IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

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| Nicholas A. Tokles, et al. | Court of Appeals No. L-14-1105 |
| Appellants | Trial Court No. CI0201204717 |
| Directions Credit Union, Inc. | |
| Appellee | |
| v. | |
| Black Swamp Customs, LLC, et al. | **DECISION AND JUDGMENT** |
| Defendants | Decided: May 15, 2015 |

* * * * *

William T. Maloney and Sarah A. McHugh, for appellants.

Gregg A. Peppel, for appellee.

* * * * *

**JENSEN, J.**

## Introduction

**{¶ 1}** This accelerated appeal began as an action in replevin by plaintiff-appellant, Nicholas Tokles, and his two companies "Debra G Inc." and "Cactus II Inc." in the Lucas County Court of Common Pleas. Appellants sought the return of supplies and equipment

used in a restaurant venture with the defendants, Black Swamp Customs, LLC, Todd W. Roberts and Michelle Roberts. Appellants alleged that they are the legal owners of the property and that its value exceeds $100,000.

**{¶ 2}** Within days of the filing of the complaint, the appellee, Directions Credit Union, Inc., filed a motion to intervene as a party plaintiff pursuant to Civ.R. 24(A). Directions Credit Union, Inc. is a creditor of the defendants and made a series of loans to them, all of which were in default. It claimed a perfected security interest in defendants' property, including the property subject to appellants' replevin action.

**{¶ 3}** Appellants and Directions Credit Union filed cross-motions for summary judgment. The trial court found in favor of Directions and against appellants. Appellants appealed. For the reasons that follow, we affirm the judgment of the trial court.

## Facts and Procedural History

**{¶ 4}** The case involves a failed business venture in the village of Whitehouse, in Lucas County, Ohio. Defendants Todd Roberts and Michelle Roberts, also of Whitehouse, formed Black Swamp Customs, LLC, in 2006 for the purpose of operating a motorcycle shop. Defendant Black Swamp Customs, LLC is an Ohio limited liability company organized in the state of Ohio.

**{¶ 5}** To secure financing for the shop, defendants obtained several loans from Directions Credit Union ("Directions"). In all, Directions made three loans to the Roberts and a group of companies owned by them, including Black Swamp Customs, LLC, totaling $660,000, plus interest.

**{¶ 6}** In exchange for the loans, defendants delivered two security agreements to Directions, giving it a security interest in property that defendants "own or have sufficient rights to * * *." The description of the property subject to the security interest includes "inventory," including "inventory now owned or hereafter acquired;" "accounts;" "general intangibles;" and "equipment." The term "equipment" is defined as "all equipment, including, but not limited to, all machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and recordkeeping equipment, and parts and tools."

**{¶ 7}** The security agreements were recorded with the Lucas County Recorder. The attachment of the assets was perfected by the filing of a UCC financing statement on September 25, 2006, and a continuation financing statement on June 1, 2011.

**{¶ 8}** Sometime in 2006, defendants began operating a restaurant, called "Skeeters," at the location where the motorcycle shop had been. In March of 2009, Directions brought a collection action against defendants when they fell behind in their loan payments.

**{¶ 9}** On December 22, 2010, appellant, Nicholas Tokles, entered into a "management agreement" with Black Swamp Customs, LLC whereby Tokles undertook to manage and rehabilitate defendants' restaurant business. Tokles is an experienced restauranteur in Northwest Ohio. Before signing the agreement, Tokles met with representatives of Directions to discuss his plans to help the restaurant succeed.

**{¶ 10}** Under the management agreement, Tokles retained 50 percent of any profits remaining after payment of all monthly loan obligations and other accounts payable. To help the restaurant succeed, the name was changed to "Nick & Jimmy's Black Swamp Sportin Pub."

**{¶ 11}** Of import to this case was Tokles' provision of equipment and restaurant supplies to the facility. According to the complaint and exhibits, Tokles provided plasma television sets, coolers, kitchen supplies, a walk in freezer, trade fixtures, tables and chairs. Some of the items were attached to the walls and floors. None of the property brought to the restaurant was financed by Directions or paid for Black Swamp Customs, LLC.

**{¶ 12}** According to the amended complaint, Black Swamp Customs, LLC breached the management agreement on August 7, 2012, when the Roberts unilaterally closed the restaurant and wrongfully denied Tokles access to the building and to his personal property. The next day, on August 8, 2012, Tokles and his companies sued defendants for replevin, conversion, breach of contract and injunctive relief.

**{¶ 13}** On August 15, 2012, Directions filed a separate action against Todd Roberts, Michelle Roberts, and the three Black Swamp companies. (Lucas County Common Pleas case No. CI0201204833). Directions obtained a cognovit judgment against them on the three promissory notes. The total amount of the unpaid debt exceeded $600,000 excluding interest. Directions then moved to intervene in the instant

case, claiming that its security interest in defendants' property extended to the same property appellants sought in their replevin action.

**{¶ 14}** On October 2, 2012, Todd and Michelle Roberts filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of Ohio. The Roberts were subsequently dismissed from the instant case.

**{¶ 15}** In their motion for summary judgment, appellants claimed that they "are the sole owners of the property and merely loaned the property to defendants." They further argued that because defendants never owned the property, defendants could not have transferred a security interest to Directions.

**{¶ 16}** In its cross-motion, Directions argued that the disputed assets were after acquired collateral which was subject to the enforceable security agreement. Directions also relied on appellants' failure to secure any interest in the property, its admission that the assets were acquired for the purpose of operating the restaurant, and that the assets were purchased in the name of Black Swamp.

**{¶ 17}** In its April 15, 2014 opinion and judgment entry, the trial court found,

> Here, Directions clearly has a security interest, through its security agreements with Black Swamp, in all of the equipment and property of Black Swamp. Directions perfected its security interest with the filing of a financing statement and maintained its interest through a continuation statement. [Appellants] did not perfect any security interest in the equipment. It is also undisputed that the Management Agreement provides

any purchases by Tokles shall be in the name of Black Swamp. Moreover, it is also evident that the equipment purchased by Tokles was used in the operation of the Business known as Nick and Jimmy's Black Swamp Sportin Pub. As a result of the foregoing, it is therefore undisputed that any equipment purchased by Tokles is a business asset of Black Swamp and is therefore subject to the perfected security interest of Directions. * * * Therefore, the Court finds Directions' Motion for Summary Judgment well-taken and GRANTED and [Appellants] Motion for Summary Judgment not well-taken and DENIED.

**{¶ 18}** Appellants filed a timely notice of appeal on May 14, 2014, assigning two assignments of error for our review:

Assignment of Error No. 1: The Lower Court Erred in Granting Summary Judgment for the Appellee.

Assignment of Error No. 2: The Lower Court Erred in Failing to Grant Summary Judgment for the Appellants.

**Law and Analysis**

**{¶ 19}** We review summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where there is no genuine issue as to any material fact and reasonable minds viewing the evidence

most strongly in favor of the nonmoving party can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

**{¶ 20}** Before ruling on a motion for summary judgment, Civ.R. 56(C) requires a trial court to thoroughly examine all appropriate materials filed by the parties. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 359, 604 N.E.2d 138 (1992). However, when the party seeking summary judgment demonstrates that no genuine issue of material fact exists, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Neither party meets this burden simply by making conclusory assertions that evidence exists to support the claims. *Id.* To carry this burden, a party must point to specific evidence which affirmatively shows that evidence exists to support the claims. *Id.*

**{¶ 21}** Appellants asserted before the trial court that they were the "owners" of the property, which they "loaned" to defendants for purposes of bolstering the restaurant business. Therefore, appellants argued, the defendants had no security interest in the property to give to Directions.

**{¶ 22}** On appeal, appellants now argue that they were the "lessors" of the property and that defendants were the "lessees." Appellants claim their right to the return of the "leased" property, pursuant to R.C. 1310.35(A). The statute provides that "a creditor of a lessee takes subject to the lease contract." In other words, appellants claim

that, as the lessor of the property, they have priority over the secured creditor, Directions. Appellants conclude "what the lessee does not have, the lessee cannot give." 2 White & Summers, *Uniform Commercial Code*, Section 15-2, (5 Ed.2008).

**{¶ 23}** The problem with appellants' argument is two-fold. First, there is no evidence in the record of a lease agreement, implicit or explicit, between the parties.

**{¶ 24}** Second, appellants failed to argue the existence of a lease before the trial court. Appellants' novel argument, and their reliance on R.C. 1310.35(A), are raised for the first time on appeal. A party may not change its theory of the case and present new arguments for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992). We will not consider arguments raised for the first time on appeal. *Szkatulski v. Bank One, N.A.*, 158 Ohio App.3d 189, 2004-Ohio-3981, 814 N.E.2d 543, ¶ 12 (6th Dist.).

**{¶ 25}** The purpose of a security agreement is to specify the necessary terms and conditions of an agreement between the parties as to the existence of a security interest in collateral. *Union Bank Co. v. Heban*, 6th Dist. Sandusky No. S-11-005, 2012-Ohio-30, ¶ 23.

**{¶ 26}** A security interest is perfected if it has attached and all of the applicable requirements for perfection have been satisfied. R.C. 1309.308(A). A security interest can be perfected at the time it attaches if the applicable requirements for perfection are satisfied before the security interest attaches.

**{¶ 27}** In general, a financing statement must be filed in order to perfect a security interest. *See* R.C. 1309.310. The filing of a financing statement provides "notice to interested third parties that the person filing it may have a security interest in the property of the debtor named therein." *Natl. Bank of Fulton Cty. v. Haupricht Bros., Inc.,* 55 Ohio App.3d 249, 255, 564 N.E.2d 101 (6th Dist.1988).

**{¶ 28}** Pursuant to R.C. 1309.201(A), a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. "A security agreement is enforceable against all third parties once it is perfected." *Heban* at ¶ 23.

**{¶ 29}** In this case, the evidence indicates that Directions filed a separate financing statement for each security agreement with the Ohio Secretary of State pursuant to R.C. 1309.501, and included in those financing statements, descriptions of the collateral sufficient to meet the requirements of R.C. 1309.108. In so doing, Directions perfected its security interest in the collateral described in the security agreements. *See* R.C. 1309.310. Indeed, appellants concede that attachment and perfection are not at issue herein.

**{¶ 30}** The issue is whether Directions' perfected security interest in defendants' property includes the equipment and supplies provided by Tokles to the restaurant.

**{¶ 31}** R.C. 1309.203(B) speaks to the issue raised in this case. The statute provides, in part,

> [A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) Value has been given;
>
> (2) *The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party*; and
>
> (3) One of the following conditions is met:
>
> (a) The debtor has authenticated a security agreement that provides a description of the collateral * * *. (Emphasis added.)

**{¶ 32}** Comment 6 to R.C. 1309.203(B) is instructive. It provides that "[a] debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach." Moreover, the determination of whether a debtor has rights in collateral is determined by application of statute, the common law, or any applicable agreements. *National City Bank, Northeast v. Specialty Tires of Am., Inc.*, 109 Ohio App.3d 387, 392, 672 N.E.2d 232 (9th Dist.1996), citing 4 White & Summers, *Uniform Commercial Code*, Section 31-6, 127 (4 Ed.1995).

**{¶ 33}** Here, there is evidence in the record to support the conclusion that defendants had rights in the collateral sufficient for a security interest to attach. For example, the management agreement between Tokles and defendants provides that expenditures made by Tokles on behalf of the restaurant were to be made "in the name of

and on account of, and upon the credit of [Black Swamp Customs LLC] * * *." There are no other agreements in the record that would arguably support a different conclusion.

**{¶ 34}** Further, there is an absence of evidence to support Tokles' position that he merely loaned the equipment to the defendants. For example, Tokles' admits that he did not label the items he brought to the restaurant as a means of distinguishing his property from defendants'.

**{¶ 35}** In sum, we find that Directions Credit Union put forth evidence to show that defendants had sufficient rights in the collateral to transfer a security interest in that collateral to Directions. We further find that appellants failed to rebut that evidence and/or to present evidence of its own demonstrating that it retained ownership of the property at issue. We agree with the conclusion of the trial court that the equipment purchased by Tokles was a business asset of Black Swamp Customs, LLC and was therefore subject to the perfected security interest of Directions.

**{¶ 36}** Appellants have failed to provide specific evidence that creates a genuine issue of material fact with respect to the areas in which the trial court granted summary judgment. Appellants' first and second assignments of error are found not well-taken.

**{¶ 37}** The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE

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