

MARKS & WEINBERG, P.C.

DISPATCHES FROM THE TRENCHES

Georgia Usury Laws & Other Cases

By Kenneth P. Weinberg

This issue of Dispatches from the Trenches: (a) addresses usury laws in Georgia and highlights why lessors should be aware of limitations on the amount of interest which lenders can charge borrowers; (b) provides a couple of example cases where assignees of originating lessors seek recovery from the guarantors of the defaulting lessees; and (c) examines whether commitment letters constitute binding contracts.

GMAC Commercial Mortgage Corp. v. Maitland Hotel Assocs., 2002 WL 596216, M.D. Fla. (Apr. 3, 2002)

GMAC Commercial Mortgage Corporation ("GMAC") leased approximately \$1.2 million in furniture, fixtures and equipment to Maitland Hotel Associates, Ltd. ("Lessee") pursuant to a lease forty-eight month lease where the rental payments were to be determined at the time of closing "based upon the aggregate cost of the equipment and [an interest] rate based on corresponding 4-year Treasury on the date of the final disbursement under the lease agreement plus 550 basis points." When Lessee defaulted in multiple payments, GMAC brought this suit to recover the unpaid rent and late fees chargeable on such amounts. The late fee provision in the lease, which was governed by Georgia law,

obligated Lessee to pay a late fee of five percent of each delinquent payment plus interest at a rate of one and one-half percent per month. Without determining whether the "lease" in question constituted a "true lease" or a condition sale or other type of lease-intended-as-security (i.e. a "loan"), the Court analyzed the usury law in Georgia to see if the late fee and interest provisions in the lease violated the State's statutory laws against charging too much interest on loans.

Section 7-4-18 of the Georgia Code contains a criminal usury statute which provides that no loan shall charge any rate of interest greater than five percent per month either directly or indirectly, by way of commission for advances, discount, exchange or by any contract, contrivance or devise whatsoever. In the event any loan violates this criminal usury statute, the lender forfeits all interest due on the loan but will still be able to collect the principal. However, the effect of that criminal usury statute has been somewhat blurred by §7-4-2(a)(1)(A) of the Georgia Code which states that the legal rate of interest of seven percent applies where a rate percentage is not established by written contract *but that* parties to a loan of *more than \$3,000 dollars but less than \$250,000* are allowed to establish any rate of interest in their contract subject to the criminal usury laws. This language calls into question whether the criminal usury statute applies to loans that are greater than \$250,000. The Court noted that, in at least one case, a Georgia court has applied the criminal usury statute to a loan exceeding \$250,000 but that a different Georgia court held, without analysis, that Georgia's usury provision did not apply to a loan that was in the amount of \$2.3 million. This issue could have been critical in the case at bar since the combination of the five percent "charge for the delinquent payment" and the one and one-half percent late fee would have violated the criminal usury cap of five percent.

GMAC originally sought to recoup both charges but waived its claim to the one and one-half percent monthly charge at an evidentiary hearing held by the Court. As such, the Court held that it need not decide whether the late charges and interest sought are subject to the criminal usury statute.

GreatAmerica Leasing Corp. v. Titan Recycling Inc., 2002 WL 482537 (E.D.Mich. Mar. 11, 2002).

GreatAmerica Leasing Corp. ("GreatAmerica") was assigned a couple of leases between Equipment Leasing Specialists, as lessor, and Stanley Metal Associates, as lessee ("Stanley Metal"). Stanley Metal later assigned its rights in the leases to Titan Recycling Inc. ("Titan"). As a condition to the assignment, Titan's owner (the "Owner") personally guaranteed Titan's obligations under the assigned leases.

When Titan defaulted under the leases, GreatAmerica filed suit against Titan and the Owner alleging that Titan breached the lease agreement by failing to make payments and that the Owner was liable for the unpaid lease payments pursuant to the personal guaranty. The district court, noting that assignees assume the assignor's rights and responsibilities provided in the lease agreement, granted GreatAmerica's motion for summary judgment on both the claim against Titan and the claim against the Owner. According to the court, there were no genuine issues of material fact regarding whether Titan failed to make payments pursuant to the lease agreement or whether the Owner failed to comply with his obligations under the guaranty.

Heller Financial Leasing, Inc. v. L.D. Dabney, 2003 U.S. Dist. LEXIS 11603 (N.D. Tex 2003)

Plaintiff Heller Financial Leasing ("Heller") took assignment of a lease from CLG, Inc, as lessor and assignor ("CLG"), and Regional Health Supply, Inc, as lessee (the "Lessee"). The Lessee went into bankruptcy and Heller sued to collect from two guarantors of the Lessee's obligations, L.D. Dabney and Niva M. Patel (the "Guarantors"). The Guarantors counterclaimed that CLG had breached its contract with the Lessee by failing to deliver all of the leased equipment, by failing to properly train and support the Lessee, and by delivering defective equipment.

As outlined by the Court, to recover on a written guaranty, a plaintiff must establish that: (1) the guarantor signed the guarantee; (2) the holder is the legal holder and owner of the guarantee; (3) and that a sum certain is due and owing on the guarantee. Finding that Heller met each of these essential elements, the court determined that Heller could meet its summary judgment obligation with respect to collecting on the Guaranty but that it must address the Guarantors counterclaim before receiving summary judgment. Since Guarantors have the burden of proof at trial, Heller could satisfy its obligations by noting the absence of proof from the Guarantors with respect to their counterclaim. The burden then switches to Guarantors to introduce evidence that CLG breached its obligations under the lease. If Guarantors failed to do so, Heller would win by summary judgment.

Cobra Capital v. RF Nitro Communications, Inc., No., 266 F. Supp.2d 432 (M.D.N.C. Mar. 17, 2003).

Cobra Capital, LLC ("Cobra") brought actions against RF Nitro Communications, Inc. ("RF Nitro") for breach of contract and tortious interference with contract. Cobra and RF Micro (a predecessor to RF Nitro) had been in negotiations for an equipment lease, which resulted in the execution of a "Lease Financing Proposal" between the parties. The Lease Financing Proposal expressly stated that "Cobra is pleased to propose lease financing," and that the proposal was "subject to the approval of COBRA and is not considered to be a commitment." A subsequent letter from Cobra outlined fourteen separate actions that had to be performed before the lease could be finalized and consummated, including the execution of various documents and the presentation of proper proof of insurance.

Before any additional progress was made, RF Nitro acquired the stock of RF Micro. RF Nitro informed Cobra of its election not to proceed with the transaction and Cobra brought claims for breach of contract and tortious interference with contract. The court found that neither party intended to create a binding contract through the Lease Financing Proposal, and dismissed Cobra's claims. In particular, the Court relied heavily on language in the

Proposal which stated that it was not a commitment. The Court also specifically rejected Cobra's claim that the fourteen acts required for consummation of the transaction were "ministerial" in nature and that the transaction was therefore substantially completed.

Kenneth P. Weinberg is a founding partner of Marks & Weinberg, PC. He and co-founder, Barry Marks, have significant experience in dealing with virtually every type of equipment and facility lease financing, have participated in leasing financings for more than a billion dollars of equipment and are recognized throughout the industry. Weinberg has written *Dispatches from the Trenches* since 2002, routinely writes articles in a variety of equipment leasing and financing journals, and has participated in numerous seminars on equipment leasing issues. If you would like more cases or articles on leasing, or have any questions or comments about this column or other leasing issues, please visit www.leaseawyer.com or contact Weinberg at 205-251-8307.



Article appeared in the October, 2003 issue of the *Monitor*.

For more articles/news regarding the equipment leasing and finance industry, visit

<http://www.monitordaily.com/>