

2004

LASALLE BANK NATIONAL ASSOCIATION,
a national banking association, fka LASALLE
NATIONAL BANK, as trustee for the registered
holders of Merrill Lynch Mortgage Investors, Inc.
Mortgage Investors, Inc. Mortgage pass-through
certificates, series 1997-cl, vs. GMAC
COMMERCIAL MORTGAGE
CORPORATION, a Pennsylvania corporation; ET
AL., : Brief of Appellant

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IN THE COURT OF APPEALS
STATE OF UTAH

LASALLE BANK NATIONAL
ASSOCIATION, a national banking
association, fka LASALLE NATIONAL
BANK, as trustee for the registered
holders of Merrill Lynch Mortgage
Investors, Inc. Mortgage Investors, Inc.
Mortgage pass-through certificates, series
1997-c1,

Plaintiff-Appellee,

vs.

GMAC COMMERCIAL MORTGAGE
CORPORATION, a Pennsylvania
corporation; ET AL.,

Defendant-Appellant.

**BRIEF OF APPELLANT GMAC
COMMERCIAL MORTGAGE
CORPORATION**

Appeal from the Third Judicial District
Court, Judge Joseph C. Fratto, Jr.

Appellate Court Case No. 20040896-CA

Trial Court Case No. 020905904

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**UTAH COURT OF APPEALS
BRIEF**

**UTAH
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ED

ORAL ARGUMENT AND A PUBLISHED DECISION ARE REQUESTED BY THE APPELLATE COURTS

FEB 18 2005

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ORAL ARGUMENT AND A PUBLISHED DECISION ARE REQUESTED

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JURISDICTION OF THE APPELLATE COURT

The Order and Judgment appealed from was signed on September 17, 2004, and entered on September 20, 2004. Defendant-appellant GMAC Commercial Mortgage Corporation filed its Notice of Appeal on October 14, 2004. The Utah Supreme Court has original appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) because this appeal involves the review of an order of a trial court over which the Utah Court of Appeals does not have original jurisdiction. This Court has jurisdiction because this is a case transferred to this Court from the Supreme Court pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUE PRESENTED

Whether a party who holds a valid and perfected security interest and asserts a superior priority when litigation is commenced, must file a UCC continuation statement during the course of the litigation in order to continue to assert priority against the adverse party.

Standard of Review: To the extent that there are no facts in dispute this issue presents a legal question that should be reviewed for correctness without deference to the trial court's ruling. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 326 (Utah 1992). To the extent that there were facts in dispute on the cross-motions for summary judgment, the Court must "accept the facts and inferences in the light most favorable to the [nonmoving] party." SME Industries, Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 2001 UT 54, ¶ 9, 28 P.3d 669 (citing Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah

1991)). Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. (citing Utah R. Civ. P. 56(c) and Franco v. Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 32, 21 P.3d 198).

Determinative or applicable cases, statutes, and rules are: The Travelers Insurance Co. v. First National Bank of Blue Island, 621 N.E.2d 209 (Ill. Ct. App. 1993); Chrysler Credit Corp. v. United States, 1978 U.S. Dist. LEXIS 19263, at *5 (E.D.Va. March 3, 1978); Avant Petroleum, Inc. v. Banque Paribas, BP North America Petroleum Inc., 853 F.2d 140 (2d Cir. 1988).

CITATION TO THE RECORD SHOWING THAT THE ISSUE WAS PRESERVED IN THE TRIAL COURT

This issue was properly raised in the Cross-Motion for Summary Judgment that defendant-Appellant GMAC Commercial Mortgage filed in the trial court. (R. 899-902.) This issue was also raised in the Motion for Summary Judgment filed by the plaintiff LaSalle Bank National Association. (R. 802-807.) The trial court ruled on this issue in a written opinion. (R. 1864-1868).

A STATUTE OF CENTRAL IMPORTANCE TO THIS APPEAL

(3) Except as provided in Subsection (6), a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter

for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is considered to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

Utah Code Ann. § 70A-9-403 (1997).¹

STATEMENT OF THE CASE

On December 1, 1997, GMAC Commercial Mortgage Corporation (“GMACCM”) entered into a Master Lease Agreement with Qinn, Ltd. (“Qinn”), pursuant to which GMACCM agreed to purchase certain personal property (the “Equipment”) that Qinn would rent from GMACCM, in exchange for rent payments that Qinn agreed to pay directly to GMACCM. The Lease further provides that, in order to secure Qinn’s promise to make rent payments for the Equipment, GMACCM would take a present and continuing purchase money security interest (“PMSI”) in the Equipment. On December 23, 1997, GMACCM recorded a UCC-1 Financing Statement describing the Equipment and thereby created a perfected PMSI in the Equipment that was superior in priority to the blanket security interest held by LaSalle Bank National Association (“LaSalle”) in Qinn’s real and personal property.

¹ The provisions of UCC Article 9 in effect as of December 1997, are the applicable authorities because the current Article 9 provides: “If the relative priorities of the claims were established before this act takes effect [July 1, 2001], former Chapter 9 determines priority.” Utah Code Ann. § 70A-9a-709(1). The relative priorities between GMACCM and LaSalle were established on December 23, 1997 – the date that GMACCM filed its UCC-1 Financing Statement. (R. R. 864, ¶ 4; R. 1255, ¶ C; R. 1390, ¶ 2(v)).

On July 1, 2002, after Qinn fell into insolvency and defaulted on its obligations to LaSalle and GMACCM, LaSalle commenced this lawsuit seeking the appointment of a receiver and foreclosure on all of Qinn's property, including the Equipment. LaSalle also asking the trial court to declare that LaSalle's blanket security interest in all of Qinn's property was superior to the security interests of GMACCM and others. At the time the complaint was filed, GMACCM's purchase money security interest in the Equipment was perfected and it was superior in priority to LaSalle's blanket security interest. This fact was conceded by LaSalle below. (R. 2003, Tr. page 15, lines 11 thru 14 ("July 2002 is when the litigation gets filed. So as pointed out by counsel [for GMACCM], as of the date the complaint is filed, GMAC has the oldest filed UCC-1, LaSalle has the junior perfected security interest."); see also R. 1256 (where LaSalle concedes in its brief that "[i]t is true that GMAC's PMSI used to be perfected" as of the date the complaint was filed)).

Six months after the commencement of this lawsuit, on December 23, 2002 (at the five-year anniversary of the filing of GMACCM's Financing Statement), GMACCM did not file a UCC continuation statement to renew its Financing Statement. Even though this event occurred *after* the commencement of this lawsuit, LaSalle advanced it as the basis for LaSalle's argument on summary judgment that the trial court should declare LaSalle's blanket security interest to be superior to GMACCM's PMSI in the Equipment. GMACCM opposed LaSalle's motion for summary judgment and filed a cross-motion citing authorities which hold that a party

should not be required to file a continuation statement in order to maintain its priority after this litigation was commenced.

On September 17, 2004, the trial court ruled on LaSalle's and GMACCM's cross-motions for summary judgment. The trial court granted LaSalle's motion and denied GMACCM's cross-motion. This appeal seeks review of the trial court's grant of LaSalle's motion and denial of GMACC cross-motion.

STATEMENT OF FACTS

With one exception noted below, the following facts were not disputed before the trial court:

LaSalle's Blanket Security Interest in The Real and Personal Property Located at Qinn's Holiday Inn Airport Hotel

1. As of November 1, 1996, Qinn was the owner of certain real and personal property located at 5575 West Amelia Earhart Drive in Salt Lake City, Salt Lake County, Utah (the "Property"). (R. 823, ¶ 18; R. 863.)
2. On November 1, 1996, Qinn executed and delivered to LaSalle's predecessor-in-interest a Promissory Note for the principal amount of \$6,370,000 (the "Note"). (R. 821, ¶ 2; R. 863.)
3. To secure payment of the indebtedness evidenced by the Note, on November 1, 1996, Qinn, as Trustor, executed and delivered to LaSalle's predecessor-in-interest, as Beneficiary, a Deed of Trust, Security Agreement, Assignment of Rents and Fixture Filing (the "Deed of Trust"). (R. 823, ¶ 19; R. 863.)

4. The Deed of Trust was recorded on November 1, 1996, describing and constituting a first lien on the Property and the improvements described therein known as the Holiday In Airport, and all furniture, furnishings, fixtures, goods inventory and personal property located thereon. (R. 824, ¶ 20; R. 863.)

5. In addition to the Deed of Trust, Qinn executed and delivered to LaSalle's predecessor-in-interest a separate Security Agreement, dated November 1, 1996 (the "Security Agreement"). (R. 830, ¶ 52; R. 863.) Under this Security Agreement, as additional security for the loan evidenced by the Note, Qinn granted to LaSalle's predecessor-in-interest a security interest in the Collateral (as therein defined), including to all improvements, buildings and other structures now or hereafter situated on the Property, and all inventory, personal property, fixtures, appliances, goods, deposits, accounts and accounts receivables. (R. 831, ¶ 53; R. 863.)

6. A UCC-1 Financing Statement evidencing the security interest held by LaSalle's predecessor-in-interest in the Collateral was filed in the Office of the Utah Division of Corporations and Commercial Code and recorded on November 1, 1996. (R. 831, ¶ 54; R. 863.)

7. On November 1, 2001, LaSalle's November 1996 UCC-1 Financing Statement lapsed. (R. 1673, ¶ 3.) LaSalle filed a new UCC-1 Financing Statement on January 23, 2002 (R. 1673, ¶ 4), and again on March 19, 2003. (R. 1673, ¶ 8.)

**GMACCM Made a Loan Allowing Qinn to Purchase
Additional Personal Property
and
GMACCM Acquired a Perfected Purchase
Money Security Interest**

8. On or about December 1, 1997, GMACCM entered into a Master Equipment Lease Agreement (the “Lease”) with Qinn for approximately a 54-month period. (R. 864, ¶ 1; R. 1254, ¶ A; R. 1390, ¶ 2(i)).

9. Pursuant to the Lease, GMACCM agreed to purchase certain personal property consisting of hotel furniture, fixtures and equipment (collectively the “Equipment”) that Qinn would, in turn, lease from GMACCM, in exchange for rent payments that Qinn agreed to pay directly to GMACCM. (R. 864, ¶ 2; R. 1255, ¶ B1 R. 1390, ¶ 2(i)).

10. The Lease further provides that, in order to secure Qinn’s promise to make rent payments for the Equipment, GMACCM would take a present and continuing security interest in the Equipment. (R. 864, ¶ 3; R. 1255, ¶ B; R. 1390, ¶ 2(ii)).

11. GMACCM filed and recorded a UCC-1 Financing Statement (the “Financing Statement”) on or about December 23, 1997 with the State of Utah Department of Commerce Division of Corporations & Commercial Code. (R. 864, ¶ 4; R. 1255, ¶ C; R. 1390, ¶ 2(v)).

12. The Financing Statement contains a detailed description of all of the Equipment that GMACCM purchased and subsequently leased to Qinn. (R. 864, ¶ 5; R. 1255, ¶ B; R. 1390, ¶ 2(vi)).

13. GMACCM filed the Financing Statement within 20 days of the time at which Qinn took possession of the Equipment. (R. 864, ¶ 6 (referencing the Affidavit of Laurie Bivona (R. 891-894); and R. 1390, ¶¶ 2(iii) & 2(iv) (referencing the Affidavit of John Hopkins (R. 1316-1386)). LaSalle disputed this fact but did not offer any evidence suggesting to the contrary. (R. 1255, ¶ D.) The trial court did not see this fact as being seriously contested. (R. 1758 (noting in its Minute Entry that “Factually there is no dispute.”))

14. On or about June 1, 2002, the Lease between GMACCM and Qinn expired by its own terms (approximately 54 months after its execution on December 1, 1997). (R. 1389, ¶ 1(i)).

15. Paragraph 18 of the Lease requires Qinn to return the Equipment to GMACCM at the end of the term. (R. 1389, ¶ 1(iii)).

16. GMACCM did not file a continuation statement to renew its Financing Statement on December 23, 2002 – the five-year anniversary of the filing of the Financing Statement. (R. 1389, ¶ 1.)

17. On August 18, 2003, GMACCM re-perfected by filing a new UCC-1 Financing Statement. (R. 1674, ¶ 13.)

**The Commencement of this Litigation and
Relevant Procedural History**

18. LaSalle filed its Complaint on July 1, 2002. (R. 1.) LaSalle’s Complaint alleges that GMACCM’s PMSI is “junior in time, subordinate and inferior to the right, title and interest of [LaSalle] in and to the [Equipment] by reason of

[LaSalle's] Deed of Trust.” (R. 12, ¶ 59.) LaSalle claimed that GMACCM's security interest in the Equipment is subordinate and inferior to LaSalle's security interest therein primarily because LaSalle recorded and filed its security interest first-in-time. (R. 12, ¶ 59 (Complaint); R. 864, ¶ 7; R. 1255, ¶ B.)

19. In its Complaint, LaSalle also asserts a cause of action seeking “the immediate appointment of a receiver of the Property, without regard to the value thereof or the solvency or financial condition of defendant Qinn, to enter upon and take possession of and to preserve, safeguard, control, and manage the Property, and prevent waste therefrom, and to collect and receive all of the Rents therefrom.” (R. 14, ¶ 76 (Complaint)).

20. On September 18, 2002, GMACCM answered LaSalle's Complaint and asserted that GMACCM held a superior interest in the Equipment based on GMACCM's Lease with Qinn and GMACCM's Financing Statement. (R. 283, ¶ 59.)

21. On October 30, 2002, LaSalle made a motion to the trial court seeking the appointment of a receiver under Rule 66, Utah Rules of Civil Procedure, to take possession and control of the Property, including the Equipment that GMACCM purchased for Qinn that is pledged as security to GMACCM. (R. 379-384; & 348-378.)

22. On February 28, 2003, LaSalle filed a motion for partial summary judgment seeking an order allowing the foreclosure of its Deed of Deed and security interests, and appointing a receiver. (R. 802-807; R. 1673, ¶ 7.) As regarding GMACCM's interest in the Equipment, LaSalle asked the trial court to enter a

judgment decreeing that “none of the defendants” are entitled to possession of the Equipment and that the defendants’ interests in the Equipment is “subordinate, junior and inferior to the right, title and interest of LaSalle therein pursuant to the Deed of Trust.” (R. 804, ¶ 5.)

23. On April 2, 2003, GMACCM filed an opposition to LaSalle’s Motion for Partial Summary Judgment. (R. 861-890.) GMACCM’s opposition was supported by the Affidavit of Laurie Bovina and the Affidavit of John Hopkins. (R. 861-890, 891-894, & 1316-1386). At the same time, GMACCM also filed a Cross-Motion for Summary Judgment against LaSalle. (R. 899-902, & 861-890.)

24. On April 10, 2003, Qinn filed an opposition to LaSalle’s motion for partial summary judgment. (R. 903-1252.) Qinn’s opposition was supported by two Affidavits of Meredith K. Palmer (R. 921-924, & 1248-1252), and one Affidavit of Richard Pearson. (R. 925-1247.)

25. On July 28, 2003, at the time set for the hearing on the LaSalle’s and GMACCM’s cross-motions, Qinn appeared through counsel and announced that it had filed for chapter 11 bankruptcy protection (case no. 0332764). Without hearing argument, the trial court ordered: “This matter is stayed, as to the parties present, pending the outcome of the Federal Bankruptcy matter.” (R. 1400.) The parties present were Qinn, LaSalle, and GMACCM. (*Id.*)

26. On August 21, 2003, the trial court entered an Order Concerning Plaintiff’s Motion for Summary Judgment and for Appointment of a Receiver, which provided, in part: “With the commencement of a Chapter 11 bankruptcy case by

QINN, the automatic stay provisions of 11 U.S.C. § 362(a) bar the continuation of any further action against QINN in this proceeding, subject to entry of an order by the Bankruptcy Court lifting or modifying the automatic stay.” (R. 1402.)

27. On September 23, 2003, the trial court entered an Order for Appointment of Receiver whereby the trial court appointed Kenneth L. Edwards to be “receiver of the Property during the pendency of this action or until further order of this Court.” (R. 1412, ¶ 2.) The Receiver was given all of the authority commonly given to a receiver, such as the power to take custody of the Property, operate the Property, collect rents, etc. (R. 1412-1419.)

28. On April 30, 2004, following a ruling from the bankruptcy court that it would abstain from hearing the issues raised in GMACCM’s Cross-Motion for Summary Judgment, GMACCM filed a Sur-Reply In Support of its Cross-Motion for Summary Judgment and asked the trial court to rule on this motion in GMACCM’s favor. (R. 1620-1631.)

29. On May 27, 2004, LaSalle filed a Notice to Submit for Decision asking the trial court to rule on LaSalle’s Motion for Partial Summary Judgment with respect to GMACCM. (R. 1682-1684.)

30. On July 6, 2004, the trial court heard oral arguments on LaSalle’s Motion for Partial Summary Judgment and GMACCM’s Cross-Motion for Summary Judgment. (R. 1688, 1731, Transcript of Hearing on July 6, 2004 (“Tr.”), R. 2003.)

31. On July 28, 2004, the trial court entered a Minute Entry denying GMACCM’s Cross-Motion for Summary Judgment. (R. 1758-1761.)

32. On August 25, 2004, GMACCM filed a written objection to a portion of the proposed Order and Judgment submitted by LaSalle. (R. 1788-1792.)

33. On September 17, 2004, the trial court entered a Minute Entry sustaining GMACCM's objection to a portion of the proposed Order and Judgment. (R. 1862-1863.) On the same date, the trial court signed the Order and Judgment (modified by striking the portion that GMACCM objected to) granting summary judgment to LaSalle and against GMACCM. (R. 1864-1868.)

34. On October 14, 2004, GMACCM filed its Notice of Appeal seeking review of the trial court's Order and Judgment entered on September 17, 2004. (R. 1897-1896.)

ARGUMENT

I. WHEN THIS LAWSUIT WAS COMMENCED, GMACCM'S PURCHASE MONEY SECURITY INTEREST WAS SUPERIOR TO LASALLE'S NON-PURCHASE MONEY SECURITY INTEREST.

It is well established that a perfected purchase money security interest ("PMSI") takes priority over a conflicting, non-purchase money security interest that was perfected on an earlier date. Utah Code Ann. § 70A-9-312(4) (1997)²; Meyer v. General Am. Corp., 569 P.2d 1094, 1098-99 (Utah 1977). A PMSI becomes

² The provisions of UCC Article 9 in effect as of December 1997, are the applicable authorities because the current Article 9 provides: "If the relative priorities of the claims were established before this act takes effect [July 1, 2001], former Chapter 9 determines priority." Utah Code Ann. § 70A-9a-709(1). The relative priorities between GMACCM and LaSalle were established on December 23, 1997 – the date that GMACCM filed its UCC-1 Financing Statement. (R. R. 864, ¶ 4; R. 1255, ¶ C; R. 1390, ¶ 2(v)).

“perfected” when the secured party files a financing statement for the equipment at issue at any time prior to 20 days after the debtor takes possession of the equipment. Utah Code Ann. § 70A-9-312(4) (1997); see also First Interstate Bank of Utah v. Internal Revenue Serv., 930 F.2d 1521, 1525 (10th Cir. 1991) (recognizing the PMSI as an exception to the “first-to-file” rule).

In this case, it was beyond dispute below that GMACCM filed its Financing Statement within 20 days of the time at which Qinn took possession of the Equipment. (R. 864, ¶ 6 (referencing the Affidavit of Laurie Bivona (R. 891-894); and R. 1390, ¶¶ 2(iii) & 2(iv) (referencing the Affidavit of John Hopkins (R. 1316-1386)). In fact, at the hearing, LaSalle’s counsel conceded that GMACCM held the superior priority over LaSalle in the Equipment on the date the complaint was filed. (R. 2003, Tr. page 15, lines 11 thru 14 (“July 2002 is when the litigation gets filed. So as pointed out by counsel [for GMACCM], as of the date the complaint is filed, GMAC has the oldest filed UCC-1, LaSalle has the junior perfected security interest.”); see also R. 1256 (where LaSalle concedes in its brief that “[i]t is true that GMAC’s PMSI used to be perfected” as of the date the Complaint was filed)). The trial court did not see this fact as being contested. (R. 1758 (noting in its Minute Entry that “Factually there is no dispute.”))

Thus, as of the date this lawsuit was filed by LaSalle on July 1, 2002, GMACCM’s PMSI was perfected and had priority over LaSalle’s non-purchase money security interest. The issue presented to the trial court – and now on appeal – is: Whether a party who holds a valid and perfected security interest and asserts a

superior priority when litigation is commenced, must file a continuation statement during the course of the litigation in order to continue to assert priority against a competing creditor. The trial court framed the issue like this:

The issue the court is called upon to decide is whether pending litigation tolls the necessity to timely file a continuation statement – pursuant to Article 9 U.C.C. – in order to maintain priority of interest in personal property. The decision determines the parties’ relative priorities with respect to certain equipment purchased with a loan from GMAC. Factually there is no dispute. If GMAC was required to file a continuation statement on its purchase money security interest, it has lost priority over LaSalle Bank.

R. 1758 (Minute Entry, p. 1). The trial court’s ruling on this issue is a legal question that is reviewed for correctness without deference to the trial court’s ruling. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 326 (Utah 1992). For the reasons explained below, the trial court erred in holding that GMACCM was required to file a continuation statement *after* the commencement of the litigation in order to maintain its priority.

II. THE LAW DOES NOT REQUIRE GMACCM TO FILE A CONTINUATION STATEMENT DURING THIS LITIGATION IN ORDER TO MAINTAIN THE PRIORITY THAT EXISTED WHEN THIS LAWSUIT WAS COMMENCED.

The trial court erred as a matter of law in holding that GMACCM was required to file a continuation statement *after* the lawsuit commenced. As noted above, GMACCM held a perfected PMSI that was superior to the interest of LaSalle in the Equipment at the time this lawsuit was commenced on July 1, 2002. A party cannot rely on events that occur subsequent to the filing of its complaint as a basis to support

its claims. See United Pacific Ins. Co. v. Durbano Constr. Co. Inc., 1444 F.R.D. 402, 406-07 (D. Utah 1992) (holding that non-movant's argument based on evidence of conditions subsequent to those that existed at the time the complaint was filed was wholly without merit).

Cases from other jurisdictions that have considered this factual situation have held that it is not necessary for competing creditors in a priority dispute to file a continuation statement once the litigation is commenced. A party who fails to file a continuation statement might lose its priority with respect to third-parties who are not part of the litigation, but, as between competing litigants, the claims to priority are fixed as of the date the lawsuit is commenced. All that remains is for the trial court to adjudicate those claims. There are three cases from other jurisdictions where courts were presented with the same or similar factual scenario of this case, and all three reached the same result.

In The Travelers Insurance Co. v. First National Bank of Blue Island, 621 N.E.2d 209 (Ill. Ct. App. 1993), two creditors held competing security interests in the property of the debtor, a Holiday Inn franchisee. One secured creditor, Travelers, instituted an action to foreclose on its mortgage and security interests. After commencing the action, Travelers failed to file a continuation statement, its filing lapsed, and First National Bank, the competing secured creditor, filed a motion for summary judgment asking the court to declare that First National Bank had priority over Travelers' security interest. The court ruled that the rights of the parties were

fixed as of the date the foreclosure action was filed, and Travelers was therefore entitled to priority notwithstanding the lapse of its filing. See id. at 215.

In Chrysler Credit Corp. v. United States, 1978 U.S. Dist. LEXIS 19263, at *5 (E.D.Va. March 3, 1978), the plaintiff had a perfected security interest in the debtor's property when the litigation was commenced, but the plaintiff's UCC-1 lapsed during the course of the litigation because no continuation statement was filed. The court held that the plaintiff was nonetheless entitled to priority. See id. The court explained that the purpose of filing is to give notice of the existence of a security interest, and, since the litigation itself provided notice of the plaintiff's security interest to all interested parties, there was no need to file a continuation statement to give additional notice. See id.

In Avant Petroleum, Inc. v. Banque Paribas, BP North America Petroleum Inc., 853 F.2d 140 (2d Cir. 1988), the Second Circuit reached a similar result. In Avant, two creditors claimed competing security interests in funds of the debtor. The debtor deposited the funds with the court and commenced an interpleader action to determine the creditors' respective rights. Paribas's security interest had priority over BP's, but Paribas's filing lapsed for failure to file a continuation statement after the debtor commenced the action. The court held that "“certainly the purpose of requiring the filing of a continuation statement would not be served with regard to existing creditors who already had notice of the creditor's perfected security interest and knowledge of the interpleader actions themselves on the date the interpleader actions

were filed.’” Id. at 145 (quoting the district court). Paribas was therefore entitled to priority notwithstanding the lapse of its financing statement. See id.

The rationale of these cases applies here. GMACCM and LaSalle are the only claimants to the Equipment. By LaSalle’s own admission, GMACCM had a perfected PMSI when LaSalle commenced its foreclosure action in this Court on July 1, 2002. (R. 2003, Tr. page 15, lines 11 thru 14 (“July 2002 is when the litigation gets filed. So as pointed out by counsel [for GMACCM], as of the date the complaint is filed, GMAC has the oldest filed UCC-1, LaSalle has the junior perfected security interest.”); see also R. 1256 (where LaSalle concedes in its brief that “[i]t is true that GMAC’s PMSI used to be perfected” as of the date the complaint was filed)). LaSalle knew of GMAC’s perfected PMSI when it filed its complaint, but nevertheless petitioned the trial court to declare that LaSalle’s security interest had priority over GMAC’s. (See R. 283, ¶ 59.) GMACCM answered LaSalle’s complaint and put LaSalle on notice that GMACCM held a PMSI in the Equipment that was superior to LaSalle’s blanket security interest. (Id.) This put at-issue the contest between GMACCM’s perfected PMSI and LaSalle’s inferior blanket security interest as of the commencement of the lawsuit – almost a full six months before the purported expiration of GMACCM’s Financing Statement. Filing a continuation statement in such a situation would serve no purpose, since the only parties with a claim in the Equipment were already before the Court, and already knew of each other’s security interests and respective priorities. The trial court erred in failing to follow the reasoning and precedent established in Travelers, Chrysler, and Avant.

The trial court's holding requiring a party to file a continuation statement even though the issue is pending and ready to be decided produces an inequitable result because it causes forfeiture of rights that are lost only because the parties have been forced to wait for the court to make its decision. It is patently unreasonable for LaSalle, having admitted that GMACCM held a superior interest in the Equipment on the date it commenced this lawsuit, to prevail on a forfeiture theory when there was no dispute that GMACCM's PMSI in the Equipment was in place and superior to LaSalle's interest until the *middle* of the lawsuit. In order for LaSalle to assert its lapse argument, it must acknowledge GMACCM's ownership of and superior security interest in the Equipment prior to December 23, 2002, which it expressly did below. (R. 2003, Tr. page 15, lines 11 thru 14; and R. 1256.) This reveals that LaSalle could not have possibly held a security interest superior to GMACCM's interest in the Equipment at the time LaSalle filed its Complaint. Accordingly, the trial court committed error when it ruled as a matter of law that LaSalle's security interest was superior to GMACCM's.

In addition, the trial courts ruling fails to apply the plain language of Utah Code Ann. § 70A-9-304(2) (1997)³ which provides that GMACCM's PMSI is

³ The provisions of UCC Article 9 in effect as of December 1997, are the applicable authorities because the current Article 9 provides: "If the relative priorities of the claims were established before this act takes effect [July 1, 2001], former Chapter 9 determines priority." Utah Code Ann. § 70A-9a-709(1). The relative priorities between GMACCM and LaSalle were established on December 23, 1997 – the date that GMACCM filed its UCC-1 Financing Statement. (R. R. 864, ¶ 4; R. 1255, ¶ C; R. 1390, ¶ 2(v)).

automatically continued during the pendency of these proceedings. *Id.* (“If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later.”) In this lawsuit LaSalle sought and received the appointment of a receiver to take control of all of Qinn’s property, including the Equipment that is the subject of GMACCM’s PMSI. (R. 14, ¶ 76; R. 1412-1419.) With its request for, and appointment of, a receiver this lawsuit is an equitable insolvency proceeding at least in part. Thus, under the statute, GMACCM was entitled to rely upon its PMSI throughout these proceedings because the PMSI was perfected and superior to LaSalle’s interest at the time this lawsuit was commenced.

Finally, not only did GMACCM hold a PMSI in the Equipment at the time that LaSalle filed its complaint, but GMACCM also had the unchallenged contractual right requiring Qinn to return the leased Equipment to GMACCM at the expiration of the Lease, which occurred one month *prior* to the date LaSalle filed its Complaint. (R. 1389, ¶¶ 1(i) & 1(iii) (The Lease between GMACCM and Qinn expired on June 1, 2002 – 54 months after its execution and one month before LaSalle commenced this litigation.)) No type of blanket security interest claimed by LaSalle can be used to defeat GMACCM’s contractual right to have Qinn return the leased Equipment at the end of the lease’s term. It was error for the trial court to have ignored this contractual

right, even if GMACCM's PMSI was properly deemed to have become unperfected when it was not renewed.

For these reasons, this Court should reverse the trial court and enter an opinion holding that GMACCM's PMSI in the Equipment is superior to LaSalle's interest. The Court should adopt the rule from Travelers, Chrysler, and Avant to hold that a party is not be required to file a continuation statement during the litigation in order to maintain its priority after the litigation has commenced. At minimum, the trial court should not have overlooked GMACCM's contractual right to have Qinn return the Equipment to GMACCM on June 1, 2002, at the end of the Lease's term.

CONCLUSION

GMACCM respectfully requests that this Court enter an order reversing the opinion of the trial court, and enter an order holding that, under the facts of this case, GMACCM's right to possession of the Equipment is superior to any interest held by LaSalle.

Dated: February 18, 2005

DURHAM JONES & PINEGAR

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Atlanta, Georgia 30309


David W. Tufts

Attorneys for Defendant-Appellant
GMAC Commercial Mortgage Corp.

[Attachment: Brief on CD ROM]

PROOF OF SERVICE

I hereby certify that on this 18th day of February, 2005, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLANT GMAC COMMERCIAL MORTGAGE CORPORATION** to be mailed in the U.S. Mail, first-class, postage prepaid, to the following:

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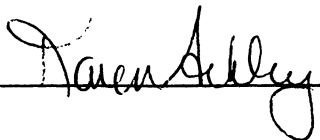
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ADDENDUM

1. Minute Entry, dated July 28, 2004 (R. 1758-1761).
2. Order and Judgment, dated September 17, 2004 (R. 1864-1868).

Tab 1

LASALLE BANK NATIONAL
ASSOCIATION, *ET. AL.*

MINUTE ENTRY
Case No. 020905904
Judge Fratto

V.

GMAC COMMERCIAL CREDIT
CORPORATION, *ET. AL.*

The matter is before the court to consider GMAC Commercial Credit Corporation's Cross Motion for Summary Judgment. The motion was argued on July 6, 2004 and taken under advisement.

The issue the court is called upon to decide is whether pending litigation tolls the necessity to timely file a continuation statement- pursuant to Article 9 U.C.C.- in order to maintain priority of interest in personal property. The decision determines the parties' relative priorities with respect to certain equipment purchased with a loan from GMAC. Factually there is no dispute. If GMAC was required to file a continuation statement on its purchase money security interest, it has lost priority over LaSalle Bank.

GMAC argues that the UCC filing is for the purpose of notification of interest in property. Pending litigation serves the same purpose as between the parties to the litigation. Further, where the issue has been considered elsewhere, GMAC's position has been supported..

LaSalle responds that to adopt defendant's position would create a judicial rule tolling neither supported by statute nor well advised. Indeed, the statute only recognizes (since repealed) a suspension of filing requirements during insolvency proceedings. Additionally, plaintiff asserts

that those cases cited by GMAC are distinguishable, and there is authority to the contrary.

Having considered the pleadings, arguments, and those cases cited, the court finds plaintiff's position more persuasive. Priority through timely filing is a statutory creature, and it is for the legislature to decide when its requirements are tolled.

The U.C.C. filing accomplishes more than just notification. It is the procedure by which priority is determined. There is no priority except through the code and its filing requirements.

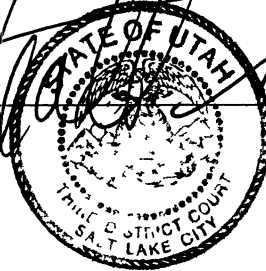
Accordingly, the filing requirements were not tolled by the litigation. The motion is denied in that GMAC was required to file a continuation statement to maintain priority.

Counsel for LaSalle should prepare and submit a proposed order.

Dated this 28th of July, 2004

BY THE COURT:

JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020905904 by the method and on the date specified.

METHOD	NAME
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Case No: 020905904
Date: Jul 30, 2004

SUITE 900
SALT LAKE CITY UT 84111

Dated this 30 day of July, 20 04.



Deputy Court Clerk

Tab 2

IMAGED

FILED DISTRICT COURT
Third Judicial District

SEP 20 2004

SALT LAKE COUNTY

Deputy Clerk

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Robert Palmer Rees, A4652
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P.O. Box 510210
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Telephone: (801) 531-8900
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

LASALLE BANK NATIONAL ASSOCIATION,
a national banking association, fka LASALLE
NATIONAL BANK, AS TRUSTEE FOR THE
REGISTERED HOLDERS OF MERRILL
LYNCH MORTGAGE INVESTORS, INC.
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 1997-C1,

Plaintiff,

vs.

QINN LTD., a Utah limited partnership; JAY I.
JOHNSON; ZIONS FIRST NATIONAL BANK, a
national banking association; GMAC
COMMERCIAL CREDIT CORPORATION, a
Pennsylvania corporation; BANK OF UTAH, a
Utah corporation; KOREY L. HANSEN;
NORTHERN UTAH ELECTRIC, INC., a Utah
corporation; KWL CONSULTING &
CONSTRUCTION, INC., a Utah corporation;
UTAH STATE TAX COMMISSION; and DOES
1 THROUGH 25,

Defendants.

ORDER AND JUDGMENT

Civil No.020905904

Judge Joseph C. Fratto, Jr.

Order and Judgment @J



The Motion for Summary Judgment (the "Plaintiff's Summary Judgment Motion") of plaintiff LaSalle Bank National Association, as Trustee for the Registered Holders of Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, Series 1997-C1 ("LaSalle"), and the Cross-Motion for Summary Judgment (the "GMAC Summary Judgment Motion") of defendant GMAC Commercial Mortgage Corporation ("GMAC") having come on for hearing before this Court on July 6, 2004, the parties being represented by and through their respective counsel, and the Court having issued a Minute Entry herein dated July 28, 2004, and the Court being fully informed and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff's Summary Judgment Motion is hereby granted.
2. The GMAC Summary Judgment Motion is hereby denied, GMAC having failed to timely file a continuation statement on its security interest in the Hotel FF&E (as hereafter defined).
3. Plaintiff LaSalle has a valid and perfected first priority security interest in and to the furnishings, fixtures, equipment and personal property located on and/or attached to the premises of the hotel property having an address of 5575 Amelia Earhart Drive in Salt Lake City, Salt Lake County, Utah (the "Hotel FF&E").
4. That the lien of defendant GMAC in the Hotel FF&E is junior in time, subordinate and inferior to the lien, right and interest of plaintiff LaSalle in the Hotel FF&E.
5. Supplementing the Judgment, Order for Appointment of Receiver, and Decree of Foreclosure and Order of Sale entered herein by this Court on September 22, 2003 (the

"Judgment"), it is hereby ordered that plaintiff LaSalle may cause a sheriff's sale of the Hotel FF&E to be conducted, by writ of execution or otherwise, at which sale plaintiff LaSalle shall be entitled to credit bid up to the amount of the difference between the Judgment sum of \$7,201,045.00 and the amount credit bid by plaintiff LaSalle at the sheriff's sale of the real property held on February 17, 2004 in the amount of \$6,047,787.00, plus interest thereon, and further that upon sale by the sheriff of said Hotel FF&E that the proceeds thereof shall be distributed as follows:

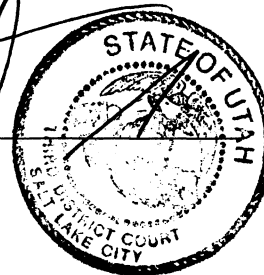
- (a) to pay the sheriff's costs and sale;
- (b) to pay plaintiff LaSalle or its attorneys the amount owing under the Judgment, including any additional amounts hereafter determined to be owing; and
- (c) to pay any surplus to the clerk of this court for distribution.

This provision of this Order and Judgment allowing for a sheriff's execution sale of the Hotel FF&E is without prejudice to plaintiff LaSalle pursuing, as to all or any portion of the Hotel FF&E if plaintiff chooses, one or more non-judicial dispositions or non-judicial foreclosures under the provisions of Revised Article 9 of the Utah Uniform Commercial Code.

DATED this 17th day of September, 2004.

BY THE COURT:

Honorable Joseph C. Krato, Jr.
District Court Judge



020905904

APPROVED AS TO FORM:

David W. Tufts
Durham, Jones & Pinegar

Stanley A. Seymour
Kilpatrick Stockton LLP

Attorneys for Defendant GMAC Commercial
Mortgage Corporation

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of August, 2004, I caused a true and correct copy of the foregoing ORDER AND JUDGMENT to be mailed, first class postage pre-paid, to the following persons:

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