IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 11-11166

TERRA PARTNERS,

Plaintiff – Appellant Cross-Appellee

v.

RABO AGRIFINANCE, INC., AG ACCEPTANCE CORPORATION,

Defendants – Appellees Cross- Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION
CIVIL ACTION NO. 2:08-CV-194-J

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate disqualification or recusal.

Appellant:
Terra Partners, a general partnership comprised of:
Williams & Veigel, Inc.
Burnett & Veigel, Inc.
Kirk & Veigel, Inc.
Massey, Kirk & Veigel, Inc.

Other interested parties:
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Robert Veigel
Ella Marie Veigel
Bill and Holly Kirk

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REQUEST FOR ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a), oral argument should be granted because it will significantly aid the decisional process. This is an appeal from three consecutive summary judgments that resulted in the dismissal of Appellant's complaint for conversion damages and declaratory relief. There are numerous grounds on which the district court erred in its rulings, and oral argument will assist the Court of Appeals in understanding the rulings and the basis for error in those rulings based on the record and decisional law.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES, RULES

SECONDARY AUTHORITIES

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TO THE HONORABLE JUSTICES OF THE
UNITED STATES FIFTH CIRCUIT COURT OF APPEALS:

Appellant Terra Partners ("Terra Partners"), Plaintiff below, hereby submits its Appellant's Brief in support of its appeal as follows:

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court of a suit brought by Appellant Terra Partners against Appellees Rabo Agrifinance, Inc. ("Rabo")[1] and Ag Acceptance Corporation ("AAC")[2], sometimes collectively referred to as the "Rabo parties," for conversion of personal property and for declaratory relief.

[1] Rabo was a successor in interest to Ag Services of America Inc. ("ASA"), an agricultural lender based in Iowa. It is part of the Rabobank Group, owned by a Dutch entity.
[2] AAC was a wholly owned special purpose subsidiary of ASA and is now also a member of the Rabobank Group.

This Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1291, since the judgment of the district court is a final decision, and therefore appealable to this Court.

STATEMENT OF THE ISSUES

ISSUE ONE: An Issue of Fact Existed Whether Terra Partners Identified Its Property to Support Its Claim for Conversion.

ISSUE TWO: The Court Erred in Applying Equitable Principles to Deny Enforcement of the Diversified Lien

ISSUE THREE: A Fact Issue Was Presented Whether AAC's September 2, 2003 Foreclosure On Its Original 3rd Lien Deed Of Trust Cut Off Diversified's 3rd Lien

ISSUE FOUR: The Diversified Lien Attached to the 75% Interest in the 960 Acres960 Acres

ISSUE FIVE: The Court Erred in Holding That Robert Veigel's Payment of the Diversified Judgment Extinguished Its Lien in the 25% Interest in the 960 Acres

ISSUE SIX: The Court's Finding of Collateral Estoppel Applied to Bar Appellant's Conversion Claim Based on Earlier Objections to Sale Credits Was Inconsistent With Applicable Law

ISSUE SEVEN: The Court Erred In Concluding Rabo's Fraudulent Transfer Claim Was Revived

ISSUE EIGHT: A Fact Issue Existed Whether Robert Veigel Was Insolvent At The Time He Assigned The Diversified Judgment to Terra Partners

ISSUE NINE: The Court Erred In Concluding Res Judicata Did Not Bar The Fraudulent Transfer Claim

ISSUE TEN: The Court Erred in Holding The Eviction Was Pursuant to a Judicial Order Rather Than Self-Help Which Required No Breach of Peace

ISSUE ELEVEN: The Court Erred in its Legal Determination that Terra Partners Was Bound by the Waiver in the Security Agreements

ISSUE TWELVE: The Court Misapplied Texas Law in Concluding that Terra Partners Presented No Evidence of Damages

STATEMENT OF THE CASE

Terra Partners filed a state court complaint[3] which the Rabo parties removed to the U.S. District Court for the Northern District of Texas, Judge Mary Lou Robinson, presiding.

Following discovery and pretrial submissions to the Court, the Rabo parties filed three successive motions for summary judgment.[4] The 1st motion was granted in part as to a portion of Terra Partner's conversion claim based on property it owned. The Court also denied Terra Partner's claim for declaratory relief as to the enforceability of its subrogation interest in the Diversified Judgment.[5]

The Rabo parties then filed their 2nd motion for summary judgment as to Terra Partners' conversion claim based on property retained by the Rabo parties following a court-ordered auction to satisfy the outstanding deficiency judgment owed by the various Veigel entities other than Terra Partners. Appellees also

[3] Record ("R") at p. USCA5 35-86.
[4] R. at USCA5 690-1110 (Ds' 1st MSJ) and T.P.'s Response at USCA5 1222-186, and T.P. Supplemental Response at USCA5 2907-2957; R. at USCA5 1222-1862 (2nd MSJ) and T.P.'s Response at USCA5 4084-4426; R. at USCA5 4771-5102 (3rd MSJ), and T.P.'s Response at USCA5 5104-5184.
[5] *Terra Partners v. Rabo Agrifinance, Inc.*, 2010 WL 3270225 (N.D.Tex. Aug. 18, 2010) ("1st MSJ Opinion"); Appx, Tab 2.

sought a determination that Robert Veigel's assignment of the Diversified Judgment was a fraudulent transfer. The Court granted this summary judgment.[6]

The Court directed Terra Partners to file a supplemental statement indicating whether any conversion claims remained.[7] Appellant filed its statement listing property possessed by Terra Partners under lease interests that was not addressed by the two prior rulings.[8]

The Rabo parties then filed their 3rd motion for summary judgment addressing the remaining conversion claim, which the Court granted.[9]

On the same day the Court issued its 3rd MSJ Opinion, it entered a Final Judgment dismissing Terra Partners claims and taxing costs.[10] Terra Partners then timely perfected its appeal to this Court.[11]

STATEMENT OF FACTS[12]

Appellant Terra Partners ("Terra Partners") is a Texas general partnership consisting of four family owned corporations[13] formed in 2000 for the purpose of farming land formerly owned by Terra XXI Ltd. ("Terra XXI") known as the Big

[6] *Terra Partners v. Rabo Agrifinance, Inc.*, 2011 WL 2413356 (N.D.Tex. Jun. 15, 2011) ("2nd MSJ Opinion").Appx., Tab 3.
[7] R. at USCA5 4711-4713.
[8] R. at USCA5 4723-4770.
[9] *Terra Partners v. Rabo Agrifinance, Inc.*, 2011 WL 5527292 (N.D.Tex. Nov. 8, 2011) ("3rd MSJ Opinion"); Appx., Tab 4
[10] R. at USCA5 5215; Appx., Tab 5
[11] R. at USCA5 5229-5230; Appx, Tab 6.
[12] Unless otherwise noted, the facts in this section are taken from the Court's 3 MSJ Opinions.
[13] Williams & Veigel, Inc. owned by Robert and Ella Marie Veigel, Burnett & Veigel Inc. owned by Steve Veigel, Kirk & Veigel, Inc. owned by Bill and Holly Kirk, and Massey Kirk & Veigel, Inc. owned by Bill and Holly Kirk and Steve Veigel.

Farm[14] and a 960 acre tract ("960 Acres")[15] (adjoining the Big Farm) in Deaf Smith County, Texas. On March 5, 2003, Veigel Farms Inc. assigned its lease interest in the Big Farm to Terra Partners.

Prior to 2000, Veigel Farm Partners ("VFP") had been the entity which farmed most of the Big Farm and all of the 960 Acres. VFP had purchased an irrigation system through Circle M Irrigation, which held a purchase money security interest in the irrigation equipment. Diversified Financial Services ("Diversified") acquired Circle M's interest, and obtained a state court judgment in May, 2000 against VFP and its guarantors, including Robert Veigel and Terra XXI. Both VFP and Terra XXI owned farming equipment which was used in VFP's and Terra Partner's farming and ranching operations.

Ag Services of America ("ASA") and Ag Acceptance Corporation ("AAC") had loaned VFP and Terra XXI approximately $2.15 million dollars between 1997-99 to conduct farming and ranching operations, secured by 2nd and 3rd liens on

[14] The Big Farm along with a two half sections subleased to Todd Northcutt comprise the approximately 5,662.88 acres in Deaf Smith County, Texas owned by Terra XXI on which First Ag Credit posted its original first lien deed of trust (No. 94-2566), ASA posted its original second lien deed of trust (No. 98-1253), and ACC posted its original third lien deed of trust (No. 98-1254) for foreclosure on September 2, 2003 which AAC claims title as result of its $20,000 credit bid on foreclosure of its original **third** lien deed of trust (No. 98-1254).

[15] The 960 Acres consisted of a 25% interest owned by Robert Veigel, individually, and a 75% interest owned by his family members. AAC initially purchased the 75% interest, conveyed it to Terra XXI per the order on the October 20, 2002 settlement agreement, and reacquired title in a foreclosure sale after Terra XXI defaulted on its obligations. Rabo later acquired Robert Veigel's 25% interest through a foreclosure sale held after AAC attempted to foreclose on it using the Diversified Judgment which AAC had obtained. Robert Veigel paid off the Diversified Judgment, filed a Notice of Subrogation, and assigned the Diversified Judgment to Terra Partners.

Terra XXI's property in Deaf Smith County, Texas and in New Mexico. VFP and Terra XXI also executed security agreements which gave the ASA and AAC a security interest in their crops, receivables and farm/ranching equipment.

VFP and Terra XXI filed chapter 11 bankruptcies in August and September 2000. Under the confirmed bankruptcy plans in January, 2002, ASA and AAC were to have a 2nd lien interest on all real property owned by Terra XXI.[16] Only Diversified's original judgment lien was carried forward as a 3rd lien on all real property owned by Terra XXI. The Rabo parties secured farming loan was reduced to $1.5 million, and as part of the post confirmation settlement dated October 20, 2002, AAC transferred title to the 75% interest in the 960 Acres to Terra XXI.

Following a default AAC conducted a non-judicial foreclosure on its original 3rd lien deed of trust (No. 98-1254) on September 2, 2003 on Terra XXI's Texas property, including the Big Farm. While litigation over the propriety of the foreclosure and AAC's eviction action made its way through the Texas courts, Terra Partners continued its farming operations on the Big Farm and 960 Acres.

[16] The 1st lien was held originally held by First Credit Bank of Texas, which had provided mortgage financing to Terra XXI and VFP in 1994.This lien was assigned to First Ag Credit, which was to have been given a 1st lien position in Terra XXI's confirmed plan. After confirmation of Terra XXI's bankruptcy plan, Rabo acquired the 1st lien interest, and AAC acquired Diversified's 3rd lien interest; R at USCA5 1466-1478 (Plan of Reorganization at 1471) and R at USCA5 1479-1483 (Order confirming plan).

AAC subsequently foreclosed on the 75% interest in the 960 Acres and filed a partition action in federal court, assigned to Judge Robinson (the "Partition Suit"). After acquiring the Diversified Judgment, AAC attempted to foreclose on Robert Veigel's 25% interest in the 960 Acres. However, Robert Veigel paid the Diversified Judgment in full to AAC, then filed a Notice of Subrogation Rights of record against his co-guarantors.[17] He foreclosed, without objection by the Rabo parties, on a home in Hereford based on his subrogated interest in the Diversified Judgment.[18] He then assigned the Diversified Judgment to Terra Partners in consideration for reduction of the loan obligation to Gee Brothers, who had loaned him funds to pay off the Diversified Judgment, and for payment of attorneys' fees and expenses of the Veigel parties in the state and federal court litigation.[19] Terra Partners then obtained a writ of execution to execute on the property on which AAC had foreclosed on Terra XXI on September 2, 2003. AAC filed suit in state court to quash the writ, then dismissed the suit after the writ expired.

Rabo filed a federal action, assigned to Judge Robinson, to reduce the deficiency owing on the original note given to ASA to judgment (the "Deficiency Suit"). Terra Partners was not a party to this action. In state court, the Rabo parties filed an injunction action seeking to prohibit the Veigel entities from

[17] R. at USCA5 4339.
[18] R. at USCA5 4133-4134.
[19] R. at USCA5 4135-4140.

removing any of the collateral from the Big Farm and 960 Acres (the "Equipment Suit"). After removal of the suit to federal court, again assigned to Judge Robinson, a preliminary injunction was granted prohibiting the removal of the collateral by the Veigel entities from the Big Farm and 960 Acres, but did not disturb Terra Partner's continued possession and use of the Big Farm and 960 Acres. Terra Partners was later joined as a defendant in the Equipment Suit.

In October, 2006, AAC obtained a writ of possession for the land it foreclosed upon on September 2, 2003, including the Big Farm. On October 23, 2006, using armed sheriff deputies, and coordinated by Rabo's counsel, Cliff Walton, the Rabo parties took possession of the Big Farm and the 960 Acres, and convinced the deputies not to allow the Veigels and Terra Partners to remove farming equipment and other personal items from the Big Farm to the 960 Acres. Four days after the eviction, Rabo's counsel wrote a letter to the Veigel's counsel indicating that the Rabo parties intended to conduct an inventory of personal property on the Big Farm and 960 Acres, and requested the Veigels identify any personal property remaining on the Big Farm and 960 Acres belonging to Terra Partners.

The Veigel's counsel agreed to the inventory, and indicated in his letter response that Terra Partners considered all farming property remaining on the

properties to be its property which it either owned or possessed.[20] Steve and Robert Veigel attended the inventory, and identified personal property belonging to Terra Partners and other Veigel entities, some of which was noted in the Inventory.[21]

Because at the time of the eviction and the farm inspection Terra Partners was not allowed to move its property to the 960 Acres to use in its farming operations, Terra Partners filed a state court suit in Deaf Smith County, Texas, claiming conversion by the Rabo parties of all personal property of Terra Partners owned, leased or otherwise possessed and used on the Big Farm and 960 Acres. Terra Partners also sought declaratory relief that it held a valid subrogation interest as a superior lien against the property of the Rabo parties, including the Big Farm and 960 Acres based on the Diversified Judgment.

The Rabo parties removed the state court suit to the Northern District of Texas, where it was assigned to Judge Robinson. After discovery and submission of pretrial materials, the Rabo parties filed three successive motions for summary judgment.

The first summary judgment sought to eliminate both Terra Partner's conversion claim and claim for declaratory relief based on the assigned Diversified Judgment, and for declaratory relief in favor of the Rabo parties regarding the

[20] R. at USCA5, 2871-2873.
[21] R. at USCA5, 2919-2947.

Diversified Judgment. In a Memorandum Opinion and Order dated August 18, 2010[22], Judge Robinson held that as to property owned by Terra Partners in place at the Big Farm and the 960 Acres at the time of the eviction and farm inventory, no conversion had occurred due to the Veigel's refusal to identify the specific property belonging to the Veigel entities, including Terra Partners.[23] Judge Robinson further held that there were issues of fact precluding summary judgment as to Terra Partners remaining conversion claims relating to property leased or being used by Terra Partners at the time of eviction.

As to the parties respective declaratory claims for relief related to the Diversified Judgment, Judge Robinson held that any right of subrogation for Terra Partners had not accrued because the deficiency judgment owed to Rabo by the Veigel entities, including Robert Veigel, on the notes originally given to ASA had not been satisfied, that the Diversified lien on the Big Farm was cut off by AAC's foreclosure, that Robert Veigel's payment of the Diversified Judgment extinguished any lien of Diversified on his 25% interest of the 960 Acres, and that Diversified's lien did not attach to the 75% interest because its 3rd lien was preserved under Terra XXI's confirmed bankruptcy plan only as to property owned

[22] *Terra Partners v. Rabo Agrifinance, Inc.*, 2010 WL 3270225 (N.D.Tex. Aug. 18, 2010) ("1st MSJ Opinion"); Appx., Tab 2.
[23] Judge Robinson's 1st MSJ Opinion referenced on pp. 9-10 Steve Veigel's testimony that the Veigels and Terra Partners were demanding to move **all** of the personal property to the 960 Acres.

by Terra XXI at the time its bankruptcy petition was filed, and Terra XXI did not own the 75% interest in the 960 Acres as of the date it filed bankruptcy.

The Rabo parties then filed their second motion for summary judgment addressing Terra Partner's conversion claim for property not sold but retained by the Rabo parties following a court-ordered auction sale in April 2008, and seeking a determination that the assignment of the Diversified Judgment by Robert Veigel to Terra Partners was a fraudulent transfer.

In a second Memorandum Opinion and Order[24], Judge Robinson held that the conversion claim was barred by collateral estoppel based on her earlier ruling on objections raised by the Veigels (not Terra Partners) in the prior Deficiency Suit. She also held that the assignment of the Diversified Judgment by Robert Veigel was a fraudulent transfer.

Following the entry of the 2nd MSJ Opinion, Judge Robinson directed Terra Partners to file a statement addressing any remaining cause of action it contended was not addressed in the two prior summary judgment rulings. In response, Terra Partners filed its Supplemental Complaint and Statement of Claim on Conversion,[25] which listed property not owned but possessed by Terra Partners at the time of eviction.

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[24] *Terra Partners v. Rabo Agrifinance, Inc.*, 2011 WL 2413356 (N.D.Tex. Jun. 15, 2011) ("2nd MSJ Opinion"); Appx, Tab 3.

[25] R. at USCA5 4723-4770 (Docket #149, filed 8/5/2011).

The Rabo parties then filed their third motion for summary judgment. In her Third Memorandum Opinion and Order[26], Judge Robinson held that Terra Partners' remaining conversion claim was limited to the personal property remaining on the Big Farm that Terra Partners leased or otherwise possessed, and not any property already on the 960 Acres. As to such property, the Court held the Rabo parties had a superior right of possession to the leased equipment under Rabo's security agreements with the Veigel entities (not Terra Partners), rejecting Appellant's evidence that the eviction was a breach of the peace and instead holding that the eviction was pursuant to judicial process. The Court further held that as the lessee of the equipment, Terra Partners was bound by the waiver of conversion claim in the security agreements. Finally, the Court held that the conversion claim failed because Terra Partners did not provide evidence of actual loss, and its damages evidence was too conjectural and speculative, and failed to satisfy the Texas law requirement of "reasonable certainty."

SUMMARY OF ARGUMENT

Judge Robinson erred in granting the 1st summary judgment because she ignored Terra Partners' evidence that it did identify property belonging to it, contrary to her conclusion that no conversion occurred as to owned property of Terra Partners due to its refusal to identify such property. Judge Robinson erred in

[26] *Terra Partners v. Rabo Agrifinance, Inc.*, 2011 WL 5527292 (N.D.Tex. Nov. 8, 2011) ("3rd MSJ Opinion"); Appx., Tab 4.

denying Terra Partners declaratory relief on the Diversified Judgment because Texas subrogation law precludes equitable considerations from being applied to a statutory subrogation interest. Further, there were fact issues whether Rabo had foreclosed on an inferior lien to the Diversified lien.

In the 1st summary judgment, Judge Robinson expressly ruled there were questions of fact precluding summary judgment with respect to: i) whether an agreement had been reached during the eviction concerning moving the property to the 960 Acres; ii) whether Terra Partner's oral lease to use the equipment was fraudulent; iii) whether the conversion action was barred by limitations or res judicata; and iv) whether the conversion action was waived by the security agreement.

Notwithstanding the presence of these factual issues, in the 2nd summary judgment, Judge Robinson held that collateral estoppel barred the conversion claim relating to property not sold at the court-ordered auction, and that the assignment of the Diversified Judgment was a fraudulent transfer.

Terra Partners submits that the Rabo parties failed to submit adequate summary evidence to establish the elements of collateral estoppel. Terra Partners and AAC were not parties to the Court's prior ruling on the Veigel's objections to the sale credits in the Deficiency Suit. Terra Partners, AAC and Rabo were parties

to the Equipment Suit in which Judge Robinson determined what property were fixtures and what property was subject to foreclosure sale.

With regard to the fraudulent transfer ruling, Terra Partners submits the Court erred in concluding that the amended complaint allowed the Rabo parties to revive their fraudulent transfer claim, which was not filed within one year as required by Tex.Bus.&Comm.Code §24.010, which is a statute of repose, not a statute of limitation. Terra Partners further submits that a fact issue existed whether Robert Veigel was insolvent at the time of the assignment of the Diversified Judgment to Terra Partners. Finally, the Court erred in determining that res judicata did not bar the Rabo parties' fraudulent transfer claim since it had been raised by the Rabo parties in prior litigation between the same parties.

Regarding the conversion claim on the 3rd summary judgment, the Court erred in concluding the eviction was by judicial process, rather than self-help, which required no breach of the peace. Further, the specific terms of the writ of possession did not authorize any execution on the personal property and the notice of eviction ordered the tenants to remove all personal property or have it removed by the Sheriff, so the Court's conclusion that no conversion had occurred was erroneous. The waiver of conversion clause in the security agreement was not binding on Terra Partners, and was not enforceable against Terra Partners under Texas law.

ARGUMENT AND AUTHORITIES

Standard of Review

"The appellate court in reviewing the record must determine whether there is any genuine issue of material fact underlying the adjudication, and if not, whether the substantive law was correctly applied." 6 J. Moore & J. Wicker, *MOORE'S FEDERAL PRACTICE* §56.27[1] (2d ed. 1988).

When a defendant moves for summary judgment on an affirmative defense, he must show the absence of a genuine issue of fact and establish each element of his defense as a matter of law. *Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741,744 (5th Cir. 1994).

The district court must resolve all reasonable doubts about the facts in favor of the non movant. *Cooper Tire & Rubber Co. v. Farese,* 423 F.3d 446, 456 (5th Cir. 2005).

A genuine issue of fact is one that can be resolved only by a trier of fact because it can be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2548 (1986). A fact is considered "material" when it is one that can affect the outcome of the suit under governing law. *Id.* at 248.

I.
1st Summary Judgment Ruling

ISSUE ONE: An Issue of Fact Existed Whether Terra Partners Identified Its Property to Support Its Claim for Conversion.

Judge Robinson held in the 1st MSJ Opinion that the Rabo parties made a reasonable request that Terra Partners identify property on the Big Farm it owned which Terra Partners refused to do. She concluded that Terra Partners' refusal to identify such property meant there was no conversion as a matter of law, relying on *Whitaker v. Bank of El Paso*, 850 S.W.2d 757, 760 (Tex.App.-El Paso 1993, no pet.).[27]

As the court noted in her opinion[28], Terra Partners did not own the Big Farm or owe any debt to the Rabo parties at the time of the eviction. Cliff Walston persuaded Deputy Ginter not to allow Terra Partners to remove any of its property from the Big Farm to the 960 Acres,[29] even though the Sheriff's notice of eviction, consistent with Texas law, instructed the tenants to remove all personal property or have it done by the Sheriff at the tenant's expense In doing so, the Rabo parties' conduct constituted an absolute refusal to recognize Terra Partners' ownership interest in the personal property.

[27] 1st MSJ Opinion at p. 7-8; Appx., Tab 2.
[28] Id. at p. 6.
[29] R. at USCA5 1345-1347, paragraphs 20-28 of Steve Veigel Affidavit.

TEXAS BUSINESS & COMMERCE CODE §9.210 places the burden on the *creditor* to identify collateral claimed by the creditor within 14 days upon request by a debtor. TEXAS BUSINESS & COMMERCE CODE §9.625(f) allows for recovery of damages if the creditor fails to comply with §9.210. A security agreement authorizing a creditor to repossess personal property is insufficient to establish that all personal property located at a location is owned by the debtor and encumbered by the security agreement. *Lighthouse Church of Cloverleaf v. Texas Bank,* 889 S.W.2d 595, 603-04 (Tex.App.—Houston [14th Dist.] 1994, writ denied).

The Rabo parties acquired plaintiff's property without any legal authority since it did not belong to them. *See* Uniform Commercial Code comments to TEXAS BUSINESS & COMMERCE CODE §9.609. Furthermore, a demand by the plaintiff is not required if the defendant's acts manifest a clear repudiation of the plaintiff's rights. *In re ACM-Texas, Inc.*, 430 B.R. 371 (Bky, W.D. Tex. 2010) (citing *Cass v. Stephens,* 156 S.W.3d 38, 61 (Tex. App.-El Paso 2004, pet den) *cert den*. 552 U.S. 819).

The Court's holding ignored the crucial facts that the temporary injunction in the Equipment Suit did not prohibit moving the personal property to the 960 Acres and that it was the Rabo parties who initially refused Terra Partners permission to remove its personal property from the Big Farm. The Texas courts in similar circumstances have held that such a refusal to return property is not

saved by a later request to identify ownership in the property. See, *Stein v. Mauricio,* 580 S.W.2d 82, 83 (Tex.Civ.App.-San Antonio 1979, no writ) (rejecting argument that owner of jukeboxes required to establish ownership before conversion can occur). See also, *Hamilton v. McLean*, 2000 WL 502828 *2 (Tex.App.-Austin 2000, no pet.) (rejecting argument that court should have submitted qualified refusal as instruction to jury) (unpub. op.).

Further, the Texas courts have also recognized that the issue of qualified refusal presents an issue of fact for the jury to resolve. See, *Smith v. Maximum Racing, Inc.,* 136 S.W.3d 337, 344 (Tex.App.-Austin 2004, no pet.); *Hofland v. Elgin-Butler Brick Co.,* 834 S.W.2d 409, 413 (Tex.App.-Corpus Christi 1992, no pet.); *Earthman's Inc. v. Earthman,* 526 S.W.2d 192, 204 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ).

There was no legal duty on Plaintiff to immediately respond to Defendants' demand to identify property. In any event, Plaintiff did not refuse to identify property to which it had a superior right of possession. At the eviction proceedings, Steve Veigel informed both Defendants' counsel, Cliff Walston, and Deputy Ginter, that all of the equipment located on the farm belonged to Terra Partners[30] Further, following completion of the eviction process, counsel for Terra Partners, Van Northern, responded to a letter from Defendants' counsel, Tom

[30] R. at USCA5 2472-2484 (Ex. G, Steve Veigel depo, p. 56 at lines 13-25; p.57 at lines 1-2; p. 135 at lines 1-25; page 136 at lines 1-15; p. 161 at lines 16-25; p. 162 at lines 1-6).

Riney, in which he reaffirmed that all of the equipment which remained on the farm belonged to Terra Partners and demanded it be returned.[31].

Finally, an inventory of the personalty left on the farm after the eviction was prepared in which the specific items were identified as property belonging to Terra Partners directly or through its right of ownership under its lease agreements for the property.[32] This inventory was made an exhibit to this Court's judgment in the *in rem* Equipment Case.[33]

Thus, the summary judgment evidence presented did not establish the Rabo parties qualified refusal defense as a matter of law, and a question of fact for the jury was present whether their request under the circumstances was reasonable given their initial refusal to allow Terra Partners to remove its property from the Big Farm to the 960 Acres.

ISSUE TWO: The Court Erred in Applying Equitable Principles to Deny Enforcement of the Diversified Lien

The Court, while recognizing in the Equipment Suit that Robert Veigel had subrogation rights held that Terra Partners was precluded from enforcing that assigned right because Robert Veigel had not paid off the Rabo parties debt secured by a 2nd lien on the irrigation equipment.[34] The Court's analysis was based

[31] R. at USCA5 1811-1813 (Ex. J-59 at PACER Document No. 35-70).
[32] R. at USCA5 4740-4770.
[33] R. at USCA5 2921-2947 (PACER Doc. #77-2 in Cause 2:06-CV-000153-J).
[34] 1st MSJ Opinion at pp. 15-16; Appx., Tab 2.

on its prior holding in the Equipment Suit, but that suit only considered the right of subrogation in the context of the irrigation equipment, and did not address it in the context of effectuating a lien against real property owned by the principal (Terra XXI), as provided for in Tex.Civ.Prac.&Rem.Code § 43.004(b)(1), which provides:

> (b) A surety who pays on a judgment as described in Subsection (a) is subrogated to all of the judgment creditor's rights under the judgment. A subrogated surety is entitled to execution on the judgment against:
>
> (1) the principal's property for the amount of the surety's payment, plus interest and costs;

In *Great Am. Ins. v. North Austin MUD,* 908 S.W.2d 415, 424 (Tex. 1995), the Texas Supreme Court held that "Suretyship …allows a surety full rights of indemnity against its principal.

The Texas Supreme Court has held that contract-based subrogation rights should be governed by the parties' express agreement, and are not invalidated by equitable considerations, such as prejudice to another lienholder, which might control in the absence of an agreement. *Fortis Benefits v. Cantu,* 234 S.W.3d 642, 648-50 (Tex. 2007).

In the context of statutory subrogation rights, the Texas courts have held that subrogation rights are paramount over the right of a party to receive reimbursement, and the courts are precluded from using their equitable powers to prevent the surety's right to first money reimbursement. See, *Resolution Oversight*

Corp. v. Garza, 2009 WL 1981424 *4 (Tex.App.-Austin 2009, no pet.) (analyzing subrogation rights under Tex.Lab.Code § 417.002 governing workman's compensation benefits) (unpub. op.). See also, *Tex. Worker's Comp. Ins. Fund v. Knight*, 61 S.W.3d 91, 94 (Tex.App.-Amarillo 2001, no pet.).

The Court erred by applying equitable principles to limit Terra Partner's statutory right of subrogation against its principal's real property, ie., Terra XXI's interest in the Big Farm and 960 Acres.

ISSUE THREE: A Fact Issue Was Presented Whether AAC's September 2, 2003 Foreclosure On Its Original 3rd Lien Deed Of Trust Cut Off Diversified's 3rd Lien

The Court resolved issues of fact adversely to Terra Partners in its construction of Terra XXI's bankruptcy plan and its holding that the Diversified lien was inferior to the 3rd lien deed of trust (No. 98-1254) on which AAC foreclosed on Terra XXI's property.[35] The Court erred in holding that AAC foreclosed on the 2nd lien because ASA pulled down its posted sale on its 2nd lien deed of trust (No. 98-1253) when AAC was the only bidder.

Only Diversified as a holder of an allowed secured claim expressly preserved its original liens.[36] The Terra XXI Plan, § 3.06 provides that the

[35] 1st MSJ Opinion at 16-21; Appx., Tab 2.
[36] R. at USCA5 1482 and 1535 (See paragraph 6 of Exhibit A to Terra XXI and Veigel Farm Partners confirmation orders attached as Exhibits 12 and 25 to affidavit of Steve Veigel).

Diversified judgment lien is the only 3rd lien on Terra XXI's real property. This was the only original lien preserved under Terra XXI's confirmed plan.

However, Shawn Smiens, Rabo's Chief Operating Officer/Managing Director, testified at trial in the state court case (CI-04B-011), that AAC foreclosed on its original deed of trust (No. 98-1254), which was its "third or fourth" lien subject to the Diversified lien.[37] Thus, AAC foreclosed on its original 3rd lien deed of trust which was not allowed under the Terra XXI Plan, instead of ASA's original 2nd lien deed of trust which was also posted for foreclosure the same day.

To protect its lien position vis-à-vis Diversified (whose lien AAC later acquired), Rabo (ASA) could have either foreclosed on its second lien, or request that Diversified subordinate its lien to AAC's existing deed of trust, since Diversified also held a purchase money security interest in the irrigation system on the property. AAC chose to do neither, instead foreclosing on an inferior lien subject to the Diversified lien, as testified to by Shawn Smiens, AAC's representative.

Further, Rabo and AAC could have requested as part of their declaratory relief in the Equipment Suit that the district court adjudicate that the Diversified lien was extinguished by AAC's September 2, 2003 foreclosure on Terra XXI's property , which they failed to do.

[37] R. at USCA5 1814-1820 (TP Ex. J-60).

Terra Partners presented evidence raising an issue of fact whether Rabo's representative's testimony established that AAC foreclosed on an inferior lien to the Diversified judgment lien.

ISSUE FOUR: The Diversified Lien Attached to the 75% Interest in the 960 Acres960 Acres

The Court held that the Diversified judgment lien could not attach to the 75% interest in the 960 Acres because Terra XXI did not own this interest at the time of its bankruptcy.[38] The Court relied on language in the confirmed Terra XXI plan[39] that the Diversified claim will be secured by Diversified's existing abstract of judgment lien on all real estate owned by Terra XXI …on which Diversified held liens on the date of the filing of bankruptcy.[40] However, the confirmed plan did not address real property acquired by Terra XXI post-confirmation. Under applicable law, the plan was required to "deal with" such property in order for the pre-petition judgment lien of Diversified to be extinguished. See, *Elixir Industrial, Inc. v. City Bank & Trust Co. (In re Ahern Enterprises, Inc.)*, 507 F.3d 817 (5th Cir. 2007).

Terra XXI's confirmed plan expressly provided that Diversified's pre-petition lien would be preserved.[41] Subsequent to plan confirmation, the parties

[38] 1st MSJ Opinion at p. 18; Appx., Tab 2.
[39] R. at USCA5 1474 (¶3.06).
[40] 1st MSJ Opinion at p. 18; Appx., Tab 2.
[41] R. at USCA5 1474.

entered into a settlement agreement in which AAC agreed to convey the 75% interest in the 960 Acres to Terra XXI or its assignee.[42]Terra XXI acquired title to the 75% interest in the 960 Acres by warranty deed with vendor's lien dated 8/7/03, effective as of 10/21/02, but not tendered and recorded until 8/25/03. However, AAC did not judicially foreclose on its vendor's lien; instead it non-judicially foreclosed on a deed of trust dated 8/14/2003, effective 10/21/2002, but not tendered and recorded until 8/25/2003. The gap in the effective dates, execution dates, tender and recording dates, raises a question of fact whether AAC's deed of trust was part of a contemporaneous single transaction which precluded Diversified's judgment lien from becoming an intervening lien to which AAC's title from its non-judicial foreclosure was subject to.

There is no question that under Texas law, the existing judgment lien of Diversified would attach to the 75% interest in the 960 Acres once Terra XXI acquired ownership of that interest. Texas Property Code § 52.001 states:

> Sec.52.001.ESTABLISHMENT OF LIEN. Except as provided by Section 52.0011 or 52.0012, a first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, if the judgment is not then dormant, **constitutes a lien on and attaches to any real property of the defendant,** other than real property exempt from seizure or forced sale under Chapter 41, the Texas Constitution, or any other law, that is located in the county in which the abstract is recorded and

[42] R. at USCA5 1543-1547 (Settlement), USCA5 1548-1561 (Hearing Transcript), USCA5 1562-1567 (Order Clarifying Settlement) and USCA5 1568-1584 (New Clarified Settlement).

indexed, **including real property acquired after such recording and indexing**.

The Rabo parties relied on 11 U.S.C. § 1141(d) in stating that confirmation of a plan discharges the debtor from all pre-petition debts. However, they ignored the precatory language, "except as otherwise provided in the plan." Here, the confirmed plan, as noted above, preserved Diversified's pre-petition lien and provided that Diversified could pursue "Terra XXI and its property" in the event that the debtor defaulted and failed to cure the default, which is not disputed.

Thus, pursuant to the express provisions of the confirmed plan, and by operation of Texas law, Diversified's lien attached to the 75% interest when Terra XXI acquired the 75% interest from AAC by warranty deed.

ISSUE FIVE: The Court Erred in Holding That Robert Veigel's Payment of the Diversified Judgment Extinguished Its Lien in the 25% Interest in the 960 Acres

Texas law has consistently recognized that when a surety, which includes a guarantor of an obligation, pays an indebtedness or judgment owed by the primary obligor, then the surety becomes subrogated to the rights of the creditor, including the right to enforce the deed of trust lien or judgment lien, as applicable. See, *Navarro Oil Co. v. Cross,* 200 S.W.2d 616, 618 (Tex. 1946); *McShaffry v. Amegy Bank Nat'l Ass'n,* 332 S.W.3d 493 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (while payment of judgment extinguishes debt, Section 34.04 provides subrogation rights for guarantors who have paid a judgment, who may assert rights against co-

guarantors for proportionate share of payment); *Gregg v. Tx. Bank & Trust Co.*, 235 S.W. 689, 694 (Ct. App. 1921, writ ref'd) (surety who paid off two notes and interest on third note held subrogated to rights of plaintiff and to enforcement of liens); *Eustis v. Frey,* 204 S.W. 118, 119 (Tex.Civ.App.-Amarillo 1918, writ ref'd) (surety paying debt held subrogated to securities, liens and priorities of creditor to extent of payment on debt); *Billingsley v. West,* 197 S.W. 1054 (Tex.Civ.App.-El Paso 1917, no writ) (sureties subrogated to rights of bank under deed of trust and entitled to foreclosure; lien not extinguished, but preserved for their benefit); *Darrow v. Summerhill,* 58 S.W. 158, 162 (Tex.Civ.App.-Dallas) *aff'd*, *Summerhill v. Darrow,* 57 S.W. 942 (Tex. 1900) ("It is well settled that when a surety is compelled to pay the debt of his principal, subrogation to the rights of the creditor follows").

The federal courts applying Texas law, have reached the same conclusion. See, *Dietrich Ind. Inc. v. U.S.,* 988 F.2d 568, 569, 571-72 (5th Cir. 1993) (purchaser discharging senior lien entitled to subrogate that lien over a junior recorded lien); *Hurt v. Read,* 108 F.2d 282, 283 (5th Cir. 1939) (Sureties held entitled to be subrogated to rights of lienholders whose debt was paid to protect property); *Ross v. Brown,* 396 F.Supp. 192, 196 (E.D. Tex. 1975) (sureties who paid debt to protect title to land have equitable lien to property).

By paying off the Diversified Judgment, Robert Veigel extinguished the debt (and thus had no further liability for same), and became subrogated to collect from the primary obligor (VFP) and his co-sureties, including enforcement of the existing judgment lien. That Terra Partners, in accepting assignment of such rights, released Robert Veigel and his wife from further liability is of no moment, because the lien was already preserved through subrogation for enforcement against the primary obligor and co-sureties.

Since the Rabo parties received payment of the Diversified Judgment, they cannot complain that Robert Veigel, and Terra Partners, as assignee, succeeded to their lien rights, particularly when the Rabo parties, while they owned the judgment lien, took no steps to satisfy the Diversified debt or subordinate the Diversified lien to their other existing liens on the property. Under Texas statutory subrogation law, equitable considerations such as prejudice to a debt holder, are inapplicable. *Fortis Benefits v. Cantu,* 234 S.W.3d 642, 648-50 (Tex. 2007). The Rabo parties cannot suffer prejudice by reason of Terra Partners enforcement of the Diversified lien rights, as their debt represented by such lien, was paid in full to them. See, *Murray v. Cadle*, 257 S.W.2d 291, 302 (Tex.App.-Dallas 2008, pet. denied) (creditor in no worse position than it occupied before debt paid, and failed to offer evidence to show it was prejudiced).

For these reasons, the Rabo parties were not entitled to summary judgment on the basis that Terra Partners' release of Robert Veigel in the assignment prevented the Diversified lien from attaching to the 25% interest of the 960 Acres.

II.
Second Summary Judgment Ruling

ISSUE SIX: The Court's Finding of Collateral Estoppel Applied to Bar Appellant's Conversion Claim Based on Earlier Objections to Sale Credits Was Inconsistent With Applicable Law

The Rabo parties cited Texas case law on collateral estoppel.[43] Since the underlying cases were all federal cases before this Court, the federal law of collateral applies. See, *In re Horne,* 2011 WL 350473 (W.D. Tex. Feb. 2, 2011) (denying parties summary judgment on collateral estoppel) *citing Recoveredge, LP v. Pendecost,* 44 F.3d 1284, 1290 (5th Cir. 1995).

The federal test requires that the party seeking to invoke collateral estoppel must establish that there was a final judgment in the prior action and that 1) the parties must be identical; 2) the issue at stake is identical to the one involved in the prior action; 3) the issue must have been actually litigated in the prior action; and 4) the determination of the issue must have been a necessary part of the judgment in the prior suit. *Id.; see also, In re Keaty,* 397 F.3d 264, 270-71 (5th Cir. 2005).

The key difference between Texas and federal law on collateral estoppel is that the issue actually litigated must be identical to the issue sought to be

[43] R at USCA5 3772-3773 (Brief at pp. 5-6).

subsequently litigated for federal collateral estoppel to apply. Courts within the 5th Circuit deem an issue to have been "actually litigated" if the prior court conducted a hearing at which the parties appeared and gave evidence. *Id.* While there is no specific requirement of a trial or evidentiary hearing in order for collateral estoppel to apply, there must be specific, subordinate, factual findings made by the prior court in resolving the issue. *In re Keaty*, 397 F.3d at 273.

Here, there was not identity of the parties in the Deficiency Suit, since neither Terra Partners nor AAC was a party to that action,.[44]. Moreover, the issue of the sale credits to be applied after the Court-ordered sale is not the same issue whether the Rabo Parties *converted* property previously identified and declared to be "personal property" and not "fixtures" in the EQUIPMENT SUIT belonging to, or leased by Terra Partners.[45] Even if the issues were the same, there were no specific findings made by the Court on the VEIGELS' post-judgment *pro se* objections to which Terra Partners was not a party and was not represented by counsel. Due process requires that Terra Partners receive a full and fair adjudication related to

[44] Terra Partners was a party to the EQUIPMENT SUIT and the PARTITION SUIT. The fact that Terra Partners was a party in these actions does not help because **there was no order ever entered in the EQUIPMENT SUIT or the PARTITION SUIT on the VEIGELS' *pro se* objections that can serve as a basis for collateral estoppel or *res judicata.*** Further, identity of issues is lacking in those matters.

[45] The Rabo Parties acknowledged that a dispute exists over the property leased by Terra Partners. See R. at USCA5 3768 (DEFENDANTS' Brief at p. 1, n. 1). However, Terra Partners' claim of conversion is not dependent on any lease as all rights to claims of conversion of the property were assigned to Terra Partners by the owners of all of the leased property. R at USCA5 4387-4393.

property retained and converted by the Rabo parties following the Court-ordered sale.

Further, the Rabo parties and Terra Partners are bound by the final judgment in the Equipment Suit which adjudicated what was personal property subject to sale and what constituted fixtures.

For all of these reasons, the Rabo parties failed to establish that res judicata or collateral estoppel bars the Court's consideration of Terra Partners' remaining conversion claim, and summary judgment should have been denied on this basis.

ISSUE SEVEN: The Court Erred In Concluding Rabo's Fraudulent Transfer Claim Was Revived

The Court held that the Rabo parties' fraudulent transfer claim was timely brought because it was asserted in a counterclaim within 30 days of the filing of an amended complaint by Terra Partners adding assertions pertaining to the declaratory relief sought on the Diversified Judgment.[46]

Pursuant to the statue of repose, TEX. BUS. & COMM. CODE §24.010(a)(3), a fraudulent transfer claim is extinguished and cannot be tolled unless the action is

[46] 2nd MSJ Opinion at p. 9; Appx., Tab 3. Terra Partners had filed a Motion to Strike the Counterclaim (R. at USCA 1115-1121) based on the Rabo parties lack of capacity to bring such action due to failure to properly register as a bank in Texas, which the Court denied (R. at USCA 2787). Because Appellant believes Judge Robinson's holding that the fraudulent transfer was revived is clearly contrary to Texas law, as discussed infra, it has not separately briefed the denial of this Motion, which was part of its notice of appeal. Appx., Tab 6. Appellant reserves the right to address this issue in later briefing to the Court, or in response to Appellees' cross-appeal.

brought …within one year after the transfer was made. TEX. BUS. & COMM. CODE § 24.006(b).

Robert Veigel assigned his subrogation claim to Terra Partners on September 12, 2006, recorded as instrument no. 06-2787 in the Official Public Records of Deaf Smith County on November 16, 2006.[47] In addition to the constructive notice provided the Rabo parties from such recordation, Terra Partners' writ of execution was issued on November 9, 2006 and served on AAC prior to AAC filing suit to quash such writ on November 29, 2006.[48] The Rabo parties filed their counterclaim for fraudulent transfer in this matter on 4/20/2009, more than 2 ½ years later.[49]

The Rabo parties cannot avail themselves of the Texas "revival statute," Tex. Civ. Prac. & Rem. Code §16.069, which allows claims arising in the same underlying transaction or occurrence otherwise barred by *limitations* to be asserted within 30 days of the date their answer was due.

The Texas courts have clearly held that a revival is precluded when the cause of action is governed by a statute of repose. See, *Galbraith Eng. Consultants, Inc. v. Pochucha,* 290 S.W.3d 863, 866-869 (Tex. 2009); *Lawrence v.*

[47] R. at USCA5 4135-4140.
[48] R. at USCA5 4217-4221 (Writ) and USCA5 1352 (AAC's Petition to Invalidate Writ).
[49] R. at USCA5 671-689.

Bottling Group LLC, 2011 WL 2449513 *3 (Tex.App.-Dallas 2011, no pet.) (following *Galbraith*) (unpub. op.).

The Austin court of appeals in *Cadle Co. v. Wilson,* 136 S.W.3d 345, 350 (Tex.App.-Austin 2004, no pet.) specifically found that Tex.Bus.&Comm.Code §24.010, is a statute of repose, and that the discovery rule required the creditor to bring a fraudulent transfer claim within one year of the date of discovery of the fraudulent transfer.

Under *Galbraith* and *Wilson,* the Court erred in holding that the Rabo parties fraudulent transfer was timely brought.

ISSUE EIGHT: A Fact Issue Existed Whether Robert Veigel Was Insolvent At The Time He Assigned The Diversified Judgment to Terra Partners

The Rabo parties' 2nd MSJ presumed, but failed to present any summary judgment evidence that Robert Veigel was insolvent at the time he transferred his subrogation rights to Terra Partners.[50] This assumption overlooks the fact that Robert Veigel paid the Rabo parties $551,052.21 as demanded on June 30, 2006 to satisfy in full the Diversified Judgment, and subsequently obtained a writ of execution and foreclosed on a property in Hereford using his subrogation rights.[51] In the absence of *any summary judgment evidence establishing the insolvency* of

[50] See R. at USCA5 3777 (Defendants Brief at p. 10).
[51] See, EQUIPMENT SUIT opinion, *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.,* 2007 WL 2446278 (N.D. Tex. 2007).

Robert Veigel, the Rabo parties were not entitled to summary judgment on their fraudulent transfer claim.

Moreover, a transfer is not fraudulent if made for reasonable consideration. As stated in the September 12, 2006 assignment, Terra Partners' consideration for such assignment included satisfaction of Robert Veigel's debt owed to Terra Partners as the result of the encumbrance and subsequent sale of Terra Partners' 25% undivided interest in Section 138 and the East One-Half of Section 139, Blk M-7, Castro County, Texas.[52]

Given the litigation expenses against the Rabo parties that Terra Partners has incurred seeking to enforce its subrogation rights in the Diversified Judgment in the Equipment Suit and this matter, it certainly appears that Terra Partners consideration paid to Robert Veigel greatly exceeded the value of his right of subrogation to the Diversified Judgment, especially in the absence of any evidence to the contrary from the Rabo parties.

ISSUE NINE: The Court Erred In Concluding Res Judicata Did Not Bar The Fraudulent Transfer Claim

The issue whether Terra Partners or Robert Veigel was entitled to exercise subrogation rights to the Diversified Judgment was before the Court in the EQUIPMENT SUIT. In the EQUIPMENT SUIT, the Court issued a final judgment and ruled that Robert Veigel had a valid subrogation interest which he validly assigned

[52] R. at USCA5 4135-4140.

to Terra Partners, but that Terra Partners could not exercise Robert Veigel's, subrogation rights against the personal property subject to the purchase money first lien of Diversified Judgment until the underlying deficiency owed to Rabo secured by Rabo's 2nd lien on such property was paid in full.[53] See, *Rabo Agrifinance, Inc. v. Terra XXI, Ltd., et al.,* 2007 WL 2446278 (N.D. Tex. 2007)[54] At no time did the Rabo parties assert in the EQUIPMENT SUIT, the PARTITION SUIT, or in AAC's state court suit to enjoin and quash Terra Partners' writ of execution under the Diversified Judgment that the assignment of the Diversified Judgment from Robert Veigel to Terra Partners was a fraudulent transfer.[55]

[53] Even though the Rabo parties proclaimed in the EQUIPMENT SUIT and the DEFICIENCY SUIT that AAC had reassigned all of its interest and security back to Rabo Agrifinance Inc.'s successor, Ag Services of America, Inc., sometime prior to the end of October 2003, the Court never distinguished between the various separate and distinct debts, security, rights, and interests of Rabo Agrifinance Inc. and AAC in issuing judgment in the EQUIPMENT SUIT. The issue is further muddled by yet another set of separate and distinct debts, security, rights, and interests of Rabo Agrifinance Inc. acquired from First Ag Credit which are superior to separate interests claimed by AAC but which were never secured by the irrigation equipment purchased from Circle M and financed by Diversified.

[54] A portion of the ruling is quoted by the Rabo parties in their Brief at p. 7 (R. at p. USCA5 3774).

[55] AAC asserted this claim in state court when it filed suit on November 29, 2006 in Cause No. CI-06K-066, 222nd District Court of Deaf Smith County (Judge Saul, presiding) to quash Terra Partners' writ of execution on the property that AAC had non-judicially foreclosed on September 2, 2003 subject to the Diversified Judgment. (R. at p. USCA5 5216 - 5228). Terra Partners had just successfully executed its subrogation rights to the Diversified Judgment against a house in Hereford which was subject to the Diversified Judgment obtaining a Sherriff's Deed recorded in the Official Public Records of Deaf Smith County, Texas on November 9, 2006 as Instrument No. 06-2816 without any subsequent objection by the Rabo parties or the title insurance company which subsequently insured title to the property (R. at p.USCA5 4141). Any denial of Terra Partner's rights under the Diversified Judgment as sought by the Rabo parties could affect such insured title and other transactions.

The doctrine of res judicata bars matters which were, or could have been, litigated in a prior proceeding between the parties. See, *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)* 163 F.3d 925, 934 (5th Cir. 1999). The Rabo parties had the opportunity to raise the fraudulent transfer issue in the prior matter when Terra Partners exercised its subrogation rights in the Diversified Judgment, but the Rabo parties failed to do so. *Res judicata* bars the Court's consideration of this issue in this matter. See, *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 799 (Tex. 1992); *Browning v. Navarro*, 887 F.2d 553, 560 (5th Cir. 1989) (debtor could have raised fraud claim in §1983 claim). See also, *Claxton v. Yarbrough*, 2007 WL 418734 *4 (E.D.Tex. 2007) *aff'd* 246 Fed. Appx. 864, 2007 WL 2510582 (5th Cir. 2007) (holding nonsuited claim for minority oppression could have litigated in 1st suit based on same nucleus of operative facts and privity of parties) (unpub. op.).

III.
Third Summary Judgment Ruling

ISSUE TEN: The Court Erred in Holding The Eviction Was Pursuant to a Judicial Order Rather Than Self-Help Which Required No Breach of Peace

The Rabo parties improperly exercised self-help in breach of the peace by forcibly repossessing the personal property without any judicial process over the protests of Terra Partners' representatives. A secured party may take possession of collateral upon default by (1) resorting to the judicial process or (2) without

judicial process only "if it proceeds without breach of the peace." TEX. BUS. & COM. CODE ANN. §9.609(b) (Vernon 2002). The Uniform Commercial Code Comment to TEX. BUS. & COM. CODE ANN. §9.609 (Vernon 2002) states:

> "This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party's use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503".[56]

Neither the state court writ of possession to the property foreclosed on by AAC on September 2, 2003, nor the Court's preliminary injunction in the EQUIPMENT CASE gave any judicial rights to the Rabo parties to utilize law-enforcement officers to deny Terra Partners possession of its personal property on 960 Acressuch property since the writ of possession was directly to the property, not to personal property found on the property.[57] The notice of eviction stated that the Veigel parties, including Terra Partners, were to remove *their personal property* from the premises or the Sheriff would do so at the tenant's cost. The Court simply erred when it held that the unauthorized seizure of Terra Partners' property was done pursuant to judicial process.[58]

To acquire such legal right, the Rabo parties would need to seek a writ of attachment pursuant to T.R.C.P 592 *et. seq* and TEX.CIV.PRAC.&REM.CODE

[56] TEX. BUS. & COM. CODE ANN. §9.609(b) was formerly §9-503.
[57] R. at USCA5 1774-1792.
[58] 3rd MSJ Opinion at p. 8; Appx., Tab 4.

§61.001 *et. seq.*; writ of sequestration pursuant to T.R.C.P 696, 697 and TEX.CIV.PRAC.&REM.CODE §62.001 *et. seq.*; a writ of garnishment pursuant to T.R.C.P 658; or otherwise moved to expand the preliminary injunction to prohibit Terra Partners' right of possession and use of the personal property. They did not seek such remedies.

The action of the Rabo parties is analogous to the bank's actions in *Lighthouse Church of Cloverleaf v. Tex. Bank*, 889 S.W.2d 595, 603 (Tex.App.-Houston [14th Dist.] 1994, writ denied):

> Bank argues the Security Agreement granted it the right to enter the real property for the purposes of repossessing personal property so long as the entry can be done without a breach of the peace. This is a classic "self-help" repossession provision commonly found in security agreements covering personal property. The undisputed facts show the Bank entered the real property and excluded Appellants from that property. We have already determined, under the facts presented, this action, although without force, was without legal authority.

Likewise, the action of the Rabo parties in entering the Big Farm and 960 Acres to prevent Terra Partners from removing its personal property over their protests was a breach of the peace in violation of TEX. BUS. & COM. CODE ANN. §9.609 and §9.625. *See Mehan v. Wamco XXVIII, Ltd.*, 138 S.W.3d 415, 418-419 (Tex. App.-Fort Worth 2004, no pet.):

> The evidence shows that Wamco could not obtain access to the inventory without Mehan's permission or without attempting to break and enter onto Mehan's real property. Thus, even though Wamco was entitled to repossess the inventory and equipment under section 9.609 because [Debtor] defaulted on its loan, Wamco did not have the

> ability to exercise control and dominion over the inventory in accordance with section 9.609 without the assistance of a court because it could not do so without breaching the peace.

See also, *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572, 574 (Tex. Civ. App.-Houston [14th Dist.] 1981, no writ), *abrogated in part on other grounds by Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302 (Tex. 1988); *Census Fed. Credit Union v. Wann,* 403 N.E.2d 348, 351-52 (Ind. Ct. App. 1980) ("[E]ven in attempted repossession of a chattel off a street, parking lot or unenclosed space, if repossession is verbally or otherwise contested at actual time of and in immediate vicinity of attempted repossession by defaulting party or other person in control of chattel, secured party must desist and pursue his remedy in court.").

ISSUE ELEVEN: The Court Erred in its Legal Determination that Terra Partners Was Bound by the Waiver in the Security Agreements

Under general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein. Accordingly, one party cannot contractually waive the statutory rights of one who is not a party to the contract. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir.1999) and *Adams v. Unione Mediterranean Di Sicurta*, 364 F.3d 646, 652 (5th Cir. 2004).

Furthermore, Texas courts have established that it is against public policy to enforce any contractual waiver of illegal acts such as conversion. *Zapata v. Ford*

Motor Credit Co., 615 S.W.2d 198, 201 (Tex.1981) (waiver of conversion clause is not only contrary to public policy, but it is also prohibited by statute).

The security agreements at issue were executed between Veigel Farm Partners ("VFP") *et. al.* and the Rabo parties before Terra Partners ever came into existence. The original parties to the agreement could not have reasonably contemplated Terra Partners would be bound by its terms, since VFP was operating the farms at the time the security agreements were executed.

Terra Partners is not a successor partnership to VFP, was not assigned and did not assume or guarantee any debt to the Rabo parties secured by the security agreements, and did not otherwise consent to be bound by the terms of the security agreements.

Terra Partners was not a signatory to the agreement and cannot, by its lease of the farming equipment, be deemed to have consented to waive its claims for illegal conversion. *Zapata v. Ford Motor Credit Co.*

Terra Partners is not a successor or assignee of the security agreement because its leasehold interest in the farming equipment is not the same as an assignment. An assignment is a transfer *of the whole* of any property, real or personal. *See* Black's Law Dictionary (5th Ed.). In contrast, a lease of tangible personal property means a contract by which one owning such property grants to

another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price. *Id.*

In this case, VFP leased the farming equipment to Terra Partners for a specified time and payment, and retained an interest in its leased equipment. Thus, Terra Partners cannot be equated to a successor or assign of the security agreement and the agreement is not enforceable against it as lessee.

The equipment owned by Terra Partners was never encumbered by the security agreements. In *Morrison v. Standerfer*, 2010 WL 1137034 *3 (Tex.App.-Ft. Worth 2010, no pet.):

> "[the Defendant] was not a party to the lease between [Plaintiff and a third party], and there was no evidence that [the third party] had an ownership interest in [Defendant's] plane or that [Defendant] consented to be bound by the terms of the lease … We hold that the lease did not create a valid, enforceable lien against [Defendant's] property."

Similarly, Terra Partners was not a party to the security agreement between VFP and the Rabo parties, and Terra Partners did not consent to be bound by the terms of the security agreement.

> "Texas law generally does not permit two parties to agree to place a lien on the property of a third party who does not consent to the lien. An agreement purporting to do so does not create a valid, enforceable lien against the third party's property."
> *Id*. at *2.

Thus, the Rabo parties never had a right to take possession of the personal property of Terra Partners and their act of depriving Terra Partners of their farming

equipment constitutes conversion. See, *Burns v. Rochon,* 190 S.W.3d 263, 266-70 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (lessor's right to lockout holdover tenant failed to authorize conversion of lessee's leased equipment).

As a procedural matter and as a question of fact, at least one of the Rabo parties should not be able to assert the waiver defense. Terra Partners presented summary judgment evidence that, based on prior decisions of the Court, only one of the Rabo parties held an interest in the security agreement at the time the conversion took place.[59] By failing to present evidence of which of the Rabo parties is asserting the defense of waiver of conversion, their argument is improperly brought and should be denied for that reason.

For the foregoing reasons, the waiver provision in the security agreements is inapplicable to at least one of the Rabo parties and unenforceable as to Terra Partners.

[59] According to the finding in *Rabo Agrifinance, Inc. v. Terra XXI, Ltd., 2006 WL 2828748* *3-*4 (N.D.Tex. 2006)(No. 2:05-CV-000314-J), the Rabo parties admitted that only AAC held the rights under the security agreement on the date of conversion in 2006. Alternatively, according to the findings in *Rabo Agrifinance, Inc. v. Veigel Farm Partners,* 2008 WL 341425 *3 (N.D.Tex. 2008)(No. 2:05-CV-000243-J) and *Rabo Agrifinance, Inc. v. Terra XXI Ltd.*, 2007 WL 2446278 (N.D.Tex. 2007)(No. 2:06-CV-000153-J), the Rabo parties have admitted that AAC purportedly reassigned all of its interest to RAF's predecessor either in 2002 or 2003, and as such RAF held the rights under the security agreements on the date of conversion in 2006. Despite the contrary positions taken by the Rabo parties in the past, all three decisions are clear that only one entity, either RAF or ACC, held the debt and security interest at any time. Therefore, only one of the the Rabo parties can assert contractual waiver as a defense.

ISSUE TWELVE: The Court Misapplied Texas Law in Concluding that Terra Partners Presented No Evidence of Damages

For most personal property, the general measure of damages for the *lost value of the property* is the fair market value of the property at the time and place of the conversion, together with legal interest. *Imperial Sugar Co. v. Torrans,* 604 S.W.2d 73, 74 (Tex. 1980).

However, damages for conversion may include losses or expenses necessary to compensate the plaintiff for all actual losses or injuries sustained, not merely the reasonable market value of the property. See *Soto v. Sea Road Int'l Inc.,* 942 S.W.2d 67, 75 (Tex.App.- Corpus Christi 1997, writ denied). The measure of damages for conversion includes loss of use. See, *Bures v. First Nat'l Bank, Port Lavaca,* 806 S.W.2d 935, 939 (Tex.App.- Corpus Christi 1991, no pet.).

> "The usual measure of damages for loss of use of injured property is the reasonable cost of renting a replacement, although the plaintiff need not actually rent a substitute … Where the property is not rentable, the plaintiff may resort to proving the actual worth of use."

Goose Creek Consol. ISD of Chambers and Harris Counties, Texas v. Jarrar's Plumbing, Inc., 74 S.W.3d 486, 497 (Tex.App.-Texarkana 2002, pet. den.). See also, *Luna v. North Star Dodge Sales, Inc.,* 667 S.W.2d 115, 119 (Tex. 1984).

Terra Partners showed damages for both *loss of use* and the *lost value* of its personal property which was ordered sold in the EQUIPMENT CASE, that was not sold at the April 2, 2008 judicial sale, and is still retained by the Rabo parties.

Terra Partners also showed damages for the loss of use of the personal property owned by Plaintiff from the time of conversion on October 23, 2006 until sold on April 2, 2008. The receipts from the April 2, 2008 sale is some indication of the value of the personal property that was sold.

In establishing Terra Partners' damages for *loss of use* and *lost value* in specific equipment, Terra Partners can show both damages during the period of conversion from October 23, 2006 until November 6, 2008, the date of the Friemel settlement in which Terra Partners relinquished further lease rights to Defendants and left the 960 Acres.

Terra Partners could have utilized its leased farming equipment on the 960 Acres until levied upon by the U.S. Marshal for sale on April 2, 2008. Additionally, Terra Partners lost the opportunity to have rented such portions of equipment (*e.g.*, the irrigation equipment and grain elevator facility) owned by Terra Partners or leased by Terra Partners on both the Big Farm and the 960 Acres prior to the April 2, 2008 sale and such similar equipment that was not sold at the April 2, 2008 sale.

Recovery should also be permitted for the value of Terra Partners' lost opportunity to plant crops on the 960 acres[60] after the 2007 wheat crop planted by Friemel was harvested in June and July, 2007. In *United States v. Hatahley*, 257

[60] Terra Partners would not be limited to plantings only on the 25% interest in the 960 acres, as it had lease rights to farm the entire 960 Acres.

F.2d 920,924 (10th Cir. 1958), the 10th Circuit stated: "Plaintiffs also testified that because of the loss of their animals they were not able to grow crops and gardens as extensively as before. ***These were factors upon which damages for loss of use could have been based.***" (emphasis added).

Terra Partners can show damages from the loss of use of its equipment for the period in question not only for the rental value of the equipment itself, but also for the lost opportunity to grow additional crops on the 960 Acres after the Friemel wheat crop was harvested in June and July 2007. At a minimum, at least one more fall crop could have been planted and harvested before Terra Partners relinquished possession of the 960 Acres in November, 2008 pursuant to the Friemel settlement.

A 9th Circuit decision points to the Restatement (Second) of Torts as the most relevant authority on the damages issue of "loss of use." Restatement (Second) of Torts § 929 states that "[i]f one is entitled to judgment for harm to land resulting from past invasion ..., the damages include compensation for ... the loss of use of the land . ." Comment d to § 929 explains that "the plaintiff is entitled to recover for the past or *prospective loss of use* ... as stated in § 931 . Thus, under the Restatement, the value of the lost grazing opportunity turns on the type of use to which the land was 'commonly put.'" *Masayesva v. Hale*, 118 F.3d 1371, 1383-84 (9th Cir. 1997). In this case, if the farm land is commonly put to use for growing

crops, then the value of the lost planting opportunity is an appropriate measure for damages based on conversion.

Thus, Terra Partners should be entitled to recover the value of the lost opportunity to plant crops on the 960 Acres as well as the rental value of the equipment due to the unlawful conversion by the Rabo parties.

The Court erroneously held that Terra Partners must submit evidence that it actually lost business profits.[61]

Where the converted property has no readily ascertainable fair market value, the damages are the actual value of the property to the owner at the time of the loss. *Crisp v. Sec. Nat'l Ins. Co.,* 369 S.W.2d 326 (Tex. 1963).

> It is well settled that the owner of property can testify as to his opinion regarding the value of his own property …even if the owner's testimony is halting and indefinite it nonetheless will be sufficient to sustain a verdict when there is no controverting evidence.

Espinosa v. Schomberg, 601 S.W.2d 161, 164 (Tex.Civ.App.-Waco 1980, writ ref'd n.r.e.). See also, *Burns v. Rochon*, 190 S.W.3d 263, 271 (Tex.App.-Houston [1st Dist.] 2006, no pet.).

Terra Partners presented evidence of damages in accordance with these standards through Steve Veigel.[62] This evidence met the requirement that Terra

[61] 3rd MSJ Opinion at p. 11; Appx., Tab 4.
[62] R. at p. USCA5 5115-5135 and USCA5 5176-5184.

Partners identify specific evidence and articulate how it supports its claim. See, *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

The Court's reliance on *Camp v. Ruffin*, 30 F.3d 37, 38 (5th Cir. 1994) is misplaced. *Camp* held that the plaintiff must show evidence of actual injury to support his *fraud or misrepresentation claim.* Id. Under Texas law, benefit of the bargain damages are not compensable in these claims. *Id.*

The Court's citation to *Burkhart Grob Luft Und Raumfahrt GmbH & Co. KG v. E-Sys., Inc.*, 257 F.3d 461, 467 (5th Cir. 2001) is similarly flawed. *Burkhart* is not a conversion case. It dealt with whether the plaintiff presented sufficient evidence of lost profits, which under Texas law, must be established with reasonable certainty for a new or speculative venture. *Id.*

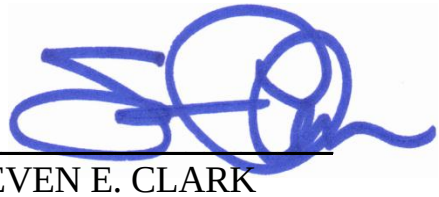
In contrast, Terra Partners had been operating on the farms since 2000, and was not a "new or speculative" venture.

In summary, the Court erred in concluding that Terra Partners presented no competent evidence of its damages for its conversion claim.

CONCLUSION

For all of the foregoing reasons, Terra Partners prays that the Court's summary judgment rulings and final judgment be set aside, and the case remanded for further proceedings before the jury.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct electronic copy of Appellant's Brief has been served in accordance with Fed.R.App.P. 25 and 5thCir.R. 25 upon Appellees' counsel of record designated below on this 28th day of March, 2012.

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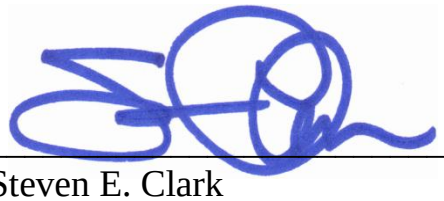

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