

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2007-CA-00707**

**MARILYN GOOLSBY, RECEIVER, and  
LEND LEASE ASSET MANAGEMENT, LP,  
AUTHORIZED SERVICER FOR LASALLE  
BANK NATIONAL ASSOCIATION AS TRUSTEE  
FOR CHASE COMMERCIAL MORTGAGE**

**APPELLANTS**

**VS.**

**COBRA SECURITY, INC.; WAYNE MILLS;  
LYNCH OIL COMPANY; PANOLA PAPER COMPANY;  
WHITE DOVE JANITORIAL; ARAMARK UNIFORM  
SERVICES, INC.; 1-DAY SIGNS; AND DAMOR, INC.**

**APPELLEES**

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**APPEAL FROM THE CHANCERY COURT  
OF  
LAFAYETTE COUNTY, MISSISSIPPI**

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**APPELLEES' BRIEF**

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**ORAL ARGUMENT NOT REQUESTED**

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IN THE SUPREME COURT OF MISSISSIPPI

MARILYN GOOLSBY, RECEIVER, ET AL

APPELLANTS

VS.

CAUSE NO. 2007-CA-00707

COBRA SECURITY, INC, ET AL

APPELLEES

CONSOLIDATED WITH 2004-CA-1485-SCT

I.

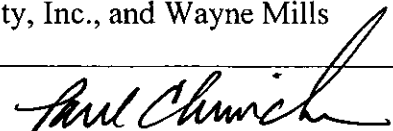
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. There representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- Marilyn Goolsby, Appellant;
- Lend Lease Asset Management, LP, Authorized Servicer for LaSalle Bank National Association As Trustee for Chase Commercial Mortgage, Appellant;
- J. Hale Freeland, counsel for Appellants;
- M. Reed Martz, counsel for Appellants;
- Cobra Security, Inc., Appellee;
- Wayne Mills, Appellee;
- David G. Hill, Esq., counsel for Appellees;
- Paul Chiniche, Esq., counsel for Appellees;
- David L. Minyard, Esq., trial counsel for Appellees;
- Lynch Oil Company, unsecured creditor of Aegis Oxford;
- Tim Peeples, Esq., counsel for Hartford Fire Ins. Co.;
- Panola Paper Company, unsecured creditor of Aegis Oxford;
- Robert Drinkwater, Esq., counsel for Aegis Oxford;
- White Dove Janitorial, unsecured creditor of Aegis Oxford;
- Aramark Uniform Services, Inc., unsecured creditor of Aegis Oxford;
- 1-Day Signs, unsecured creditor of Aegis Oxford; and
- Damor Inc., unsecured creditor of Aegis Oxford.

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Attorneys of Record for Appellees, Cobra Security, Inc., and Wayne Mills



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DAVID G. HILL  
PAUL CHINICHE

II.

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III.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

**Cases**

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Lend Lease Asset Management, L.P. v.  
Cobra Security, Inc., 912 So.2d 471 (Miss. 2005) ..... 2

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IV.

STATEMENT REGARDING ORAL ARGUMENT

The undersigned do not believe oral argument will be of substantial utility to the resolution of these matters and therefore do not request the same. However, should this Court desire to hear oral argument, Appellees will be happy to comply with the same.

V.

STATEMENT OF THE ISSUES

The principal issue in this second appeal is whether the Appellants' appeal is moot, frivolous, and barred by the doctrine of *collateral estoppel*. Although Appellees are unable to ascertain the basis Appellants cite to seek this appeal, it appears Appellants seek appeal on the following questions: (a) Whether or not the Appellees must return attorney fees and damages awarded Cobra Security, Inc. ("Cobra"), by the Chancellor, and (b) whether Chase had a superior interest over money Cobra collected from Aegis Oxford, LLC. ("Aegis").

VI.

STATEMENT OF THE CASE

This is Appellants second attempt to appeal the result of an agreed judgment entered into between Appellee, Cobra Security, and a third party, Aegis Oxford, LLC. On March 31, 2004, in the Chancery Court of Lafayette County, Mississippi, Chancellor Edwin R. Roberts, approved the confessed judgment in the amount of \$20,076.63 by defendant, Aegis Oxford, to plaintiff, Cobra Security's suit for contractual damages and attorney fees. The confessed judgment came out of a suit initiated by Cobra Security against numerous parties, including the court appointed Receiver for Aegis; who is the Appellant in this appeal<sup>1</sup>. Appellees' Record Excerpt at page 1.

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<sup>1</sup> Cobra's suit contained a claim against the Receiver alleging a violation of the Chancery Court's mandate on the part of the Receiver for her failure to pay an invoice submitted by Cobra pursuant to a separate Chancery Court order, of April 15, 2003, which ordered the Receiver to collect and compromise

At the end of Cobra's case in chief, Aegis confessed judgment in the amount of \$20,076.63 owed to Cobra for security services rendered, but unpaid by Aegis<sup>2</sup>. Lend Lease I, at ¶ 8. Neither the Receiver nor Lend Lease objected to the entry of the judgment, (Appellees' Record Excerpt at page 6, paragraph 3), and the Chancellor deferred his ruling as to all other defendants. Appellees' Record Excerpt at page 1.

After the trial, the parties submitted to the Chancellor their findings of fact and conclusions of law. On June 14, 2004, the Chancellor issued his judgment and order of the court. The Chancellor held that Cobra had a valid judgment against the Receiver as well as Aegis in the amount of \$20,076.63. Appellees' Record Excerpt at page 14, Paragraph 2; Lend Lease I at ¶ 10. It was from the June 14, 2004, judgment against the Receiver that she sought her first appeal to this Court.

Following Appellants first appeal, this Court on October 13, 2005, set out the complicated facts and procedural posture surrounding the receivership of the Oxford Mall in Oxford, Mississippi, in Lend Lease I.<sup>3</sup> In order to avoid duplication, Appellees hereby incorporate by reference the opinion of Lend Lease I and supplement as necessary in order to provide the Court with a full understanding of the issues before the Court.

This Court noted in Lend Lease I that although a notice of appeal was filed by both the Receiver and Chase, only the Receiver submitted a brief, presented oral argument, and pursued the appeal.<sup>4</sup> In Lend Lease I the Receiver raised two issues, namely (1) whether the Chancellor erred in granting Cobra a judgment, and (2) whether Cobra should have been liable for attaching

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all demands while Aegis began to wind down its Oxford mall business. Lend Lease Asset Management, L.P., Authorized Servicer LaSalle Bank National Association, As Trustee For Chase Commercial Mortgage, and the Receiver, Marilyn Goolsby v. Cobra Security, Inc. and Wayne Mills, Cause No. 2004-CA-01485-SCT, at ¶ 4.

<sup>2</sup> The judgment amount is itemized in paragraph 3 of the Order dated March 31, 2004.

<sup>3</sup> Lend Lease Asset Management, L.P. v. Cobra Security, Inc., 912 So.2d 471 (Miss.2005).

<sup>4</sup> Lend Lease I at ¶ 13.

the Mall and stopping the Mall's foreclosure.<sup>5</sup> When this Court found the Receiver's second issue to be moot<sup>6</sup> it correctly stated the legal question to be whether Cobra had any legal claim against the Receiver for the Receiver's refusal to pay Cobra's pre-receivership invoices.<sup>7</sup> Because this Court found that no such legal claim existed, it addressed no other issue<sup>8</sup> and reversed the Chancellor's judgment against the Receiver and rendered judgment for the Receiver on Cobra's claim for contractual damages and attorney's fees.<sup>9</sup> Since this Court did not address the judgment Cobra obtained from Aegis, Cobra's judgment for \$20,076.63 against Aegis was properly upheld by this Court.

Following this Court's decision of October 13, 2005, the Receiver on August 15, 2006, filed in the Chancery Court of Lafayette County a Motion to Order Return of Funds Collected by Unsecured Creditors Pending Appeal. A hearing on Receiver's motion was held on April 24, 2007, a transcript was taken to preserve the issues<sup>10</sup> and at the conclusion of the hearing, Chancellor Roberts denied the Receiver's motion. An order of the Chancery Court was issued on April 24, 2007 and is contained in full in Appellants' Record Excerpts at page 3-4. The Appellant (Receiver) now comes before this Court on its second appeal.

## VII.

### SUMMARY OF THE ARGUMENT

First, in Lend Lease I, this Court reversed only the Chancellor's judgment against the Receiver and not the judgment against Aegis. Since Cobra collected its judgment entirely from Aegis, the Receiver has no basis for this second appeal. Secondly, because neither Chase nor the

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<sup>5</sup> Lend Lease I at ¶ 14.

<sup>6</sup> Lend Lease I at ¶ 15.

<sup>7</sup> Lend Lease I at ¶ 17 and 18.

<sup>8</sup> Lend Lease I at ¶ 17.

<sup>9</sup> Lend Lease I at ¶ 29.

<sup>10</sup> See Appellees' Record Excerpt at page 17.

Receiver addressed whether it had a superior interest over the money judgment collected by Cobra from Aegis in Lend Lease I, this issue is procedurally barred from consideration.

## VIII.

### ARGUMENT

#### A. COBRA COLLECTED ITS \$20,076.63 JUDGMENT FROM AEGIS

Cobra collected the \$20,076.63 judgment from Aegis and not the Receiver. The Receiver cites nothing to support the proposition that she paid any part of the \$20,076.63 judgment Cobra received against Aegis. In fact, the Receiver's appeal is void of any evidence that she personally paid anything to Cobra even though the Chancellor issued a judgment against her and Aegis. Understandably, the Chancellor took issue with the Receiver when she paid some creditors of Aegis and not others; however, this Court reversed Cobra's judgment against the Receiver.<sup>11</sup> In other words, the Receiver was not liable to Cobra for her refusal to pay Cobra's pre-receivership invoices.<sup>12</sup> This Court in Lend Lease I considered not whether Cobra had a claim against rents, but rather whether Cobra may recover from the Receiver personally for her refusal to pay Cobra's pre-receivership invoices.<sup>13</sup> Where this Court declined to extend liability to the Receiver for her duties as the Receiver, this Court stated Cobra's claim for pre-receivership services must be pursued against Aegis.<sup>14</sup> This is exactly what happened in the March 31, 2004 Judgment. Appellees' Record Excerpt at page 1.

To be clear, and as outlined in the Chancellor's Order of February 24, 2005, Cobra collected its judgment of \$20,076.63 from Aegis in two ways.<sup>15</sup> First, on August 5, 2005, Cobra received \$6,165.37, from the sheriff's sale of a 2003 Toyota Tacoma truck owned by Aegis. Id.

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<sup>11</sup> Lend Lease I at ¶17, 18, and 29.

<sup>12</sup> Lend Lease I at ¶ 17.

<sup>13</sup> Lend Lease I at ¶ 18.

<sup>14</sup> Lend Lease I at ¶ 23.

<sup>15</sup> See Appellant Record Excerpt at page 6.



According to the February 24, 2005 Order, the sale of the truck left Aegis owing Cobra a balance of \$13,922.26<sup>16</sup>. Id. Second, Cobra received \$13,922.26 in funds from Aegis that consisted of utility deposits Aegis had with the City of Oxford Electric Department and People Lease.<sup>17</sup> Therefore, none of the funds Cobra collected from Aegis were those of the Receiver. For the Receiver to now claim that she is entitled to the return of funds she paid Cobra is an intentional attempt to mislead this Court.

### B. CHASE HAS NO CLAIM TO THE DEPOSITS

In Lend Lease I neither Chase nor the Receiver addressed whether it had a superior interest over the money judgment collected by Cobra from Aegis. As part of this Court's earlier procedural analysis of this case in Lend Lease I, the Court noted that although a notice of appeal was filed by both the Receiver and Chase, only the Receiver submitted a brief, presented oral argument, and pursued the appeal.<sup>18</sup> Specifically this Court said, "neither Chase [emphasis added] nor the question of whether the Chancellor enjoyed power sufficient to allow him to reclassify this debt<sup>19</sup> as unsecured is before us<sup>20</sup>." To raise the issue now is improper. Issues not raised on appeal are procedurally barred from consideration.<sup>21</sup> The only issues raised in Lend Lease I were (1) whether Cobra wrongfully attached the Mall and stopped foreclosure and ~~(2) whether Cobra could recover from the Receiver for refusing to pay Cobra's pre-receivership invoices.~~ Therefore, neither Chase nor the Receiver has standing to now claim Chase had priority to the deposits received by Cobra on April 24, 2005.

<sup>16</sup> It must be noted that after the sale of the truck, Aegis also owed Lynch Oil \$358.24; Panola Paper Co. \$71.39; Aramark Uniform \$90.38; 1-Day Signs \$193.22; Damor, Inc. \$254.48; and White Dove Janitorial \$1,548.91.

<sup>17</sup> See Appellant Record Excerpt at page 5-6.

<sup>18</sup> Lend Lease I at ¶13.

<sup>19</sup> Referring to the \$2.7 million deficiency that resulted from the foreclosure of the Oxford Mall.

<sup>20</sup> Lend Lease I at ¶21.

<sup>21</sup> Glover v. Jackson State University, 755 So.2d 395, 398-9 (Miss.2000).

### C. THIS APPEAL IS MISLEADING, MOOT AND FRIVOLOUS

Since the Appellants' issues in this second appeal have either already been addressed by this Court in Lend Lease I, or are now barred for its failure to properly raise the issues in their first appeal, the Appellees are entitled to an award of attorney fees and all costs for having to respond to such a frivolous appeal. Mississippi Rule of Appellate Procedure 38, provides that if the Supreme Court shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the Appellee.<sup>22</sup>

The Appellants have classified the issues before this Court as follows:

“The principal issue in this appeal is whether the unsecured judgment creditors will be allowed to keep attorneys fees and other damages pursuant to a judgment which was reversed and where this Court has explicitly stated they were not entitled to the funds, as well as whether these same unsecured creditors will be allowed to keep the money over which another party, Chase, clearly had a superior interest.” See Brief of the Appellants at page 8.

From reading Appellants' brief it would seem that this Court in Lend Lease I reversed Cobra's judgment against Aegis. Additionally, Appellants assert this Court stated Cobra, among others, was not entitled to the funds it received. However, this is not the case at all. Instead, Lend Lease I reversed only the Chancellor's holding that the Receiver was liable to Cobra for damages.<sup>23</sup> Not only are Appellants' statement of the issues wrong, but its attempt to mischaracterize this Court's earlier decision is an attempt to mislead this Court to believe Appellants have issues ripe for appeal. Further, because neither Chase nor the Receiver asked this Court to consider the hierarchy of all creditors in the first appeal, this second appeal must be dismissed on procedural grounds and all costs of this appeal including attorney fees incurred by Appellees must be awarded against the Appellants.

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<sup>22</sup> Miss.R.App.P. 38.

<sup>23</sup> Lend Lease I at ¶18, 28, and 29.

IX.

CONCLUSION

Because Cobra collected its entire judgment from Aegis and not the Receiver, the Appellants have no basis to claim a return of funds that represent the contractual damages and attorney fees Cobra was awarded against Aegis. Neither Chase nor the Receiver have a basis to ask this Court to reclassify Chase's interest, because Chase failed to raise its issue on the first appeal. For all the reasons cited above, this Court must award the Appellees their cost of having to respond to this frivolous appeal, including attorney fees.

SO SUBMITTED this 25<sup>th</sup> day of October, 2007.

RESPECTFULLY SUBMITTED,

COBRA SECURITY, INC. and  
WAYNE MILLS, Appellees

By:



DAVID G. HILL, MS Bar No. [REDACTED]  
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X.

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Appellees, Cobra Security, Inc., and Wayne Mills, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellees** to:

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DATED this 25<sup>th</sup> day of October, 2007.

  
\_\_\_\_\_  
PAUL CHINICHE