

1993

William F. Webb, Trustee of the WFPP Trust v.
Frederick Paul Ninow; Staci L. Ninow; R-West, Inc.,
a Corporation; Homer Cutrube; Ned F. Parson;
Jim Hart; and Commercial Factors of Salt Lake
City, LTD., a Limited Partnership; and Westone
Bank, Utah, a corporation: Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert F. Orton; Milo S. Marsden, Jr.; Marsden, Orton, Cahoon and Gottfredson; Attorneys for Appellant.

Francis J. Carney; Paul M. Simmons; Suitter, Axland and Hanson; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *William F. Webb v. Frederick Paul Ninow; Staci L. Ninow; R-West, Inc.; Homer Cutrube; Ned F. Parson; Jim Hart; Commercial Factors of Salt Lake City, LTD.; Westone Bank, Utah, a corporation*, No. 930522 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5428

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

NO. 930522CA

WILLIAM F. WEBB, Trustee of
the WFPP TRUST,

Plaintiff/Appellant,

vs.

FREDERICK PAUL NINOW;
STACI L. NINOW; R-WEST, INC.,
a Corporation; HOMER CUTRUBUS;
NED F. PARSON; JIM HART; and
COMMERCIAL FACTORS OF SALT
LAKE CITY, LTD., a Limited
Partnership,

Defendants, and

WEST ONE BANK, UTAH, a
corporation,

Defendant/Appellee.

Case No. 930522-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM SUMMARY JUDGMENT ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE ANNE M. STIRBA PRESIDING

ROBERT F. ORTON (2483)
MILO S. MARSDEN, JR. (2086)
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 South Main Street, Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800
Attorneys for Appellant

FRANCIS J. CARNEY (0581)
PAUL M. SIMMONS (4668)
SUITTER AXLAND & HANSON
175 South West Temple #700
Salt Lake City, Utah 84101
Telephone: (801) 532-7300
Attorneys for Appellee of Appeals

NOV 08

IN THE UTAH COURT OF APPEALS

WILLIAM F. WEBB, Trustee of
the WFPP TRUST,

Plaintiff/Appellant,

vs.

FREDERICK PAUL NINOW;
STACI L. NINOW; R-WEST, INC.,
a Corporation; HOMER CUTRUBUS;
NED F. PARSON; JIM HART; and
COMMERCIAL FACTORS OF SALT
LAKE CITY, LTD., a Limited
Partnership,

Defendants, and

WEST ONE BANK, UTAH, a
corporation,

Defendant/Appellee.

Case No. 930522-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM SUMMARY JUDGMENT ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE ANNE M. STIRBA PRESIDING

ROBERT F. ORTON (2483)
MILO S. MARSDEN, JR. (2086)
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 South Main Street, Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800
Attorneys for Appellant

FRANCIS J. CARNEY (0581)
PAUL M. SIMMONS (4668)
SUITTER AXLAND & HANSON
175 South West Temple #700
Salt Lake City, Utah 84101
Telephone: (801) 532-7300
Attorneys for Appellee

PARTIES IN THE COURT BELOW

The caption of this case contains the names of all parties in the court below except that defendant R-West, Inc., was originally named as R-West Systems, Inc.

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE ISSUE AND STANDARD OF REVIEW	1
DETERMINATIVE STATUTE	1
STATEMENT OF THE CASE	2
A. Nature of the Case, Course of Proceedings and Disposition in the Court Below	2
B. Statement of Facts	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Bank's Perfected Security Interest Is Superior to the Plaintiff's Lessor's Lien	5
A. The Plain Language of Section 38-3-2 Gives the Bank's Interest Priority	5
B. Utah Case Law Does Not Alter the Conclusion That the Bank's Interest Has Priority over the Plaintiff's Lessor's Lien	12
C. Neither History nor the Common Law Can Change the Plain Meaning of the Statute	17
D. The Statute and the Trial Court's Ruling Are Supported by Sound Policy Considerations	19
II. Section 38-3-8 Does Not Alter the Priorities of the Parties' Respective Claims	22
CONCLUSION	25

Page(s)

ADDENDUM 27

Findings of Fact and Conclusions of Law

Summary Judgment

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<u>Allisen v. American Legion Post No. 134,</u> 763 P.2d 806 (Utah 1988)	21
<u>Andrus v. Glover Constr. Co.,</u> 446 U.S. 608 (1980)	9
<u>Bonham v. Morgan,</u> 788 P.2d 497 (Utah 1989)	1
<u>Brinkerhoff v. Forsyth,</u> 779 P.2d 685 (Utah 1989)	8
<u>Caminetti v. United States,</u> 242 U.S. 470 (1917)	8
<u>Citizens Bank v. Elks Bldg., N.V.,</u> 663 P.2d 56 (Utah 1983)	7, 11, 12-14
<u>Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,</u> 447 U.S. 102 (1980)	8
<u>Darden v. Ogle,</u> 310 So.2d 182 (Ala. 1975)	10
<u>Eason v. Wheelock,</u> 101 Utah 162, 120 P.2d 319 (1941)	14
<u>English v. Standard Optical Co.,</u> 814 P.2d 613 (Utah Ct. App. 1991)	10
<u>Ernst & Ernst v. Hochfelder,</u> 425 U.S. 185 (1976)	21
<u>Escondido Mut. Water Co. v. LaJolla Band of</u> <u>Mission Indians,</u> 466 U.S. 765 (1984)	21
<u>Freund v. Utah Power & Light Co.,</u> 793 P.2d 362 (Utah 1990)	20
<u>Fudge v. Downing,</u> 83 Utah 101, 27 P.2d 33 (1933)	6
<u>Gray v. Kappos,</u> 90 Utah 300, 61 P.2d 613 (1936)	7, 15-16
<u>Howard v Calhoun,</u> 155 Fla. 689, 21 So.2d 361 (Fla. 1945)	17
<u>Katz v. Pierce,</u> 732 P.2d 92 (Utah 1986)	10

<u>Olson v. Park-Craig-Olson, Inc.</u> , 815 P.2d 1356 (Utah Ct. App. 1991)	23
<u>Pentecost v. Harward</u> , 699 P.2d 696 (Utah 1985)	6
<u>Richins v. Delbert Chipman & Sons Co.</u> , 817 P.2d 382 (Utah Ct. App. 1991)	10
<u>Scharf v. BMG Corp.</u> , 700 P.2d 1068 (Utah 1985)	1
<u>Schurtz v. BMW of N. Am., Inc.</u> , 814 P.2d 1108 (Utah 1991)	8
<u>State v. Amicone</u> , 689 P.2d 1341 (Utah 1984)	10
<u>State v. Eldredge</u> , 773 P.2d 29 (Utah), <u>cert.</u> <u>denied</u> , 493 U.S. 814 (1989)	23
<u>Totorica v. Thomas</u> , 16 Utah 2d 175, 397 P.2d 984 (1965)	8
<u>United Cigar Stores Co. of Am. v. Florence Shop</u> , 17 P.2d 871 (Wash. 1933)	5
<u>Universal C.I.T. Credit Corp. v. Congressional</u> <u>Motors, Inc.</u> , 228 A.2d 463 (Md. 1967)	10
<u>Ward v. Richfield City</u> , 798 P.2d 757 (Utah 1990)	1

Statutes

Ala. Code § 7-9-310(2)	9, 18
Comp. Laws Utah § 3777 (1917)	15
Rev. Stat. Utah § 52-3-2 (1933)	15
Utah Code Ann. §§ 25-6-1 through -13	22
Utah Code Ann. § 38-3-1	6, 7, 13
Utah Code Ann. § 38-3-2	1, 4, 5, 7, 9, 13, 15, 17, 18
Utah Code Ann. § 38-3-3 through -6	7
Utah Code Ann. § 38-3-8	22, 23, 24

Page(s)

Utah Code Ann. § 70A-9-102(1)	10
Utah Code Ann. § 70A-9-104(b)	10
Utah Code Ann. § 70A-9-107	21
Utah Code Ann. § 70A-9-301	21
Utah Code Ann. § 70A-9-302	21
Utah Code Ann. § 70A-9-312	11, 21
Utah Code Ann. § 70A-9-313	21
Utah Code Ann. § 78-2a-3(2)(k)	1

Other Authorities

49 Am. Jur. 2d <u>Landlord and Tenant</u> § 726 (1970)	5-6
Annotation, <u>Secured Transactions: Priority as Between Statutory Landlord's Lien and Security Interest Perfected in Accordance with Uniform Commercial Code</u> , 99 A.L.R.3d 1006 (1980)	10
2A N. Singer, <u>Statutes and Statutory Construction</u> §§ 46.04 & 46.06 (Sands 4th ed. 1984)	8

JURISDICTION

Section 78-2a-3(2)(k) of the Utah Code gives this court jurisdiction over this appeal.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue: Did the trial court correctly conclude that, under section 38-3-2 of the Utah Code, West One's perfected security interest took priority over the plaintiff's lessor's lien?

Standard of Review: The trial court's interpretation of a statute and grant of summary judgment present questions of law, which this court reviews for correctness. See, e.g., Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990); Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).

DETERMINATIVE STATUTE

Interpretation of section 38-3-2 of the Utah Code is determinative of the issue presented for review. That section states:

38-3-2. Priority of lessor's lien.

The lien provided for in this chapter [i.e., a lessor's lien] shall be preferred to all other liens or claims except claims for taxes and liens of mechanics under Chapter 1 of this title, perfected security interests, and claims of employees for wages which are preferred by law; provided, that when a lessee shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or when his property shall be put into the possession of a receiver, the lien herein provided for shall be limited to the rent for ninety days prior thereto.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below

The plaintiff brought this action to foreclose its lessor's lien against certain personal property of the defendant lessees, Frederick Paul Ninow, Staci L. Ninow and R-West Systems, Inc. See Record ("R.") at 2-7, 52-57 & 163-70. Defendant West One filed an answer claiming a perfected security interest in the same property. R. at 114-17, 194-97. The case involves the relative priority of the plaintiff's and West One's claims to the property.

The parties stipulated that the property could be sold and the proceeds placed in an escrow account pending the court's ruling on the relative priority of the parties' competing claims. R. at 342-45. The priority issue was decided by cross-motions for summary judgment. R. at 244-95 & 299-316.¹ The trial court ruled that West One's perfected security interest in the collateral had priority over the plaintiff's lessor's lien. R. at 351; Transcript, June 10, 1991 (R. at 400), at 10-11. The court entered its findings of fact and conclusions of law, granted West One's motion for summary judgment and denied the plaintiff's motion for partial summary judgment. R. at 352-62.

¹ The plaintiff claims that the parties stipulated that the plaintiff's lessor's lien was prior to West One's security interest. Brief of Appellant at 7 (citing plaintiff's affidavit). West One only stipulated that the plaintiff's lien attached before West One's lien was perfected, not that it had priority over West One's lien. See Transcript, June 10, 1991 (R. at 400), at 1.

The plaintiff appealed, but the appeal was summarily dismissed for lack of appellate jurisdiction because no final order had ever been entered resolving the plaintiff's claims against one of the defendants, Commercial Factors. See R. at 414, 420-21. Following remittitur, the plaintiff obtained a default judgment against Commercial Factors, R. at 444-46, the earlier summary judgment was revised to make it a final order, R. at 442, and the plaintiff appealed a second time, R. at 447-49.

B. Statement of Facts

The WFPP Trust owned a commercial building in Salt Lake City, Utah. On July 2, 1988, the WFPP Trust, as lessor, entered into a lease with defendants Frederick Paul Ninow, Staci L. Ninow and R-West Systems, Inc., as lessees. The lease was for a period of five years and two months, beginning July 1, 1988, and ending August 31, 1993. R. at 172-82.

Before August 4, 1988, the lessees moved certain equipment onto the premises, including certain laminating equipment that is at issue on this appeal. See R. at 327.

UCC-1 financing statements covering the laminating equipment and naming West One or its predecessors in interest as the secured party were duly filed on August 4, 1988; November 8, 1988; February 3, 1989; February 9, 1989; and October 27, 1989. See R. at 255-95.

The lessees failed to pay the rent due under the lease. On January 24, 1990, the lessees abandoned the leased premises, and the plaintiff repossessed them. R. at 327.

On February 2, 1990, the plaintiff, as trustee of the WFPP Trust,² brought this action seeking, among other things, a writ of attachment against the equipment located on the leased premises. R. at 2-7. West One successfully defended the action on the grounds that its perfected security interest in the laminating equipment had priority over the plaintiff's lessor's lien under section 38-3-2 of the Utah Code. See R. at 194-235, 352-62.

SUMMARY OF ARGUMENT

Utah's statute governing lessors' liens says that such liens are preferred to all other liens or claims except certain enumerated claims, including "perfected security interests." Utah Code Ann. § 38-3-2 (1988). The plaintiff had a lessor's lien and West One had a perfected security interest in the same property. Under the plain language of the statute, West One's perfected security interest had priority over the plaintiff's lessor's lien. (Point I.A.)

None of the plaintiff's arguments justify a departure from the plain language of the statute. Utah case law does not support the plaintiff's interpretation of the statute. (Point I.B.) Neither does the history of lessors' liens or the common

² For convenience, West One will refer to both the plaintiff and the WFPP Trust as the "plaintiff."

law. (Point I.C.) The plaintiff's policy arguments are similarly unavailing. In fact, public policy supports the trial court's interpretation of the statute. (Point I.D.)

Recognizing the weakness of his statutory arguments, the plaintiff now argues, for the first time on appeal, that the statute does not apply. The court should not reach the merits of this argument, but even if the plaintiff were correct that the statute does not apply (and there is no evidence of record to support this assertion), the only basis for the plaintiff's claim would be the common law, and there is no common law lessor's lien. Thus, if the plaintiff were correct that the statute does not apply, the plaintiff would have no claim to the property or its proceeds. (Point II.)

ARGUMENT

I.

The Bank's Perfected Security Interest Is Superior to the Plaintiff's Lessor's Lien.

A. The Plain Language of Section 38-3-2 Gives the Bank's Interest Priority.

A landlord had no lien against the property of his tenant at common law. See, e.g., United Cigar Stores Co. of Am. v. Florence Shop, 17 P.2d 871, 873 (Wash. 1933).³ Thus, absent a

³ Some jurisdictions recognized a common law remedy of distress for rent in arrears, under which the landlord could seize any removable personal property found on the leased premises. "The right to distrain is not a strict lien, but rather is a peculiar right which is in the nature of a lien, until the goods are actually distrained under a landlord's warrant." 49 Am. Jur. 2d

contract or statute granting such a lien, a landlord has no lien against the property of his tenant as security for rent.⁴ The lease in this case did not provide for a landlord's lien, R. at 172-82, so the only basis for the plaintiff's claim to the laminating equipment or the proceeds from its sale is the Utah statute governing lessors' liens--title 38, chapter 3 of the Utah Code.

Section 38-3-1 of the Utah Code provides for a limited lessor's lien: "Except as hereinafter provided, lessors shall have a lien for rent due upon all nonexempt property of the lessee brought or kept upon the leased premises so long as the lessee shall occupy said premises and for thirty days thereafter." Utah

Landlord and Tenant § 726 at 675 (1970). In many jurisdictions, the remedy has been expressly abolished by statute, and in others it is deemed impliedly abolished by statutes governing the general remedies for recovery of rent. Id. A few jurisdictions never recognized the remedy. Id. It is not clear whether Utah ever recognized the remedy or whether enactment of Utah's lessors' lien statute impliedly abolished the remedy. In any event, absent a consensual lien, compliance with Utah's lessors' lien statute is now the only way a landlord can seize a tenant's property. Pentecost v. Harward, 699 P.2d 696, 699 (Utah 1985) (absent compliance with the statute, seizing a tenant's property is actionable as a tort); Fudge v. Downing, 83 Utah 101, 27 P.2d 33, 37 (1933) (tenant could recover the value of personal property taken where the landlord failed to show that it acquired any lien on the personal property by statute or agreement). The plaintiff does not claim he has any interest in the property other than a lessor's lien.

⁴ The plaintiff conceded as much in the brief he filed on his first appeal. See Brief of Appellant at 12, Webb v. Ninow, (Utah) (No. 910318) (Utah Ct. App. No. 92052-CA) ("A landlord by virtue of his position has no lien upon any property of his tenant as security for rent, in the absence of contract or statute").

Code Ann. § 38-3-1 (1988). See also Citizens Bank v. Elks Bldg., N.V., 663 P.2d 56, 58 (Utah 1983). A lessor can preserve his statutory lien by seeking a writ of attachment within thirty days after the lessee abandons the premises, in compliance with sections 38-3-3 through -6. See Citizens Bank, 663 P.2d at 58.

The same chapter that creates lessors' liens also establishes their priority: "The lien provided for in this chapter shall be preferred to all other liens or claims except claims for taxes and liens of mechanics under Chapter 1 of this title, perfected security interests, and claims of employees for wages which are preferred by law" Utah Code Ann. § 38-3-2 (emphasis added). See also Gray v. Kappos, 90 Utah 300, 61 P.2d 613, 615 (1936) (a lessor's lien is subordinate to the liens specified in the statute).

It is undisputed that the plaintiff had a lessor's lien against the lessees' equipment under section 38-3-1. It is also undisputed that the plaintiff preserved his lessor's lien by seeking a writ of attachment within thirty days after the lessees abandoned the premises. But it is also undisputed that West One had a perfected security interest in the equipment as of August 4, 1988, well before the plaintiff ever sought to foreclose his lessor's lien. Under the plain language of the statute, West One's perfected security interest takes priority over the plaintiff's lessor's lien.

The plaintiff argues, however, that, where a lessor properly preserves his lien by seeking a writ of attachment within the thirty-day period, the lien relates back to the start of the lease or, at the latest, to when the collateral was brought onto the premises and that the lessor's lien takes priority over security interests that were perfected after that date. Because the plaintiff preserved his lessor's lien by obtaining a writ of attachment within thirty days after the lessees quit the premises, he claims that his lien is superior to the bank's security interest, which was not perfected until after the plaintiff's lessor's lien attached.

The only problem with the plaintiff's argument is that it is not what the statute says.

It is a basic canon of statutory construction that, in interpreting a statute, the court must first look to the statute's plain language and must give effect to every part of the statute. See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980); Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991); Totorica v. Thomas, 16 Utah 2d 175, 397 P.2d 984, 987 (1965); 2A N. Singer, Statutes and Statutory Construction § 46.06 (Sands 4th ed. 1984). If the language of the statute is plain and unambiguous, it must be given effect. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917); Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); N. Singer, supra, § 46.04. Exceptions not made in the statute generally

cannot be read into it. See, e.g., Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980).

The language of the statute here is clear and unambiguous. It gives lessors' liens priority over all other liens and claims "except" certain enumerated claims, including "perfected security interests." Utah Code Ann. § 38-3-2. It does not say that the security interest must have been perfected before the lessor's lien attached. If that is what the legislature intended, it certainly could have said so, but it did not. Cf. Ala. Code § 7-9-310(2) (giving a landlord's lien priority over security interests that attach after the property is brought onto the premises).

The plaintiff would have the court rewrite the statute to read: "The lien provided for in this chapter shall be preferred to all other liens except . . . security interests perfected before the landlord's lien attaches" It is not the function of the court to rewrite or amend statutes, however. The court must apply the statute as it is written, and, under the plain language of the statute, West One's perfected security interest is preferred over the plaintiff's lien. The plaintiff's argument that a lessor's lien should be preferred to later perfected security interests is best addressed to the legislature.

The plaintiff now suggests, for the first time on this appeal, that his lessor's lien is itself a "perfected security interest" within the meaning of the statute and that the priority

among the plaintiff's interest and West One's should therefore be determined solely on the basis of when each arose. See Brief of Appellant at 12. The plaintiff never made that argument below or in his original brief on appeal and cites no authority for his argument.⁵ The court should therefore not even consider the argument. See, e.g., Katz v. Pierce, 732 P.2d 92, 95-96 (Utah 1986); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 387 (Utah Ct. App. 1991); English v. Standard Optical Co., 814 P.2d 613, 618-19 (Utah Ct. App. 1991).

The argument lacks merit in any event. The statute gives "perfected security interests" priority over lessors' liens. It would be tautologous to suggest that the term "perfected security interests" includes lessors' liens. If that were the case, then the statute would mean that lessors' liens have priority over lessors' liens. If the legislature had intended "perfected security interests" to include lessors' liens, either it would not

⁵ The cases generally distinguish between statutory lessors' liens and security interests, the perfection of which is governed by article 9 of the Uniform Commercial Code. See, e.g., Darden v. Ogle, 310 So.2d 182, 184-85 (Ala. 1975); Universal C.I.T. Credit Corp. v. Congressional Motors, Inc., 228 A.2d 463, 469-70 (Md. 1967). See generally Annotation, Secured Transactions: Priority as Between Statutory Landlord's Lien and Security Interest Perfected in Accordance with Uniform Commercial Code, 99 A.L.R.3d 1006 (1980). Compare Utah Code Ann. § 70A-9-102(1) (1990) (article 9 of the Uniform Commercial Code is generally meant to apply to any transaction, regardless of form, that is meant to create a security interest in personal property or fixtures), with id. § 70A-9-104(b) (article 9 does not apply to a landlord's lien).

have subordinated lessors' liens to perfected security interests in the first place, or it would have referred to "other perfected security interests" or to "perfected security interests other than lessors' liens," and not simply to "perfected security interests," without limitation.

Even if the plaintiff's lessor's lien were considered a "security interest," the trial court's ruling was still correct because the plaintiff's lien was not perfected until after West One's security interest. A lessor's statutory lien is not perfected until the lessor files a complaint and has a writ of attachment executed. Citizens Bank v. Elks Bldg., N.V., 663 P.2d 56, 58 (Utah 1983). It is undisputed that West One's security interest was perfected before the plaintiff ever filed his complaint or sought a writ of attachment. Thus, under the plaintiff's proposed first-in-time rule, West One's security interest would have priority over the plaintiff's lessor's lien even if that lien were considered a "perfected security interest." Cf. Utah Code Ann. § 70A-9-312(5)(a) (1990) (conflicting security interests in the same collateral rank according to priority in time of filing or perfection). West One's perfected security interest therefore has priority over the plaintiff's lessor's lien, even if that lien were properly considered a "perfected security interest."

B. Utah Case Law Does Not Alter the Conclusion That the Bank's Interest Has Priority over the Plaintiff's Lessor's Lien.

Despite the plain language of the statute, the plaintiff suggests that Citizens Bank v. Elks Building, N.V., 663 P.2d 56 (Utah 1983), requires the court to recognize exceptions to the strict priority established by the statute.⁶ The landlord in Citizens Bank did not perfect its lessor's lien by filing an action for a writ of attachment within the thirty days provided for by the statute. The court, in dicta, stated that, if the lessor had timely sought a writ of attachment and executed on it, "its statutory lien would have been perfected, and it would have been prior to the Bank's security interest." 663 P.2d at 58. This statement can only properly be understood in light of the facts in that case.

The lease in that case ran from August 15, 1980, to February 14, 1981. The lessee failed to pay its rent in November 1980, and on December 15, 1980, it closed its business, leaving certain equipment on the premises. Thereafter, in March 1981, the

⁶ The plaintiff claims that the trial court did not consider the Citizens Bank case, suggesting that, if it had, its decision may have been different. In fact, the trial court judge stated that she had reviewed the pleadings and the cases that the parties had cited, "particularly the Utah cases." Transcript, June 10, 1991 (R. at 400), at 10 (a copy of which is included in the addendum to the Brief of Appellant). The plaintiff cited Citizens Bank in his memorandum in support of his motion for partial summary judgment. R. at 307. Thus, the trial court apparently considered the case. Counsel for the plaintiff may not have argued the case at the hearing on his motion, but that does not mean that the trial court did not consider it. If in fact the trial court did not consider the case, as the plaintiff claims, it was only because the plaintiff did not sufficiently bring it to the court's attention. The plaintiff cannot therefore claim that the trial court erred by not considering the case.

lessee applied for a loan from Citizens Bank. The loan was approved and disbursed on April 7, 1981, and the bank filed a financing statement on the same day to perfect a security interest in the lessee's equipment, including the equipment left on the leased premises. Two days later, the landlord filed a complaint against the lessee for unpaid lease payments, in which the landlord asserted a lessor's lien against the equipment. The trial court ruled that the bank's security interest had priority over the lessor's lien. The lessor appealed, contending that it had both a statutory lien and a contractual lien on the equipment and that both were prior to the bank's security interest. Id. at 57-58.

On appeal, the court first considered the validity of the lessor's claimed liens. Because it found that the lessor did not have a valid lien, it did not reach the question of priorities. Id. at 58. In fact, the court's opinion does not even mention the priority statute--Utah Code Ann. § 38-3-2. Instead, the court first looked at section 38-3-1, which grants the lessor a lien but only for a limited period: "[B]y the express terms of the statute, the lessor's statutory lien terminates thirty-one days after the lessee has quit the premises." 663 P.2d at 58. Thus, the court concluded, the lessor's "statutory landlord's lien expired January 16, 1981, and, barring a contractual lien, [the landlord] stood as an unsecured creditor after that date." Id.⁷ The court noted

⁷ The court also rejected the landlord's claim that it had a contractual lien on the property.

that a landlord can preserve his statutory lien by bringing an action within thirty days. Id. (citing Eason v. Wheelock, 101 Utah 162, 120 P.2d 319 (1941)). The court then stated that, if the landlord had "file[d] a complaint against the lessee, request[ed] a writ of attachment, and execute[d] on the writ," "its statutory lien would have been perfected, and it would have been prior to the Bank's security interest." Id. (emphasis added). That is because, if the landlord had acted within the time required by the statute (that is, by January 16, 1981), it would have attached and executed on the property before the bank ever took its security interest. The bank did not have any interest in the property before April 7, 1981, and the lessor's claim could have been fully satisfied by that time.

The court did not say that, had the lessor acted timely, its lien would have been superior to or would have had priority over the bank's perfected security interest. Rather, the court said that the lessor's lien simply "would have been prior to," that is, earlier in time than, the bank's security interest. See id. (emphasis added). In other words, the lessor would have had a lien before the bank did and could have foreclosed on its interest before the bank's interest ever arose. Thus, Citizens Bank does not justify an interpretation of the priority statute contrary to its plain language.

The plaintiff also argues that Gray v. Kappos, 90 Utah 300, 61 P.2d 613 (1936), stands for the rule that first in time

prevails. In fact, that case merely held that a purchase money mortgage given before a lease was entered into was superior to a lessor's lien, a proposition neither side disputes. Nevertheless, the case merits some discussion.

In 1928 a bank loaned the Kapposes money to buy sheep and took a note and mortgage in return. In January 1929 the Kapposes leased land from the plaintiff on which to graze their sheep. The bank subsequently loaned the Kapposes more money to buy more sheep. The Kapposes gave the bank new notes and mortgages, which the parties apparently intended as renewals of the prior notes and mortgages. After the sheep were sold, the plaintiff brought an action, claiming that his lessor's lien took priority over the interests of the bank and of the purchaser of the sheep.

The court first quoted the priority statute in effect at the time, which was identical to current section 38-3-2 except that it referred to "mortgages for purchase money" rather than "perfected security interests." See 61 P.2d at 614-15 (quoting Rev. Stat. Utah § 52-3-2 (1933); Comp. Laws Utah § 3777 (1917)). The court stated categorically: "Under this statute, if the mortgage foreclosed by the bank was for the purchase money for the sheep in question, then it has priority over the lien claimed by plaintiff." Id. at 615. The court concluded that the initial mortgage and its subsequent renewals were purchase money mortgages and thus had priority.

The lessor in Kappos next claimed that his lien should at least have priority over the mortgages on sheep bought after January 1929, since the sheep were brought onto the leased property before the mortgages were ever filed of record. The court rejected the argument. It reemphasized that the plaintiff's lien, "based entirely on the statute," was "subordinate to a purchase-money mortgage." Id. The court recognized that the failure to record a purchase money mortgage could estop the mortgagee from claiming benefits under the mortgage, but the plaintiff had not claimed that the bank was estopped. The court concluded, "The transactions being bona fide, and there being no fraud or estoppel claimed, the plaintiff's lien is subject to the purchase-money mortgage," as the statute provided. Id.⁸

C. Neither History nor the Common Law Can Change the Plain Meaning of the Statute.

⁸ In dicta, the court also reasoned that the lessor could not obtain any greater rights in the sheep than the Kapposes had when the sheep were brought onto the property, and since the sheep were already subject to the bank's purchase-money mortgage, the lessor's lien "was likewise subject to that same mortgage." 61 P.2d at 615. In other words, because the bank was first in time, the lessor's lien attached only to the already encumbered sheep. The court's reasoning on this point seems faulty. See, e.g., id. at 616 (Wolfe, J., concurring). Under that reasoning, a lessor could never have priority over a prior claim, yet the statute gives lessors priority over all claims except those specifically enumerated. But even if the court were right that the bank's purchase money mortgage had priority because it was also first in time, that does not mean that the statute only gives a purchase money mortgage (or, as in this case, a perfected security interest) priority where it is first in time. The statute contains no such limitation.

The plaintiff argues that the principles governing priorities in common law distress actions should apply to statutory lessors' liens and give lessors' liens priority over competing security interests that are perfected after the lease commences and the collateral comes onto the premises. The argument is irrelevant since, whatever the situation may have been at common law or in other jurisdictions, the priority of the parties' claims in this case is governed by the statute, Utah Code Ann. § 38-3-2, and the statute gives perfected security interests priority over lessors' liens, regardless of when the security interest was perfected.⁹ The plaintiff has not shown that any of the cases he has cited from other jurisdictions applied a statute identical to Utah's to reach the result the plaintiff argues for, and, in fact, to the extent those cases were decided on the basis of statutory interpretation, they apparently did not involve priority statutes like Utah's. See, e.g., Howard v. Calhoun, 21 So.2d 361 (Fla. 1945) (construing a statute giving a lessor a lien from the time property is brought onto the premises in light of the state constitutional homestead exemption).

If Utah's priority statute were meant simply to codify the general rule of priority (namely, that the first to attach has priority), there would have been no need for the statute, since

⁹ Moreover, the plaintiff has not even shown that Utah ever recognized a common law right on the part of a lessor to distrain his tenant's property. See supra note 3.

that would have been the result if the statute were silent as to priorities. Moreover, that is not what the statute says. The statute could have established priorities based on when a lien or other claim attached or was perfected. Cf. Ala. Code § 7-9-310(2) (establishing priorities between a landlord's lien and a security interest in collateral based on when the security interest attached in relation to the collateral being brought onto the premises). But it does not. It says that lessors' liens "shall be preferred to all other liens or claims," without regard for when they arose or when they were perfected, with certain exceptions, including "perfected security interests." Utah Code Ann. § 38-3-2. If perfected security interests had to be perfected before the lessor's lien attached to have priority over the lessor's lien, the same would have to be true of the other exceptions, also. The plaintiff does not claim that the other exceptions (i.e., tax liens, mechanic's liens and claims of employees for wages) must have attached or been perfected before the lessor's lien to have priority, and there is simply no evidence that the legislature intended to impose any priority requirement on any of the excepted liens.

D. The Statute and the Trial Court's Ruling Are Supported by Sound Policy Considerations.

Important policy considerations support the conclusion that perfected security interests have priority over lessors' liens, regardless of when they were perfected. In fact, a cursory

reading of the statute indicates that all the exceptions to the priority of lessors' liens (namely, tax liens, mechanics' liens, and preferred claims of employees for wages, as well as perfected security interests) represent policy choices by the legislature, that is, choices to prefer certain types of claimants to landlords when it comes to distributing a defaulting lessee's personal property, just as the legislature's initial choice to prefer lessor's liens over other liens (even when those liens were first in time) was based on policy considerations. The preference for lessors' liens encourages landlords to rent their property by giving them some assurance that they will get paid. The exception for perfected security interests, on the other hand, benefits both lessees and lessors by making it easier for lessees to borrow money, which may be essential to their ability to make money and thus pay their rent. It also encourages lenders to lend money, knowing that they will be secure even if the borrower later defaults on a lease obligation. If lessors had priority over all subsequently perfected security interests, commerce would be very difficult since lenders would be unwilling to lend money if they could not be assured, despite UCC searches, that their security interests would mean anything in the event of default. Even if the tenant were current in his rent at the time the lender perfected his security interest, a subsequent failure to pay rent could make the lender's perfected security interest worthless. Lenders could

not protect themselves and would not be willing to take that risk.¹⁰ Thus, the Utah Legislature had a rational basis for subordinating lessors' liens to perfected security interests. There may be other policy considerations favoring lessors, but the court "can only presume that the legislature weighed the competing considerations when it enacted [the statute] and can only suggest that complaints against inherent unfairness in the statutory scheme should be addressed to that body." Freund v. Utah Power & Light Co., 793 P.2d 362, 369 (Utah 1990).

The plaintiff suggests that, even if the original priority statute represented a policy choice preferring lenders to landlords in certain situations (namely, in the case of purchase money mortgages), the 1977 amendment to the statute, which replaced the phrase "mortgages for purchase money" with "perfected security interests," was simply meant to bring the statute's terminology into line with the Uniform Commercial Code, which introduced the term "security interest" and did away with other types of liens, such as chattel mortgages, hypothecations, pledges, conditional sales, and the like, and was not meant to expand the scope of security interests that would take priority over lessors' liens.

¹⁰ The plaintiff suggests that a lender could protect itself by obtaining a landlord subordination agreement. Brief of Appellant at 9 n.12. But that presupposes a landlord willing to sign such an agreement, and not all landlords may be willing. The legislature could reasonably conclude that lenders should not have to bear the risk that a landlord may be unwilling to subordinate his lien voluntarily.

Brief of Appellant at 9 n.11. The plaintiff cites no legislative history to support this argument, and it is not supported by the statutory language. If that were the legislature's intent, the legislature certainly could have said so. It could have simply replaced the term "mortgages" with "perfected security interests," without deleting the phrase "purchase money," or it could have replaced the whole phrase ("mortgages for purchase money") with the term "purchase money security interest," which is a defined term under the UCC. See Utah Code Ann. § 70A-9-107 (1990).¹¹ Where, as here, the statutory language is plain and unambiguous, the court will not look beyond the language to divine some contrary legislative intent but can assume that the language the legislature chose accurately expresses its intent. See, e.g., Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 772 (1984); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199-201 (1976); Allisen v. American Legion Post No. 134, 763 P.2d 806, 809 (Utah 1988). The legislature chose to make lessors' liens subordinate to all "perfected security interest[s]," not just perfected purchase money security interests.

The plaintiff also suggests that, if the statute is given its plain meaning, a landlord could be deprived of his lien through

¹¹ The UCC treats purchase money security interests different from other security interests for some purposes. See, e.g., Utah Code Ann. §§ 70A-9-301, -302, -312 & -313. If the legislature had intended to give only purchase money security interests priority over lessors' liens, it certainly knew how to make the distinction.

"sham transactions": "A lessee could borrow money, give a perfected security interest, and defeat a landlord lien." Brief of Appellant at 11. The plaintiff does not explain how such a transaction would be a "sham" if the lessee received consideration for the security interest he gave the lender, especially if he was current on his rent at the time, and the plaintiff concedes that there are remedies for sham or fraudulent transactions under the Uniform Commercial Code. Id. See also Utah Code Ann. §§ 25-6-1 through -13 (1989 & Supp. 1991) (Utah Uniform Fraudulent Transfer Act).

II.

Section 38-3-8 Does Not Alter the Priorities of the Parties' Respective Claims.

Lastly, the plaintiff argues that chapter 3 of title 38, governing lessors' liens, does not apply in this case and that, under the common law, the plaintiff's lien has priority over the subsequent lien of the bank.

The plaintiff raises this argument for the first time on appeal.¹² Appellate courts will generally not even consider arguments raised for the first time on appeal. See, e.g., State v. Eldredge, 773 P.2d 29, 34 (Utah), cert. denied, 493 U.S. 814

¹² In fact, the plaintiff's position on this point is just the opposite of his position in the trial court. In the trial court, the plaintiff claimed, in his complaint, amended complaint and second amended complaint, that chapter 3 of title 38 did apply and that it gave the plaintiff a lessor's lien against the property. See R. at 4-5, 54-55 & 166-67.

(1989); Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1358 (Utah Ct. App. 1991).

Moreover, section 38-3-8, the statute the plaintiff relies on for this argument, does not even apply under the facts of this case. That statute says: "This chapter shall not be applicable to a written lease for a term of years in which, as part of the consideration thereof, the lessee or assigns shall erect a building or improvements upon the leased premises." Utah Code Ann. § 38-3-8 (emphasis added).¹³ All of the improvements required in the lease, on which the plaintiff relies, were to be completed by the lessor: "Lessor shall furnish and install concrete floor . . . ," R. at 180 § XVIII ¶ 1 (emphasis added); "Lessor shall furnish and install commercial grade carpet and base . . . ," id. ¶ 2 (emphasis added). The only obligation the lessee had was to pay half the cost to enlarge an existing door. Id. ¶ 3. At best, the lessee only promised to help pay for an improvement. A promise to pay money is not the same as a promise to make improvements, and, under the statute, it is only the lessee's erection of the improvement, not even his promise to make it, that removes a case from the scope of chapter 3. In fact, there is no evidence in the record that the improvements the lessor agreed to make were ever

¹³ The apparent rationale for section 38-3-8 is that, where the lessee has made valuable improvements on the leased premises, the lessor receives the benefit of the improvements and therefore has less need for a lien on the lessee's personal property.

made. Thus, there is no basis for concluding that section 38-3-8 even applies.

But even assuming it does, the plaintiff has not thought through the consequences of his argument. He claims that, because chapter 3 does not apply, the common law does, and under the common law rule of priorities, his lien takes priority because it was the first to attach. The plaintiff forgets, though, that there is no common law lessor's lien. The plaintiff can claim a lessor's lien only because chapter 3 of title 38 creates such a lien. If chapter 3 does not apply, as the plaintiff belatedly argues, then the plaintiff does not have any lien to take priority over West One's perfected security interest.¹⁴ Thus, section 38-3-8 does not help the plaintiff, even if it did apply.

CONCLUSION

The statute establishing the priority of lessors' liens means what it says. A lessor's lien does not take priority over a perfected security interest. The trial court correctly concluded

¹⁴ The plaintiff cites West One's argument in the trial court for the proposition that, if the statute does not apply, the common law does and that under the common law the first to attach prevails. Brief of Appellant at 15 n.14. Counsel for West One was simply referring to the issue of priorities. If the act creating lessors' liens did not establish any priorities, then the court could fill in the gap in the statute by applying the common law rule applicable to liens generally, namely, the first in time prevails. West One did not argue that, if there were no lessors' liens statute at all, the plaintiff would still have a lien on his tenants' property. See Transcript, June 10, 1991 (R. at 400), at 3-4.

that West One's perfected security interest had priority over the plaintiff's lessor's lien. The judgment of the trial court should therefore be affirmed.

DATED this 8th day of November, 1993.

SUITTER AXLAND & HANSON

Paul M. Simmons
FRANCIS J. CARNEY, Esq.
PAUL M. SIMMONS, Esq.
Attorneys for Appellee

(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the above and foregoing Brief of Appellee were mailed, postage prepaid thereon, this 8th day of November, 1993, to:

Robert F. Orton, Esq.
Milo S. Marsden, Jr., Esq.
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 South Main Street, Fifth Floor
Salt Lake City, Utah 84101

Paul M. Simmons

(Original signature)

2pms.pld001.pms

A D D E N D U M

FILED IN CLERK'S OFFICE
Salt Lake County Utah
JUN 24 1991
By Brian D. [Signature]
Deputy Clerk

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

Hon. Anne M. Stirba

0035;

plaintiff, William F. Webb. Defendant West One Bank was represented by Francis J. Carney, Esq.; plaintiff Webb by Robert F. Orton, Esq. The material facts were undisputed and, therefore, the Court makes the following:

FINDINGS OF FACT

1. Defendant, R-West, Inc. is a Utah corporation and is also known as R-West Systems, Inc.

2. On July 2, 1988, William F. Webb, as trustee of the WFPP Trust ("Webb"), as lessor, entered into a written lease agreement with defendants Frederick Ninow, Staci Ninow and R-West Systems, Inc. ("R-West"), as lessees, for the lease of certain commercial premises located at 2560 West Directors Row, Salt Lake City, Utah. The term of the lease was from July 1, 1988 to August 31, 1993.

3. On August 4, 1988, a UCC-1 Financing Statement was duly filed by Mr. Homer Cutrubus, Mr. Ned Parsons, and Mr. Jim Hart, as secured parties, as to personal property collateral consisting of certain foam lamination equipment and related material, all owned by R-West, Inc. (the "Collateral").

4. The Collateral was brought onto the leased premise sometime after July 2, 1988 and before August 4, 1988, by R-West, Inc.

5. The Collateral remained on the leased premises continuously from before August 4, 1988, until after the commencement of this action in February 1990.

6. On November 8, 1988, a second UCC-1 Financing Statement on the Collateral was filed in favor of Continental Bank & Trust Company (the former name of West One Bank, Utah).

7. A third UCC-1 Financing Statement in favor of Continental Bank & Trust Company on the Collateral was filed on February 3, 1989.

8. A fourth UCC-1 Financing Statement in favor of Continental Bank & Trust Company on the Collateral was filed as a fixture filing with the Salt Lake County Clerk's Office on February 9, 1989.

9. A fifth UCC-1 Financing Statement on the Collateral in favor of Homer Cutrubus, Ned Parsons and Jim Hart was filed on July 5, 1989.

10. A sixth and final UCC-1 Financing Statement in favor of Commercial Factors of Salt Lake City, Ltd. was filed on the Collateral on October 27, 1989.

11. On July 27, 1990, the August 4, 1988 Security Agreement of Homer Cutrubus, Ned Parsons, and Jim Hart on the Collateral was assigned to West One Bank, Utah and West One Bank has acceded

to all rights of Messrs. Cutrubus, Parsons and Hart in the Collateral.

12. Defendant R-West breached the terms of its Lease Agreement with plaintiff and at the time of the commencement of this action there was due and owing the sum of \$93,850.02 over and above all set-offs and counterclaims.

13. The premises were abandoned by defendant R-West, Inc. on January 24, 1990, after having been continuously occupied since the commencement of the lease, and plaintiff retook possession on that date.

14. On February 9, 1990, plaintiff obtained a writ of attachment as against the Collateral and duly executed same.

15. By stipulation of plaintiff Webb and defendant West One Bank the Collateral was sold for the sum of \$150,000 which amount has been placed into an interest-bearing account with West One Bank. The parties have stipulated that the Court may determine priority in the cash proceeds in the same manner as priority in the Collateral itself would have been determined had it not been sold.

DISCUSSION

West One Bank has moved for summary judgment adjudging the relative priorities of the parties in the Collateral in accordance with § 38-3-5, Utah Code Ann. (1977). Plaintiff Webb has filed

a cross-motion for summary judgment adjudging and decreeing that his lessor's lien has priority over all other liens in the Collateral, including the bank's. West One Bank and Mr. Webb, by their respective counsel, have filed memoranda which have been reviewed by the Court. No appearances have been made by or on behalf of any other parties in this action.

Section 38-3-5 provides that upon the filing of a complaint for execution upon a lessor's lien, it shall be the duty of the court to, among other things, "make a determination of the priorities of the claims, liens, and security interests in such property." There are no material disputed facts and therefore the priority issues can be decided by summary judgment under Rule 56, Utah Rules of Civil Procedure. It is undisputed that plaintiff has a lessor's lien pursuant to § 38-3-1 in the Collateral. It is also undisputed that defendant West One Bank has duly-perfected security interests in the Collateral dating from August 4, 1988. Finally, it is undisputed that the Collateral was brought onto the leased premises before the perfection of the security interest by West One Bank's predecessor-in-interest on August 4, 1988.

Section 38-3-2 provides that a lessor's lien "shall be preferred to all other liens or claims except claims for taxes and liens of mechanics under Chapter 1 of this title, perfected

security interests, and claims of employees for wages which are preferred by law . . ." (emphasis added). Plaintiff did not dispute that a perfected security interest in the Collateral would be prior to its lessor's lien had that security interest been perfected before the Collateral was brought onto the leased premises. The issue before the Court was whether a security interest in Collateral which was perfected after the Collateral had been brought onto the leased premises, and thus became subject to a lessor's lien, still had priority over the lessor's lien under § 38-3-2.

The Court, having reviewed the pertinent statutes and the memoranda submitted by counsel, having heard the arguments of counsel, and being otherwise advised in the premises, finds that the statutory intent expressed in § 38-3-2 is to grant priority to perfected security interests over lessor's liens, even if those security interests are perfected after collateral is brought onto the leased premises. Therefore, the Court concludes as follows:

CONCLUSIONS OF LAW


1. Plaintiff Webb has a valid lessor's lien pursuant to § 38-3-1 which attached to the Collateral as of the date it was brought onto the leased premises.

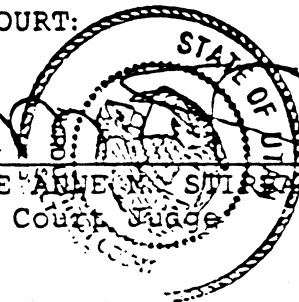
2. Defendant West One Bank has duly-perfected security interests in the Collateral which were first perfected on August 4, 1988.

3. Under § 38-3-2, Utah Code Ann. (1977) the perfected security interests of West One Bank are prior to the lessor's lien of plaintiff Webb.

MADE AND ENTERED this 24th day of June, 1991.


BY THE COURT:


HONORABLE ALLEN M. STIERS
District Court Judge



FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUN 24 1991


Deputy Clerk

Francis J. Carney, Esq. (0581)
SUITTER AXLAND ARMSTRONG &
HANSON
175 South West Temple
Seventh Floor
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Attorneys for Defendant
West One Bank, Utah

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

WILLIAM F. WEBB, Trustee of
WFPP TRUST,

Plaintiff,

-vs-

FREDERICK PAUL NINOW; STACI L.
NINOW; R-WEST, INC., a corpora-
tion, WEST ONE BANK, UTAH, a
corporation; HOMER CUTRUBUS,
NED F. PARSON; JIM HART; and
COMMERCIAL FACTORS OF SALT LAKE
CITY, LTD., a limited partner-
ship,

Defendants.

SUMMARY JUDGMENT

Civil No. 900900672-PR

Hon. Anne M. Stirba

This matter came before the Court, Honorable Anne M. Stirba presiding, on June 10, 1991, for hearing on cross-motions for summary judgment filed by defendant West One Bank, Utah and

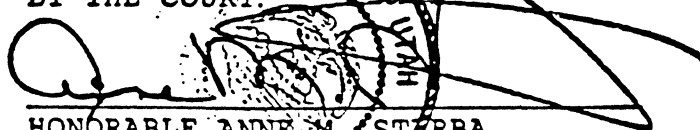
plaintiff, William F. Webb, as Trustee of WFPP Trust. Defendant West One Bank was represented by Francis J. Carney, Esq.; plaintiff Webb by Robert F. Orton, Esq.

The Court, having reviewed the memoranda submitted by counsel, and having heard the arguments of counsel, having entered its Findings of Fact and Conclusions of Law and being otherwise advised in the premises, hereby

ORDERS, ADJUDGES AND DECREES that defendant West One Bank's Motion for Summary Judgment shall be, and hereby is granted; that plaintiff William F. Webb's Motion for Summary Judgment shall be, and hereby is, denied; that, accordingly, Summary Judgment is entered in favor of West One Bank, Utah as against William F. Webb, Trustee of WFPP Trust, decreeing that the perfected security interests of West One Bank, Utah are prior to and superior to the lessor's lien of plaintiff, William F. Webb, as Trustee of WFPP Trust. The parties shall bear their own costs and fees.

MADE AND ENTERED this 24th day of June 1991.

BY THE COURT:


HONORABLE ANNE M. STERBA
District Court Judge

