2006 CarswellOnt 2758
Ontario Superior Court of Justice

Marsland Centre Ltd. v. Doon Soccer Park Group Inc.

2006 CarswellOnt 2758, 9 P.P.S.A.C. (3d) 198

Marsland Centre Limited v. Doon Soccer Park Group Inc. and Centaur Products Inc. (Defendant added on the Reference)

Flynn J.

Heard:
Judgment: May 2, 2006
Docket: C-410/05

Counsel: S. Adler for Plaintiff
No one for Defendant, Doon Soccer Park Group Inc.
T. Johnson for Centaur Products Inc.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Personal property security
II Attachment of security interest
II.1 Elements
II.1.c Enforceability
II.1.c.ii Security agreements
II.1.c.ii.E Miscellaneous
Personal property security
II Attachment of security interest
II.2 Special circumstances
II.2.c Fixtures
Headnote
Personal property security --- Attachment of security interest — Elements — Enforceability — Security agreements — General principles
Personal property security --- Attachment of security interest — Special circumstances — Fixtures
Table of Authorities
Statutes considered:
Personal Property Security Act, R.S.O. 1990, c. P.10
s. 9(2) — referred to

***Flynn J.*:**

1 This motion seeks a determination as to whether certain items supplied by the Defendant Centaur Products Inc. (Centaur) to the defendant Doon Soccer Park Group Inc. (Doon) at its indoor sports facility in the fall of 2003 are chattels subject to a registered security interest in favour of the Defendant Centaur and therefore removable from the property; or, whether they are fixtures encumbered by a first mortgage in favour of the Plaintiff and must therefore remain with the land and premises.

2 Those items include an Omnigrass Field (artificial turf) and a Product Package, consisting of bleachers, soccer goals, scoreboards and protective netting.

3 Much of the argument concerned the rules the court ought to apply in determining whether goods are chattels or fixtures.

4 But the short answer in this particular case is that that discussion is moot.

5 The Security Agreement relied upon by Centaur is a very short Conditional Sales Agreement dated December 11, 2003. While the body of that document only refers to "products purchased" and does not describe those products in detail, a footnote to the document makes reference to invoice numbers 5653 and 5857.

6 Invoice number 5653 is in the amount of $133,322 to supply and install one 80' × 120' Omnigrass field (there exist at least four other artificial turf fields on the facility).

7 Invoice number 5857 is in the amount of $38,343.45 to supply and install one Product Package, including bleacher sections, soccer goals, scoreboards and protective netting.

8 Centaur also relies upon a Financing Statement said to be registered in its favour on April 2, 2004, which describes the collateral in terms of a Conditional Sales Contract re Omnigrass field turf, bleachers, soccer goals, scoreboards, protective netting, sub floor and turf systems, and all related accessories or attachments. This document sets out a slightly greater "principal amount secured" than the total of the two invoices.

9 The debtor shown on that Financing Statement is Doon. That Defendant is also the mortgagor on a registered second mortgage for $400,000 in favour of the Defendant Centaur registered on September 1, 2004.

10 The Plaintiff holds the first mortgage on the land, originally given by Kitchener Minor Soccer Inc. on January 7, 2002. The Defendant Doon purchased the premises on March 21, 2003 and the Plaintiff agreed to allow Doon to assume the said first mortgage in accordance with the terms of an Assumption Agreement which included a provision that "the field turf and all trade fixtures currently in place and any additions or alterations to same shall be, and shall be deemed to be, part of the real property given as security and shall remain with the real property in the event of any default under the mortgage".

11 Default under the first mortgage occurred in the spring of 2004 and the Plaintiff obtained judgment on May 30, 2005 which included leave to have issued a Writ of Possession.

12 It is clear from this that both Doon and Centaur are foreclosed from claiming any right to the turf supplied by Centaur before March 21, 2003. And I do not have to determine whether the items supplied by Centaur under invoices number 5653 or 5857 constitute "additions or alterations" to the field turf and all trade fixtures in place on March 21, 2003.

13 That is so because the Financing Statement setting out Doon as the Debtor purports to rely on the so-called Conditional Sales Agreement made on December 11, 2003, long after the delivery of the goods in issue.

14 And that Conditional Sales Agreement is between different parties: the purchaser of the goods referred to in that Conditional Sales Agreement is a corporate entity called Doon Management Corporation (Doon Management) an entirely different legal person than the defendant here, Doon, which did execute that very same Conditional Sales Agreement, but only as guarantor.

15 After default had occurred on the first mortgage, Centaur and Doon entered into a Credit Facility and Forbearance Agreement on August 24, 2004 in respect of the eventual second mortgage on the property. That agreement purported to grant some kind of security interest in "Omnigrass field turf, bleachers, soccer goals, scoreboards, protective nettings and all related accessories and attachments", which Doon stipulated that it had received.

16 Unfortunately for Doon, the Plaintiff was never made a party to that agreement and cannot now be bound in any way by this subsequent instrument or putative encumbrance.

17 *Nemo Dat Non Quod Habet*.

18 When the Defendant Centaur executed and registered the Financing Statement, it named Doon as the debtor, but it relied upon the Conditional Sales Contract where the purchaser of the goods was clearly a different legal entity, Doon Management. There is no evidence of Doon's title to the goods and neither the Financing Statement nor the Credit Facility and Forbearance Agreement could operate to create that title. Accordingly, Doon had no collateral to give and could not create any valid security interest in the goods sold by the invoices referred to in the conditional sales agreement. Accordingly, Centaur has no security interest to enforce.

19 So while I might be of the view that the artificial turf, protective netting and scoreboards are fixtures, and that the bleachers are not, I do not have to decide that question.

20 In his reply argument, Mr. Johnson for the Defendant Centaur pointed me to s. 9(2) of the *Personal Property Security Act*, R.S.O. 1990, c. P-10 for the proposition that a Security Agreement is not unenforceable against a third party by reason only of a defect, irregularity, omission or error therein. But I am of the view that what happened here is no mere defect or irregularity. Surely that section does not contemplate being able to correct an error in a Financing Statement by substituting the debtor for an entirely different party.

21 The flaw here is fatal to Centaur's argument. The goods in question may or may not be chattels or fixtures but they were not supplied to Doon and that Defendant has no enforceable security interest in them, so the motion by Centaur must be dismissed.

Costs

22 The Plaintiff was entirely successful and is entitled to its costs.

23 By agreement of March 21, 2003, Doon agreed to assume the Plaintiff's first mortgage when it bought the property.

24 Centaur entered into its second mortgage on the property subject to the terms of that assumed first mortgage. That first mortgage contained standard charge terms which provided for payment by the mortgagor Doon of all costs, expenses and charges which the mortgagee Plaintiff incurred with respect to the premises, the mortgage and the enforcement of the mortgage. In other words, the mortgage contemplates full indemnification for all legal costs incurred in enforcing its terms.

25 In my view, this dispute over the soccer trappings (the goods which are the subject of this motion) of this sporting facility is part of the plaintiff's exercise in enforcing its mortgage and realizing on its security.

26 So the Plaintiff shall have all of its costs of this motion as set out in the costs outline submitted, at the actual rates charged. In my view, it is fair and reasonable for the losing Defendant Centaur to expect to pay those amounts.

27 This is especially so when one considers the costs outline submitted on behalf of Centaur. There, the primary biller was Mr. Johnson (called in 2005), whose actual rate is set at $185. When one compares the outlines, it appears that total billable hours are close and the rate set for Mr. Adler, the plaintiff's main biller, is appropriately greater because of his experience. The fee differential between the outlines is less than $600.

28 So I fix the Plaintiff's costs in the amount of $7,540, including all disbursements and GST.