UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	Case No. 93-10347
WILLIAM NICHOLAS FORTESCUE, JR.,	Chapter 7
Debtor.	

ORDER

THIS MATTER CAME ON for hearing before the undersigned United States Bankruptcy Judge on the "Motion for Possession of Personal Property" filed by Jane H. Shuttleworth and dated May 11, 1995 seeking possession of certain personal property located on the grounds of the Chanteloup house in Henderson County, North Carolina. The record shows that the Motion and Notice of same were properly filed and served. The matter came on for hearing before the undersigned United States Bankruptcy Judge on the 23rd day of May, 1995. When the matter was called for hearing, the movant herein appeared along with her counsel, William M. Alexander, Jr., the respondent, Historic Flat Rock, Inc. appeared along with its counsel, Walter C. Carpenter. The court heard testimony from Jane Shuttleworth, William Nicholas Fortescue, Jr., debtor, Richard C. Stanland, Jr., President of Historic Flat Rock, Inc., and Mark White. For the reasons stated below, the court has concluded that the Motion should be denied. The court makes the following findings of fact and conclusions of law:

1. Pursuant to a confirmed Chapter 11 plan, the debtor, William Nicholas Fortescue, Jr., was permitted to sell his personal property to use for living expenses.

2. On December 3, 1991, the debtor and Shuttleworth entered into a written agreement, entitled "PURCHASE AGREEMENT AND OPTION." The agreement provides:

> Jane Shuttleworth agrees to purchase from Nick Fortescue for the sum of $10,000 the following:
>
> A pair of marble lions
> A marble fountain including base
> A sundial with base
> An Empire dining table with matching sideboard and buffet
>
> Nick Fortescue will have the option to purchase the above items for one year from this date for $10,000, but only after Jane Shuttleworth has been paid the full amount due for the mortgage on Chanteloup.
>
> The above property shall remain at Chanteloup for up to one year and Nick Fortescue agrees to repurchase the above items for a total of $10,000 at Jane Shuttleworth's option if the above described property is damaged while in his possession.

3. All of the items were located on the debtor's premises at Chanteloup Estates; the first three are still located upon these premises. Shuttleworth obtained possession of the table, sideboard and buffet sometime in early 1995, and they are not in dispute in this action.

4. Shuttleworth paid the debtor $6,000 cash and forgave a $4,000 debt which the debtor owed her. The debtor had previously pledged the same items as collateral on a debt to Loren Wells, and the $6,000 generated from the agreement with Shuttleworth was used to pay off the prior debt to Wells.

5. There were a number of similar transactions testified to by the debtor and Shuttleworth. In each such transaction the debtor tried to get money without giving up any of the property.

Shuttleworth testified that although she gave the debtor the money at the time of their written agreement, she understood that she would get title to the items only after the one year repurchase period had expired.

6. A sale, as defined by §2-106 of the Uniform Commercial Code, consists of the passing of title from the seller to the buyer for a price. By comparison, a chattel mortgage is a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation. Beard v. Newsome, 76 N.C.App. 476, 478, 333 S.E.2d 527 (1985), *citing*, Odom v. Clark, 146 N.C. 544, 60 S.E. 513 (1908).

7. There is a strong indication that a transaction is a chattel mortgage rather than an absolute sale when the property is retained by the "seller," and the price paid by the "buyer" is not fairly proportionate to its value. Beard at 479-480, *citing*, 68 Am.Jur.2d *Secured Transactions* Sec. 96 (1973).

8. In the case at bar, with the exception of the dining room furniture which was recently acquired by Shuttleworth, the evidence shows that the items have never been removed from the Chanteloup estate.

9. In addition, the evidence shows that the items are worth far more than the price paid by Shuttleworth. The evidence presented at the hearing showed that the two lions are worth approximately $15,000; the fountain is worth between $15,000 and $30,000; the sundial is worth approximately $5,000; and the furniture is valued at around $3000. As was recited above,

Shuttleworth gave the debtor $6,000 and forgave a debt he owed to her in the amount of $4,000. The court finds the difference between the value of the property and the $10,000 "purchase price" to be further evidence that the agreement was a loan and not a sale.

10. The court finds the substance of the transaction between the debtor and Shuttleworth to have been a chattel mortgage, or a loan, rather than a sale. While the agreement was called a sale, the history of previous transactions between the parties, the retention of the property by the debtor, and the difference between the value of the property and the purported "purchase price" all belie that label.

11. Further, the court finds that the lions, fountains, and sundial are real fixtures that pass with the title to the realty rather than personal property that the debtor was permitted to sell. Real fixtures are items of personal property which have been annexed to land or permanently attached to land by the owner of the items or with his assent with the intention to make the annexation permanent. James A. Webster, Jr., Webster's Real Estate Law in North Carolina, §2-3, 25-26 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994).

12. At issue here is whether the items were annexed to the land and whether the annexor intended for them to be a permanent addition to the land. The intention of the annexor need not be express or subjective, and may be taken from the circumstances surrounding the annexation. Id.; Little By Davis v. National

Services Industry, 79 N.C. App. 688, 340 S.E.2d 510 (1986). Circumstances from which a permanent annexation may be inferred include, *inter alia*,:

a. The character of the annexation, (will its severance cause injury to the annexed item or to the realty to which it is attached?);

b. The relationship of the annexor to the real estate, (the intention to permanently annex a chattel to land is usually proportionate to the permanency of the interest the annexor has in the land); and

c. The nature and purpose of the annexation of the chattel to the land.

Webster at 26-27.

13. In this case, the items are all integral parts of a garden originally designed by Frederic Law Olmstead. The evidence shows that the sundial was installed in 1895 when Olmstead designed the garden, and that the lions and the fountain have been at Chanteloup since at least 1935 when the debtor's grandfather owned the property. The debtor testified that the lions were once temporarily removed when the debtor's father contemplated selling the property and did not want to include the lions in the sale. Other than this one occasion, there was no evidence that the items have been separated from the property since they were originally placed there at least sixty years ago.

13. The lions, fountain, and sundial are parts of a formal garden which fit in and match the rest of the gardens in type of

material and appearance. Just as the various parts of a house go together to create a house, so do, in this case, the various parts of the garden go together to create the garden. To remove the lions, fountain, and sundial would damage the gardens just like removal of the columns would hurt the house. The lions, fountain, and sundial are not just decorations; they establish this as a formal garden and their removal would substantially diminish the value of the garden.

14. The fountain and the sundial are set into the ground and are physically attached. The lions weigh approximately 500-1000 pounds each and are attached by their own weight.

15. Using the above standards, the court finds that the items are real fixtures, and as such, they are part of the realty purchased by Historic Flat Rock at the auction sale. The items were annexed by the owner of the property or at his behest, they are attached to the property by their weight and by their inclusion in a formal garden, and the character of the entire garden would be destroyed by their removal. The items are not the personal property of the debtor and were not properly sold or mortgaged by the debtor to Shuttleworth.

16. Finally, assuming arguendo that the items were the debtor's personal property and that the agreement between the parties was a sale, Shuttleworth has taken no legal action to obtain possession. She was aware that the auction sale would be held, and she took no legal action for possession either before or after the sale. Since Shuttleworth took no legal actions the

auction sale was held with the lions, fountain, and sundial on the property creating a situation where a reasonable person would believe that those items were part of the realty. Since Shuttleworth failed to obtain a legal determination of her right to the lions for a period of over two years, she is barred by the doctrine of laches.

9. The court finds that Shuttleworth should have an unsecured claim for $7,000 ($10,000 less the $3,000 value of the Empire dining table with matching sideboard and buffet which Mrs. Shuttleworth received) plus interest from December 3, 1991 at the legal rate.

IT IS THEREFORE **ORDERED, ADJUDGED, AND DECREED** that the lions, fountain, and sundial are real fixtures and run with the title to the realty, and are, therefore, now owned by Historic Flat Rock, Inc.

IT IS FURTHER **ORDERED** that Jane Shuttleworth have an unsecured claim in the amount of $7,000 plus interest at the legal rate from and since December 3, 1991.

This the 5th day of June, 1995.

George R. Hodges
United States Bankruptcy Judge