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Supreme Court of Texas.
RIYAD BANK, Houston Agency, Petitioner,
v.
Tawfic AL GAILANI and Abdallah Adel, Respondents.
No. 00-0688.

March 7, 2001.

Appearances:
Janet E. Militello, Locke Lord Bissell & Liddell LLP, Houston, Texas, for Petitioner.
H. Miles Cohn, Sheiness, Scott, Grossman & Cohn, Houston, Texas, for Respondents.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen, Justice Harriet O'Nneill, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice Craig T. Enoch, Justice Xavier Rodriguez.

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ORAL ARGUMENT OF JANET E. MILITELLO ON BEHALF OF THE PETITIONER

MS. MILITELLO: The El Paso Court of Appeals has not only let respondents escape summary judgment on their debt that they provided a roadmap for all other defaulting borrowers who seek to avoid or delay action on their accounts.

JUSTICE: If we were to decide that this case was governed by Section 9 paragraph 4, is there a question remaining about the commercial reasonableness of the sale?

MS. MILITELLO: No your Honor, there is not. The evidence is clear from the record with respect to the actions of the foreclosure sale.

JUSTICE: Well, are you asking us to find that based on the evidence submitted in the record as a matter of law? Or is there a procedural hurdle?

MS. MILITELLO: I don't think there is a procedural hurdle in all these. The court of appeals did not address and did not overturn the trial court's finding with respect to foreclosure. And the trial court found as a matter of law, that the foreclosure had been handled that the actions taken by Riyad Bank were appropriate. Thus, I think this Court can write an opinion that corrects the errors of law that

basically melted the two statutes together. What respondents have been doing is saying that the foreclosure was an attempt to take possession of the collateral in order to collect and thereby pushing it under 9.502.

JUSTICE: Before you go further into discussion the chief provisions, I need to followup on Justice O'Neill's question to make sure that I'm clear too. The bank moved for summary judgment in this case under Section 9.504?

MS. MILITELLO: Yes.

JUSTICE: Is that correct?

MS. MILITELLO: Yes.

JUSTICE: Was there any controverting summary judgment evidence that went to whether the sale was commercially raised or not?

MS. MILITELLO: Not if raised a material issue of fact.

JUSTICE: Okay. So it's your position then that the bank did establish as a matter of law that it was entitled to summary judgment. That the sale had been held in accordance with the terms of Section 9.504 and that was not controverted and therefore rendering judgment for the bank is proper on that basis.

MS. MILITELLO: Absolutely your Honor.

JUSTICE: Thank you.

MS. MILITELLO: With respect to the actions of the bank, with respect to the foreclosure sale, the security we've met besides Section 9.504 govern and the security agreement provided certain things that Riyad will do. And in fact, Riyad Bank went beyond the requirements, what they had contractually promised to do and they did more in order to insure they had the best opportunity to have bidders and to get the maximum value at the foreclosure sale. They conducted the foreclosure sale they give more notice, they're only required to give 10 days notice. They gave 15 days notice. They conducted the sale. They actually did generate interest. Those came -- and they wanted to see and inquired about the receivables but in fact after inquiring about the receivables, determined they had no interest to bid.

JUSTICE: What level of specificity does your proof have on that point? Meaning you name names of who came and inquire.

MS. MILITELLO: No your Honor. The affidavit --

JUSTICE: It's just the affidavit then --

MS. MILITELLO: It's an affidavit. It's a summary judgment without -- very little discovery, it was a summary judgment case. It said we don't have a complete record if this has gone all the way through file. But again that is another point why this case is of such importance. Because when you have a central promissory note case, which is what this case was, the appropriate vehicle to the order for financial institutions to have finality and to be able to afford and try to collect from defaulting borrowers is to have [inaudible] a summary judgment. We not only had the summary judgment hearing and there was a rehearing on the summary judgment.

JUSTICE: Well, I don't mean to keep hammering this point but I am confused about it. If you made for summary judgment again, let's assume that 9.504 is the principal statute. You put in summary judgment approved that the sale was commercially reasonable. Is it my understanding they put on no controverting proof as to the commercial reasonableness?

MS. MILITELLO: Their -- they put in an affidavit from which --

JUSTICE: And we've got that affidavit.

MS. MILITELLO: You've got --

JUSTICE: Is that a burden then to if we decide that Father Borg

was to review the summary judgment approve to determine if shift the burden on the first instance or has that been not preserved for appeal?

MS. MILITELLO: I don't -- although it was raised on appeal because respondents raised every blank. The court of appeals did not address -- the vote of the court of appeals was the issue of was the foreclosureship marginally feasible? And the court of appeals wouldn't adjust it and one can only assume because when they look at the record from Monroe, they found there was no genuine issue of material fact because the trial court looking at this, one could say, was there, was the amount bid for these account receivable was insufficient? But the records is replete with these are valueless account. And the fact that somebody nearly says, I think the price is too low, does not automatically mean summary judgment is --

JUSTICE: And I suppose that part of my confusion is to understand that after the summary judgment was granted in your favor, a counter claim was filed attacking the commercial reasonableness. And that counter claim was struck. And that's where my confusion is as to whether it was properly controverted in the first practice motion for summary judgment or if it was brought up untimely after the motion for summary judgment is followed or granted.

MS. MILITELLO: Additional claim, after the summary judgment was granted, additional allegations were made which the trial court found to be unreasonable. Primary allegation there which is stemmed from the basis of where the Appellate Court that was this issue of this credit report by Riyad Bank to the Saudi Arabian Monetary Agency which has been referred to as blacklisting in order to give it this cloud or something bad and evil that happened. And it was -- that issue that was raised and said that tainted the activity. But in fact if you look at the briefing by the respondents, you first had a foreclosure sale then this alleged blacklisting which the foreclosure sale happened and they were then Riyad's accounts, the fact that there was blacklisting review of material after. But the court of appeals without anybody having raised this issue has now taken that allegation of blacklisting and has basically said that the foreclosure sale was Riyad's attempt to take possession and control of the collateral and they moved it then under 9.502 and said now, we have a question of fact of whether there was in fact an attempt to collect by this practicing.

JUSTICE: The counter claims are filed after trial court ran in summary judgment.

MS. MILITELLO: Yes.

JUSTICE: In December, judgment disposed of all crimes in all parties.

MS. MILITELLO: Yes.

JUSTICE: If this case is [inaudible] court procedural --

JUSTICE: I'm trying to get that counter claims now in perspective in terms of procedurally. Was it, were they filed in after a final summary judgment had been entered and while the trial court is still -- that the trial court fiduciary power still existed?

MS. MILITELLO: Yes.

JUSTICE: Is that what happened or where there still claims pending that it not been dispose of at the time of counter claim was filed?

MS. MILITELLO: The counter claim, there were it was during the plenary power of the trial court.

JUSTICE: Yes, we had a final summary judgment and the plenary power had not expired yet. And that's when the counter claim alleging the blacklisting activities was filed.

MS. MILITELLO: Yes, your Honor.

JUSTICE: Okay.

MS. MILITELLO: And when those that we had a second hearing before the trial court of which all of these were raised one more time along with the blacklisting and we then moved to dismiss the counter claim and the motion for rehearing on the summary judgment. We filed a motion to dismiss this counterclaims as late file, etc. And they were then dismissed. But the issues here of some import that have an effect across the board with financial institutions which is why the Texas Bankers Association filed an amicus brief is what has happened is almost any activity now of a financial institution under the court of appeals voting could be seen to be a collection activity. Because what we have here is this allegation of credit report. So how do you rate the bank's report to the Saudi Arabian Monetary Agency of informal gathering and they discussed the delinquent debts and so there is no who is delinquent and who is not delinquent.

JUSTICE: Is that a set of law in Saudi Arabia or is that merely the custom?

MS. MILITELLO: It is a custom. And perhaps a formalized custom that makes it is what is done. Whether is there some statutory basis I'm not aware of? But it is absolutely the way banking banks who practice and work in Saudi Arabia they -- that is their normal custom. Is to get together, they discussed and they report. And it is akin to banks here in the States that do credit report. They can report to a credit agency the delinquency of some borrower. But the fact of the reporting does not make it a -- and in fact, trial court's found it, and the affidavit of Gailani certainly supports the allegation was that the credit reporting is blacklisting was done to destroy the accounts certainly not collecting.

JUSTICE: And there is no evidence at all to the extent that your client said pay up or we're going to report you.

MS. MILITELLO: No.

JUSTICE: The reporting was just done and discovered by the other side after the fact.

MS. MILITELLO: Yes.

JUSTICE: So there was no attempt to get them to pay to force all the report.

MS. MILITELLO: No. And in fact, the foreclosure had occurred prior to this activity. So what we have here is the basis of the court of appeals looking at the collection activity, and as a matter of law what was done cannot be a collection. And under this Court's holding in color will fall squarely under. There is no commercial agrees with this bank, Riyad Bank at all. The district court properly recognized that truthful credit reporting is not an attempt to collect under 9.502 and they properly recognize that the summary judgment establishes that Riyad made no attempt to collect. The foreclosure activity of Riyad Bank was appropriate. As I said would take six years we've been to every court, banking support, district court, court of appeals. And now here, the traumatic effect that this has, Riyad Bank but on all financial institutions is the whole value of a summary judgment on an admitted debt. There is no controversy that the two million dollars is owed and hasn't been repaid. And so what we have is a situation on an admitted debt. The defendants, the borrowers have been allowed to prolong and extract and not repay this Court's opinion.

JUSTICE: Any other questions? Thank you Counsel.

The Court is ready to hear argument from respondent.

SPEAKER: May it please the Court, Mr. Miles Cohn is gonna argue for the respondent.

ORAL ARGUMENT OF H. MILES COHN ON BEHALF OF THE RESPONDENT

MR. COHN: Your Honors, I'd like to begin with a point that I think Ms. Militello, and I agree on and it might help me clarify for both sides. I agree that the collection of accounts by a secured party is governed by Section 9.502. I am not trying to mix and confuse 9.504 and 9.502. The problem with this case and the reason why the analysis gets complicated, there are actually two reasons. Number one, the bank did something very unusual. The bank did not, ordinarily when a lender has a security interest or assignment of accounts, they nearly collect the accounts. They don't typically foreclose. In this case they did foreclose. And I believe there's also summary judgment evidence that they took action to collect the debt.

JUSTICE: But they had the right to foreclose. You don't dispute that.

MR. COHN: I do not dispute.

JUSTICE: And if they have the right to foreclose and chose to foreclose on the security interest they held in the accounts receivable then 9.504 governs that sale.

MR. COHN: It governs with respect to the foreclosure sale.

JUSTICE: So 9.504 does apply to this case.

MR. COHN: Absolutely with respect to the foreclosure sale. I think your honor it is best to think of it as two tracks to the extent that the bank conducted a foreclosure sale and got the benefits of that foreclosure sale which are substantial. They take ownership entitled to the property. They exclude my clients from any ability to thereafter collect. I mean, they take it over. They did it in for ten dollars. A two million dollar account receivable but they did bid in for ten dollars. If they later go out and collect two million dollars, they can pocket the whole two million dollars and not credit my clients with a penny. So they're serious.

JUSTICE: Not necessarily. And if they said commercial reason, yes?

MR. COHN: Yes.

JUSTICE: Okay.

MR. COHN: And that's why -- [inaudible].

JUSTICE: [inaudible], but then I'll own that.

MR. COHN: Absolutely. That's why the law balances the rights of the debtor of my client in this case.

JUSTICE: Why did they close your client with penny money when they lend to via start with and never got payment? I don't understand that.

MR. COHN: Well your Honor, in the summary judgment --

JUSTICE: [inaudible] they faulted. They're entitled to take the collateral and get as much as they can or little as they can.

MR. COHN: That's correct. They may foreclose so long as they do so in a commercially reasonable manner. The summary judgment evidence reflects here that the account debtor, Banderia the Saudi company was willing to pay money had made an offer to pay money. And the bank did not take it. Now, my client after the foreclosure sale didn't have a right to go in and try to collect that money itself and apply for the debt. We're cut off. We don't own the accounting more. We have no right to collect it. That's why the law imposes on the bank a duty, if they're gonna cut my clients off, to do so in a commercially reasonable manner.

JUSTICE: Was their controverting summary judgment approved as part of the record in this case, that the sale was not conducted in a commercially reasonable manner as required by Section 9.504.

MR. COHN: Absolutely, absolutely.

JUSTICE: And when was that voucher imposed that proof?

MR. COHN: That proof, two things, first of all we went through with the brief and the summary judgment evidence. There's some objections on both sides probably what had happened. As to what actually the foreclosure, the notice, and the sale consisted of, it consisted of putting a notice at the Harris County Court House. It consisted of blah, blah, blah --

JUSTICE: I understand on hand and they proved all of that after this part of destroying your entitlement and summary judgment.

MR. COHN: That's true.

JUSTICE: They would collect on the note but on the obligation. But my question is what controverting proof did you offer on the question of commercial raising validity sale?

MR. COHN: There's a affidavit of Mr. Al Gailani, my client an experience Saudi businessman explaining that if you're going to sell an account receivable, that is money owed by a Saudi company, a commercially reasonable way to do that must include some notice to the Saudi business community who would have an interest in purchasing it. In this case, the summary judgment evidence shows there was no posting at the Saudi Consulate in Houston or anywhere. There was no advertising, any media that would be read by a Saudi businessman. The only thing they did was since your Honor mentioned a minute ago, and Mr. Al Gailani testified in his affidavit as a Saudi businessman but that would not be a commercially reasonable sale of the collateral.

JUSTICE: And did the trial court in granting the summary judgment mentioned determined that the bank had met its burden of proof as a matter of law and yours was insufficient to controvert?

MR. COHN: I'm not quite sure what the term is --

JUSTICE: Well, I think the reason that I asked that I'm not trying to decide what we're supposed to be doing here in evaluating their claim. Do we look at the bank's proof in the first instance to determine whether we shift the burden and then whether Mr. Gailani's affidavit controverted? What is exactly are we supposed to be doing?

MR. COHN: Under the -- well, before I answer that question directly, the court of appeals did not reach the 9.504 issue yet.

JUSTICE: Right.

MR. COHN: I'm not sure why because I actually think it's a much stronger argument in my client's favor than the collection argument which has some problems I was gonna get to have mention but with respect to that issue under the Greyhouse decision, which is a Supreme Court decision, once the issue of commercial reasonableness is ready, is not on foreclosure sale, the lender has a duty to prove that the sale is commercially reasonable. In the context of summary judgment as in this case, that would be a burden to show that the sale is commercially reasonable as a matter of law. And I do have in our [inaudible] analysis of the cases that deal with the summary judgment analysis in this particular kind of case. What they showed is that there are only some very narrow circumstances in which summary judgment has been improved on commercial reasonableness once the issue was raised. And those issues, those circumstances have to do was situations in which one of the statutory presumptions of reasonableness. If you can prove the basis for one of those and there's no opposition testimony, the courts have approved summary judgment. And that's not

the case here. And that's something we talked about in brief. But as I said that's not an issue. Although it was not reached by the court of appeals, it can be reach by this Court obviously, and in my mind --

JUSTICE: You say that and it was not in the petitioner's brief while the merits had to be reach the 9.504 issue.

MR. COHN: Because it's an alternative ground for [inaudible] of the judgment of the court of appeals. And my understanding is that all the Court, I think this Court has two options if it I think if we were to reverse on the 9.502 analysis and that would be to affirm on the basis that summary judgment should have been denied under my 9.504 defense. Either one is sufficient to have denied --

JUSTICE: We shouldn't do that. We shouldn't really remand that to the court of appeals.

MR. COHN: I think you have that discretion to do either. I think -- I'm just saying the Court has the option to either reach the issue or send it to the court of appeals. On the 9.502 issue, the 9.504 issue by the way I think is absolutely crystal clear. There is summary judgment evidence. There is no case on the kind of evidence we have in the record here where a summary judgment has been approved under 9.504. There is none. And there shouldn't be one. Now, 9.502 is where the El Paso Court of Appeals went out on a limb. And I wanted to stand up here and kind of make a confession which is that if you know, we all know what practicing law is like, your hindsight with foresight and I could put myself three years in the past when I drafted this affidavit. I would have made it a little clearer. However, the cases are clear that when evaluating summary judgment, which is what we're doing here, that every reasonable inference is to be given to the nonmovement, in this case my client. And that's why I think we go back to Mr. Al Gailani's affidavit. And I like to point out two or three things briefly that are in that affidavit. That I think gives rise to a reasonable assumption that what the bank did is collect the account.

JUSTICE: Before you get to that, can we talked about law for just a minute.

MR. COHN: Sure.

JUSTICE: I'm a little bit confused about how 9.502 dog tails with 9.504 when we know we started this whole procedure with a sale under 9.504. You might have put that in the inquiry in that point in time. How does those two provisions work together because I think I understand that's what you're saying happen here.

MR. COHN: Yes your Honor. I think I go back to the first assumption in your question which is that the foreclosure sale appeared first. Summary judgment record is actually a little unclear on which happened first. I know Ms. Militello said they foreclosed first. But I think the collection activities as suggested in the affidavit were ongoing. I happen to think that if the summary judgment evidence showed that some say they foreclosed on day 1, and they do so in a commercially reasonable manner, the valid foreclosure sale might subject to a tad. My client from that point forward has no interest whatsoever in the collection of the account. They can't --

JUSTICE: So 9.502 then is gone. It's nothing to do -- all right.

MR. COHN: I will brief then. If they conducted down, this case is complicated by two reasons. Number one, I don't believe they conducted a commercially reasonable foreclosure sale. But, number two is not clear in the record when they conducted that sale. I take it back, there's a date on the affidavit as to the date it was conducted. The collection activity seems to be ongoing and that the inference is that they occurred both before and after the sale.

JUSTICE: Which did you get first, the collection -- I mean the foreclosure or the report to sell them.

MR. COHN: I think the well the summary judgment record is not a hundred percent clear on that. I think reading the affidavit you know, like most favorable to the non respondent is a continuing activity. These are --

JUSTICE: Is there not a date certain when the first report to Salman occurred?

MR. COHN: It is not in the record because we never had discovery on that point. I would like to take a deposition and find out exactly when it occurred. What we did learn is that Banderia's banking privileges were cut off and put out of business. We don't know exactly what date of reporting occurred. But I do agree that if the evidence will impact the trial court before it was fully developed, and if all the collection activity were [inaudible] after a valid foreclosure sale, another, I would submit in this case, because if I don't think the foreclosure sale commercially reasonable. But if you have a commercially reasonable foreclosure sale, it doesn't matter what they do. Not 9.502. There is no collection of the debtor's account because it is not the debtor's account anymore. The bank has purchased the account.

JUSTICE: What facts in this case or in the summary judgment record that allow to argue that 9.502 is implied here since I take it you take the position of the foreclosure sale did not come first in a commercially reasonable manner. Are you proposing rights under 9.502?

MR. COHN: Yes. Although I think the issue is not crystal clear, Mr. Al Gailani's affidavit first of all makes it clear that there were negotiations between the bank and the account getter, Banderia. And if you're not gonna collect the account, the bank's gonna make a decision like hands-off, you know we don't want this account which I've got the right to do. We just want to sit on the two million dollar note. Why are they undertaking negotiations? There's actually an offer here in the -- the offer was to pay the balance of the note over time, the down payment and start making monthly payments. And the bank turned down that offer and instead blacklisted Banderia. Now, I think that the court first of all I should make a related point --

JUSTICE: But even if they turn down the offer then how do they undertake to collect. It sounds like affirmative steps, I want the money now, pay me. And instead they said, no thank you.

MR. COHN: What they did is say, we don't want that offer instead we're blacklisting you. It was a in the context of when it occurred. I think with reasonable inferences that it was a collection out there.

JUSTICE: But what would be --

MR. COHN: Yeah, I wish it was clear. But I think you have to read that contract.

JUSTICE: As a common sense matter, why would they want to damage the one asset of use of collateral -- if they knew that this blacklisting was gonna destroy the account what would be the motivation to do it --

MR. COHN: Well to be honest, I would hope that this Court can take judicial notice that we're talking about law and practices in Saudi Arabia. And I think Ms. Militello even suggested when she was speaking that the practice is different there in the banks make. And they are not, unfortunately we haven't had a trial yet, but my understanding of the procedures in Saudi Arabia when you have an account is you don't go down and file a lawsuit. They don't have lawsuits like we have. They are geared more towards punishment. They still have debtor's prison for

individuals who don't pay debts in Saudi Arabia, so different society in a different set of laws. And I think that the blacklisting is heavy collect, that is if you don't pay we'll destroy you. If they don't think, the legal system there does not think like ours does. And I think you've have to understand [inaudible].

JUSTICE: We don't have a whole lot of law under Section 9.502. And Collin I think we would, is a case in which there was an undertaking to collect the account receivable. There was a whole lot of activity on the part of the bank in that incident. We have to collect on the account receivable. How would you define undertake to collect and at what point in time, what level of activity does the bank cross over the line into the undertaking to collect area.

MR. COHN: Well you're right. There's not much --

JUSTICE: You're not -- this is not a Collin case in terms of that level of activity.

MR. COHN: Well, in fact, Collin did not involve the collection of an account. We read it again this morning. Collin involved the question of notice that is when --

JUSTICE: Right. That the underlying facts involved him going into the company and monitoring and when account receivable came in they were turned over to the bank and all of those -- the bank. There was a level of activity there that there was an undertaking to collect. And where gonna draw that line?

MR. COHN: I think there has to be some assertion of a right to collect and it arises in a default situation. In other words, the mere notice to an account debtor that by the way, anything that you make, you should send to us. 9.502 treats us a separate issue. That is fact is the notice that was in effect in Collin. So merely sending a letter saying when you make your next payment, send it to me, is not a collection. That's notice to make things to the as and in. I think that there has to be a situation where there is a default and the lender does some affirmative step to collect and in this country the affirmative step may be a different sort than it would be in Saudi Arabia, where you don't have the same kind of civil process to collect the debt, that may be taken by blacklisting, punishing the debtors.

JUSTICE: What, what, how do you define, undertake to collect? What kind of activity would we need to save for a bank for a bank to be undertaken to collect an account.

MR. COHN: I think that, I'm not sure you can have a rule for all cases. It has to be an affirmative action and the Fifth Circuit has said in a case cite of the briefs, that is taking control of the account. I don't agree that it's an exclusive talking control. That's a foreclosure sale. When the bank forecloses, the debtor or borrower then can't do anything. The law doesn't say you have to foreclose as lender to collect. So clearly it contemplates that something can be done short of taking exclusive control and that maybe sitting in a demand letter, filing a lawsuit, or in this case under the law and practice of a foreign country, where the practice is blacklisting. I think blacklisting -- all I'm really saying is I think that deserves some factual development --

JUSTICE: If we will in here, if we did not put banks in jeopardy, we're on the United States, they report somebody to a credit agency.

MR. COHN: I answer that with a firm no. And I couldn't be more proud about it, your Honor. If you look at the affidavit, I know that the bank keeps saying this is garden variety credit of reporting. That's not what it is. And I think the affidavit makes that clear.

JUSTICE: Even assuming this is more severe than it puts a bench

upon the debtor than it does in the United States when a report is made to a credit agency. What we would be required to do is sometime in the future better draw a line between reporting to a credit agency and something such as reporting to SOMA

MR. COHN: I think so and I think the line is where you start to take a unified action against that debtor. If we had in this country some kind of body that could decree merely go to a meeting and say this debtor is in default. Therefore they have no banking services, state, or federal -- they can't have a bank account. They're out of business. I have a hard time saying that's just credit report. As opposed to you know, merely submitting the names to some credit agency and different banks and creditors can deal with it as they will.

JUSTICE: MR. Cohn, I mean I take it you've been really do disagree with how Judge Reedley define 9.502 undertake and to collect in this circuit case you were mentioning a minute ago.

MR. COHN: I think it may be --

JUSTICE: If you say you're talking about credit reporting that's a whole long life from how he defines it as the requirement thus comes into play when the secured party takes possession in control of the account preventing the debtor from acting on the account himself or when the secured party undertakes collection so as to entitle the debtor to rely on the former to protect the account. We're a long way from that in this account, aren't we?

MR. COHN: I think that -- yes.

JUSTICE: A very long way.

MR. COHN: I think that that is too strong and the reason why I think that is too strong is because it basically defines a foreclosure sale so if you accept that definition of collection --

JUSTICE: Well, I don't know that it does because it's allowing the debtor to rely on the former to protect the account. I mean, it doesn't imply taking over of ownership it takes over control in terms of getting them collected much like in the Collin case. But it doesn't cross over the line so that ownership is actually transferred. So where are we gonna draw the line?

MR. COHN: I don't think you have to draw the absolute line in this case. Unfortunately the factual record that could bear a lot more development in this case and I think that to get back to the point that this is in Saudi Arabia, the line may be very different when you're talking about collection activities under normal practices you know, what American Lawyers and American Banks do and what they do in Saudi Arabia. And the fact is that they don't have the same type of civil system that we do. They don't just send a demand letter and file a lawsuit. This is what they do to collect. This is my understanding in Saudi Arabia.

JUSTICE: If this is what they do to collect, how could they collect anything after something like this happens? In other words going back to what Justice O'Neill raised earlier, this is damaging to the debtor so badly that there is no meaningful hope of collection later on.

MR. COHN: I'm not saying we should adopt the system here but why do they have debtor's prison. How would you collect something when you put someone in prison --

JUSTICE: Because [inaudible], must be an attempt to collect.

MR. COHN: For 9.502 to apply there.

JUSTICE: Right. And if all that is happening is punishment as opposed to an attempt to collect. It seems like the attempt to collect issue is not triggered. I think that's how they you know, maybe in our

way of thinking about it but I think in Saudi Arabia that's what they do to collect.

JUSTICE: Hold on. Because I mean you still haven't demonstrated how reporting Osama is an attempt to collect. You've made clear your opinion that reporting Osama is an attempt to punish but there is no, I haven't heard a single word on your report yet that reporting Osama is an attempt by the bank to get money to repay the debt.

MR. COHN: It was my assumption and I wish this was more clearly spelled out in the affidavit, it was my assumption that the account debtor then went to Osama and said, okay here's cash, the whole thing that they would let [inaudible].

JUSTICE: Is there any evidence that is in the record?

MR. COHN: That is not in the record. That's why I started out saying that unfortunately you know, if hindsight was foresight the summary judgment evidence on my part on that point could have been a little better. But in evaluating a summary judgment the court is to indulge every reasonable inference in behalf of a non movement and I think when you read this affidavit as a whole that the 9.502 issue is still alive even though as I said before I still think [inaudible] bores you, this is a much stronger which is unfortunately not reached by the court's view.

JUSTICE: Any other questions? Thank you Counsel.

REBUTTAL ARGUMENT OF JANET E. MILITELLO ON BEHALF OF THE PETITIONER

MS. MILITELLO: May it please the Court. Riyad Bank operates in Texas. We were not talking about actions in Saudi Arabia except for this credit perform that occurred in the web because Riyad also operates in Saudi Arabia. What we can't lose sight of the fact, Riyad operates in Texas. The loan it issued was made in [inaudible]. The security agreements spelled out what the bank would do in the event of a default. The bank not only did all of that but went beyond the contractual requirements. We can't read in more to what if you had posted it somewhere else. If you have gone to the Saudi Consulate, maybe if you had called up some guy in Saudi Arabia you might have found somebody interested. Every single foreclosure sale could always be attacked by somebody saying I have another idea of how you could conduct this sale. There has got to be --

JUSTICE: Suppose, suppose though the debtor comes forward and says we are in a unique business enterprise. There foreclosing on the product of this unique business enterprise. And they simply posted the courthouse where they'll gonna sell it and only got ten dollars for it. Plan because if they had simply advertised with the unique business enterprises who used this unique product, they would have generated a positive cash sale. Isn't that some evidence that is not commercially reasonable?

MS. MILITELLO: Not in this case because the debtors in this case particularly Gailani and Adel are officers and directors of Banderia. It is Gailani's other company. Notice was given to Gailani, appropriate notice more notice was then required was given to this foreclosure sale.

JUSTICE: So that's a factual specific reason why this isn't a commercially unreasonable as opposed to generally speaking.

MS. MILITELLO: I also think that with you have account receivable.

As the comments to the code section state, you're there to unique type of collateral that the debtor has opportunity to go out and to collect. In this case, if they were not so apparently worthless, if the debtor thought there was value to this collateral, he could have perform the post input foreclosure collected the debt. Certainly could have tried Banderia if they thought they could have appeared at the foreclosure sale. The bankruptcy trustee walked away from these accounts to have a material issue of fact.

JUSTICE: That's the argument for any asset that gets foreclosed on. If the asset really had the value that the debtor says they have. They could have gone out of bound money to pay for that asset -- the general argument?

MS. MILITELLO: I think it count in this particularly instance, I don't think so because we have account receivable as the court notes. So as the code section notes, they are unique because there isn't a question of evaluation. If Banderia owes 2.9 million and that's the value and they have the money and were able to pay they could have just paid it over. We're not talking about tangible property where there might be a question as to the value. They could have then collected -- the debtor could have collected, Banderia could have come in and did. It certainly the bankruptcy trustee had a fiduciary duty to try and maximize for the creditors the value that he walks away from--

JUSTICE: But it means to say you're arguing facts that you want us to add up and decide as a matter of law.

MS. MILITELLO: No your Honor. But I do think that before an issue, before you can overturn a summary judgment it has to be oral. There has to be a genuine fiduciary material of fact.

JUSTICE: I thought your 9.504 is enough and file a full claim was dismissed by the trial court is not time would tell.

MS. MILITELLO: It is. It was raised. So there was a -- it was decided by the trial court and then they added counter claim and try their second attack. And both of them were dismissed. But 9.50 is a 9.504 argument originally as well as the 9.502 argument. All of it was briefed. Trial court granted summary judgment. The value of the accounts came up at the first instance. Then they raised this destruction of the collateral and as this Court has noted it makes no sense to destroy collateral if you are attempting to collect it. And I would call the Court's attention to page 6 of the respondent's brief on the merits, page 6 and 7. Here it clearly says that first, the bank took an unusual step for a lender that does not want to collect accounts. The bank foreclosed. And they say secondly, Riyad then placed the primary account that are on a blacklist. So, the respondent's brief clearly says foreclosure then blacklisting. What we have here is a situation where there's a request for the Court to indulge every inference and by that allow them to keep coming forward to change the facts allegedly the things there will never be a summary judgment available to a financial institution if that is allowed.

JUSTICE: But I'm confused again on the summary judgment standard of commercial reasonableness. I keep hammering this but the affidavit of Paul Travis which I presume was offered by the bank to establish as a matter of law commercial reasonableness. There is no real statement about -- it says what was done in a very limited manner in terms of dispensing of the collateral. Gailani's affidavit on the other hand purports to qualify him as an expert in business affairs and commercial transactions and says based on the foregoing I concluded that the sale was not commercially reasonable. Does the bank need someone to make a sort of expert type of conclusion that it was a commercially reasonable

sale, That you're familiar with sales of this type of collateral. I mean isn't that an expert perhaps determination. It doesn't it make some sort of statement to that effect?

MS. MILITELLO: No, your Honor. I do not think that needs to be in -- to have an expert then come back, make that kind of determination. They always have to have factual development for this reason. The bank's has the duty to show that it foreclosed [inaudible] that's what makes the affidavit because it says how all the things that the bank did is not only what the agreements require but even the non that you think is required. The fact that Mr. Gailani comes back in and says, I don't think that it was commercially reasonable because I don't think it was good enough to notice. And I don't think the value was enough based on what he says. I gave him the per se [inaudible] to the affidavit and [inaudible] of the court looks at that and says, all right if there's a material issue then you push your material fact. I can't find summary judgment. Looks at those two issues and the trial court determine that it just got noticed gave, the bank gave more notice, posted, and did what was required under the security rule. And there's nothing in any law that says then we have to go back and do even more. And we did what was commercially reasonable for among the Houston, Texas. We were talking about borrowed money in Houston, Texas. One of the debtors still lives in the United States. So the same with --

JUSTICE: Can you point me to the part of the security agreement that charge the foreclosure.

MS. MILITELLO: Just hold on a second. But while we're pulling that, to complete the answer the last part of it with respect to the value of the collateral began into the trial court did us, look at this and say, all right, there has been an issue of whether the value was great enough. And then the court did an analysis and says, has a genuine issue of material fact been raised? And what the court then ruled that and said, what is the evidence about values? Here we have Banderia the account debtor being an affiliated company of the debtor with offices and directors of the debtor of Banderia. They didn't come to the foreclosure sale. They didn't bid the foreclosure sale. The bankruptcy trustee walked away from these assets. There are no -- there is no paper to support this account receivable. They disappeared in a mysterious fire.

JUSTICE: Well again -- I'm trying to find it. When you say you complied with the security agreement, are you talking about Section 6.02(a)?

MS. MILITELLO: Yes, your Honor.

JUSTICE: Where does it say anything about how the sale will be conducted?

MS. MILITELLO: With respect, about two- thirds of the way down. The requirement is sending reasonable notice that should be met. The section notice is mailed postage prepaid to debtor at the address designated at the beginning --

JUSTICE: That's notice to the debtor of the sale. Where does it define what would be a commercially reasonable sale?

MS. MILITELLO: I think that under the security agreement when the parties contracted to -- this would be rights in going back to the [inaudible] what the bank is required to do.

JUSTICE: Well, I understood you to say that the security agreement the bank complied with its posting and foreclosure notice requirements but that's not what this says. The summary deals with notice to the debtor of the foreclosure sale. So, still it's governed by a general

commercial reasonableness. They don't, the parties didn't agree as what will be commercially reasonable.

MS. MILITELLO: No.

JUSTICE: Okay.

MS. MILITELLO: No more than what's in this agreement. I do think the agreement they went beyond the notice and again by giving the debtor more notice, if the debtor could come to Riyad Bank and say, fine you are posting in the Houston pawn visit, Texas law or Houston law. We're posting the Houston Chronicle, we've posted at the court house but we think that there is X, Y, Z person in Saudi Arabia that might be interested in this sale. You'll give notice there. They remain silent. They didn't come to the bank. They didn't come to the foreclosure sale. So what we will be doing is adding a level to a bank to save every situation, the bank then post by what is considered commercially reasonable and for a bank in Houston. The bank undertook what is commercially reasonable but now it has to sit back and say, "Hmm, after we conduct this foreclosure sale, I wonder what it is the debtor wants to come back later and challenges on." You could never have finality. There will never be able to be -- you will be on a step by step basis with backup on the very first case this Court heard this morning. There would never be able to be a standard. You'd have to look at each debtor and the particular significance and do they have maybe contact somewhere else in the world, somewhere else into space that has to also be noticed. And that would become a, you know, again banking law particularly difficult.

JUSTICE: Any other questions? Thank you, Counsel. That concludes today's arguments. The Marshall will adjourn the Court.

SPEAKER: All rise.

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