[Cite as *Absolute Machine Tools, Inc. v. Liberty Precision Industries, Ltd.*, 2009-Ohio-4612.]

STATE OF OHIO) IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN)

ABSOLUTE MACHINE TOOLS, INC.

Appellant

v.

LIBERTY PRECISION INDUSTRIES, LTD., et al.

Appellees

C.A. No. 08CA009503

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 06CV147692

DECISION AND JOURNAL ENTRY

Dated: September 8, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Absolute Machine Tools, Inc. ("Absolute"), appeals from a judgment of the Lorain County Court of Common Pleas that granted summary judgment to Appellee, JPMorgan Chase Bank, N.A. ("Chase"). This Court affirms.

I.

{¶2} Although this case originally involved additional claims and parties, the sole remaining dispute is Absolute's claim for declaratory judgment against Chase. Absolute and Chase both held security interests in the same property owned by a now-defunct company. Absolute sought a declaration that its security interest had priority.

{¶3} The basic facts relevant to Absolute's claim against Chase are not disputed. During November 2005, Absolute, a master distributor for several machine tool manufacturers in Taiwan, entered into a series of written contracts with Liberty Precision Industries, Ltd. ("Liberty") in which Liberty agreed to purchase 11 industrial machines from Absolute for more

than $1.7 million.[1] The contracts provided that Absolute would retain a purchase money security interest in each of the machines until Liberty paid the balance due. Absolute understood that Liberty, a custom engineering company, planned to modify the machines and resell them to another entity. Through a separate contract between Liberty and Metaldyne Corporation ("Metaldyne"), Liberty agreed to integrate the 11 machines into custom machines designed to Metaldyne's specifications. Upon completion of its integration work, Liberty would resell each machine to Metaldyne.

{¶4} Absolute ordered 11 Johnford machines from Taiwan and had them shipped to a warehouse in California. The large machines arrived over a period of time during late 2005 through early 2006, although the specific arrival dates are not clear from the record. To expedite the completion of Liberty's integration work, a carrier picked up the machines at the California warehouse and transported them to Metalydyne's facility in Greensboro, North Carolina. Liberty personnel came to the Metaldyne facility to perform the engineering work on each machine.

{¶5} Although Liberty paid Absolute several hundred thousand dollars toward the price of the machines, it failed to timely pay the remaining balance of over one million dollars. In response to a demand letter from Absolute, Liberty's counsel informed Absolute that Liberty was in financial trouble and would likely cease operations. He also informed Absolute that several years earlier, Chase had issued Liberty a large line of credit that it had secured with a blanket security interest in Liberty's after-acquired inventory and accounts receivable. Although Liberty had received at least partial payment for the 11 machines from Metaldyne, the proceeds were applied to Liberty's outstanding obligations to Chase. Liberty had insufficient assets to cover

[1] Although the agreements apparently involved additional machines, only 11 machines are at issue in this appeal.

even its outstanding obligations to Chase. Consequently, Absolute never received payment for more than one million dollars that Liberty owed for the 11 machines.

{¶6} Near the end of May, 2006, Absolute received written notification from Liberty that it had ceased operations. Absolute filed this action a few months later. Its claim against Chase sought a declaration that, despite Chase's claim that it held a blanket security interest in the 11 machines and the proceeds that Liberty received from their sale, Absolute's purchase money security interest had priority.

{¶7} Chase and Absolute ultimately filed competing motions for summary judgment, each party maintaining that its security interest had priority. The trial court entered a declaration that the blanket security interest held by Chase had priority over the purchase money security interest held by Absolute. Consequently, the court granted Chase summary judgment and denied Absolute's motion for summary judgment. Absolute appeals and raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING [ABSOLUTE'S] MOTION FOR SUMMARY JUDGMENT AND GRANTING [CHASE'S] MOTION FOR SUMMARY JUDGMENT."

{¶8} Absolute contends that the trial court erred in its determination on summary judgment that Chase's blanket security interest in Liberty's assets had priority over Absolute's purchase money security interest in the 11 machines. Because the trial court correctly found that Chase had a priority security interest in the machines, this Court need not address the parties' dispute over whether Absolute retained a security interest in the proceeds.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from

> the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex. rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

{¶10} Chase moved for summary judgment against Absolute, contending that it held a blanket security interest in all of Liberty's inventory and accounts receivable and that it had perfected its security interest before Absolute's purchase money security interest arose. Chase conceded that Absolute held a purchase money security interest in the 11 machines that it sold Liberty, but Chase maintained that Absolute had failed to take the steps necessary to give its purchase money security interest priority over Chase's prior blanket security interest in Liberty's after-acquired property.

{¶11} Pursuant to R.C. 1309.324, a purchase money security interest in inventory will have priority over all other security interests in the same collateral, provided that the purchase money secured creditor takes certain steps to notify other creditors with conflicting security interests. Specifically, under the explicit terms of R.C. 1309.324, Absolute was required to send a detailed notification to Chase, the holder of a conflicting security interest, about its purchase money security interest in the 11 machines and Chase was required to receive the notification "within five years before the debtor receives possession of the inventory." R.C. 1309.324(B)(3).

{¶12} Although Absolute filed financing statements with the New York Department of State to perfect its security interests in the 11 machines, it concedes that it did not notify Chase that it held a purchase money security interest in the 11 machines until shortly before this litigation began. Thus, Chase maintained on summary judgment that Absolute had failed to comply with these notice requirements and, therefore, failed to achieve priority status as a secured creditor.

{¶13} Absolute responded to this argument in the trial court and on appeal by maintaining that it was not required by R.C. 1309.324(B) to give notice to Chase, because Liberty never received "possession" of the machines.[2] The parties' primary dispute on appeal focuses on whether Liberty was in "possession" of the machines when it performed its engineering work on them at the Metaldyne facility.

{¶14} Absolute maintains that "possession" requires actual physical possession and, because the 11 machines were never located on property owned by Liberty, Liberty never possessed the machines. Absolute cites no authority, however, to support such a narrow construction of the term "possession."

{¶15} The term "possession" is not defined in R.C. Chapter 1309, nor do the parties point to any Ohio case law that explicitly resolves this dispute. It is a basic rule of construction that words should be given their reasonable ordinary meaning. *In re Adoption of Huitzil* (1985), 29 Ohio App. 3d 222, 223. Black's Law Dictionary (8th Ed.2004) 1201 defines "possession" as "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Absolute cites case law from other jurisdictions that likewise focuses on the debtor's ability to exert physical control over the inventory. Absolute has failed to persuade this Court that "possession" also requires that the physical control be exerted at a location owned by the debtor. Although some case law focuses on actual, physical possession, it is the debtor's ability to physically *control* the inventory that is fundamental, not the place at which the debtor exerts that control. See, e.g., *First Bethany Bank & Trust, NA v. Arvest United Bank* (Okl., 2003), 77 P.3d 595, 597 ("[I]t is implicit in Article 9 that possession means actual physical control."); *In*

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[2] Although Absolute raised additional arguments in opposition to summary judgment in the trial court, it has abandoned those arguments on appeal.

re Miller (1984), 44 B.R. 716, 720 (noting that physical possession involves the debtor's simple, physical control over the collateral).

{¶16} The evidence was not disputed that Liberty exerted physical control over each of the 11 machines for a period of at least several weeks after they arrived at the Metaldyne facility in Greensboro. Although the original plan had been to ship the machines to Liberty's facility in New York, Douglas Woods, Liberty's then-president, testified that Metaldyne had a scheduling conflict with its customers and needed to rush Liberty's redesign work. In an effort to expedite delivery of the completed machines to Metaldyne, the machines were sent directly to Metaldyne's Greensboro facility and Liberty agreed to send its people there to modify the machines.

{¶17} Liberty personnel came to the Greensboro Metaldyne facility where they spent weeks performing custom engineering work, which included programming the machines and adding tooling and fixtures. As Woods explained, although Liberty engineers would typically perform their work at Liberty's facility, "[t]he fact that it was [Metaldyne's] floor versus our floor just changed how our guys did the work." Although Woods could not recall exactly how long Liberty personnel worked on the machines at the Metaldyne facility, particularly because each machine required different modifications, he testified that it typically took approximately 16 weeks for Liberty personnel to complete these types of machine modifications. Woods was certain that the Liberty employees were working on the 11 machines at the Metaldyne facility for at least several weeks.

{¶18} Woods further explained that, although the machines were located at the Metaldyne facility, they were completely unusable by Metaldyne until Liberty had completed the reengineering work. Liberty considered each machine to be a "work in process" until the

redesign work was completed. Gary Hugunine, Liberty's former chief financial officer, testified that, even though the machines were never at a facility owned by Liberty, Liberty treated them as inventory on its financial books. From the time that each machine arrived in California until Liberty completed its work on it, the machines were included as inventory on its financial books. After Liberty completed the work on each machine, Liberty transferred the asset on its books from inventory to accounts receivable.

{¶19} Because the evidence was undisputed that Absolute failed to notify Chase of its purchase money security interest in the 11 machines before Liberty received possession of them, it failed to comply with the notice requirements of R.C. 1309.324 and Absolute's purchase money security interest did not have priority over Chase's blanket security interest in Liberty's inventory. Therefore, the trial court properly declared that Chase's security interest in Liberty's inventory had priority and that Chase was entitled to summary judgment on Absolute's claim against it. The assignment of error is overruled.

III.

{¶20} The assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, J.
CONCUR

APPEARANCES:

CHRISTIAN M. BATES, Attorney at Law, for Appellant.

WILLIAM H. FALIN, Attorney at Law, for Appellee.