

1993

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930522 CA

WILLIAM F. WEBB, Trustee of)	
the WFPP TRUST,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. 930522-CA
)	
FREDERICK PAUL NINOW;)	
STACI L. NINOW; R-WEST, INC.,)	
a Corporation; WESTONE BANK,)	Priority No. 15
UTAH, a Corporation; HOMER)	
CUTRUBUS; NED F. PARSON;)	
JIM HART; and COMMERCIAL)	
FACTORS OF SALT LAKE CITY,)	
LTD., a Limited Partnership,)	
)	
Defendants/Appellee.)	

BRIEF OF APPELLANT

APPEAL FROM SUMMARY JUDGMENT RULING THAT BANK'S SECURITY INTEREST IS SUPERIOR TO LESSOR'S LIEN SECURITY INTEREST, EVEN THOUGH THE LESSOR'S LIEN SECURITY INTEREST ATTACHED PRIOR TO THE BANK'S SECURITY INTEREST, AND WAS TIMELY PRESERVED PURSUANT TO SECTIONS 38-3-1 THROUGH 38-3-6, U.C.A. (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANNE M. STIRBA, PRESIDING.

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Defendants/Appellee.

Priority No. 15

BRIEF OF APPELLANT

PARTIES

The parties are William F. Webb, Trustee of the WFPP Trust, plaintiff/appellant (hereinafter "Lessor") and WestOne Bank of Utah, defendant/appellee (hereinafter "Bank").

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this court pursuant to Rule 3, Utah Rules of Appellate Procedure and Utah Code Ann. Section 78-2-2(3)(j) (Supp. 1990).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

1. Did the district court rule correctly that the Bank's security interest is superior to the Lessor's lien security interest, even though the Lessor's lien was prior in time and

timely preserved?¹

Because the trial court's ruling on this issue is strictly a legal conclusion, this court should accord it no deference, and should apply a "correction of error" standard of review.² Creer v. Valley Bank & Trust Co., 770 P.2d 113 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

STATUTE

Lessor's Liens.

38-3-1. Lien for rent due.

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 30 days thereafter.

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

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; 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.

¹ Under § 38-3-2, U.C.A., 1990.

² Standards of Review.

(a) Trial court's interpretation of statute presents question of law reviewed on appeal for correctness. Ward v. Richfield City, 798 P.2d 757 (Utah 1990).

(b) The appellate court accords the trial court's conclusions of law no particular deference, but reviews them for correctness. When the trial court makes findings of fact based on the parties' stipulated facts, the appellate court treats these findings as conclusions of law. Zions First Nat'l Bank v. National Am. Title Ins., 749 P.2d 651, 656 (Utah 1988).

(c) When reviewing an appeal from a summary judgment, the appellate court inquires whether there is any genuine issue as to any material fact, and if there is not, whether the moving party is entitled to summary judgment as a matter of law. The appellate court will liberally construe the evidence in favor of the party opposing the motion for summary judgment. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 798 P.2d 24 (Utah 1990); Owens v. Garfield, 784 P.2d 1187, 1188 (Utah 1989).

38-3-3. Attachment in aid of lien.

Whenever any rent shall be due and unpaid under a lease, or the lessee shall be about to remove his property from the leased premises, the lessor may have the personal property of the lessee which is upon the leased premises and subject to such lien attached without other ground for such attachment.

38-3-4. Attachment--Affidavit and bond.

The lessor shall before the issue of such writ of attachment file a complaint, and an affidavit duly sworn to setting forth the amount of rent due over and above all offsets and counterclaims and a brief description of the leased premises, and shall further state, under oath that such writ of attachment is not sued out for the purpose of vexing or harassing the lessee; and the person applying for such writ of attachment shall execute and file a bond as in other cases of attachment.

38-3-5. When attachment will issue--Determination of priorities.

Upon the filing of such complaint, affidavit, and bond it shall be the duty of the court wherein the same are filed to issue a writ of attachment to the proper officer, commanding him to seize the property of the defendant subject to such lien, or so much thereof as will satisfy the demand, and to make a determination of the priorities of the claims, liens, and security interests in such property.

38-3-6. Execution of writ of attachment.

It shall be the duty of the officer to whom the writ of attachment is directed to seize the property of such lessee subject to such lien, or as much thereof as shall be necessary to satisfy such debt and costs, and to keep the same until the determination of the action, unless the property is sooner released by bond or the attachment is discharged.

38-3-7. Release of attachment--Bond.

A bond for the release of the attached property may be given, and motion to discharge the attachment may be made, as provided in the Code of Civil Procedure in cases of attachment.

38-3-8. When chapter not applicable.

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.

STATEMENT OF THE CASE

(a) Nature of the Case

This appeal concerns the priority of a Lessor's lien security interest as against a Bank's subsequently acquired security interest in equipment located on the leased premises.³

(b) Course of Proceedings

Lessor filed its complaint and amended complaints and obtained a writ of attachment on the equipment. All defendants except the bank defaulted. The bank answered the complaints claiming its security interest was superior to Lessor's lien. The trial court disposed of the issue on cross motions for summary judgment ruling in favor of the Bank.

(c) Disposition at Trial Court

The trial court ruled that the Bank's security interest was superior to the Lessor's lien, even though it was perfected after the Lessor's lien attached to the collateral.

FACTS⁴

The stipulated facts are that Lessor owns a commercial building located in Salt Lake City, Utah. On July 2, 1988, the lessee leased space from Lessor in which to conduct a business.⁵ The lease ran from July 1, 1988 to August 31, 1993.

³ The equipment is laminating equipment. The equipment was sold for \$150,000 by stipulation of lessor and the bank with the liens to attach to the proceeds.

⁴ The facts are stipulated. (R353-355) and (Transcript pages 1 and 5).

⁵ The lease was between plaintiff WPPP Trust, as lessor, and Frederick Paul Ninow, Staci L. Ninow and R-West Systems, Inc., a Utah corporation, as lessee. (R-9).

Prior to the Bank obtaining a security interest, lessee moved the equipment onto the leased premises.⁶ Subsequently, the Bank agreed to extend lessee a line of credit. The dates of advances under the line of credit are unknown to Lessor; however, financing statements preceding the advances were filed. R. 255-95.

The lessee failed to pay the rent. On January 24, 1990 lessee abandoned the leased premises. On February 2, 1990, Lessor filed its complaint and on February 22, 1990 obtained a writ of attachment on lessee's equipment still located on the leased premises.

SUMMARY OF THE ARGUMENT

1. Lessor's lien security interest is superior to the Bank's security interest because Lessor's security interest was prior in time to Bank's security interest and was preserved in accordance with §§ 38-3-1 through 38-3-6.

2. Under common law "distress," Lessor's liens are superior to security interests perfected after the inception of the lease or the collateral coming onto the leased premises.

3. If the Utah Lessor's lien statute does not apply, because the lessee agreed to make improvements to the real property as part of the consideration for the lease,⁷ then common law applies and the Lessor's lien prevails as first in time.

⁶ This was sometime prior to August 4, 1988.

⁷ 38-3-8. When chapter not applicable.

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.

ARGUMENT

POINT I. LESSOR'S LIEN SECURITY INTEREST IS SUPERIOR TO THE BANK'S SUBSEQUENT SECURITY INTEREST UNDER §§ 38-3-1 THROUGH 38-3-8, U.C.A., 1990 AND UTAH CASE LAW

The Utah Supreme Court has given the following guidance in Citizens Bank v. Elks Bldg., N.V., 663 P2 56, 58 (Utah 1983):

U.C.A., 1953, § 38-3-1 creates 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.

Thus, by the express terms of the statute, the lessor's statutory lien terminates thirty-one days after the lessee has quit the premises. Therefore, Elks' statutory landlord's lien expired January 16, 1981, and, barring a contractual lien, Elks stood as an unsecured creditor after that date. This conclusion is consistent with prior Utah law. *Eason v. Wheelock*, 101 Utah 162, 120 P.2d 319 (1941); *In re Stone's Estate*, 14 Utah 205, 46 P. 1101 (1896).

In *In re Stone's Estate*, *supra*, we strictly construed a predecessor of § 38-3-1. The former version, which is almost identical, read:

Lessors, except as hereinafter provided, shall have a lien for rent due upon all of the property of the lessee not exempt from execution, as long as the lessee shall occupy the leased premises, and for thirty days thereafter.

The lessee in that case died and left \$270 rent unpaid. Thirty-four days after the lessee's death, the lessor, Eccles Lumber Company, brought proceedings to claim the benefit of the statutory landlord's lien. This Court held that the 34-day delay "brought the action of the lessor without the terms of the statute, and [therefore] his lien was gone." 14 Utah at 208, 46 P. at 1102. We stated: "[A]t the expiration of 30 days from the day on which a lessee ceases, for any reason, to occupy such premises, the lien ceases to exist, and consequently to have any force or effect." *Id.* at 207, 46 P. at 1102.

In *Eason v. Wheelock*, *supra*, we again construed a predecessor of § 38-3-1 with the same 30-day cut-off clause. There the holder of a chattel mortgage attempted to remove property securing the mortgage from leased premises before the 30 days had passed. The lessor locked the mortgagor out, and the mortgagor sued for conversion. Because the mortgagor's attempt to retrieve the property occurred *within* the 30-day statutory period, we upheld the lessor's right to retain possession of the lessee's property. We also stated that "[a]ny act after *that date* would be one of withholding the property." 101 Utah at 165, 120 P.2d at 320 (emphasis added).

In these types of cases, lessors, to preserve their statutory liens, must comply with the terms established by U.C.A., 1953, §§ 38-3-3 through 38-3-6, including the 30-day period. These sections permit the lessor to file a complaint against the lessee, request a writ of attachment, and execute on the writ. Had Elks done this, its statutory lien would have been perfected, and it would have been prior to the Bank's security interest.

Applying Citizens to the facts of this case, the parties have stipulated that Lessor preserved its statutory lien and security interest by timely complying with Sections 38-3-1 through 38-3-6, including filing a complaint against the lessee, requesting and obtaining a writ of attachment and executing upon the writ within the 30 day period. R. 2-7. The parties have also stipulated that the Lessor's lien security interest is prior to the Bank's security interest. R. 327. Therefore, Lessor has a statutory lien security interest under § 38-3-1 which is prior and superior to the Bank's security interest.

Oral Argument⁸

The trial court did not consider the Citizens case as evidenced by the oral argument. The following summarizes the trial court transcript.

⁸ A copy of the trial court transcript is attached as an addendum.

(a) Bank's Arguments

During the oral argument before the trial court, the bank's attorney recited the facts.⁹

With regards to the law, bank's counsel recited § 38-3-2 to the court and argued that the landlord has a prior lien, except as to taxes, mechanic liens, perfected security interests, and employee wage earnings. His argument is that the statute means what it says; perfected security interest has priority over a landlord lien no matter when it is perfected.

He argues that there is no guidance in the cases. He referred to Gray v. Kappos, 90 Utah 300, 61 P.2d 613 (1936), in which a purchase money security interest was held to be prior to the landlord's lien, but stated that the facts are distinguishable.¹⁰ He also stated that four other cases from other jurisdictions held the landlord's lien to be superior to a perfected security interest, but stated that none of the four jurisdictions have a statute like Utah's. Bank's counsel argued that where the priority is not set forth in a landlord lien statute, that the court then looks back to the common law, and the priority is given to the first attaching lien. If there is no statute, the landlord wins if his lien first attached. He further argued that if our Utah statute does not apply to all perfected security interests, but is

⁹ The lease commenced July 2, 1988. The landlord's lien attaches at the start of the tenancy. The perfected security interest dates from August 4, 1988. The equipment was brought on the premises prior to August 4, 1988. The lease is in default, and the lessee owes the lessor \$95,000. The bank loan is in default in the amount of \$150,000. The collateral was sold by stipulation for \$150,000 and the competing liens attached to the proceeds.

¹⁰ In Gray v. Kappos, 61 P2 613 (Utah 1936), the court states at page 615:

"The lien of plaintiff attached as soon as the sheep were brought upon the leased premises"

limited to prior perfected security interests, then there is no need for the statute, i.e. we would be where we were under common law.

Bank's counsel also argued that there was a good policy reason for the Utah Legislature changing from the common law priorities to making all perfected security interests superior to landlords liens. He argued that the Legislative policy reason was to allow lessees to borrow money and to allow banks to take security interests without worrying about landlord liens.¹¹

The bank also argued that for the term "perfected security interest" not to have priority over a landlord lien unless it was created prior to the landlord's lien, the same principle, i.e. priority of creation, should be applied to all the other statutory exceptions, i.e. tax liens, employee wage claims, and mechanic liens.¹²

(b) Lessor's Arguments

Lessor's legal counsel in its presentation to the trial court agreed on the facts and the issue and stated that the Utah statute codifies the common law. Lessor's counsel referred to Gray v. Kappos, which involved § 52-3-2 Revised Statutes, 1933, as amended, where the landlord lien was preferred to all other liens except

¹¹ The reason for the statute being changed by the Utah Legislature is contained in Senate Bill 191, which was to make corrections to the Utah Uniform Commercial Code. In 1977, the phrase "mortgages for purchase money" was deleted, and the phrase "perfected security interest" was implemented in its place. The Uniform Commercial Code introduced the wording "security interest" to replace all other types of liens, such as chattel mortgages, hypothecations, pledges, conditional sales, and the like. Thus, the statutory change appears to have been made for these purposes rather than as a thoughtful analysis as to policy and priorities between competing interests such as banks and landlords.

¹² It should be noted that banks commonly use landlord subordination agreements before making loans to known lessees. The bank could have avoided the risk of the landlord having a superior lien by using a landlord subordination agreement. Originally, the bank pleaded as an affirmative defense a landlord subordination agreement, but apparently there was no such subordination in this case. (R-116)

claims for taxes, mechanic's liens, mortgages for purchase money, and employee claims for wages. The only statutory change in the present statute § 38-3-2 is that mortgages for purchase money has been eliminated and perfected security interest inserted in its place.

The facts of the Kappos case are that the bank loaned Kappos \$2,000 in October of 1928 to purchase sheep. The bank took a note and mortgage. In January, 1929, a grazing lease was entered into and the real property was used for grazing sheep for several years. The note went into default and was renewed with additional monies being advanced. The first mortgage was never released; it was a renewal, not a new transaction. The sheep were sold in 1932, and the landlord sought to satisfy its rent from the sale of the sheep. The bank's lien came into being before the inception of the lease and before the sheep were placed on the premises. The landlord claimed priority over the bank's advances made after the lease inception and after the sheep entering the premises. The bank's mortgage was not recorded but was valid against those with actual notice. The landlord acquired no rights greater than the lessee's. The landlord's lien attached to what the lessee had, and the lessee's rights were subject to the purchase money mortgage; therefore, the landlord's lien was also subject to a prior purchase money mortgage.

Mr. Orton, lessor's counsel, argued that the first event in this case was the lease commencing July 1, 1988; secondly, the equipment coming onto the premises; and thirdly the bank obtaining

a perfected security interest. In the Kappos case, the first event was the creation of the chattel mortgage; the second event was the inception of the lease; the third event was the sheep coming on the premises; and the fourth event was the subsequent renewal note. Mr. Orton argued that the Legislature intended prior perfected security interests to prevail, but that if subsequent perfected security interests prevail over prior landlord liens, that the landlord could be deprived of his lien through "sham transactions." A lessee could borrow money, give a perfected security interest, and defeat a landlord lien. The trial court, Judge Stirba, asked Mr. Orton if there were not remedies for that type of conduct under the Uniform Commercial Code. Mr. Orton responded that fraud remedies are available, but that the rule from the Kappos case is that the first in time prevails. If the lease is first in time, the equipment then comes onto the premises, and a security interest is subsequently perfected, the landlord should prevail.

(c) Trial Court's Decision

Following the oral presentations of counsel, trial judge Stirba stated that she had reviewed the pleadings and the cases, particularly the Utah cases, and the prior and present statutes. She stated that the present statute is susceptible to both interpretations advanced by the respective legal counsel. She stated it was not abundantly clear what the Legislature intended, and that the Legislature did not specify that security interests had to be perfected prior to the equipment coming onto the property. She stated that she had considered the statute and the

exceptions to the landlord priority. She noted that the exceptions for taxes, mechanic liens, and employee wages do not require that they be established prior to the collateral coming onto the leased premises. She also noted that the statute says the lessor's lien is preferred to all of the liens or claims except for ". . . perfected security interests." She stated the Legislature has not required that perfected security interests be perfected prior to the property being brought onto the leasehold, and that because the other lien exceptions do not have to be created prior to the landlord lien to prevail, that a perfected security interest need not be created prior to the landlord lien for it to prevail. She noted this is a case of first impression, and that sham may occur. Her legal conclusion was that the statutory language does not indicate that the Legislature intended the security interest to be perfected prior to the collateral coming onto the property to prevail. Therefore, the trial court granted WestOne Bank's motion for summary judgment. She did not consider the Citizens case. Furthermore, she did not treat the Lessor's lien as a perfected security interest. Had she done so, she would have reached the correct, opposite conclusion i.e. that the Lessor's lien as a prior, preserved security interest prevails over the subsequent Bank security interest.

POINT II. THE LESSOR'S LIEN SECURITY INTEREST IS
SUPERIOR TO THE BANK'S SUBSEQUENT SECURITY
INTEREST UNDER COMMON LAW DISTRESS.

Common Law Distress¹³

Distress for rent in arrears, whereby the landlord may seize personal property on the demised premises, is one of the oldest, as well as one of the most efficient, of the common law remedies for the collection of rent. Re West Side Paper Co., 162 F. 110 (3d Cir. 1908). The remedy had its origin in the feudal tenures and appears to have arisen when the common law process of gavellet and cessavit, by which the landlord could seize the land itself for rent in arrears and hold it until payment was made, fell in disuse. When these remedies fell into disuse, distresses appeared to have arisen whereby instead of seizing the land, the landlord seized all movables on the land and held them until he received payment. Henderson v. Mayer, 225 U.S. 631 (1912). The right to distrain arises from the moment the relation of landlord and tenant is established, and as administered at common law, the remedy is enforceable against any removable property found upon the demised premises, whether belonging to the tenant or to a stranger.

Statutory Liens

Statutes giving the landlord a lien for rent on the property of his tenant are considered to be the outgrowth of the common law right of distress, and the principles controlling in cases of distress are often resorted to in determining the rights of the parties under such statutes. Wolcott v. Ashenfelter, 5 N.M. 442,

¹³ See 49 Am. Jur. 2d, Landlord and Tenant, Landlord's Lien, from which the following is summarized.

23 P. 780 (1890). The statutory lien of the landlord for rent attaches at the beginning of the tenancy, or when the chattels are brought upon the premises. Such a lien does not depend upon a levy, and exists independently of the institution of any proceeding for its enforcement. The remedy by levy, distress, or attachment, is simply to enforce a lien already existing. Gila Water Co. v. Int'l Finance Corp., 13 F.2d 1 (9th Cir. 1926). The landlord's statutory lien must be enforced by judicial proceedings. Provision is made in some statutes for enforcing the lien by attachment. In some jurisdictions, the landlord is required to enforce his lien within a specified time; otherwise, it is lost.

Priorities

A landlord's lien for the payment of rent is superior to any judgment or other lien acquired subsequently to the creation of the tenancy or the bringing of property onto the rented premises. Howard v. Calhoun, 155 Fla. 689, 21 So. 2d 361 (1945).

Generally, a landlord's lien created by statute has been held to be superior to a chattel mortgage given by the tenant after he has rented or entered into possession of the premises. Beall v. White, 94 U.S. 382 (1877).

Therefore, the only way the Bank's security interest should prevail is (1) if it were perfected prior to the lessor's lien, or (2) perfected after the lessor's lien expired. That did not happen in this matter; therefore, the lessor's lien security interest should prevail.

POINT III. IF THE UTAH LESSOR'S LIEN STATUTE DOES NOT APPLY, THEN COMMON LAW APPLIES AND THE LESSOR'S LIEN PREVAILS AS THE FIRST TO ATTACH.

Utah statutory lessor's liens are provided for in Chapter 3, Sections 38-3-1 through 38-3-8 of U.C.A., 1990. When Chapter 3 is not applicable, common law principles apply.¹⁴

Section 38-3-8 provides that "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." This is exactly our fact situation. The lease was entered into July 2, 1988, and the term was for a period of five years and two months, beginning the first day of July 1988, and ending the 31st day of August, 1993. Lease Article XVIII provides for, "additional conditions."¹⁵ The subject lease is for a term of years with part of the consideration consisting of the lessee erecting improvements upon the leased premises; therefore, Chapter 3 is not applicable to this lease. Under the common law, the lessee's lien attaches to the property first and the landlord's lien has priority over the subsequent lien of the bank.

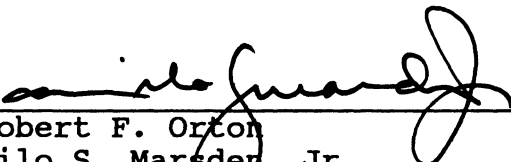
¹⁴ Mr. Carney stated during his oral argument: "There are also cited in the other side's brief four cases from other jurisdictions. They do hold that the landlord's lien is superior to the perfected security interest. However, in each one of those cases, and in none of those cases, did the state involved have a statute like ours that says, 'perfected security interest shall be prior to the landlord's lien.' All of those cases, it was silent on the subject, and simply said that the landlord would have a lien. In which case, the court goes back to the common law, which is first to attach liens. And if we didn't have this statute, I would suspect that is what you would hear. The landlord would win, the first to attach."

¹⁵ Lessor and lessee agree that lessee shall accept the building 'as is' condition and further agree as follows: (1) Lessor shall furnish and install concrete floor to match existing in front of area of warehouse, approximately 30' x 110'; (2) lessor shall furnish and install commercial grade carpet and base in existing office area; (3) lessor and lessee each agree to pay one-half the cost to enlarge one existing roll-up door to 14' x 14'. Final appearance shall match existing.

CONCLUSION

The Lessor's lien security interest is superior to the Bank's subsequent security interest and Lessor, therefore, respectfully requests this court to direct the trial court to enter judgment accordingly.

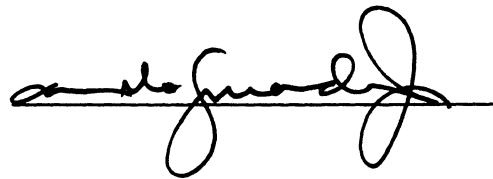
DATED this 15th day of October, 1993.



Robert F. Orton
Milo S. Marsden, Jr.
MARSDEN, ORTON, CAHOON & GOTTFREDSON
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to Francis J. Carney, SUITTER, AXLAND, ARMSTRONG & HANSON, attorney for appellee, 175 South West Temple, Seventh Floor, Salt Lake City, Utah 84101, this 15th day of October, 1993.



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IN THE UTAH COURT OF APPEALS

WILLIAM F. WEBB, Trustee of)	
the WFPP TRUST,)	
)	APPELLANT'S ADDENDUM
Plaintiff/Appellant,)	
)	No. 930522-CA
FREDERICK PAUL NINOW;)	
STACI L. NINOW; R-WEST, INC.,)	
a Corporation; WESTONE BANK,)	
UTAH, a Corporation; HOMER)	
CUTRUBUS; NED F. PARSON;)	
JIM HART; and COMMERCIAL)	
FACTORS OF SALT LAKE CITY,)	
LTD., a Limited Partnership,)	
)	
Defendants/Appellee.)	

Appellant's Addendum consists of:

1. Transcript of Motions argued before Judge Anne M. Stirba
June 10, 1991.

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

* * * * *

WILLIAM F. WEBB, Trustee of
the WPPP TRUST,

Plaintiff

vs.

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

Defendants

Transcript of:
MOTIONS

Case No. 900900672

The above-entitled cause of action came on regularly
for hearing before the Honorable Anne M. Stirba, a Judge of
the Third Judicial District Court of the State of Utah,
at Salt Lake County, Utah, on Monday, June 10, 1991.

APPEARANCES

For the Plaintiff:	ROBERT F. ORTON MARSDEN, ORTON, CAHOON & GOTTFREDSON 68 South Main Street Salt Lake City, Utah
For the Defendant:	FRANCIS J. CARNEY SUITTER, AXLAND, ARMSTRONG & HANSON 175 So. West Temple #700 Salt Lake City, Utah

1 MONDAY, JUNE 10, 1991

2 P R O C E E D I N G S

3 THE COURT: Let's go on the record in the matter
4 of William F. Webb against Ninow, case No. 900900672. Appearing
5 on behalf of the plaintiff is Mr. Robert Orton. Appearing on
6 behalf of defendant West One Bank is Francis Carney.

7 The matter comes before the Court on West One Bank's
8 Motion for Summary Judgment and the Plaintiff's Motion for
9 Partial Summary Judgment. I reviewed the pleadings in the case
10 and I appreciate Mr. Carney's book here just summarizing the
11 pleadings and setting forth all of the courtesy copies of the
12 pleadings which are at issue, and I have reviewed those.

13 Mr. Carney, you may proceed.

14 MR. CARNEY: Thank you, Your Honor. Let me briefly
15 highlight the facts and if I am telling you facts you already
16 know, please interrupt me.

17 THE COURT: I guess the facts are not in dispute.
18 You folks are in agreement as to when these things all occurred.
19 It is just as I see it: the legal question of whether that is
20 a timing element in this.

21 MR. CARNEY: Yeah, and in that regard the timing
22 element is that the lease is July 2nd of '88 and I think the
23 cases do hold that the landlord's lien attaches as of the start
24 of the tenancy. That would be July 2nd of '88.

25 And then we have the first in a series of perfected

1 security interest, all of which now are the bank loans starting
2 August 4, 1988. And we have the equipment brought onto the
3 premises sometime before the fourth of August, 1988. We have
4 a default in the lease. The landlord is owed about \$95,000.
5 The bank is in default on the bank loans, owed about \$150,000.

6 The Court may not be aware of this, but the
7 collateral has been taken off the premises by stipulation of
8 everyone. We happened to find a buyer who took the collateral
9 and sold it and got the \$150,000 for the collateral, and that
10 is sitting now in a bank account gathering interest, by
11 stipulation of everyone. We have agreed that we would still
12 treat the priority issues as if the equipment were still on the
13 premises.

14 The Statute is 38-3-2, the landlord's lien statute.
15 It says landlords have prior liens, have a lien which is prior
16 to everybody except taxes, mechanic's liens, perfected security
17 interest and employee's wage earnings. Our position simply is
18 that this statute means what it says. We have a perfected
19 security interest, therefore we are prior to the landlord's lien.

20 Now, as I understand Mr. Orton's position is that
21 the statute doesn't mean all perfected interest. It means only
22 perfected security interest which were perfected prior to the
23 time the equipment came on or the collateral came onto the
24 property. In other words, if you had lease, first event;
25 second event, collateral comes onto the property. Third event,

1 bank takes a lien, perfected security interest rather, that type
2 of security interest would not be prior since it arose after
3 the date the collateral was on the premises. That is the issue:
4 "Is that so was not so?"

5 I find no guidance one way or the other in the cases.
6 There is an old 1936 case referred to by Mr. Orton called
7 Grey vs. Cappos, involving some sheep. The court held that the
8 purchase money security interest was prior to the landlord's
9 lien. But I don't think the facts are quite similar to this
10 case, and the court doesn't really give us any guidance.

11 There are also cited in the other side's brief four
12 cases from other jurisdictions. They do hold that the landlord's
13 lien is superior to the perfected security interest. However,
14 in each one of those cases, and in none of those cases, did
15 the state involved have a statute like ours that says "perfected
16 security interest shall be prior to the landlord's lien."
17 All of those cases, it was silent on the subject and simply said
18 that the landlord would have a lien. In which case, the court
19 goes back to the common law which is first to attach liens. And
20 if we didn't have this statute, I would suspect that is what you
21 would to hear. The landlord would win, the first to attach.

22 If we were to interpret the statute to mean not
23 perfected security interest, but prior perfected security
24 interest, I suspect there would be no reason to have this statute.
25 That would bring us back to where we were under the common law;

1 first to attach liens. I suggest that this is a change, perhaps
2 for a good policy reason. A change from the common law to allow
3 all perfected security interest to be superior to landlords'
4 liens. Perhaps the reason was that to allow people who lease
5 premises to go out and borrow money and allow the banks to
6 take security interest and equipment which is on the premises
7 without worrying about the landlord.

8 The other side says "Well, in this case, the landlord
9 could be defrauded by sham security interest." I guess that is
10 so, but I guess there is a way to look beyond sham security
11 interest. I also suppose that the landlord could take his own
12 UCC-1 to cover future rents ahead. I hadn't really thought
13 that through, but it seems to me that if the landlord was that
14 concerned about the equipment, he could do that and then you would
15 simply have a contest under UCC-9: first to file will win.

16 Basically, though, what I am arguing, if the
17 legislature wanted to say "Prior perfected security interest
18 only," it would have said so, and it didn't. It says "perfected
19 security interest." We think the statute should be interpreted
20 according to what it says.

21 THE COURT: Are you aware of any other cases, or any
22 case dealing with any of the other provisions in Section 38-3-2
23 that contrive it one way or the other, whether they have to be
24 established prior to the equipment being brought up to the
25 property or --

1 MR. CARNEY: I have found nothing.

2 THE COURT: Or similar arrangement?

3 MR. CARNEY: I have found absolutely nothing on this.
4 It says "perfected security interest." I think that was a
5 1977 amendment. Before that, I think it said "purchase money
6 security interest." It goes back to 1898 and there is only
7 that '36 case and there is a '41 case which I think is also
8 referenced.

9 THE COURT: The Eastman case?

10 MR. CARNEY: Yes, and I don't think that gives us
11 much guidance either way.

12 One other thing, I think if we adopted Mr. Orton's
13 position to be logical, it would seem to me that would also have
14 to apply to tax liens and to employee wage claims, and to
15 mechanics' liens. So, for example, for tax liens they would
16 not have any priority unless they arose prior to the time the
17 lienable collateral was brought onto the premises.

18 THE COURT: Thank you. Mr. Orton.

19 MR. ORTON: It appears we are in total agreement on
20 the facts, Your Honor, and what the issue is. I believe that
21 really the statute codifies what the common law is and I would
22 like to spend just a little bit of time talking about the Grey
23 vs. Cappos case. The statute which was in effect at the time
24 of that case was 52-3-2, revised statutes of 1933. And that
25 statute provided "that the lien provided for in this chapter

1 shall be preferred to all other liens or claims, except claims
2 for taxes and liens of mechanics under Chapter 1 of this title,
3 mortgages for purchase money, and claims of employees for wages
4 which are preferred by law."

5 The current statute which was in effect at the time
6 this cause of action arose only makes one difference, and that
7 difference is instead of saying "mortgages for purchase money,"
8 it says "perfected security interest." So really I don't see
9 a lot of change in the two statutes. We are dealing now under
10 the UCC where security interests are required to be perfected
11 generally by UCC-1 filing. So with that in mind, I think that
12 although the Grey vs. Cappos case doesn't come right down and
13 say it in so many words, it is helpful and let me just review
14 the facts of that case if I might briefly.

15 In October of 1982 the bank loaned Cappos \$2,000 to
16 purchase sheep and Cappos gave the bank a note and a mortgage to
17 security payment of the purchase price. Subsequently, in
18 January of 1929, the grazing lease was entered into. And then
19 for several years thereafter, sheep were grazed on the landlord's
20 property during the summer months of each year. After that
21 grazing lease was entered into, there was a default or non-payment
22 of the note and mortgage, and the note and mortgage were renewed.
23 And then on at least two subsequent occasions, there was additional
24 money advanced and the note and mortgage were renewed. There was
25 never a release given of the first mortgage and the Court found

1 that the intension of the mortgagor and mortgagee was that the
2 new transactions constituted a renewal, not a new transaction.
3 And that is the way the case went off, as I see it. The sheep
4 were then sold in 1932, while on the premises of the landlord,
5 and the landlord brings suit to collect rentals due and owing
6 and seeks to have the sheep sold and collect the rent from the
7 sale of the sheep.

8 Now, as I understand what the court is saying in that
9 case is, No. 1, the parties intended each new transaction or
10 each new note and mortgage as a renewal of the first note and
11 mortgage. And the earlier ones were not satisfied but there was
12 simply a renewal. The court says that legal effect should be
13 given to the intent of the mortgagor and the mortgagee.

14 Further, the plaintiff does not claim that his lien
15 has priority over the first lien that was given, which came
16 before the lease and before the sheep were ever put on the
17 premises. And, however, on the later advances of money, he
18 does claim that his lessor's lien is superior. The court says
19 that the mortgage, though unrecorded, is valid as between the
20 mortgagor and the mortgagee and those with notice of the
21 mortgage.

22 And finally, the court says that the plaintiff acquired
23 no rights which Cappos, the owner of the sheep, did not have.
24 The lien attached to whatever rights Cappos did have. And since
25 that right is subject to the purchase money mortgage, it must

1 follow that the lien of the plaintiff is also subject to it.

2 I think that language is very helpful.

3 Our case is different. What we have here is, we
4 have a lease on July 1, 1988, followed by equipment coming onto
5 the premises. And then subsequent to the lease and the equipment
6 coming onto the premises, there is a perfected security interest.
7 And that is where the difference comes in between our case and
8 the Cappos case; and that is that in our case the lease is
9 entered into and the equipment comes onto the premises before
10 any security interest. And as I view what the court is saying,
11 the reason the court is holding against the plaintiff lessor in
12 this case is because it contrues the subsequent notes and
13 mortgages as renewals of the earlier mortgage which did come
14 before the lease and before the sheep were put on the premises.

15 Now, I really think that if that were not the
16 construction that the legislature intended to be given, that
17 certainly the lessor could be deprived of his lien rights though
18 a sham transaction. A lessee presumably within a day or week
19 before the termination of the lease, seeing the lease coming
20 to an end and realizing he owes money on the lease, could borrow
21 money, give security against the property on the premises and
22 claim under the statute that the perfected security interest
23 given is superior to the lien of the lessor.

24 THE COURT: Let's suppose the legislature did intend
25 that the statute not require perfection prior to the equipment,

1 property coming onto the leasehold. Assume that for a moment.
2 And someone did try to defraud someone by perfecting a security
3 interest in order to avoid the responsibilities of paying the
4 leasehold and having a lien attached, would you see no remedy
5 whatsoever in the Uniform Commercial Code for that kind of
6 conduct?

7 MR. ORTON: There might be a remedy based on fraud
8 or something of that nature, yes. Yes. I really find no law,
9 Your Honor, which would support the defendant's position in
10 this case. And the law, we cited in our brief, I think, is
11 consistent with our position. Although the facts are somewhat
12 different and the statutes are somewhat different, I think if
13 you take everything we have cited and what I understand the
14 general law to be across the country, and then look at the one
15 Utah case we do have, and view the basis on which the Supreme
16 Court came down the way it did on this case, I think the logical
17 conclusion is that the lessor's lien in this case where the
18 lease was entered into first, the equipment came onto the
19 premises second, and then the security interest came after,
20 that the lessor's lien has priority.

21 THE COURT: All right, thank you.

22 MR. ORTON: Thank you.

23 THE COURT: Mr. Carney.

24 MR. CARNEY: A small point, Your Honor. 9 -- I can't
25 remember what it is -- 9104 says that in order to create a

1 security interest, you must give value and if no true value is
2 given, then there is no security interest and a sham could be
3 taken apart like that. I will submit it, unless there are
4 questions I haven't answered.

5 THE COURT: No, thank you. I have reviewed the
6 pleadings as I indicated previously, and the cases that you have
7 cited, particularly the Utah cases. Mr. Orton, I think -- and
8 I have looked at this statute and predecessor statute as well.
9 And I think that the statute may be susceptible to both
10 interpretations. I don't think that this is abundantly clear
11 what the legislature intended with regard to that. At least,
12 it don't specifically address whether the security interest had
13 to be perfected prior to the property equipment being brought
14 onto the premises. I have considered the statute and the other
15 interests that are accepted under it; specifically, the claims
16 for taxes and liens of mechanics under Chapter 1 of this title,
17 and claims of employees for wages which are preferred by law,
18 none of which, I believe, are required to be perfected prior
19 to the leasehold creations, if you will, and the interest coming
20 onto the property, if you will, under the leasehold. And the
21 statute does say "that the lien provided for in this chapter
22 shall be preferred to all of the liens or claims except for,
23 among the other things, perfected security interest."

24 After considering all of it and your arguments, as
25 well, I am persuaded that the legislature has not required that

1 the claimed security interest be perfected prior to the property
2 being brought onto the leasehold. And I think that because --
3 I don't see that the other interest there have to be perfected
4 either. And the legislature hasn't seen fit to distinguish
5 perfected security interest from other interest that it accepted
6 under that particular statute.

7 This does seem to be a case of first impression,
8 at least so far as the perfected security interest language is
9 concerned. And because it is my view that -- concern about
10 sham security interest may occur, I think there is some
11 safeguard for that. Accordingly, I think that the language of
12 the statute, although not as clear as every one would like it
13 to be, the plain reading of the statute does not indicate that
14 the legislature intended security interest to be perfected
15 prior to the property being secured from coming onto the
16 leasehold, and that would be my ruling, Mr. Carney, Mr. Orton.
17 Therefore, I am granting West One Bank's Motion for Summary
18 Judgment. I am denying the plaintiff's Motion for Partial
19 Summary Judgment.

20 Mr. Carney, I would like you to prepare Findings of
21 fact, Conclusions of Law, and Judgment in accordance with the
22 Court's ruling.

23 MR. CARNEY: Thank you, Your Honor.

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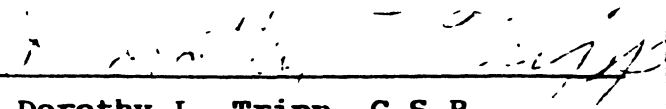
REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:
That I am one of the Official Court Reporters
of the Third District Court of the State of Utah.

That on Monday, June 10, 1991, I reported the
testimony and proceedings, to the best of my ability on
said date in the above-entitled matter, presided over
by the Honorable Anne M. Stirba in the Third District
Court of Salt Lake County, State of Utah; and that the
foregoing pages, numbered from 1 to 11, inclusive,
contain a full, true and correct account of said
proceedings of Motions to the best of my understanding,
skill and ability on said date.

Dated at Salt Lake City, Utah, this 12th day
of June, 1991.



Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 74-1801-8