

SEP 07 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

1	In re:)	BAP No.	AZ-05-1045-SKMo
2)		
3	GTI CAPITAL HOLDINGS, L.L.C.;)	Bk. Nos.	03-07923-SSC
4	G.H. GOODMAN INVESTMENTS)		03-07924-SSC
5	COMPANIES, L.L.C.,)		
6)	Adv. No.	04-00676
7	Debtors.)		
8)		
9	COMERICA BANK,)		
10)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	EDWARD M. MCDONOUGH, Examiner;)		
14	GTI CAPITAL HOLDINGS, L.L.C.;)		
15	G.H. GOODMAN INVESTMENTS)		
16	COMPANIES, L.L.C.,)		
17)		
18	Appellees.)		

Argued and Submitted on
September 22, 2005, at Phoenix, Arizona

Filed - September 7, 2006

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: SMITH, KLEIN AND MONTALI, Bankruptcy Judges.

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or rules of res judicata, including issue preclusion and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 This appeal is from a summary judgment entered against a
2 creditor who ran afoul of the bankruptcy "strong-arm" powers with
3 respect to the status of its security interest in vehicles that
4 yielded \$1,010,581 in sales proceeds. It is also an appeal from
5 denial of the creditor's reciprocal summary judgment motion
6 asserting theories of contractual and equitable subrogation.
7 Agreeing that the court correctly applied Arizona law, we AFFIRM.

8 **I. FACTS**

9 The material facts are not in dispute. Nor does either party
10 assert that there is a genuine issue of material fact remaining
11 for trial. The material facts, stated in the light most
12 favorable to appellant Comerica Bank-California ("Comerica"), are
13 as follows.

14 Jointly administered Chapter 11² cases for GTI Capital
15 Holdings, L.L.C. ("GTI") and G.H. Goodman Investments Companies,
16 L.L.C. ("GHG") (collectively, the "Debtors") were filed May 8,
17 2003.

18 Until their assets were sold in the transaction that led to
19 the present dispute, the Debtors were in the business of
20 manufacturing and supplying aggregate and ready-mix concrete for
21 use in residential and commercial construction projects.

22 The primary creditor, Comerica, is successor-by-merger to
23 Imperial Bank, which, in September 2001, about twenty months
24 before bankruptcy, entered into a credit agreement with GTI and

25 ²Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 GHG to provide a line of credit and loans totaling \$21,250,000.
2 GTI executed security instruments that granted real and personal
3 property liens in favor of the lender.³

4 Article 4.1 of the credit agreement included a term that
5 required GTI to "cause" its obligations under the agreement "to
6 be secured at all times by a valid and effective Deed of Trust,
7 Assignment of Rents, Security Agreement and Fixture Filing from
8 Borrower . . . granting Lender a valid and enforceable security
9 interest in all its personal property as described above, subject
10 to no prior liens."

11 One of the constituent loans in the transaction was the so-
12 called Existing Equipment Term Loan ("EETL Loan") of \$6,750,000,
13 which was for the purpose of refinancing all of GTI's then-
14 outstanding equipment loans with third party lenders. Another
15 was the New Equipment Term Loan ("NETL Loan") of \$1,500,000 that
16 enabled GTI to purchase new equipment. The EETL Loan and NETL
17 Loan were both used to refinance and purchase motor vehicles.

18 Under the mechanics of the refinancing transaction, GTI
19 obtained control of loan proceeds from Comerica, which it used to
20 pay the prior lenders in full. The payments to the prior lenders
21 were made by GTI, not Comerica. Consequently, none of the prior
22 lenders executed an assignment or other contractual document in
23 favor of Comerica.

24 The security agreement that GTI executed in connection with
25 the EETL Loan and the NETL Loan provided that: "If the Collateral
26 includes motor vehicles, [GTI] . . . shall cause the Security

27 _____
28 ³For convenience, we refer only to Comerica because
distinguishing Imperial Bank from Comerica is not material here.

1 Interest to be shown as a valid first lien on the Certificate of
2 Title for all titled vehicles and shall deliver lien filing
3 receipts to Secured Party [Comerica] as evidence thereof.”
4 However, GTI did not cause Comerica’s name to be placed on all of
5 the certificates of title for motor vehicles subject to
6 registration in Arizona that it either refinanced, borrowed
7 against, or purchased. This was significant because Arizona, by
8 statute, provides that the “exclusive” method for perfecting a
9 “lien, encumbrance, title retention instrument or document” is by
10 filing and complying with Arizona statutes that require any lien
11 against a vehicle subject to registration to be reflected on the
12 vehicle title in order to be effective. Ariz. Rev. Stat.
13 (“A.R.S.”) § 28-2133.

14 Appellee Edward M. McDonough was appointed as Examiner on
15 July 3, 2003, on a motion by Comerica. The Debtors, who had
16 filed a preference action against Comerica, were allegedly
17 refusing to provide reasonable access to books and records.

18 The Examiner investigated the affairs of the Debtors and
19 reported his preliminary opinion that the Debtors were grossly
20 mismanaging their business and that, without a substantial
21 injection of equity to fund a plan, the only viable
22 reorganization strategy would be a § 363 going concern sale of
23 assets free and clear of liens, claims and interests.

24 Comerica made a motion under § 1106(b), in October 2003, to
25 expand the duties of the Examiner so as to authorize him to sell
26 the Debtors’ assets.

27
28

1 The Debtors, also in October 2003, sought leave to amend the
2 complaint in their preference action against Comerica to add a
3 count to avoid unperfected liens.

4 The court, at a hearing on December 15, 2003, denied the
5 Debtors' motion for leave to amend their complaint and indicated
6 that the Examiner should review the viability of lien avoidance
7 claims and whether those claims should be preserved for the
8 Examiner or for some person other than the Debtors to prosecute.
9 The court directed the Examiner to file a complaint "as soon as
10 possible" with respect to the validity of the liens. Comerica
11 did not object at that hearing to the direction to the Examiner
12 to bring such an action.

13 In February 2004, the court approved the sale of
14 substantially all of Debtors' assets, as had been requested by
15 Comerica, including motor vehicles to Az Materials, L.L.C. for
16 \$8,000,000 ("Sale Proceeds").

17 After the sale, the Examiner, noting that Comerica was not
18 named on the Arizona certificates of title for sixty-three of the
19 seventy-one vehicles that were sold, asked Comerica to stipulate
20 that its lien was unperfected to that extent. Comerica responded
21 by filing a motion for turnover of all Sale Proceeds ("Turnover
22 Motion"), asserting that, as to the vehicles, it was subrogated
23 to the prior lenders' perfected liens.

24 The Examiner commenced an adversary proceeding against
25 Comerica on behalf of the Debtors' estates to avoid the
26 unperfected security interests. According to the Examiner's
27 contemporaneous report, Comerica's lien interest in sixty-three
28 vehicles, valued at \$1,010,851, could be avoided because Comerica

1 was not identified as the lienholder on any of those certificates
2 of title.⁴ The Examiner valued the eight vehicles as to which
3 Comerica's lien interest did appear on the certificates of title
4 at \$32,046.

5 On cross-motions for summary judgment, the court ruled that
6 Comerica was secured with respect to only \$32,046 of the
7 \$1,042,897 attributable to motor vehicles, rejected Comerica's
8 arguments for contractual and equitable subrogation in the
9 refinancing transactions, and entered judgment accordingly.

10 This timely appeal ensued.

11 **II. JURISDICTION**

12 Bankruptcy court subject matter jurisdiction is founded on
13 28 U.S.C. § 1334(b). An action to determine the validity,
14 extent, or priority of liens is a core proceeding that a
15 bankruptcy court may hear and determine. 28 U.S.C.
16 § 157(b)(2)(K). We have appellate jurisdiction pursuant to 28
17 U.S.C. § 158(c).

18 **III. ISSUES**

- 19 1. Whether the Examiner has standing.
- 20 2. Whether the Examiner was entitled to summary judgment as a
21 matter of law in the face of Comerica's assertion of
22 subrogation rights in liens on certain of Debtors' titled
23 vehicles notwithstanding Arizona's statutorily "exclusive"
24 method of perfecting security interests in motor vehicles.⁵

26 ⁴Comerica concedes that many of the certificates in question
27 identify Debtors' prior lenders as lienholders.

28 ⁵Comerica lists seventeen issues on appeal, sixteen of which
relate to the grant of summary judgment.

1 **IV. STANDARD OF REVIEW**

2 We review the grant or denial of summary judgment de novo.
3 Captain Blythers, Inc. v. Thompson (In re Captain Blythers,
4 Inc.), 311 B.R. 530, 534 (9th Cir. BAP 2004), aff'd, 2006 WL
5 1478849 (9th Cir. 2006); Paine v. Griffin (In re Paine), 283 B.R.
6 33, 36 (9th Cir. BAP 2002). Viewing the evidence in the light
7 most favorable to the nonmoving party, we must determine whether
8 there are any genuine issues of material fact and whether the
9 trial court correctly applied relevant substantive law. Captain
10 Blythers, 311 B.R. at 534; Tobin v. Sans Souci Ltd. P'shp (In re
11 Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). We may affirm
12 summary judgment on any ground supported by the record. Newton
13 v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).

14 It is of no consequence to the de novo standard of review
15 that the trial court described its memorandum decision on the
16 summary judgment motions as containing "findings of fact and
17 conclusions of law" because such findings are not authorized on
18 summary judgment and are not reviewed under anything other than
19 the de novo standard. Zilog, Inc. v. Corning (In re Zilog,
20 Inc.), 450 F.3d 996, 1002 (9th Cir. 2006).

21 **V. DISCUSSION**

22 This dispute embodies a classic betrayal in the world of
23 secured transactions: the secured party relies on the debtor to
24 perfect the security interest and does not monitor compliance.

25 Here, GTI was contractually obliged to "cause the Security
26 Interest to be shown as a valid first lien on the Certificate of
27 Title for all titled vehicles and [to] deliver lien filing
28 receipts to Secured Party [Comerica] as evidence thereof." When

1 the bankruptcy case was filed about twenty months later, only
2 eight of seventy-one pertinent certificates of title reflected
3 Comerica's security interest on the certificates of title.

4 The bankruptcy trustee has, "without regard to any knowledge
5 of the trustee or of any creditor," all the rights of a
6 hypothetical creditor who, as of the commencement of the case,
7 obtains a judgment or execution lien or perfected status as a
8 bona fide purchaser of real property. 11 U.S.C. § 544(a). Since
9 Comerica does not appear on the Arizona certificates of title for
10 sixty-three of the vehicles that the court authorized to be sold
11 with liens to attach to proceeds, the validity of the Arizona
12 liens is legitimately in issue.

13 1. Standing

14 The first question is whether the Examiner had standing to
15 bring the adversary proceeding. The standing question is one of
16 statutory standing. See Simantob v. Claims Prosecutor, LLC (In
17 re Lahijani), 325 B.R. 282, 291-92 (9th Cir. BAP 2005); In re
18 Godon, Inc., 275 B.R. 555, 561-63 (Bankr. E.D. Cal. 2002).

19 Comerica argued at the summary judgment hearing that the
20 Examiner lacked standing to bring an adversary proceeding on
21 behalf of the estate because his powers are limited to those
22 enumerated in § 1106(b), or otherwise specifically ordered by the
23 court.⁶ Comerica's paraphrase, however, misstates the statute.

24 _____
25 ⁶Section 1106 ("Duties of trustee and examiner") provides,
in relevant part:

26 (b) An examiner appointed under section
27 1104(d) of this title . . . shall perform the
28 duties specified in paragraphs (3) and (4) of
subsection (a) of this section, and, except
to the extent that the court orders

(continued...)

1 Under the precise language of § 1106(b), in addition to the
2 duties to investigate and report, the Examiner "shall perform . .
3 ., except to the extent the court orders otherwise, any other
4 duties of the trustee that the court orders the debtor in
5 possession not to perform." 11 U.S.C. § 1106(b). This does not
6 require that the court specifically designate the Examiner to
7 perform any specific trustee duties. To the contrary, the
8 Examiner is statutorily presumed (i.e. "except to the extent that
9 the court orders otherwise") to be required ("shall perform") to
10 undertake all trustee duties that the court directs the debtor in
11 possession not to perform.

12 It follows that Comerica's argument that the absence of a
13 written order specifically authorizing the Examiner to prosecute
14 the § 544 avoiding action under the trustee strong-arm powers is
15 fundamentally fallacious. The denial at the hearing on December
16 15, 2003, of the Debtors' motion for leave to amend the complaint
17 in their preference action to assert the trustee strong-arm
18 power, coupled with the court's assertion that the Examiner or
19 someone other than the debtor in possession should pursue such an
20 action, suffices to confer § 1106(b) statutory standing on the
21 Examiner to prosecute the action in question.

22 The salient point is that (using the statute's negative
23 form) the court unambiguously denied the debtor in possession's
24 request for leave to prosecute the action and did not order the

25 _____
26 ⁶(...continued)

27 otherwise, any other duties of the trustee
28 that the court orders the debtor in
possession not to perform.

11 U.S.C. § 1106(b).

1 Examiner not to pursue the action. That satisfied the § 1106(b)
2 requirements for the Examiner to have statutory standing.

3 Moreover, a fair reading of the entire record reveals that
4 there was no doubt in the mind of the court that its rulings had
5 operated affirmatively to authorize the Examiner to sue Comerica
6 under the trustee "strong-arm" power. The court's explicit oral
7 directive at the hearing that the Examiner file the lien
8 avoidance complaint "as soon as possible" was, at the very least,
9 an implicit order granting the Examiner the power to commence the
10 action. Under the circumstances, the fact that the ruling was
11 not reduced to a written order neither diminishes nor negates its
12 force. Noli v. Commissioner, 860 F.2d 1521, 1525 (9th Cir. 1988)
13 (oral order granting relief from stay is effective when made
14 where the debtors had notice of its existence and content).

15 Since it is undisputed that Comerica interposed no specific
16 objection to the court's rulings at the December 15 hearing,
17 Comerica's arguments that depend on putting a fine point on what
18 its counsel did, or did not, actually say at that hearing could
19 not make a difference to the resolution of the question of
20 standing and, hence, is beside the point.

21 In sum, Comerica's assertion that there was not an express
22 written order affirmatively directing the Examiner to sue
23 Comerica is both immaterial and lacks substantial merit. Thus,
24 the court did not err when it concluded that the examiner had
25 statutory standing under § 1106(b).

26 2. Merits of the Summary Judgment

27 As to the merits of the summary judgment, Comerica contends
28 that, under the undisputed facts, it is entitled to equitable

1 subrogation under Arizona law and hence should have had summary
2 judgment awarded in its favor. Although the parties insist that
3 there are no genuine issues of material fact, in our de novo
4 review, we independently assess whether there are genuine issues
5 of material fact. Moreover, since we are reviewing the record de
6 novo, the various arguments by Comerica regarding allegedly
7 erroneous evidentiary rulings and clearly erroneous factual
8 findings are mooted because we are considering the underlying
9 information in the light most favorable to Comerica. The
10 ultimate issue, in the absence of genuine issues of material
11 fact, distills to the substantive question of whether the
12 Examiner was entitled to judgment as a matter of law or,
13 conversely, whether Comerica was entitled to judgment.

14 A. Perfection of an Arizona Motor Vehicle Lien

15 There is no issue of fact regarding the absence of
16 Comerica's name on the Arizona certificates of title for sixty-
17 three of the seventy-one vehicles that were sold and that were
18 required to be registered in Arizona.⁷

19 Though Article 9 of the Arizona Uniform Commercial Code
20 generally governs the perfection of security interests in
21 personal property, the UCC filing provisions do not apply to the
22 perfection of a security interest subject to a certificate of
23
24
25

26 ⁷In support of his motion for summary judgment, the Examiner
27 provided certificates of title to establish that Debtors owned
28 seventy-one vehicles subject to registration as of the date of
the sale to Az Materials in 2004 and that, as of then, only eight
of the certificates of title identified Comerica as lienholder.

1 title statute. A.R.S. § 47-9311⁸; see Noble v. Bonnett, 577 P.2d
2 248, 250 (Ariz. 1978) (en banc) ("We feel constrained by the
3 mandatory language of the statute to give a strict
4 interpretation."). The Arizona titled vehicle statutes are set
5 forth in A.R.S. §§ 28-2131 - 28-2136 ("Titled Vehicle Statutes").

6 Under Arizona law, the exclusive method for a party
7 asserting a lien against a motor vehicle is to have complied with
8 the applicable title statute in order for its lien to have
9 priority over a subsequent lien creditor or purchaser. A.R.S.
10 § 28-2131. A lender perfects its lien against this kind of
11 property by having its name noted on the certificate of title.
12 A.R.S. § 28-2132. Under A.R.S. § 28-2133(C), this manner of
13 perfection is "exclusive," except for liens dependent upon
14 possession.⁹ The Arizona Supreme Court has made clear that strict

15 ⁸A.R.S. § 47-9311 provides in pertinent part:

16 A. Except as otherwise provided in subsection
17 D of this section, the filing of a financing
18 statement is not necessary or effective to
19 perfect a security interest in property
subject to:

20 2. A statute of this state that provides for
21 central filing of or that requires indication
22 on a certificate of title of a security
23 interest in the property, including title 28,
24 chapter 7, article 4, and that requires
indication of the security interest on a
certificate of title for a vehicle required
to be titled and registered under § 28-2153.

. . . .

25 A.R.S. § 47-9311(A) (2) (emphasis added).

26 ⁹A.R.S. § 28-2133 provides in relevant part:

27 B. The filing and issuance of a new
28 certificate of title as provided in this

(continued...)

1 compliance with the Titled Vehicle Statutes is required. First
2 Nat'l Bank v. Carbajal, 645 P.2d 778, 781 (Ariz. 1982); Noble,
3 577 P.2d at 250.

4 There is, in this instance, a subsequent lien creditor or
5 purchaser: to wit, the bankruptcy trustee by virtue of the so-
6 called "strong-arm" power created by § 544(a).

7 Under § 544(a), the Examiner, armed with the rights and
8 duties of the trustee with respect to the property in question,
9 has all the rights and powers of a hypothetical judicial lien
10 creditor and of an execution lien creditor under applicable state
11 law which, in this case, is Arizona law. Pitrat v. Morris (In re
12 Santa Fe Adobe, Inc.), 34 B.R. 774, 776 (9th Cir. BAP 1983);
13 Pierce v. Conseco Fin. Serv'g Corp. (In re Lockridge), 303 B.R.
14 449, 457 (Bankr. D. Ariz. 2003).

15 As noted, Arizona law specifies that liens on titled
16 vehicles are not valid against subsequent lienholders unless the
17 procedure for perfecting such liens has been followed. A.R.S.
18 §§ 28-2131, 28-2133(B)-(C), 28-2153. Hence, in light of the
19

20 ⁹(...continued)

21 article is constructive notice to creditors
22 of the owner or to subsequent purchasers of
23 all liens and encumbrances against the
24 vehicle described in the certificate of
25 title, except those that are authorized by
26 law and are dependant on possession.

27 C. The method provided in subsection B of
28 this section for giving constructive notice
of a lien or encumbrance on a vehicle
required to be titled and registered under
§ 28-2153 . . . is exclusive, except for
liens dependent on possession.

A.R.S. § 28-2133(B)-(C) (emphasis added)

1 absence of Comerica's name from sixty-three of the certificates
2 of title, the Examiner prevails over Comerica with respect to
3 those sixty-three vehicles unless there is some applicable
4 exception.

5
6 B. Arizona Equitable Subrogation

7 There is no issue of fact regarding the method in which the
8 funds borrowed from Comerica under the EETL Loan and the NETL
9 Loan were handled. The Debtors obtained control of the funds and
10 used them to pay the prior liens, i.e. refinance, or to purchase
11 new vehicles.¹⁰ Comerica did not directly pay any prior lienor,
12 nor did it obtain any written assignments with respect to the
13 refinancing transactions. Nor has it presented facts sufficient
14 to establish a genuine issue of material fact regarding some
15 other theory for contractual subrogation. Hence, Comerica is
16 left only with its contention that it is entitled to equitable
17 subrogation under Arizona law.

18 Comerica argues that the failure of perfection under
19 Arizona's Titled Vehicle Statutes still leaves open a possibility
20 of perfection under the common law doctrine of equitable
21 subrogation, which it asserts is liberally applied in Arizona.

22 ¹⁰The certificates of title for the remaining items fall into
23 three categories: 1) those that reflect lien releases in 1998,
24 1999, and 2000 by Debtors' prior lenders; 2) those that still
25 reflect the recorded liens of lenders whose loans were paid off
26 with the proceeds of the GTI loans; and 3) those that reflect no
27 liens at all. We need not delineate the number of the sixty-
28 three vehicles in question that were newly purchased because that
detail is not necessary to our decision. It does appear that
some of the existing vehicles did not have liens on them at the
time of the Comerica loan transaction. However, the analysis of
existing lien-free vehicles and of new vehicles would be the
same.

1 The equitable subrogation doctrine allows a nominally junior
2 lien to take over the position of a prior lien. Lamb Excavation,
3 Inc. v. Chase Manhattan Mortgage Corp., 95 P.3d 542, 544 (Ariz.
4 Ct. App. 2004). The remedy is designed to avoid the circumstance
5 of one party receiving a windfall at the expense of another. Id.
6 The application of the doctrine "allows a subsequent lender who
7 supplies funds used to pay off a primary and superior encumbrance
8 to be substituted into the priority position of the primary
9 lienholder, despite the recording of an intervening lien." Id.
10 Under Arizona law, equitable subrogation may be applied where (1)
11 there is an express or implied agreement that the subsequent
12 lender will be substituted for the prior lienholder, (2) the
13 subsequent lender is not a volunteer, and (3) an intervening lien
14 claimant is not prejudiced. Id. at 545-46.

15 There are several problems with the equitable subrogation
16 theory in this appeal. First, the § 544(a) "strong-arm" power
17 makes the bankruptcy trustee an intervening lien claimant who
18 would, by definition, be prejudiced. Thus, one of the essential
19 elements for an Arizona equitable subrogation is missing in a
20 manner that is incapable of cure.

21 Second, an equitable remedy ordinarily requires an order of
22 a court before it becomes a remedy. Assuming that the Arizona
23 courts would have ordered an equitable subrogation with respect
24 to the refinanced vehicles, it is plain that there was neither a
25 court order to that effect, nor even an action on file seeking
26 such an order, as of the commencement of the case. In principle,
27 this is fatal to Comerica's equitable remedy theory as a device
28 to defeat the muscle of the exercise of the trustee's § 544(a)

1 "strong-arm" power. Even if we were to assume that the Arizona
2 courts would overlook the presence of the trustee's intervening
3 "strong-arm" lien, the facts, taken in the light most favorable
4 to Comerica, still do not add up to equitable subrogation.

5 In this context, the material facts that we accept in the
6 light most favorable to Comerica are: (1) that EETL Loan funds
7 were used to refinance some of the existing vehicles; (2) that
8 NETL Loan funds were used to acquire new vehicles (if any); (3)
9 that the Debtors had a contractual obligation to "cause the
10 Security Interest [in favor of Comerica] to be shown as a valid
11 first lien on the Certificate of Title for all titled vehicles
12 and [to] deliver lien filing receipts to Secured Party [Comerica]
13 as evidence thereof"; (4) that the Debtors neither "caused"
14 Comerica's lien to be shown as a valid first lien on the
15 pertinent certificates of title, nor delivered lien-filing
16 receipts to Comerica; and (5) that the Debtors have no excuse for
17 not having done so.¹¹

18 The fatal flaw in Comerica's theory is that it provides no
19 explanation that rises to the level of a genuine issue of
20 material fact to establish why, between September 2001 and May
21 2003, it did not take steps to protect its interests when it did
22 not receive the contractually-required evidence that Comerica was
23 shown as a first lienor on the certificates of title. The face
24 of the security agreement demonstrates that the parties knew how
25 to perfect a security interest in an Arizona motor vehicle and
26 crafted a contractual mechanism to police compliance. It is not

27
28 ¹¹These facts make it unnecessary to consider the bankruptcy
court's evidentiary rulings about which Comerica complains.

1 reasonable to expect that equitable heartstrings of a court will
2 be strong enough to save a creditor weighed down by knowledge of
3 the statute, a specific contractual method for policing
4 compliance, and twenty months of inactivity in circumstances that
5 should have triggered inquiry.¹²

6 In order to demonstrate the existence of a triable issue of
7 material fact to defeat the Examiner's summary judgment motion,
8 it was incumbent upon Comerica to present evidence sufficient to
9 show that it could meet its burden of proof as to the elements of
10 Arizona equitable subrogation. Anderson v. Liberty Lobby, Inc.,
11 477 U.S. 242 (1986). We, like the bankruptcy court, are
12 persuaded that Comerica did not carry its burden to demonstrate a
13 sufficient possibility of equitable subrogation so as to defeat
14 summary judgment.

15 VI. CONCLUSION

16 Based on the foregoing, we are persuaded that there is no
17 genuine issue of material fact and that the Examiner is entitled
18 to judgment as a matter of law. Hence, we AFFIRM.

19 _____
20 ¹²We agree with the Examiner that the Ninth Circuit's
21 Freightliner decision, where the creditor "did everything it
22 could do to perfect its interest in debtor's vehicle collateral
23 before the bankruptcy petition was filed" and still lost, is
24 factually similar. Freightliner Mkt. Dev. Corp. v. Silver Wheel
25 Freightliner, Inc., 823 F.2d 362, 365 (9th Cir. 1987) (Oregon
26 law). If Freightliner controlled, the fact that Comerica
27 remained inert for twenty months before the bankruptcy case was
28 filed would dictate the result. Nevertheless, Freightliner is
merely informative because Oregon is not Arizona, and we must
predict how the Arizona Supreme Court would construe the Arizona
statute in the present circumstances. Even though the Arizona
and Oregon statutes are essentially the same, the respective
state supreme courts are free to construe them differently. We
predict that the Arizona Supreme Court would rule in favor of a
judgment lien or execution lien creditor on the facts of this
case.