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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/04/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JP MORGAN CHASE BANK, N.A., a) No. 1 CA-CV 10-0298
Delaware corporation,)
) DEPARTMENT D
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
LAMB LIVESTOCK, LLC,) of Civil Appellate
) Procedure)
Intervenor/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-002236

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

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Chandler

G E M M I L L, Judge

¶1 Intervenor/appellant Lamb Livestock, LLC ("Lamb Livestock") appeals from the trial court's decision after an evidentiary hearing authorizing the receiver on behalf of

plaintiff/appellee JP Morgan Chase Bank ("Chase") to take possession of certain items of property that Chase contended belonged to its debtor, Western Grain Company ("Western Grain"). Lamb Livestock claimed an interest in some of the items of property and appealed. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On February 1, 2008, Chase filed a complaint for breach of contract as well as for the appointment of a receiver and for an injunction to prevent disposal of assets against defendants Western Grain Company and guarantors, Kevin and Brenda Lamb (collectively "the defendants"). The complaint alleged that Western Grain, through Kevin Lamb as manager, had entered into a credit agreement, initially in December 2005, pursuant to which Chase had loaned certain sums to Western Grain, secured by a security agreement. The security agreement granted to Chase a security interest in all of Western Grain's accounts, chattel paper, equipment, farm products, general intangibles, instruments, inventory and all proceeds, products and supporting obligations, existing or later acquired. Chase filed a UCC1 Financing Statement to perfect its security interests on January 10, 2006. The Lambs had executed a continuing guaranty to ensure Western Grain's performance of its obligations to Chase.

¶13 Western Grain stipulated to the appointment of a receiver and the court appointed as receiver MCA Financial Group, Ltd. ("MCA"). The stipulated order authorized MCA to "take exclusive possession, custody and control of and over any and all personal property and other property, wherever located, whether tangible or intangible, consisting of Chase's Collateral."

¶14 Chase subsequently filed a motion for summary judgment on the breach of contract and breach of guaranty claims against Western Grain and the Lambs respectively. In response, Western Grain and the Lambs admitted liability on the contractual obligations, but requested that the court not enter judgment until the receivership was completed, so that the remaining obligations owed by Western Grain and the Lambs could be calculated. On January 15, 2009, the court granted the motion for summary judgment, directing Chase to lodge a form of judgment at the close of the receivership.

¶15 In June 2009, Chase filed an application for an order in aid of execution. The application asserted that Western Grain and the Lambs had provided to Chase a list of equipment dated September 1, 2007, as collateral, but when MCA had attempted to take possession of the items of equipment, Western Grain and Kevin Lamb, as manager, had refused it admittance and refused to allow MCA or the sheriff to take possession of the

property. The application sought an order directing the sheriff to take immediate possession of the equipment and to find Western Grain in contempt.¹

¶16 Attached to the application was an affidavit from Dianne Jackson, a vice president of Chase, who avowed that Western Grain and the Lambs had provided to Chase a list of equipment dated September 1, 2007, representing the collateral for the loan from Chase to Western Grain. She further avowed that neither Chase nor MCA had been provided access to the equipment on that list.

¶17 Stacie Witten, a senior managing director of MCA, avowed that Kevin Lamb had admitted that the September 1, 2007, list was an accurate copy of the list that Western Grain had provided to Chase representing the collateral. She further avowed that Lamb had failed to respond to attempts to contact him to assist in locating the equipment identified as collateral, and that an examination of Western Grains' books and records had resulted in a new spreadsheet of equipment apparently owned by Western Grain. She avowed that Kevin Lamb had told her that some of the items on the equipment spreadsheet belonged to other family members. The affidavit further stated that, after she requested that Lamb address the ownership of the

¹ The application noted that the Lambs had filed a Chapter 12 petition in bankruptcy that was later converted to a Chapter 11 bankruptcy case.

equipment, she received a response from Western Grain in December 2008 disputing Western Grain's ownership of all the equipment on the list provided to Chase and the equipment spreadsheet created by MCA and demanding that Western Grain prove ownership of each item of equipment before the receiver would be permitted to take possession of it. Although Kevin Lamb had cooperated in turning over several trucks, a substantial amount of equipment had not been turned over and although Kevin Lamb indicated that a number of items belonged to family members, he did not respond to requests to identify the specific items that he did not dispute belonged to Western Grain. Witten attached to her affidavit an updated list of equipment, designated Exhibit O, showing the items not yet turned over to MCA that were identified as belonging to Western Grain from Western Grain's books and records as well as items that had been seen at property in Queen Creek where equipment was stored but whose owner was still unidentified. For each item of property, the exhibit designated a reference number, included a description of the property, and indicated whether the owner of the item was Western Grain or "unidentified."

¶18 At a status conference, Kevin Lamb told the court that his son's and father's company, Lamb Livestock, might have an ownership interest in the Western Grain equipment. Counsel for Lamb Livestock and Wyatt Lamb, Kevin Lamb's son and the manager

and former part owner of Lamb Livestock, entered an appearance.

¶19 The court held an evidentiary hearing at which appeared Chase, Wyatt Lamb, Wyatt Lamb, Inc. and Lamb Livestock, LLC, and Kevin Lamb. Wyatt Lamb testified as to the items of equipment in which he or Lamb Livestock claimed an interest. Using the updated equipment list designated Exhibit O to Witten's affidavit,² and identifying each item of property by its reference number on the list, Wyatt testified that of 105 items of property, he claimed an interest in 58 and was unsure about 20, because he could not identify the property. Wyatt similarly testified regarding the September 1, 2007 equipment list, claiming an interest in 48 of 107 items and stating that he was unsure about whether he had an interest in 26 others. Wyatt testified that Lamb Livestock had leased the Queen Creek property where much of the property at issue was located, and that the Queen Creek real property had never been leased or owned by Western Grain. He also testified that many different owners had personal property, such as trailers, on the Queen Creek property. He stated that Western Grain, which was a merchandiser that marketed and sold crops produced by farms, including Lamb Livestock, would have no use for ditchers,

² Chase's Application for an Order in Aid of Execution, with the Witten affidavit and attached Exhibit O, as well as the Jackson affidavit and its attached Exhibit A (the September 1, 2007 list), was admitted as Exhibit 12 at the evidentiary hearing.

cultivators, discs, mulchers, or other farming equipment that appeared on Exhibit O or the September 1, 2007, list.

¶10 Chase submitted into evidence financial statements for Western Grain, Inc. for August 2005, September 2006, and September 2007 that listed fixed assets that included various items of farming equipment, as well as insurance records listing items of equipment that appeared on Exhibit O. Chase also submitted an exhibit titled Western Grain Co. Equipment List, dated August 29, 2005, as well as the September 1, 2007, equipment list; the two lists were similar, but not identical. Kevin Lamb testified that he had no reason to believe that the August 2005 list did not come from Western Grain's records and that it probably did, and also testified that he provided Chase with the September 1, 2007 list and that he did not believe that anything he disclosed was not owned by Western Grain at that time. He contended, however, that the September 1, 2007 list was an insurance list.

¶11 Stacie Witten testified that the September 1, 2007 equipment list was discovered when MCA went through Western Grain's documents and that Dianne Jackson had provided the same list when Chase was asked for a list of what it believed was its collateral. Witten stated that the items on Exhibit O identified as belonging to Western Grain were derived from the equipment list, while those that listed the owner as

"unidentified" were items found on the Queen Creek property for which, with a few exceptions, MCA had found no documentation as to owner in Western Grain's records. She testified that MCA had asked Kevin Wyatt to identify the owner of the various items, but that he had not.

¶12 The court directed the parties to submit proposed findings of fact and conclusions of law and a separate briefing of legal issues. In its legal briefing, Lamb Livestock argued that the September 1, 2007 equipment list was prepared for insurance purposes, that the equipment was for farming, which Western Grain did not do, and that absent titles, registration, invoices or other documentary evidence, Chase could not show ownership in Western Grain. Lamb Livestock also argued that, because Lamb Livestock rented the Queen Creek property on which the personal property was located, the personal property was presumed by law to belong to Lamb Livestock. The company also contended that some of the equipment was owned or liened by third parties.

¶13 Chase argued that it was entitled to take possession of all equipment on Exhibit O that was not referenced as having an "unidentified" owner, and that of the owner "unidentified" items, it was entitled to take possession of those specific items it claimed neither Wyatt nor Kevin Lamb disputed were owned by an entity other than Western Grain.

¶14 The court included the following in its findings of fact:

8. Some equipment contained on the Equipment List is listed in the insurance records which indicate that Western Grain maintained and paid for coverage of the equipment. (Trial Exhibits 8 and 9)

9. Some equipment contained on the Equipment List also was reflected in audited and unaudited financial statements of Western Grain, as well as in tax returns filed by Western Grain, including a balance sheet dated September 30, 2007. (Trial Exhibits 1-7)

10. Lamb Livestock, formed in 2004 and owned by Wyatt and Kevin Lamb, asserts ownership to some of the property. However, Lamb Livestock failed to produce any documents establishing that it was the owner of the equipment contained on the Equipment List, with the exception of Trial Exhibits 15 and 16.

11. The receiver was unable to reconcile or otherwise determine whether Western Grain owned or had possession of any of the equipment on [Exhibit 0] with a notation of "unidentified" owner.

12. Wyatt Lamb and Kevin Lamb did not dispute or otherwise establish even a rebuttable presumption that Reference Nos 18, 21, 22, 27, 30, 33, 49, 50, 58, 67, 70, 103, and 118 of the items of equipment on [Exhibit 0] with a notation of "unidentified", were equipment owned by an entity other than Western Grain.

13. Wyatt Lamb and/or Lamb Livestock did not provide any evidence or otherwise testify as to any interest (or rebuttable presumption of ownership) contrary to Western Grain's ownership of the items of

equipment on [Exhibit O] identified as Reference Nos. 10, 12, 19, 20, 25, 31, 53, 69, 82, 83, 84, 91, 92, 95, 100, 101, 105, 108, 128, 129, 133, 136, 137, 138, 146, 148, 150, 154, 155, 2.

In its conclusions of law, the court stated:

1. Defendant led Plaintiff to believe that it owned the property listed in the Equipment List. Therefore, Plaintiff believed its blanket lien on Defendant's property extended to the Equipment.

. . .

3. Except for the documentation provided for vehicles, Plaintiff has rebutted the presumption that Lamb Livestock or any other entity owns the property on [Exhibit O], Plaintiff rebutted the presumption of ownership with Western Grain's insurance records, financial statements, and tax returns.

¶15 The court entered an order authorizing MCA to take possession of and sell all equipment on Exhibit O that was not listed as "unidentified," except any that might be subject to a bankruptcy stay. Of those items designated as the owner being "unidentified," the court ordered that the receiver could take possession of and sell those with reference numbers 18, 21, 22, 27, 30, 33, 49, 50, 58, 67, 70, 103, and 118. In essence, of the items whose owner was unidentified, the court authorized the receiver to take only those for which Wyatt Lamb testified either that Lamb Livestock had no interest or that he did not know if Lamb Livestock had an interest. The court further

ordered the receiver to resolve any claims to the property by third parties directly with those third parties.

¶16 Lamb Livestock has appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).³

DISCUSSION

¶17 On appeal from a trial to the court, we are bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We are not bound by the trial court's conclusions of law, and consider legal questions de novo. *Sabino*, 186 Ariz. at 149, 920 P.2d at 29; *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993). We view the evidence and reasonable inferences from the evidence in the light most favorable to the prevailing party and must affirm if any evidence supports the trial court's judgment. *Inch*, 176 Ariz. at 136, 859 P.2d at 759.

¶18 The burden of proving that an item of property is subject to a security interest is on the party asserting that interest. 79 C.J.S. *Secured Transactions* § 103 (2011). Appellant-intervenor Lamb Livestock argues that the court improperly shifted the burden away from Chase and instead placed the burden on the Lambs and Lamb Livestock to prove that the

³ The legislature has recently amended A.R.S. § 12-2101 and renumbered it. See 2011 Ariz. Sess. laws, ch. 304 § 1 (1st Reg. Sess.).

property belonged to someone other than Western Grain.⁴ Lamb Livestock bases this contention on the trial court's Findings of Fact 12 and 13.

¶19 We do not find that Findings of Fact 12 and 13 demonstrate that the court improperly shifted the burden of proof. Finding of Fact 12 concerned those items of property on Exhibit O that were designated as owner "unidentified." Finding of Fact 13 concerned items on Exhibit O that had been designated as being owned by Western Grain. In each finding, the court's statement simply reflects that the Lambs and Lamb Livestock had asserted no claim on the particular items noted. They represented a finding regarding the evidence presented in opposition to Chase's position that Western Grain was the owner of the specific items of property. That the court noted the

⁴ In making this argument, Lamb Livestock asserts that under A.R.S. § 47-9203(B)(2) (Supp. 2010), a security interest is not enforceable against the debtor if the debtor has no rights in the collateral or no power to transfer rights to a secured party. Chase interprets this argument as a newly raised issue that is waived: "whether Western Grain ever had an interest in the property at issue to subject the property to the security interest granted to Chase." We do not agree with Chase's interpretation of Lamb Livestock's argument. The issue presented has always been whether Western Grain owns the various items of property that Chase seeks to recover. To the extent, however, that Lamb Livestock may be arguing that any claimed security interest is unenforceable because it does not comply with A.R.S. § 47-9203, Lamb Livestock did not present that argument to the trial court and so has waived it on appeal. See *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (this court usually does not consider arguments not first presented to the trial court).

absence of evidence from the Lambs and Lamb Livestock with respect to certain items of equipment does not indicate that the court failed to hold Chase to its burden of proving ownership.

¶20 The court had also found that Kevin Lamb had provided a copy of the September 1, 2007 list of equipment, titled "Western Grain Co. Equipment List" to Chase; that the receiver had found various items on that list on the Queen Creek property; that the receiver had created Exhibit O based in part on the September 1, 2007 list and the additional review of Western Grain's records; and that some of the equipment on the September 1, 2007 list was reflected in financial and insurance records of Western Grain.

¶21 Kevin Lamb testified that he or someone at his direction had prepared the September 1, 2007 equipment list, that he had provided it to Chase, and that he did not believe he had disclosed anything on the list that Western Grain did not own. Kevin Lamb also testified that he believed an equipment list dated August 29, 2005, and also titled "Western Grain Co. Equipment List," came from Western Grain. That list was similar in form to the September 1, 2007 list and listed a number of the same items of equipment. The August 29, 2005 equipment list set \$1,620,000 as the total value of the equipment of Western Grain at that time. A financial statement for Western Grain Co. dated August 15, 2005 similarly listed the value of the equipment

owned by Western Grain at \$1,620,000. This supports the conclusion that the property listed on the August 29, 2005, equipment list was, in fact, equipment owned by Western Grain, from which one could infer that the similar list dated September 1, 2007 was, as its title stated, a list of equipment owned by Western Grain. Other financial statements listed various items of equipment, some of which corresponded with the September 1, 2007 equipment list. Chase also submitted insurance documents showing that Western Grain had insured various items of property on Exhibit O. From this evidence presented by Chase one could infer that the property on the September 1, 2007 list, as well as those mentioned in the records of Western Grain, which made up part of Exhibit O, was Western Grain's property.

¶22 Although Kevin Lamb testified that both the September 1, 2007 and August 29, 2005 equipment lists were likely insurance lists, the court was free to reach a different conclusion. See *City of Tucson v. Apache Motors*, 74 Ariz. 98, 107-08, 245 P.2d 255, 261 (1952) ("The rule is that the judge or jury, being the sole judges of the facts and the credibility of witnesses, may or may not believe an interested party."); *Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 86, 912 P.2d 1309, 1315 (App. 1995) ("[A] trial court is not bound to accept even the uncontradicted evidence of a disinterested party.").

¶123 Lamb Livestock also asserts that the court ignored un rebutted evidence from Wyatt and Kevin Lamb that an Aulick trailer and a Tye grain drill did not belong to Western Grain. As already noted, the court as the finder of fact, determines the facts and credibility of the witnesses and is free to reject un rebutted evidence from an interested or uninterested party. See *Apache Motors*, 74 Ariz. at 107-08, 245 P.2d at 261; *Premier Fin. Servs.*, 185 Ariz. at 86, 912 P.2d at 1315. Moreover, the testimony was not un rebutted; both items were listed on the September 1, 2007 equipment list as being equipment of Western Grain.

¶124 Lamb Livestock also argues that, because the equipment was located on real property leased by Lamb Livestock, Arizona law presumes that Lamb Livestock owns the property. It contends no evidence rebuts the presumption. "[T]he mere possession of personal property, unless that possession is qualified or explained, raises the presumption of ownership in the possessor." *Starkweather v. Conner*, 44 Ariz. 369, 375-76, 38 P.2d 311, 314 (1934). Even assuming, without deciding, that Lamb Livestock would be entitled to the benefit of such a presumption under the facts here, the trial court heard evidence to rebut that presumption.

¶125 First, Chase presented the September 1, 2007 equipment list produced by Western Grain and titled "Western Grain Co.

Equipment List," as well as financial and insurance documents of Western Grain that included lists of some equipment, and the registrations and titles of some vehicles in the name of Western Grain. With respect to those items of equipment designated as having an "unidentified" owner, for which Chase did not produce any documentation, Wyatt Lamb rebutted the presumption of ownership himself on behalf of Lamb Livestock by disavowing any interest in numerous items of property. Where Wyatt Lamb claimed an interest in property for which Chase provided no documentation, the court denied Chase recovery of that equipment; the court authorized recovery only of those items in which Wyatt Lamb disclaimed any interest.

¶126 To the extent that Lamb Livestock may claim that Chase did not prove Western Grain's ownership of the equipment designated as owner "unidentified" and for which Chase produced no documentation, Lamb Livestock, the only appellant, is not adversely affected by such a ruling, having disavowed any interest in the property. It cannot therefore appeal that part of the judgment. See *Thompson v. Better-Built Aluminum Prods. Co.*, 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996) (party may appeal only that part of judgment adversely affecting him).

¶127 Lamb Livestock also contends that the award of some specific items is not supported by the evidence. Lamb Livestock, however, has failed to identify to what items it

refers. We are therefore unable to address this argument.

¶128 Chase requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01, which authorizes the court to award reasonable attorneys' fees to the successful party in any contested action arising out of contract. A.R.S. § 12-341.01(A) (2003). An action to enforce a security agreement arises out of contract for purposes of the statute. *See, e.g., Wollenberg v. Phoenix Leasing Inc.*, 182 Ariz. 4, 10, 893 P.2d 4, 10 (App. 1994) (award of fees under A.R.S. § 12-341.01 permissible "in a contest between competing security interests in the same collateral"). In our discretion, we will award an amount of reasonable attorneys' fees and costs to Chase upon its compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure.

CONCLUSION

¶129 The superior court's judgment is affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Presiding Judge

_____/s/_____
PHILIP HALL, Judge