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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CENTERBANK,	:	Case No. A2101178
Plaintiff,	:	Judge Megan E. Shanahan
v.	:	**DECISION**
PRIME ALLIANCE BANK, INC.,	:	
Defendant.	:	

This case is before the Court on the cross motions for summary judgment filed by Plaintiff, CenterBank ("CenterBank"), and Defendant, Prime Alliance Bank, Inc. ("Prime Alliance"). For the reasons that follows, the Court denies the motion of CenterBank and grants the motion of Prime Alliance.

STANDARD

Rule 56(C) provides that summary judgment may only be granted when the moving party demonstrates (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom summary judgment is made. *Zurich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998); *Vahila v. Hall*, 77 Ohio St.3d 421, 429-430 (1997).

Under Civil Rule 56, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists with regard to the essential element of the claims of the non-moving party. *Id.* The moving party cannot discharge its initial burden under the rule with a conclusory assertion that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that summary judgment is appropriate.

The burden is then on the non-moving party to present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. *Dresher* at 293. The non-moving part may not rely on mere allegations or denials in his pleading Civ.R. 56(E); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1998).

The parties agree that there is no genuine issue of material fact and that summary judgment for one of the parties is appropriate.

FACTS

This case involves the Envision Theater ("Kenwood Envision") in Kenwood, Ohio. In 2019, Regents Capital Corporation entered into a Master Lease with Kenwood Envision leasing "the personal property and/or services described in a Lease Schedule or Lease Schedules." The Lease Schedule refers to "Equipment Description and Location: See Attached Exhibit "A" attached hereto and made a part hereof." Exhibit "A" is a 40-page list of "Equipment, Personal Property, And/or Software (the "Equipment") Related to Lease Schedule: 152870 dated:

04/22/2019 to Master Lease Agreement Number 20179741 Dated: 04/22/2019". There is an additional lease schedule dated July 22, 2019, bearing lease schedule number 153128, consisting of 4 pages.

Thereafter, Regents sold, assigned, and transferred to Prime Alliance all of Regent's right, title and interest in and to each of the lease documents. The lease documents include the Master Lease, the Lease Schedules, and all other documents, instruments and writings that relate to the Master Lease Agreement. Subsequently, Kenwood Envision obtained an additional loan from CenterBank and granted to CenterBank a blanket security interest in all business assets of Kenwood Envision. Eventually, Kenwood Envision defaulted on both obligations. CenterBank claims that it has a priority interest in the business assets of Kenwood Envision, including the assets included in the lease documents held by Prime Alliance. Prime Alliance disagrees. The collateral was sold in March 2021 via a consensual secured party sale and the proceeds placed in escrow pending a resolution of the dispute as to priority.

The central issue in this case is in what assets did Kenwood Envision have an interest in which it could give a security interest to CenterBank?

Prime Alliance makes two arguments in support of its position that it has the first lien on the collateral. First, it argues it has a true lease and, therefore, the contents of Prime Alliance's financing statements are irrelevant. Second, Prime Alliance argues that if it is not a true lease, Prime Alliance has first priority because its financing statements are sufficient and are superior to CenterBank's subsequently filed lien. CenterBank counters that Prime Alliance is certainly not the holder of a true lease and that Prime Alliance did not properly perfect its security interest in the property that is the subject matter of the lease schedules. As a result, CenterBank maintains its interest in the property is superior to Prime Alliance's interest in the property.

1. Is Prime Alliance the holder of a true lease?

"A true lease is an agreement for delivery of property to another under certain limitations for a specific period of time after which it is to be returned to the owner." *Fifth Third Leasing Co. v. Akron Builders & Remodeling,* 1994 Ohio App. LEXIS 3257 (9th Dist.) at *10.

R.C. § 1301.203 provides that whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case. Specifically, R.C. § 1301.203(B) provides as follows:

> (B) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:
>
> (1) The original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
>
> (3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or
>
> (4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

Prime Alliance argues that it is a true lease because 1) the original term of the Master Lease was less than the remaining economic life of the Equipment; 2) Kenwood Envision was not bound to renew the lease for the remaining economic life of the Equipment or bound to become the owner of the Equipment; 3) Kenwood Envision did not have an option to renew the lease for the remaining economic life of the Equipment for no additional consideration or nominal additional consideration upon compliance with the Master Lease; and 4) Kenwood

Envision did not have an option to become the owner of the Equipment for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Kenwood Envision could become the owner only if it paid the then fair market value of the Equipment. Hence, Prime Alliance argues that it is the holder of a true lease and its UCC filings were unnecessary and irrelevant.

CenterBank counters that a review of the Lease Schedules illuminates the incongruity of the statement of Prime Alliance that "the original term of the Master Lease was less than the remaining economic life of the Equipment." CenterBank asks: "What remaining economic life could these items possibly have to Prime Alliance or any other lessor after being used in the buildout of the Envision Theater? None. The only reasonable conclusion therefore is that the original term of the [Master Lease]is equal to or greater than the remaining economic life of such Collateral."

CenterBank argues that Kenwood Envision was bound to renew the lease or bound to become the owner of the goods. Kenwood Envision simply was not going to return the personal property listed in the Lease Schedules. CenterBank refers to the "economic realities" test: "[o]ne might apply that test (the economic realities test) by asking the question: at the end of the lease, would the lessee be a fool not to exercise the option? If only a fool would fail to exercise the option, then the economic reality must be a sale notwithstanding the language of lease and option." James J. White & Robert S. Summers, Uniform Commercial Code § 30-3, vol. 4 (5th ed., West 2002).

Yet, paragraph 6 of the Lease also provides that "the Equipment shall at all times remain the property of Lessor." And paragraph 13 of the Lease provides as follows:

> Unless Lessee purchases the Equipment or the term of the Lease Schedule has been extended or renewed, each strictly in accordance with the terms

> and conditions set forth in the Master Lease and the Lease Schedule, upon the expiration or earlier cancelation or termination of the Lease Schedule, Lessee shall, at its sole expense and risk, de-install, disassemble, pack, crate, insure and return the Equipment to Lessor.

CenterBank argues it is absurd to consider this a true lease as at the end of the lease Kenwood Envision would be a fool not to exercise the option to purchase. The only sensible course for Kenwood Envision at the end of the term would be to exercise the purchase option. Kenwood Envision was, in effect, "bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods." *See* R.C. §1301.203(B)(2). Moreover, the Master Lease provided for the entire build-out and furnishing of a new movie theater with associated construction, labor and other costs included such as "staging," "installation," "project management," "programming," "training," "programming & setup," "delivery" and "shipping." And, the Lease Schedules include items such as sinks, faucets, LED wire, natural gas, door hinges, window frames, wires and cables.

"It is a long-standing rule that courts will determine the true nature of a security transaction and will not be prevented from exercising their function of judicial review by the form of words the parties may have chosen." *United States v. Poling,* 73 F. Supp.2d 882, 893 (S.D. Ohio 1999). "Neither the subjective intent of the parties nor the label that is placed upon the document controls whether the document is a true lease or one intended as a security interest." *Columbus Motor Car Co. v. Textile-Tech, Inc.,* 68 Ohio Misc. 25, 428 N.E.2d 882, 885 (Franklin Cty. Mun. Ct. 1981). "A determination of whether an agreement is a true lease or is an agreement for a secured sale requires examination of the entire transaction between the parties." *Fifth Third Leasing Co. v. Akron Builders & Remodeling,* 1994 Ohio App. LEXIS 3257 (9th Dist.) at *10-11. And the inquiry "has shifted the focus from 'the intent of the parties' to the economic realities of a given transaction in determining whether the transaction is a true lease or

a disguised security arrangement." *Hanes v. Vital Prods. Co. (In re Vital Prods. Co.),* 210 B.R.109, 112 (Bankr.N.D.Ohio 1997).

Although not *per se* determinative of the issue, CenterBank notes that the Master Lease does contain indicia of being a security agreement, such as: the lessee is obligated to pay all taxes and fees; the lessee is obligated to pay all repair and maintenance costs; the lessee assumes risk of loss; and the lessee is obligated to pay insurance. *See* R.C. §1301.203(C)(2)-(3).

Prime Alliance notes that the Master Lease on its face contains a fair market purchase option. A mere boilerplate provision in a lease stating that the lessee has the option to become the owner of the goods by paying the fair market value of the goods does not in and of itself evidence a true option, *i.e.*, an actual choice. *Columbus Motor Car Co. v. Textile-Tech, Inc.,* 68 Ohio Misc. 25, 29, 428 N.E.2d 882, 886 (Franklin Cty.1981)

The boilerplate language in the Master Lease notwithstanding, the only sensible course for Kenwood Envision at the end of the lease term would be to exercise the purchase option. Kenwood Envision was, in effect, "bound to renew the lease for the remaining economic life of the goods or [was] bound to become the owner of the goods." R.C. §1301.203(B)(2). The Court finds that the actual substance of the Master Lease transaction is a lease intended for security. It is not a true lease.

2. Did Prime Alliance file adequate financing statements resulting in a priority security interest?

The Court now considers whether the financing statements filed by Prime Alliance were sufficient to grant Prime Alliance a priority security interest in the collateral described by CenterBank as the "Exhibit A Collateral." "The key is whether a potential creditor would have been misled." *Farm Credit Serv. of Mid-America, ACA v. Rudy, Inc.,* 113 Ohio App.3d 93, 100 (citing *In re Waters*, 90 Bank. 946, 960 (Bankr.N.D. Iowa 1988)).

At the outset, Regents Capital Corporation ("Regents") owned the equipment and other tangible personal property listed on the 44 pages attached to Plaintiff's complaint. These comprise the "Exhibit A Collateral." The Master Lease and the two Lease Schedules between Regents and Kenwood Envision were assigned to Prime Alliance. A financing statement was filed with the Secretary of State on April 22, 2019. The financing statement describes the identity of the collateral as follows:

> All Equipment leased, or to be leased to the Debtor by the Secured Party, under the terms of the Lease Schedule #152870 Dated 4-22-19 to Master Lease Agreement Number 20179741 dated 4-22-2019 including without limitation, all products, proceeds, accessions, renewals, revisions and substitutions of the foregoing. The equipment described herein is owned by and is the property of the Secured Party and is leased to Debtor in a transaction which does not constitute a financing transaction. This filing is made for information purposes.

Thereafter, on July 22, 2019, another financing statement was filed, describing the collateral as follows:

> All Equipment leased, or to be leased to the Debtor by the Secured Party, under the terms of the Lease Schedule #153128 Dated 7-22-19 to Master Lease Agreement Number 20179741 dated 4-22-2019 including without limitation, all products, proceeds, accessions, renewals, revisions and substitutions of the foregoing. The equipment described herein is owned by and is the property of the Secured Party and is leased to the Debtor in a transaction which does not constitute a financing transaction. This filing is made for information purposes.

Then, an amendment of the April 22, 2019, financing statement and an amendment of the July 26, 2019, financing statement were filed. In each amendment the financing statement was assigned by CT Corporation to Prime Alliance Bank with a mailing address of 1868 South 500 West Woods, Cross, UT 84087. Each financing statement and amendment provided contact information for the filer of the financing statement. However, the actual exhibits to the Lease Schedules were not attached to the financing statements filed with the Ohio Secretary of State.

The Ohio Revised Code provides that a financing statement sufficiently indicates the collateral that it covers if the financing statement provides that it covers all assets or all personal property of the debtor, or otherwise sufficiently describes the collateral. R.C. § 1309.504. UCC 9-108 provides that a description of collateral reasonably identifies collateral if it identifies the collateral by specific listing, category, quantity or any other method, if the identity of the collateral is objectively determinable. R.C. § 1309.108. R.C. § 1309.108 does not specifically allow collateral to be described by incorporation by reference to another document or record.

"The sole function of financing statements under the UCC is to put third parties – usually prospective buyers or lenders – on notice that there may be an enforceable security interest in the property of the debtor". *Farm Credit Serv. of Mid-America, ACA v. Rudy, Inc.,* 113 Ohio App.3d at 100, 680 N.E.2d 637 (2nd Dist. 1996), quoting *Kubota Tractor Corp v. Citizens & Southern Nat'l Bank*, 198 Ga. App. 830, 833, 403 SE2d 218. A financing statement is insufficient where a hypothetical creditor could have been led astray. *Id.*

Prime Alliance maintains it is not required to file the actual lease schedules and the 44 pages itemizing its collateral. Referencing *Farm Credit Serv. of Mid-America, ACA v. Rudy, Inc.,* 113 Ohio App.3d 93, 101, 680 N.E.2d 637 (2nd Dist. 1996), the seminal case on the issue of sufficiency of financing statements, Prime Alliance sets forth the following general principle, to wit:

> The function of the financing statement requirement is to give notice of a potential interest in property of a specifically identified debtor as well as means by which an inquiring party may acquire more detailed information concerning that interest.

Farm Credit Serv. of Mid-America, ACA v. Rudy, Inc., supra, further provides as follows:

> We agree with Judge Lee in *First Bank v. Eastern Livestock Co.*, 837 F.Supp. 792, that the settled rule is that the description in the filing need only put other creditors on notice of a possible security interest in the collateral in

question. Once the appellant was notified that FCS had a possible security interest in Helstern's 1992 crop, it had a duty of further inquiry to disclose the complete state of affairs.

We do not believe that the notice given by FCS to appellant in November 1991 was so "seriously misleading" that it would simply stop appellant from making the further inquiries that it was obligated by the UCC to make. *In re Tri-State Equip., Inc.* (C.A. 10, 1986), 792 F.2d 967.

We agree with the trial court that FCS's notice of security interest in Helstern's 1992 crop "substantially complied" with the requirements of Section 1631(e), Title 7, U.S.Code. See *Lisco State Bank v. McCombs Ranches, Inc.* (D.Neb.1990), 752 F.Supp. 329.

Farm Credit Serv. of Mid-America, ACA v. Rudy, Inc., 113 Ohio App.3d at 103.

CenterBank argues that the April 2019 and the July 2019 financing statements, as amended, are deficient and that the outcome of this case depends on whether Prime Alliance properly perfected its security interest, an issue that turns squarely on the legal sufficiency of the Prime Alliance financing statements. CenterBank argues that Prime Alliance did not properly perfect its security interest for the following reasons:

1) Its collateral description in the financing statement attempts to incorporate by reference the equipment lease schedules but neither attaches those lease schedules not specifically describes the equipment or other assets contained in the lease schedules.

2) It misidentifies the lease that it attempts to incorporate.

CenterBank also relies on *Farm Credit Services v. Rudy, Inc., supra,* for the proposition that the financing statement must adequately indicate the collateral that it purports to cover. And CenterBank relies on *Altair Global Credit Opportunities Fund(A), LLC v. Puerto Rico AAA Portfolio Bond Fund, Inc. (In re Fin. Oversight & Mgt. Bd.),* 914 F.3d 694, 711-712 (1st Cir.2019), in which the Court found that the financing statements that were the subject matter of that action did not tell interested parties where to find the referenced document which contained the description of the pledged property.

In *In re Fin. Oversight & Mgt. Bd.),* 914 F. 3d 694, 711-712 (1st Cir.2019), the court stated:

> Requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purpose of the UCC. The UCC filing requirements are clear. It would not have been difficult whatsoever for the 2008 financing Statements to provide proper notice. The Resolution could simply have been attached to these filings, as the Security Agreement was. (citations omitted)

Id. at 711-712.

Centerbank also argues that the financing statement must at least contain adequate information to identify the other party to the agreement described in the financing statement. *Scarver v. Silverline Servs. (In re Wastetech, LLC),*605 B.R. 264, 274-275 (Bankr.N.D.Ga. 2019). Centerbank says that the financing statements describe the collateral as equipment leased "to the Debtor by the Secured Party under the terms of the Lease Schedule [#152879 dated 4-22-2019/#153128 Dated 7-22-2019] to Master Lease Agreement Number 20179741 dated 4-22-2019[.]" But the "Secured Party" listed on the original Prime Alliance financing statement is "CT Corporation System, as representative." CenterBank notes that there has never been any lease or agreement that states it is between Kenwood Envision and CT Corporation (as Secured party or as representative). Consequently, third parties would not have been led by the description to any lease or agreement in the name of the actual secured party referenced in the financing statements. Yet, the Court notes the assignments clearing up possible confusion were filed months before the Centerbank transaction.

"The mere filing of a financing statement does not create a mandatory duty upon third parties to contact the debtor or creditor in every instance. Rather it is only when the financing statement contains a sufficient description of the type or item of collateral that the duty to pursue

further inquiry arises. *I.A. Durbin, Inc. v. Jefferson Natl. Bank (In re I.A. Durbin, Inc.),* 46 B.R. 595, 601 (Bankr.S.D.Fla.1985).

The Court finds that the financing statements put creditors on notice of a possible security interest in Kenwood Envision's property and CenterBank had a duty of further inquiry to disclose the complete state of affairs. Unlike *In re Fin. Oversight & Mgt. Bd., supra,* there was indication where to find the document and whom to contact for further information. The financing statement was not so seriously misleading that it would simply stop a third-party creditor from making the further inquiries that it was obligated to make.

3. **The Exhibit C Collateral.**

Prime Alliance and CenterBank entered into a Secured Creditor Asset Purchase Agreement whereby they sold the Collateral by a secured party private sale under R.C. § 1309.610. The parties refer to Exhibit A Collateral, Exhibit B Collateral and Exhibit C Collateral. The Exhibit A Collateral is the property listed on the Lease Schedules held by Prime Alliance. The assets that were sold at the sale are referred to as the Exhibit C Collateral. Some of the assets sold are not listed in the Exhibit A Collateral. The Exhibit B Collateral is all business assets listed on Exhibit C that were not included or listed on Exhibit A.

CenterBank says that even if the Court rules in favor of Prime Alliance on the Exhibit A Collateral, CenterBank has a priority interest in the Exhibit B Collateral.

As suggested by the parties in their papers, the parties are directed to confer regarding the resolution of the parties' interest in the Exhibit B Collateral.

CONCLUSION

The Court finds that there is no genuine issue of material fact, that Prime Alliance is entitled to judgment as a matter of law, and viewing the evidence most strongly in favor of

CenterBank, reasonable minds can come to but one conclusion and that conclusion is adverse to CenterBank. The Court grants Prime Alliance's motion for summary judgment. The Court denies CenterBank's motion for summary judgment. The parties will prepare an entry pursuant to Local Rule 17.

4/4/22

Megan E. Shanahan, Judge

ENTERED

APR 04 2022

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