

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

SEMARK ASSOCIATES, LLC,	:	April Term 2017
	Plaintiff,	:
	v.	No. 3432
RCL, LLC,	:	
	Defendant.	Commerce Program
	:	
	:	Control Nos. 18032747/18032429

ORDER

AND NOW, this *26th* day of July, 2018, upon consideration of the Parties' Cross Motions for Summary Judgment, all responses in opposition, and the attached Opinion, it hereby is **ORDERED** as follows:

1. Plaintiff Semark Associates, LLC's Motion for Summary is **Denied**.
2. Defendant RCL, LLC's Motion for Summary Judgment is **Granted**.

It is further **ORDERED** that judgment is entered in favor of defendant RCL, LLC on all of Plaintiffs' claims.

BY THE COURT



NINA WRIGHT PADILLA, J.

Semark Associates, Llc -WSJDM



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COMMERCE PROGRAM

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OPINION

This action involves the priority of competing interests in a liquor license. Plaintiff Semark Associates, LLC (“Semark”) is the landlord and owner of real property located at 437-61 North 3rd Street in Philadelphia, Pa. 19123.¹ Prior to October 23, 2015, Semark leased a portion of the premises, to Miriam’s Kids, Inc. who operated a restaurant bar and owned a liquor license.² Miriam’s Kids, Inc.’s defaulted on the lease and transferred the liquor license to Semark.³

On October 23, 2015, Semark entered into a written lease agreement with Razz, LLC (“Razz”)⁴ for a term of five years and two months beginning on the latter of November 1, 2015 or the day the Pennsylvania Liquor Control Board (“PLCB”) approved the liquor license transfer to Razz.⁵ The Lease provided the following as it pertains to the liquor license:

¹ RCL’s motion for summary judgment ¶ 2; Semark’s response in opposition to RCL’s motion for summary judgment ¶ 2.

² RCL’s motion for summary judgment ¶¶ 3, 4; Semark’s response in opposition to RCL’s motion for summary judgment ¶¶ 3, 4.

³ RCL’s motion for summary judgment ¶ 4; Semark’s response in opposition to RCL’s motion for summary judgment ¶ 4. Semark paid Miriam’s Kids Inc. \$20,000 for the liquor license.

⁴ Miriam’s Kids Inc. and Razz are not parties in this action.

⁵ Lease Agreement dated October 23, 2015 between Semark Associates, LLC and Razz, LLC.

8. LIQUOR LICENSE

8.1 PLEDGE OF LICENSE. TENANT shall not under any circumstances, during the term of this Lease, or any extensions or upon termination of the Lease for any reason, including, default, transfer the Liquor License (the "License") from the Lease Premises to another location, or transfer the Liquor License to another owner, unless LANDLORD opts not to purchase it, as provided below. To secure TENANT's obligation: (a) to perform fully under this Lease in all respects, (b) to perform fully under the Judgment Note between TENANT and LANDLORD, representing payment to Landlord for the sale of a Liquor License to TENANT and, (c) not to transfer License to any other location, TENANT hereby pledges and grants LANDLORD a security interest in the License in accordance with the terms of the Uniform Commercial Code, as adopted and revised from time to time in Pennsylvania. LANDLORD shall have the right to file form UCC-1 and such other documents (including without limitation form UCC-3) as shall be needed from time to time to perfect, renew, revive, and continue LANDLORD's security interest in the License. Said security is intended to create for LANDLORD a first lien against the License, and as requested from time to time TENANT shall execute and deliver promptly any documents reasonably required to perfect and/or maintain LANDLORD'S said interest.

8.2 RIGHT TO PURCHASE LICENSE.

...

(b) UPON TERMINATION OF THIS LEASE PURSUANT TO A DEFAULT BY TENANT, LANDLORD, OR LANDLORD'S ASSIGNEE, SHALL HAVE A RIGHT, BUT NOT THE OBLIGATION, TO PURCHASE THE LIQUOR LICENSE FROM TENANT OR THE SUCCESSOR OWNER OF THE LIQUOR LICENSE; THE PURCHASE PRICE FOR THE LICENSE SHALL BE ONE DOLLAR (\$1.00 (SIC) LESS ANY MONIES DUE LANDLORD FROM TENANT.

...

(d) The right to repurchase the License shall be secured by a lien against the License which shall be in a first position and under and subject to no other liens or encumbrances except for a lien to secure the aforesaid loan of \$150,000 from LANDLORD to TENANT; LANDLORD may perfect its lien by filing a financing statement (form UCC-1) and such other documents from time to time shall be necessary to maintain, continue, renew, and terminate its lien. ⁶

⁶ Lease Agreement between Semark Associates, LLC and Razz with a commence date of November 1, 2015.

On October 29, 2015, Semark assigned all of its right, title, and interest in the liquor license and delegated all of its obligations to Razz.⁷ In exchange, Razz paid Semark \$150,000 for the liquor license which was secured by a Promissory Note.⁸ Razz also executed a judgment note to replace the promissory note once the liquor license was transferred. The judgment note was secured by a lien against the license which was to be in first position and under and subject to no other liens or encumbrances. Semark could perfect its lien by filing a financing statement.⁹

On December 8, 2015, the PLCB approved the application for transfer of license to Razz subject to the satisfaction of the following conditions: the execution and return to the PLCB of a Certification of Completion affirming financial arrangements and an application for off premises catering permit if Razz intended on conducting any catered functions during the 2016 calendar year.¹⁰ The Certificate of Completion was to be completed and submitted to the PLCB within fifteen days of transaction completion (settlement) affirming that the financial arrangements were completed as reported and that Razz had legal possession of or legally occupied the subject premises.¹¹

On December 9, 2015, Razz entered into an Installment Judgment Note with defendant RCL, LLC (“RCL”). RCL provides financing to restaurants which lease or purchase amusement

⁷ See Assignment – Liquor License dated October 29, 2015 between Semark Associates, LLC and Razz, LLC. See also, RCL’s motion for summary judgment ¶ 5; Semark’s response in opposition to RCL’s motion for summary judgment ¶ 5.

⁸ See also, RCL’s motion for summary judgment ¶ 6; Semark’s response in opposition to RCL’s motion for summary judgment ¶ 6.

⁹ See Assignment – Liquor License dated October 29, 2015 between Semark Associates, LLC and Razz, LLC.

¹⁰ See, Letter with Attachments from the Pennsylvania Liquor Control Board dated December 8, 2015.

¹¹ Id. A completed Certificate of Compliance is not part of the record. Semark avers that the liquor license was transferred to Razz on December 18, 2015. See Semark’s response to RCL’s motion for summary judgment ¶ 14. Semark does not cite any evidence to support this statement.

or vending equipment from its affiliated company, Automatic Coin Vending Company.¹² RCL loaned Razz \$50,000. The Installment Judgment Note provided in part as follows:

...this Note shall serve as a Security Agreement pursuant to which Maker [Razz] is Debtor and Payee [RCL] is Secured Party. Payee shall be authorized to record a UCC-1 Financing Statement to perfect its security interest in the License as collateral.¹³

In addition to the Installment Judgment Note, Razz and RCL also entered into a Security Agreement wherein Razz granted to RCL a perfected security interest in collateral to secure the indebtedness of \$50,000.¹⁴ Razz represented in the Security Agreement that the Liquor License was clear and free from and was not subject to “any assignment, security interest, mortgage, pledge lien, levy for taxes or other assessments, interest, charge, adverse claim or other encumbrance including any financing statement or other documents filed by any public office.”¹⁵ The collateral subject to the Security Agreement included the liquor license. On December 9, 2015, RCL filed a UCC-1 financing statement with the Secretary of the Commonwealth perfecting its security interest in Razz’s collateral for the loan which included the liquor license.¹⁶ On December 18, 2015, Semark filed its UCC-1 financing statement with the Secretary of the Commonwealth of Pennsylvania perfecting its security interest in the liquor license.¹⁷

¹² See also, RCL’s motion for summary judgment ¶ 13; Semark’s response in opposition to RCL’s motion for summary judgment ¶13.

¹³ Installment Judgment Note dated December 9, 2015 between Razz, LLC and RCL, LLC dated December 9, 2015.

¹⁴ Security Agreement dated December 9, 2015 between Razz, LLC and RCL, LLC.

¹⁵ Id. at 4 (h).

¹⁶ See also, RCL’s motion for summary judgment ¶ 24; Semark’s response in opposition to RCL’s motion for summary judgment ¶24.

¹⁷ UCC filing Acknowledgement of Semark Associates LLC financing statement on December 18, 2015.

In the fall/winter of 2016, Razz defaulted under the terms of the lease agreement with Semark by failing to pay the base rent due for October, November and December, 2016.¹⁸ On December 29, 2016, Semark confessed judgment against Razz for possession and money in the amount of \$40, 740.01.¹⁹ During the eviction process, Semark discovered Razz had entered into a financing agreement with RCL and that RCL filed a UCC-1 financing statement as to the liquor license before Semark filed its UCC-1 financing statement.²⁰ In April, 2017, Semark filed this action against RCL seeking a determination of the rights of the parties pursuant to their competing security interests in the liquor license. RCL filed preliminary objections to the complaint. The preliminary objections were sustained in part and the claim for attorneys' fees was stricken. All other preliminary objections were overruled. Presently pending before the court are the cross motions for summary judgment asking the court to determine the priority of the competing security interests held by the respective parties herein.

DISCUSSION

Pursuant to 13 Pa.C.S.A. § 9203(a) and (b) an enforceable security interest is created and attaches when (1) the collateral is in possession of the secured creditor or the debtor signs a security agreement which contains a description of the collateral, (2) value has been given and (3) the debtor has rights in the collateral. Upon the completion of all of these steps an enforceable security interest is created.²¹ A security interest attaches when it becomes

¹⁸ See, *Semark Associates, LLC v. Razz, LLC, et. al.*, 1612-3403, complaint in confession of judgment ¶ 10.

¹⁹ RCL's motion for summary judgment ¶¶ 28, 29; Semark's response in opposition to RCL's motion for summary judgment ¶¶ 28,29.

²⁰ RCL's motion for summary judgment ¶ 31; Semark's response in opposition to RCL's motion for summary judgment ¶¶ 31.

²¹ *Kendrick v. Headwaters Production Credit Ass'n*, 523 A.2d 395, 396 (Pa.Super. 1987).

enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified above have taken place unless explicit agreement postpones the time of attachment.²² A security agreement is defined as “an agreement which creates or provides for a security interest.”²³

In the case *sub judice*, Semark and RCL possess valid security agreements. Semark’s was created when the Lease and Assignment of Liquor License were executed. Semark entered into a written lease agreement and judgment note with Razz which gave Semark the right to file a UCC-1 filing statement. While Semark has a valid security interest, at the time the Lease and Assignment Agreement were executed, Razz did not have any right to the liquor license since the PLCB had yet to approve the transfer from Semark to Razz and therefore attachment could not occur immediately.²⁴ Since Razz did not acquire rights to the liquor license until December 8, 2015, the date the PLCB approved the transfer of the license, Semark’s security interest could not attach and become enforceable. As it pertains to RCL, the security agreement was created when Razz signed the security agreement the day after the liquor license was transferred and attached immediately.²⁵ Based on the foregoing, Semark and RCL have valid security interests in the liquor license.

²² 13 Pa.C.S.A. § 9203(a)(1), (2), (3) and (b).

²³ 13 Pa.C.S. A. § 9105.

²⁴ 13 Pa.C.S.A. § 9203(a)(1), (2), (3) and (b).

²⁵ Semark argues that at the time RCL perfected its security interest Razz did not have an interest in the collateral. The court does not agree. The record evidence shows that the PLCB approved the transfer of the liquor license to Razz on December 8, 2018. While certain items were required by the PLCB to be submitted before the transfer became permanent, Razz did have rights in the liquor license at the time the Installment Judgment Note and security agreement was entered into with RCL which could be attached. A debtor’s limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. See, 13 Pa. C. S. A. §9203 comment 6. Security interest attach to whatever rights a debtor may have, broad or limited, as those rights may be. *Id.* As such, at the time RCL’s security interest attached, Razz did have an interest in the liquor license which was attached by RCL’s security interest.

The next questions to be addressed are whether the security interests were perfected and if perfected which security interest has priority. The purpose of perfection is to “discourage and prevent the creation of secret liens” by putting the world on notice that the collateral has been encumbered. Semark argues that it has a purchase money security interest in the liquor license and therefore it was not necessary to perfect its security interest by filing a UCC-1 financing statement because a purchase money security interest takes priority over a conflicting security interest created or a financing statement filed.²⁶ However, the liquor license at issue here is not subject to the provisions regarding purchase money security interests because purchase money security interests are limited to goods, including fixtures, and software.²⁷ A liquor license is a generable intangible, specifically excluded from the definition of a good and not subject to the exceptions relied upon by Semark.²⁸

To perfect a security interest in a general intangible, Article 9 of the UCC requires a secured party to file a financing statement with the Secretary of the Commonwealth of Pennsylvania.²⁹ As a general rule, a creditor with a perfected security interest in collateral has, under the Uniform Commercial Code, an interest therein which is superior to that of unsecured

²⁶ Relying on 13 Pa. C. S. A. § 9317 (e) (if a person filed a financing statement with respect to purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor that arise between the time when the security interest attaches and the time of filing) and § 9324 (a)(a security interest is perfected when the debtor receives possession of the collateral within twenty days thereafter).

²⁷ 13 Pa. C. S. A. § 9103 (b) and (c).

²⁸ 13 Pa. C.S. A. § 9102 (2).

²⁹ See, *In re Tam of Allegheny LLC*, 575 B.R. 131, 135 (Bkrtcy.W.D.Pa., 2017), citing, 13 Pa. C.S.A. § 9310(a) (“[A] financing statement must be filed to perfect all security interests”); see also *Comm. Nat’l Bank, of Pa. v. Seubert & Assocs., Inc.*, 807 A.2d 297, 307 (Pa. Super. 2002) (“Article 9 requires a secured party to file with the appropriate agency in order to perfect an interest in general intangibles.”).

creditors.³⁰ Where two or more creditors have perfected security interests in the same collateral, however, 13 Pa.C.S.A. § 9322 provides that generally, the party who filed its security interest first will have priority even if they knew that another party had a prior but unperfected claim.

The undisputed record shows that RCL perfected its security interest by filing a UCC-1 financing statement on December 9, 2015 and that Semark perfected its security interest by filing a UCC-1 financing statement on December 18, 2015. Applying the priority rules to these conflicting security interests, it is clear that RCL perfected its security interest first. In an attempt to escape the application of the priority filing rules, Semark argues that its option to purchase the liquor license in the Lease and the Assignment Agreement impacts the priority of RCL's security interest in the liquor license and makes the filing of the UCC filing statement void. While an option to purchase the liquor license existed within the respective agreements, the conditions required for Semark to exercise its option to purchase were not triggered when the security interest was created and perfected. As such, the option to purchase does not affect the application of the UCC's rules regarding conflicting security interest filing priority rules. Based on 13 Pa. C. S. A. § 9322, RCL's UCC-1 financing statement was filed first and therefore RCL's security interest in the liquor license has priority over Semark's security interest in the liquor license.

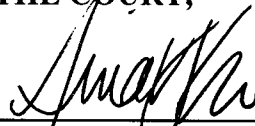
Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is denied and

³⁰ See, *United States Fidelity & Guarantee Co. v. United Penn Bank*, 362 Pa.Super. 440, 524 A.2d 958, 960 (1987); 13 Pa.C.S.A. § 9201.

Defendant's Motion for Summary Judgment is granted. Judgment is entered in favor of defendant RCL, LLC on all Plaintiffs' claims.

BY THE COURT,



NINA WRIGHT PADILLA, J.