

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

ROLAND G. HUEBNER
WILLIAM L. HUEBNER
BEAR BLUFF FARMS
HUEBNER BROTHERS

FILED

Case Number:

SEP 25 1986

WF11-84-00376
(CONSOLIDATED)

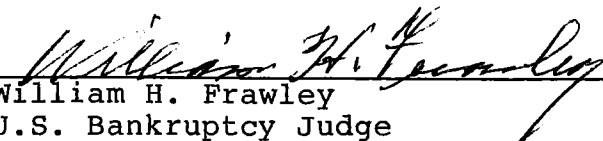
U.S. BANKRUPTCY COURT
Debtors **ORDER**
CLERK

The court having this day entered its memorandum opinion, findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Federal Land Bank of St. Paul is the owner of the cranberry vines that are the subject of this dispute and that the First Wisconsin National Bank of Milwaukee is estopped from asserting any interest in the cranberry vines.

Dated: September 25, 1986.

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Jerry W. Slater
Attorney William Steinmetz
Attorney Mark Metz

UNITED STATES BANKRUPTCY COURT
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In re: **FILED** Case Number:

ROLAND G. HUEBNER
WILLIAM L. HUEBNER
BEAR BLUFF FARMS and
HUEBNER BROTHERS, **U.S. BANKRUPTCY COURT**
Debtors.

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MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The Federal Land Bank of St. Paul (FLB), by Jerry Slater, has brought a motion seeking relief from the 11 U.S.C. § 362 automatic stay. The First Wisconsin National Bank of Milwaukee (First Wisconsin), by William Steinmetz and Mark Metz, has filed an objection to FLB's motion. First Wisconsin asserts that it has an interest in certain cranberry vines that is superior to any interest that FLB has in the cranberry vines. The debtor appears in this matter by Galen Pittman. The court has been requested to determine the priority of the interests that FLB and First Wisconsin have relative to the cranberry vines. 28 U.S.C. § 157(b)(2)(k). This issue has been submitted to the court for determination through briefs.

On April 26, 1982, the debtor granted FLB a mortgage to the real property at issue in this matter: "[t]ogether with all the tenements, hereditaments and appurtenances thereunto belonging" This mortgage was recorded with the Register of Deeds for Jackson County on May 4, 1982. On May 12, 1982, the debtor

granted First Wisconsin a mortgage on the same property. First Wisconsin recorded this mortgage with the Register of Deeds for Jackson County on May 26, 1982. The debtor also granted First Wisconsin a security interest in:

All crops growing or to be grown by Debtor and the products of all such crops, on property described as:

All cranberry vines, growing cranberry vines and cranberry produce and proceeds from the sale of said cranberry produce grown on and located on Government Lots 9 and 10, Section 3, Township 20 North, Range 1, East, Town of Bear Bluff, Jackson County, WI.

Other property specifically described as:

All irrigation equipment including but not limited to all irrigation pipe, pumps, motors and related equipment used and necessary in the irrigation of the cranberry beds located on Government Lots 9 and 10, Section 3, Township 20 North, Range 1 East, Town of Bear Bluff, Jackson County, Wisconsin.

First Wisconsin filed a financing statement with respect to this security interest with the Register of Deeds for Jackson County on May 26, 1982.

On August 30, 1983, FLB commenced a foreclosure action in the Circuit Court of Jackson County. First Wisconsin was listed as a defendant in that action. FLB's schedule of defendants filed with the complaint specifically listed that First Wisconsin apparently claimed an interest in the property: a) by the mortgage filed May 26, 1982; and, b) by the financing statement filed May 26, 1982. On January 17, 1984, First Wisconsin filed a cross-claim and third-party summons and complaint requesting a Judgment of Foreclosure with respect to the subject real estate.

First Wisconsin did not list FLB as a defendant. First Wisconsin did not resist FLB's action and a Judgment of Foreclosure was entered in favor of FLB on January 24, 1984. This judgment barred and foreclosed First Wisconsin "of all right, claim, lien and equity of redemption in the said premises, except the right to redeem the same before sale as provided by law." On February 29, 1984, a Judgment of Foreclosure was entered in favor of First Wisconsin. This judgment provided recognition of the fact that FLB held the first mortgage on the property.

First Wisconsin now asserts that it has a perfected purchase-money security interest in the cranberry vines located on the real property which has priority over any interest that FLB has in the cranberry vines due to its mortgage. FLB argues that the cranberry vines are a part of the real property and appurtenant to the real property, and that it has a priority interest in the cranberry vines. FLB further argues that First Wisconsin should be estopped from attempting to assert a priority interest in the cranberry vines due to the Judgment of Foreclosure entered in FLB's favor on January 24, 1984. "The doctrine of estoppel by record prevents a party from litigating against what was actually litigated or might have been litigated in a former action." Leimert v. McCann, 79 Wis. 2d 289, 293 (1977). FLB was the plaintiff in the foreclosure action and First Wisconsin was a named defendant. First Wisconsin could have litigated the issues

at that time but instead allowed the Judgment of Foreclosure to be entered in favor of FLB.

First Wisconsin now argues that the cranberry vines did not become a part of the real estate and, hence, FLB does not have an interest in the cranberry vines. First Wisconsin also argues that even if the vines did become a part of the real estate, FLB's foreclosure action did not affect First Wisconsin's priority purchase-money security interest in the cranberry vines. It is asserted that this security interest was perfected by the financing statement of May 26, 1982.

The nature of the cranberry vines themselves is quite interesting. See College of Agriculture - University of Wisconsin, Cranberry Growing in Wisconsin, Circular 654 (1966). The vines are planted in "bogs." The planting is accomplished by affixing "clippings" of cranberry vines into the soil. Roots then develop into the soil and the clippings begin to mature into cranberry vines. Ordinarily it takes about four years after such a planting for the vines to bear sufficient fruit to yield a crop. Often a cranberry grower pays in excess of \$5,000.00 per acre to develop a cranberry bed for planting. See Klingbeil and Rawson, Wisconsin Cranberry Lore, page 10 (July, 1975). The life of a cranberry vine which has had proper care is indefinite. Some cranberry vines have been growing in Wisconsin for about 100 years. Although cranberry vines do have root systems that must be embedded into the soil in order for the vines to grow, they do not have "tap roots." Thus, it is possible to remove cranberry

vines from the ground and roll them into bundles without causing material injury to the vines themselves.

Initially the court must address the issue of whether the cranberry vines are fixtures. The relevant statutory section provides: "goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law." Wis. Stat. § 409.313(1)(c). Generally, a good can be said to become a fixture when it is affixed to the real estate with the intention of making a permanent accession to the freehold. Dept. of Revenue v. Smith Harvestore Products, 72 Wis. 2d 60 (1976).

This court has long followed a three-part test to determine whether or not particular articles of property are fixtures: Whether articles of personal property are fixtures, i.e., real estate, is determined in this state, if not generally, by the following rules or tests: (a) Actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.

Id. at 67.

In the matter before the court it is evident that the vines are affixed to the land. The roots of the plants are embedded in the soil. It is also apparent that the application or adaptation of a cranberry vine to a cranberry bog constitutes a "use or purpose to which the realty is devoted." Finally, it is the presumed intention of a hypothetical ordinary reasonable person that when a cranberry vine is planted in a cranberry bog such

vine will remain a permanent accession to the real estate. Id. at 69. The cranberry vines involved in this matter are fixtures. No other reasonable conclusion is possible.

First Wisconsin makes a rather ingenious argument that cranberry vines are crops and, therefore, not fixtures. The problem with this argument is that although the cranberries on the vines may be a crop, the cranberry vines themselves are not a crop.

The word "crop" is derived from the old English "crope" signifying the top or the fruit of a plant. 21 Am. Jur. 2d, Crops § 1 (1981). Under common law, a long line of cases can be found with respect to the issue of whether crops are personal property or are a part of the real estate. Matter of Gorden, 47 B.R. 245 (Bankr. W.D. Wis. 1985). These decisions primarily revolved around the issue of whether the crops had been severed or constructively severed from the real estate. This notion of severance was referenced by the drafters of the Uniform Commercial Code in the Article on Sales. Wis. Stat. § 402.107(2) and § 402.105(c). Similarly, under the Article on Secured Transactions certain crops such as apples or berries may at times be considered to be constructively severed from the real estate and constitute personal property. Wis. Stat. § 409.401(1)(a). However, it cannot be said that the apple trees of an apple orchard are crops. Likewise, it cannot be said that the cranberry vines in a cranberry bog are crops.

First Wisconsin asserts that the debtors have mowed clippings from portions of the cranberry bogs for the last two years. First Wisconsin argues that this is evidence that the cranberry vines themselves should be considered crops. This argument is without merit. The debtors were not operating a vine nursery. They were engaged in the business of producing cranberries. To the extent that they were obliged to sell mowed clippings from portions of their cranberry bogs, this is substantially different from the business of selling whole cranberry vines as a commercial enterprise. The cranberry vines are not crops; they are fixtures.

First Wisconsin also argues that even if the cranberry vines are fixtures, FLB does not have an interest in the vines. This argument is equally without merit. There is no question but that FLB had a mortgage on the real estate including "all the tenements, hereditaments and appurtenances thereunto belonging" If the cranberry vines are fixtures, then FLB has an interest in the cranberry vines by the very definition of a fixture. Wis. Stat. § 409.313(1)(c). First Wisconsin argues that FLB's complaint and Judgment of Foreclosure did not sufficiently put First Wisconsin on notice that FLB was claiming an interest in the cranberry vines. The schedule of defendants that FLB filed with its complaint on August 30, 1983, specifically references any interest that First Wisconsin claimed by virtue of the financing statement of May 26, 1982. Apparently First Wisconsin chose to ignore the foreclosure action brought by

FLB and in which First Wisconsin was a named defendant. If First Wisconsin wanted to establish its interest in the cranberry vines it could have done so before a judgment was entered in favor of FLB.

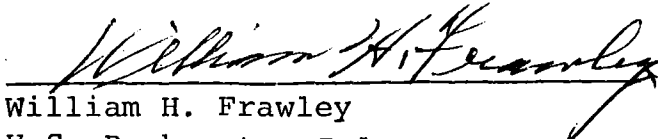
In summary, the cranberry cuttings that the debtors purchased were goods. When the debtors planted the cuttings into the cranberry bog an interest in the cranberry vines arose under real estate law. Department of Revenue v. Smith Harvestore Products, 72 Wis. 2d 60 (1976). Thus, the cranberry vines became fixtures. Wis. Stat. § 409.313(1)(c). FLB held an interest in the cranberry vines due to its mortgage filed on May 4, 1982. First Wisconsin allowed a Judgment of Foreclosure to be entered in favor of FLB on January 24, 1984. First Wisconsin is now estopped from attempting to assert a priority interest in the cranberry vines. Leimart v. McCann, 79 Wis. 2d 289 (1977).

It is the conclusion of the court that FLB is the owner of the cranberry vines due to the properly recorded mortgage of May 4, 1982, and the Judgment of Foreclosure entered January 24, 1984. First Wisconsin is estopped from attempting to assert an interest in the cranberry vines by the Judgment of Foreclosure entered in favor of FLB on January 24, 1984.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

Dated: September 25, 1986.

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge