IN THE SUPREME COURT OF MISSISSIPPI

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

v. — CAUSE 2007-CA-00707

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

CONSOLIDATED WITH 2004-CA-1485-SCT

BRIEF OF THE APPELLANTS

ORAL ARGUMENT NOT REQUESTED

J. HALE FREELAND (MSB NO. [redacted]
M. REED MARTZ (MSB NO. [redacted]
MARKOW WALKER, P.A.
265 N. LAMAR BLVD, SUITE I
POST OFFICE DRAWER 50
OXFORD, MISSISSIPPI 38655-0050
(662) 234-9899
COUNSEL FOR APPELLANTS

IN THE SUPREME COURT OF MISSISSIPPI

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

v. — **CAUSE 2007-CA-00707**

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**

CONSOLIDATED WITH 2004-CA-1485-SCT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations 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;
- David L. Minyard, Esq., 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.

Attorney of Record for Appellants

J. HALE FREELAND
M. REED MARTZ

IN THE SUPREME COURT OF MISSISSIPPI

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

v. — **CAUSE 2007-CA-00707**

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**

CONSOLIDATED WITH 2004-CA-1485-SCT

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

STATUTES

CASES

OTHER AUTHORITY

STATEMENT ON ORAL ARGUMENT

Oral Argument Not Requested.

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.

STATEMENT OF THE ISSUES

1. 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 security interest.

STATEMENT OF THE CASE

This is an appeal about the priority of secured and unsecured interests. The Receiver, as a conservator for the receivership property, and Lend Lease Asset Management, as the servicer for the trustee holding the mortgage (hereinafter referred to as "Chase" for simplicity), bring this appeal on behalf of themselves and the mortgagee, Chase Commercial Mortgage.

On October 13, 2005, this Court entered an opinion in the matter of *Lend Lease Asset Management, L.P., Authorized Servicer for 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, in which the Court set forth the complicated factual background involving the receivership of the Oxford Mall in Oxford, Mississippi. To avoid prolixity, the Appellants incorporate herein by reference paragraphs 2-12 of said opinion and supplement only as necessary to ensure a full understanding of the issues presented today.

After thoroughly reviewing the facts and law, this Court affirmed the allowance of execution upon the Toyota Tacoma truck owned by Aegis Oxford[1], entirely reversed the judgment against the Receiver, and reversed and rendered Cobra's claim for contract damages and attorneys fees against the Receiver. *Lend Lease*, 2004-CA-01485-SCT at ¶ 29. The Court's mandate, dated October 13, 2005, stated the "Appellants and appellees [are] taxed with costs of appeal."

On October 25, 2005, the Receiver filed in this Court a "Motion To Assess Costs Against The Appellee And Amend Mandate." In this Motion the Receiver requested the Court tax the costs

[1] Note is made that, as confirmed by the Court's opinion at paragraph 14, the only two issues raised by the Receiver on appeal were whether the Receiver was liable for violation of her duties and whether Cobra was liable for statutory damages. The Receiver did not appeal the issue regarding the attachment and sale of the truck which was the subject of litigation in a separate court (circuit court).

of appeal[2] ($2,413.00) against Cobra and amend its mandate to require the unsecured creditors repay those deposit refunds which were executed upon in satisfaction of the judgment against the Receiver.[3] The Motion was necessary because the Chancellor had ordered the deposits paid to the unsecured creditors since the Receiver had insufficient assets to post a bond equal to 125% of the judgment, even though the deposits entrusted to her care as the Receiver exceeded 100% of the judgment against her. (The deposit refunds totaled $17,618.84, whereas the unpaid portion of the judgment against the Receiver totaled $16,427.88).

A decision by the Court not having been made on this Motion, on August 15, 2006, the Receiver filed a "Motion To Order Return of Funds Collected by Unsecured Creditors Pending Appeal" in the Lafayette County Chancery Court. Cobra responded to said Motion on August 21, 2006. A hearing was held on April 10, 2007, at which time the Chancellor denied the Motion on the basis that the deposits "were not subject to a lien from a secured creditor" and that the Motion was untimely. Record Excerpt at page 3; Record at page 1.

a. *Statement of Relevant Facts*

The Receiver, Ms. Marilyn Goolsby, was appointed by the trial court "to preserve and protect the property, including rents collected; to make such payments as were authorized by the Chancellor and as were necessary to protect the property from waste; and to make payments for services

---

[2] The primary issue appealed by the Receiver was the judgment against her. There were no additional costs related to the second issue, that of damages for Cobra's ex parte attachment order, which the Court stated was not the Receiver's to raise. Thus, the entirety of the costs on appeal should be recoverable against Cobra as the judgment against the Receiver was reversed and the Chancellor's award of attorneys fees and contract damages was reversed and rendered.

[3] See "Judgment and Order of the Court" dated June 14, 2004, at page 12, Record in Cause 2004-CA-01485-SCT at page 403. See also Order dated February 24, 2005, Record Excerpts at page 5.

contracted for by the Receiver." *Lend Lease*, 2004-CA-01485-SCT at ¶23. This she did and did so properly. *Id.* Accordingly Cobra's judgment against the Receiver for alleged breach of her duties was reversed, as was the Chancellor's award of attorney's fees totaling $12,652.22 incurred collecting an alleged debt of $2,865.00 and other contractual damages which were inapplicable to the Receiver. *Id.* at ¶ 28.

On July 23, 2004, Aegis Oxford executed an assignment of all its right, title and interest to moneys held as security deposits by People Lease and the City of Oxford Electric Department to the Receiver for the benefit of Aegis Oxford's creditors. Record Excerpts at page 8. This vested ownership of the deposits in the Receiver and it was the Receiver upon whom the unsecured creditors executed their judgment.[4] From the deposits, Cobra was paid $13,922.26. Aegis Oxford's other unsecured creditors were awarded the aggregate sum of $2,516.62 from these deposits as well.[5] Record Excerpts at page 5 (Order dated February 24, 2005). Even though there remained a deficiency of almost 2.7 million dollars on the mortgage at this time, these unsecured parties were

---

[4] The trial court's April 10, 2007, order seems to make much out of the fact that no entity objected to its March 31, 2004, order. This is of no significance. Foremost, said order only established that the unsecured creditors had a judgment against Aegis Oxford, not the Receiver. **At the time of execution on the deposits** (February 24, 2005), **the deposits belonged to the Receiver** (for the benefit of Aegis Oxford's creditors), not to Aegis Oxford, because of the assignment on July 23, 2004. It is manifest from review of the record that the execution was against the Receiver (why else would the Chancellor require the Receiver to post a bond on appeal to prevent execution on the deposits?) and that the Receiver did in fact raise this issue on appeal. Therefore, this matter was timely raised on appeal in the original *Lend Lease* action and in the Receiver's post-opinion Motion to Amend the Court's Mandate. There is no factual or legal basis for the proposition that Lend Lease's secured interest did not extend to the deposits which were assigned to the Receiver for the benefit of the creditors. See April 10, 2007, Order at ¶ 3 (Record Excerpt at page 3; Record at page 1.)

[5] Lynch Oil received $358.24; Panola Paper received $71.39; Aramark Uniform Services received $90.38; 1-Day Signs received $193.22; Damor, Inc. received $254.48; and White Dove Janitorial received $1,548.91.

actually paid using funds which were in the hands of the Receiver for the benefit of the creditors according to their respective priorities.

Pursuant to the Chancellor's finding that Lend Lease's mortgage and perfected security interest was "unsecured debt and has no priority over any other debt", the primary secured creditor got none of the deposit proceeds despite a valid, perfected and priority security interest in all of Aegis Oxford's Oxford Mall real property as well as "all rents, additional rents, revenues, issues and profits" and the right, upon default, "to receive and collect any sums payable to the Debtor thereunder." Record in *Lend Lease*, 2004-CA-01485-SCT at 329-342, and in particular at page 335.

As noted by this Court, "With respect to Chase's position as a secured creditor, we find the record conclusively, and without contradiction, establishes that the $2.7 million deficiency from the foreclosure was debt secured by virtually all assets of Aegis's Mall property." *Lend Lease*, 2004-CA-01485-SCT at ¶21; *see also* ¶¶2,5 and fn. 5 (noting, respectively, "debt was secured by virtually all of its property including rents and accounts receivable," the property was "further secured by a perfected security interest in substantially all of the assets of the Mall" and that Chase had a security interest in the rent proceeds).

Even though the Receiver was vindicated on appeal, she still has not been returned the property which was improperly taken from her under execution. It is from the trial court's refusal to require the unsecured creditors to return the funds which they inappropriately received that this appeal is taken.

SUMMARY OF THE ARGUMENT

The law of security interests, at least with respect to this matter, is straightforward - unsecured creditors do not get paid until the secured creditor is satisfied. Priority in payment is the whole purpose of perfecting a security interest. The Chancellor erred when he refused to require the unsecured creditors to return the deposit funds they received when the judgment upon which the execution was reversed and rendered by this Court and since the unsecured creditors did not have priority over Chase to the deposit proceeds to begin with. There is nothing in the law nor in the trial court's orders which required Chase, the secured creditor, to file a claim where it had a perfected security interest in the very property which was executed upon.

When this Court reversed the judgment against the Receiver, it clearly reversed the unsecured creditors' right to execution on that judgment as well[6]. Thus, the unsecured creditors must be required to repay the funds they received so that the funds can be distributed in the correct order of payment per the security interests.

[6] It is essential to a proper understanding of the Appellant's argument to understand that the Chancellor erred in giving the deposits to the unsecured creditors in satisfaction of the judgment against the Receiver. The Receiver does not challenge the validity of judgment against Aegis Oxford and thus makes no objection to execution upon Aegis Oxford's assets. However, at the time they were executed upon, the deposits no longer belonged to Aegis Oxford; rather, the deposits belonged to the Receiver and were executed upon to satisfy the judgment against her, which of course, was then reversed by this Court.

ARGUMENT

a. Standard of Review

The Chancellor's conclusions of law are reviewed de novo. *Lend Lease*, 2004-CA-01485-SCT at ¶14, citing *Saliba v. Saliba*, 753 So. 2d 1095, 1098 (Miss. 2000).

b. Cobra Lost on Appeal but Got to Keep the Money - This is Plain Error

Even though this Court reversed the Chancellor's award against the Receiver in its entirety and further held the award of attorneys fees incurred by Cobra was reversed and rendered, the Chancellor's April 10, 2007, order not only allows Cobra to keep the deposits over which Chase clearly has priority, but the order further allows Cobra to keep the attorney's fees which this Court specifically stated the Chancellor erred in awarding![7] *Lend Lease*, 2004-CA-01485-SCT at ¶28. The decision of the trial court allowing Cobra and the other unsecured creditors to keep the deposits to which Chase had priority[8] is clearly erroneous and must be reversed. The entirety of the $16,438.88 executed-upon deposits must be returned to the Receiver for payment according to the perfected priority interest of Chase.

c. Chase Had Priority To The Deposits

This Court has previously recognized Chase had a valid and perfected interest in the Oxford Mall property, real and personal, which extended to almost all assets and clearly included the deposit

---

[7] "Heads I win, tails you lose."

[8] Especially where this Court said Cobra was not entitled to the vast majority (63%) of its judgment anyway, the same constituting attorneys fees which were disallowed. *Lend Lease*, 2004-CA-01485-SCT at ¶28.

refunds at issue. *Lend Lease*, 2004-CA-01485-SCT at ¶¶ 2, 5, 21 and fn. 5.[9] While it is conceded Cobra and the other unsecured creditors did obtain a judgment lien which, at least by Cobra, was enrolled in the Lafayette County Circuit Clerk's office, it is shown to the Court that Chase's secured interest pre-dated the enrollment of any such judgment liens and thus Chase clearly had priority over Cobra and the other judgment creditors. Valid liens and priorities which have become fixed before the receivership are not disturbed. MISS. CHANCERY PRACTICE § 477 (*citing L'Hote v. Boyet*, 85, Miss. 636, 38 So. 1 (Miss. 1904)).

Chase had priority in the deposit refunds pursuant to MISS. CODE ANN. § 75-9-322. Cobra and the other unsecured creditors did not obtain a judgment against Aegis Oxford until March 31,

---

[9] The original Deed of Trust and Security Agreement granted Chase a security interest the following, inter alia:

> "All agreements, contracts, certificates, instruments, franchises, permits, licenses, plans, specifications and other documents, now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Land and any part thereof and any Improvements or respecting any business or activity conducted on the Land and any party thereof, **including without limitation, the right, upon the happening of any default hereunder, to receive and collect any sums payable to Borrower thereunder.**"

Section 1.1(l) (emphasis added). Additionally, the security agreement gave the secured party an interest in the following property:

> "All agreements, contracts, certificates, instruments, franchises, permits, licenses, plans, specifications and other documents, now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Land and any part thereof and any Improvements or respecting any business or activity conducted on the Land and any party thereof, and all right, title and interest of the Debtor therein and thereunder, including, without limitation, **the right, upon the happening of any default under the Security Instrument, or any other document executed in connection therewith, to receive and collect any sums payable to the Debtor thereunder.**" Section (12) (emphasis added).

Record in *Lend Lease*, 2004-CA-01485-SCT, Exhibit 1to April 19, 2004 hearing; Exhibit 2 to motion for summary judgment.

2003. Chase's security instruments were filed December 16, 1996.[10] Record Excerpt in *Lend Lease*, 2004-CA-01485-SCT, at pp. 23-24; Exhibit 2 to April 19, 2004, hearing (deed of trust); Vol. I[11], transcript pp. 7–9, order appointing Receiver, ¶ 5-7. Thus, it is clear that Chase's legal priority with respect to the deposits was ignored in favor of subsequent creditors without any right to priority. Furthermore, the Chancery Court ignored its prior order of August 25, 2003, in which it stated that the unsecured creditors would be paid only if the mortgage was satisfied. Record in *Lend Lease*, 2004-CA-01485-SCT at 175-76. The trial court also ignored MISS. CODE ANN. § 89-1-45 in giving Cobra Security priority over the secured creditor, Chase, whose foreclosure resulted in over a two million dollar deficit.

d. **The April 10, 2007, Order Contains Numerous Inaccuracies**

The order was erroneous in the following respects:

- Paragraphs One and Two state Cobra "became a Judgment Creditor" on March 31, 2004 but did not object to the order. Record Excerpt at page 3; Record at page 1. While it is true that Cobra became a judgment creditor of Aegis Oxford on that date, it is incorrect that Cobra became a judgment creditor of the Receiver on that date. The judgment against the Receiver was not entered until June 14, 2004, and that judgment was reversed. This is important because the Receiver, the "owner" of the deposits at the time they were executed upon,

[10] The original Deed of Trust and Security Agreement was adopted by Aegis Oxford, on November 24, 1998, by an Assumption of Deed of Trust. In executing this assumption, Aegis Oxford assumed the same obligations as the original mortgagor, including the grant of a security interest in all personal property of the debtor. Record in *Lend Lease*, 2004-CA-01485-SCT, Exhibit 1, April 16, 2004 hearing; Exhibit 2 to Motion for Summary Judgment.

[11] The transcript has two volumes relating to the hearings of the court and four volumes of the pleadings and court orders. There are two volumes one and two and only the clerk's record is numbered consecutively. To distinguish the two, the brief identifies the hearings by date.

upon, would not have any standing to object to a judgment against Aegis Oxford and thus it should not come as a surprise she did not object to that Order. Likewise, Chase would not object to a judgment against Aegis Oxford as its security interests were still paramount to that of the now-judgment creditors.

- Paragraph Three of the Order states the deposits were not subject to the lien of any secured creditor. *Id.* As explained above, this is simply erroneous. Chase had a Deed of Trust and Article 9 security interest in the deposits. The Chancellor gives no explanation for his conclusion. That Aegis Oxford's assignment of the deposits to the Receiver did not occur until approximately four months after judgment was taken against Aegis Oxford is irrelevant. Aegis Oxford assigned the deposits to the Receiver for the benefit of its creditors. Cobra and the other unsecured creditors had no right to those deposits prior to the execution which did not occur until almost a year later. *McPhillips Constr. Co. v. Carter-Murphy Constr. Co.*, 227 So.2d 302 (Miss.1969) (money is not subject to an enrolled judgment lien absent a seizure of the money); *Henry v. Alexander*, 131 Miss. 588, 94 So. 846 (Miss.1923) (lien on money begins from seizure and not from date of judgment); *Cahn v. Person*, 56 Miss. 360 (1879) (same). The subsequent judgment liens of Cobra and other unsecured creditors did not change the order of priority in favor of Chase. *Cf.* MISS. CODE ANN. § 11-7-191 (liens "shall have priority according to the order of such enrollment").

- Paragraph Four states the motion to return the deposits should have been brought on appeal and thus is barred. This is incorrect for several reasons. First, the issue was raised on appeal. See the Court's opinion in *Lend Lease*, 2004-CA-01485-SCT at ¶¶ 16, 18 and 22. Second, the Receiver could not petition for return of the funds until after the judgment against her

was reversed. Third, as soon as the judgment was reversed, the Receiver did raise this issue with its pending Motion to Amend Mandate in *Lend Lease*, 2004-CA-01485-SCT, and then in her subject motion before the Chancery Court.

- Paragraph Five states the Motion to Amend Mandate brought in the matter of *Lend Lease*, 2004-CA-01485-SCT, was denied. This is incorrect as said Motion has not been ruled upon and is still pending. Paragraph Five also states the Receiver asked the Chancery Court to amend the Supreme Court's mandate. This is incorrect. The Receiver simply asked for the money back, consistent with the reversal in the Supreme Court.

CONCLUSION

The Chancery Court let Cobra and the other unsecured creditors keep the money this Court explicitly said they were not entitled to. Additionally, the Chancery Court ignored the clear priorities of interest in favor of Chase, the only secured creditor, and gave the money to junior creditors (who were not even secured) even though over 2.7 million dollars remained unpaid on the promissory note secured by a deed of trust and Article 9 perfected security interest. This is plain error and thus this Court should reverse the Chancery Court and order the deposits to be repaid by the unsecured creditors, with statutory interest. The Receiver and Chase further pray that this Court award them costs of this appeal as well as the costs incurred in the matter of *Lend Lease*, 2004-CA-01485-SCT.

WHEREFORE, PREMISES CONSIDERED,

BY: MARKOW WALKER, P.A.

J. HALE FREELAND, MSB No. [redacted]
M. REED MARTZ, MSB No. [redacted]

MARKOW WALKER, P.A.
265 N. LAMAR BLVD., STE. I
Post Office Drawer 50
Oxford, Mississippi 38655
Telephone: (662) 234-9899
Facsimile: (662) 234-9762
E-mail: rmartz@markowwalker.net

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant Lift, Inc., 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 Appellant*** to:

David G. Hill, Esq.
David L. Minyard, Esq.
Hill & Minyard, P.A.
Post Office Box 429
Oxford, Mississippi 38655

Lynch Oil Company
Post Office Box 885
Oxford, Mississippi 38655

Tim Peeples, Esq.
Daniel Coker Horton & Bell
Post Office Box 1396
Oxford, Mississippi 38655

Panola Paper Company
Post Office Box 1146
Batesville, Mississippi 38606

Robert Drinkwater, Esq.
Post Office Box 119
Jackson, Mississippi 39205

Aramark Uniform Services, Inc.
Post Office Box 30153
Memphis, Tennessee 38130

White Dove Janitorial
66 County Road 430
Paris, Mississippi 38949-3801

1-Day Signs
2422 South Lamar Avenue
Oxford, Mississippi 38655

Damor, Inc.
Post Office Box 288
Lakehurst, New Jersey 08733

Honorable Ed Roberts
Post Office Box 49
Oxford, Mississippi 38655

This the 24 day of July, 2007.

J. HALE FREELAND
M. REED MARTZ