial Code. Beach argues that it does indeed have a perfected security interest and that the litigation of the issue of whether it holds a perfected security interest in the B-Bonds is precluded by the doctrine of collateral estoppel.

In support of Beach's argument that collateral estoppel should be applied in this case, Beach highlights the Summary Judgment Order in which this Court noted that Beach’s Statement of Material Facts (Doc. 24) was deemed admitted. Beach specifically points to an allegation contained in the Statement of Material Facts declaring that “Beach’s secured interest in the [B-]Bonds was perfected by its possession.”

Although this Court did deem the Statement of Material Facts as admitted in its Summary Judgment Order when ruling that the Debtor could not avoid the registration of Beach as owner of the B-Bonds under a 11 U.S.C. § 547 preference action, this Court does not accept the argument that the relitigation of the issue regarding Beach’s alleged perfected security interest is precluded by collateral estoppel.

In order to invoke the doctrine of collateral estoppel, the Court must find all four of the following elements: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation was a “critical and necessary” part of the decision in the first judgment; and

(4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000).

When determining whether a previous issue was a “critical and necessary” part of the first judgment, such issue must have been essential to the ultimate decision previously made and that the judgment could not have been made without it. *In re Green*, 262 B.R. 557 (Bankr. M.D. Fla. 2001). The court in *Green* further noted that “federal courts are cautious in the application of collateral estoppel, and favor the preservation of rights and the substantive determination of issues in circumstances where it cannot be ascertained which issues were essential to a judgment in a previous proceeding.” *Id.* If multiple grounds could support a judgment previously made and the court does not clearly state on which ground the judgment rests, then collateral estoppel does not apply to either issue. *Community State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

In this case, Beach contends that the issue of Beach's perfected security interest was a "critical and necessary" part of the Court's decision in the Summary Judgment Order. When Beach previously moved for partial summary judgment as to Count 1, Beach was required to demonstrate that at least one of the elements of § 547(b) was not present in order for Beach to prevail in the § 547(b) preference action.² While granting Beach's motion for partial summary judgment and rejecting the Debtor's request to avoid the registration of Beach as owner of the B-Bonds pursuant to § 547(b), the Court did not explicitly state which element or elements of § 547(b) were absent. Multiple independent grounds, including whether or not the Debtor was insolvent on a certain date, could have conceivably supported this Court's decision to grant

² 11 U.S.C. § 547(b) provides in relevant part that a transfer of an interest of the debtor in property may be avoided if it was: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) that enabled such creditor to receive more than such creditor would receive if the case were a case under Chapter 7 of this Title, the transfer had not been made, and such creditor received payment of such debtor to the extent provided by the provisions of this Title.

Beach partial summary judgment. As a result of this, coupled with the Court not clearly demonstrating which specific grounds it based its decision on, the Court cannot now make a finding that the issue of Beach's perfected security interest was a "critical and necessary" part of the decision granting partial summary judgment and denying the Debtor's request for avoidance. Therefore, it is inappropriate to invoke the doctrine of collateral estoppel. Instead, this Court must now make a substantive determination of whether Beach has a perfected security interest.

The Debtor asserts that Beach does not have a perfected security interest in the B-Bonds on account of Beach's failure to procure the registration of any security interest on the Bond Register. The Debtor further argues that the registration of any security interest on the Bond Register was the only way Beach could have obtained a perfected security interest because the B-Bonds are, as alleged by the Debtor, "uncertificated securities."³

The Court rejects the Debtor's argument that the only way Beach could have perfected its security interest was by registering the security interest on the Bond Register. There appears to be several avenues of perfecting a security interest on the B-Bonds, and in this case, the methods of perfection depend largely on the B-Bond's label as a "certificated security" or "uncertificated security." See Fla. Stat. §§ 679.3121, 679.3131 and 679.3141. A "certificated security" means a security that is represented by a certificate, and an "uncertificated security" means a security that is not represented by a certificate. Fla. Stat. §§ 678.1021(d) and 678.1021(r). A "certificate" is a document in which a fact is formally attested. *Black's Law Dictionary* (9th ed. 2009).

Upon a review of Exhibit 1 and 2 (collectively the "B-Bond documents") (Docs. 72-3 and 72-4) of the Debtor's Second Amended Complaint and finding that no doubt exists as to the B-Bond documents' validity in form and content, it appears to this Court that the B-Bonds are "certificated securities" as a matter of law. The B-Bonds are clearly represented by the B-Bond

³ Both the Debtor and Beach assert that the B-Bonds are "securities."

documents in which a multitude of facts are formally attested. Indeed, each B-Bond document contains an attested-to-signature by the president of the issuer, Governmental Facilities Leasing Corporation, and a Certificate of Authentication signed by AmSouth Bank.⁴ This Court should also note that the Debtor previously referred to the B-Bond documents as “certificates” in both its original Complaint (Doc. 1) and the Statement of Facts and Legal Contentions (Doc. 15). Now however, the Debtor conveniently ignores the B-Bond documents and their legal significance, and argues that the B-Bonds are not “certificated securities” without providing any authority. Regardless of the Debtor’s inconsistent labeling of the B-Bonds, it appears to this Court that the B-Bond documents demonstrate that the B-Bonds are “certificated securities” as defined in Fla. Stat. § 678.1021(d).

Since the B-Bonds are, as a matter of law, “certificated securities” this Court must look to Fla. Stat. § 678.3131 which provides that “[a] secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities.” A delivery of certificated securities occurs when the secured party takes possession of the security certificate. Fla. Stat. § 678.3011.

In this case, it is uncontested that Beach had physical possession of the B-Bonds or more specifically, the B-Bond security certificates as early as May 14, 2009. Furthermore, there is no evidence or even assertion that Beach ever relinquished possession since originally obtaining it in 2009.⁵ Given Beach’s uninterrupted possession of the B-Bonds, Beach fulfilled the requisites for obtaining a perfected security interest under Fla. Stat. § 678.3131. Accordingly, this Court rejects the Debtor's contention and finds that Beach held a perfected security interest in the B-Bonds prior to December 1, 2011, the date of the Debtor’s filing for Chapter 11.

⁴ By virtue of merger, Regions Bank is now the Trustee.

⁵ On October 12, 2011, Yancy Langston, attorney for Beach, obtained possession of the B-Bonds for the benefit and on behalf of Beach.

Count 5

The Debtor contends that all of the indebtedness owing from the Debtor to Beach should be satisfied on account of Beach's purported commercially unreasonable disposition of the B-Bonds. This Court rejects the Debtor's contention and denies the requested relief because, as mentioned above, no commercially unreasonable disposition had occurred. The November 2011 registration of Beach as the owner of the B-Bonds was not a "disposition" for the purposes of Chapter 679 of the Florida Statutes and consequently the registration was not subject to certain requirements of Fla. Stat. §§ 679.610, 679.611, and 679.613.

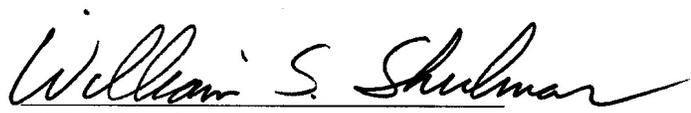
Based on the foregoing it is hereby

ORDERED that Beach's Motion for Summary Judgment is granted as follows:

1. With respect to Count 3, the motion for summary judgment is GRANTED. The Debtor's request to void the November 2011 registration of Beach as the owner of the B-Bonds is denied.
2. With respect to Count 4, the motion for summary judgment is GRANTED. The Debtor's request for declaratory relief that Beach did not hold a perfected security interest in the B-Bonds prior to December 1, 2011 is denied.
3. With respect to Count 5, the motion for summary judgment is GRANTED. The Debtor's request to deem their indebtedness to Beach as satisfied is denied.

DONE AND ORDERED.

Dated: July 3, 2013


WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE