

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

VERMONT FEDERAL CREDIT UNION
Plaintiff

v.

JASON C. MARSHALL
Defendant

Docket No. 1142-10-14 Cncv

RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS
and MOTION FOR PARTIAL SUMMARY JUDGMENT

This is a debt collection case. Defendant, Jason Marshall, allegedly defaulted on two car loans and one personal loan provided by plaintiff, Vermont Federal Credit Union. The Credit Union seeks a judgment for the unpaid debt, together with interest, costs, and attorney's fees.

I. Motion for Judgment on the Pleadings

The Credit Union moves for judgment on the pleadings as to Counts Two and Three of its complaint. "On a motion for judgment on the pleadings, the court must take the facts as pleaded by the non-moving party as true, and render judgment only if it can do so as a matter of law." In re Knapp, 152 Vt. 59, 63 (1989). In his answer, Marshall admitted all the allegations in Counts Two and Three. The court notes that as to Count Two, the complaint states that as of October 17, 2014, the deficiency was \$7,410.96, while the answer states it was \$7,140.96. Given Marshall's admissions, the court construes the amount stated in his answer as a typographical error. The Credit Union is entitled to judgment on the pleadings as to Counts Two and Three.

II. Motion for Partial Summary Judgment

The Credit Union seeks summary judgment on Count One, arguing that it gave proper notice before disposing of the car and that it sold the car in a "commercially reasonable" manner.

Standard of Review

Summary judgment under V.R.C.P. 56 is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Guiel v. Allstate Ins. Co., 170 Vt. 464, 467 (2000). While the non-moving party gets the benefit of all reasonable doubts and inferences, he still “has the burden of submitting credible documentary evidence or affidavits sufficient to rebut the evidence of the moving party.” Endres v. Endres, 2008 VT 124, ¶ 10, 185 Vt. 63. Here, Marshall did not file an opposing memorandum, a statement of disputed facts, affidavits, or other documentary evidence within 30 days of being served with the Credit Union’s motion. Thus, to the extent that the Credit Union’s factual assertions are supported by relevant parts of the record, as required by V.R.C.P. 56(c), the court will treat those assertions as undisputed. V.R.C.P. 56(e)(2).

Facts

On April 22, 2013, Marshall obtained a loan from the Vermont Federal Credit Union in the amount of \$4,139 to purchase a 2000 VW Jetta. Marshall subsequently defaulted on the loan by failing to make payments. On March 5, 2014, the Credit Union repossessed the car. On March 10, 2014, the Credit Union notified Marshall that the car would be sold at a private sale at any time after ten days from the date of the notice. On June 30, 2014, the car was sold at a dealers-only auction for \$400. As of July 3, 2014, Marshall owed \$4,800.94 on the loan.

Discussion

Vermont’s Uniform Commercial Code, found in Title 9A, governs the disposition of collateral after default. To obtain a deficiency judgment after the sale of repossessed collateral, “the secured party has the burden of pleading and proving that any given disposition of collateral was commercially reasonable, and preceded by reasonable notice.” Chittenden Trust Co. v.

Maryanski, 138 Vt. 240, 244–45 (1980). Failure to comply strictly with these requirements will bar the secured party from obtaining a deficiency judgment. Id. at 246.

1. Sufficiency of Notice

A secured party must provide reasonable notice to a debtor before it sells the repossessed collateral. 9A V.S.A. § 9-611(b).¹ Assuming *arguendo* that the transaction in this case is a consumer-goods transaction, the notice of disposition must:

- (1) identify the debtor and the secured party;
- (2) describe the collateral to be disposed of;
- (3) state the method of disposition;
- (4) state that the debtor is entitled to an accounting of the unpaid debt and the charge for providing it, if any;
- (5) state the time and place of a public sale or the time after which a private sale will be held;
- (6) describe the debtor’s liability for any deficiency;
- (7) provide a phone number where the debtor can find out the price to redeem;
and
- (8) provide a phone number or a mailing address where the debtor can obtain more information about the disposition and the secured obligation.

9A V.S.A. § 9-614(1). “A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law.” Id. official cmt. ¶ 2.

Section 9-614(3) then goes on to provide a sample notice form which creditors may use and which satisfies the requirements in paragraph (1). Id. official cmt. ¶ 3. The notice provided to Marshall in this case was identical to the sample notice in § 9-614(3) and also included all of the

¹ The Uniform Commercial Code prescribes what information must be included in such a notice depending on whether the underlying debt arose out of a commercial transaction or a consumer-goods transaction. *Compare* 9A V.S.A. § 9-613 *with* 9A V.S.A. § 9-614. Section 9-614, which applies to consumer-goods transactions, incorporates the requirements found in § 9-613 and also imposes additional ones. Because it is unclear whether the transaction in this case is a commercial or a consumer transaction, the court will address the sufficiency of the notice in light of the stricter requirements for consumer transactions.

information required by § 9-614(1). The court concludes that the Credit Union thus provided reasonable notice of its intent to sell the car.

2. Commercial Reasonableness

Section 9-610(b) of Title 9A “imposes a positive duty on the secured party to act in a commercially reasonable manner in every aspect of the disposition of collateral.” Will v. Mill Condominium Owners’ Ass’n, 2004 VT 22, ¶ 16, 176 Vt. 380. Generally, this duty means that “the secured party is required to utilize his best efforts to sell the collateral for the best price and to have a reasonable regard for the debtor’s interest.” Maryanski, 138 Vt. at 244 (quoting First Nat’l Bank & Trust Co. v. Holston, 559 P.2d 440, 444 (Okla. 1976)). “[T]he fact that a better price could have been obtained does not necessarily mean that the sale was not commercially reasonable, . . . but the secured party must make a good faith effort to maximize the value of the collateral.” Id.

Whether a sale is commercially reasonable is determined on a case-by-case basis. Will, 2004 VT 22, ¶ 17. The secured party bears the burden of proof on this issue. Id. In this case, to grant summary judgment, the court would have to find that the Credit Union “proved specific facts which, when viewed in totality, constituted a commercially reasonable disposition of the collateral.” Maryanski, 138 Vt. at 245.

The Credit Union sold Marshall’s car for \$400 at a private, dealers-only sale. This is an accepted method of disposition under the Uniform Commercial Code. *See* 9A V.S.A. § 9-610(b) (“[A] secured party may dispose of collateral by public or private proceedings . . .”). Dealers-only sales are thus not *per se* commercially unreasonable. *See In re Estate of Sagmiller*, 615 N.W.2d 567, 571 (N.D. 2000) (“[I]t may not be presumed, without evidence, a retail disposition is superior to a wholesale dealers-only disposition.”); Ford Motor Credit Co. v. Mathis, 660 So. 2d 1273, 1277 (Miss. 1995) (“When the factors of manner, method, time, place and terms of sale

are considered, the disposition of repossessed property at a dealer-only wholesale auction may very well be commercially reasonable.”).

In cases where the Vermont Supreme Court has considered commercial reasonableness, it has looked at all aspects of the sale. In Chittenden Trust Co. v. Maryanski, 138 Vt. at 242, defendant defaulted on two promissory notes secured in part by restaurant equipment. Plaintiff bank repossessed and sold the two-year old equipment, worth \$63,000 new, for just \$12,000, and filed a deficiency action. Id. at 246. At trial, the bank’s witness “did not know in what order the items of collateral were sold, whether they were sold by public or private sale, how much was realized on each particular item, who sold them or to whom they were sold, or what was credited to defendant’s account.” Id. Nonetheless, the trial court granted a deficiency judgment in favor of the bank. Id. at 242. The Supreme Court reversed, holding that “[u]nder any construction of this evidence,” the bank failed to show that the sale was commercially reasonable. Id. at 246.

Next, in Federal Financial Co. v. Papadopoulos, 168 Vt. 621, 622 (1998) (mem.), defendants obtained and defaulted on a \$20,000 bank loan secured by their restaurant equipment. Plaintiff bank hired a dealer to repossess the equipment, and then sold the equipment to the same dealer for \$1,010, but “did not solicit any other bids or obtain information from any other source about the value of the property.” Id. The bank then filed a deficiency action, which the trial court dismissed on the ground that the sale was commercially unreasonable. Id. The Supreme Court affirmed, explaining that:

A review of the court’s carefully reasoned decision . . . reveals that it did not fault plaintiff’s use of a private sale, but rather plaintiff’s exclusive reliance on one bid from the dealer already in possession, and its failure to obtain any other independent appraisals, valuations, or bids to establish the market value of the collateral. . . .

[A] review of the court’s decision [also] reveals that it did not rely on sale price alone, but merely factored the extremely low bid,

compared to the equipment's resale value, into its overall assessment. This was proper.

Id. at 623.

Most recently, in Will v. Mill Condominium Owners' Association, 2004 VT 22, ¶ 1, the owner of a condominium unit appealed a trial court order confirming the nonjudicial foreclosure sale of her unit. The Supreme Court reversed the trial court's order on the ground that the sale was commercially unreasonable. Id. ¶ 18. The Court explained:

[T]he disparity between the condominium's sale price and its fair market value, although not dispositive, must be taken into account in the assessment of the reasonableness of the sale. . . . In this case, the discrepancy suggests that no efforts were made to attain the best price for the unit. The trial court found the fair market value of the condominium to be "approximately \$70,000." Although the court observed that attorney Nitka and the Seiples [the couple who purchased the unit] apparently thought that the property was subject to an undischarged \$45,000 mortgage, the purchase price [of \$3,510.10]—even under such an assumption—was less than 15% of the value found by the trial court. . . .

[Moreover], Mr. Nitka [informed] Mr. Seiple . . . that the minimum acceptable bid for this property would be \$3510.50. Although there is no suggestion that this was done in bad faith, giving this information to the only bidder was certainly not a way to maximize the value of the collateral; rather, it was an assurance that the condominium would be sold for exactly that low amount.

Id. ¶¶ 18–19.

The foregoing cases establish that, although not dispositive, a difference in the purchase price of collateral and its sale price after default is relevant. In some cases, the difference may be so great that, absent any evidence to explain it, it weighs against a finding of reasonableness. *See Am. Fin. Corp. v. DeLong*, 140 Vt. 292, 292 (1981) (per curiam) (a sale was held commercially unreasonable because the secured party "sold, for \$155.00, an automobile with a suggested listed value of \$1,275.00, without presenting any evidence of factors which would explain the inordinate difference").

In this case, the loan letter states that the car's value in 2013 was \$4,975. Open-End Disbursement Receipt Plus (Apr. 22, 2013) (Pl.'s Ex. A to Compl.). The car's \$400 sale price at auction was just 8% of that value. The record contains no evidence about the car's condition at the time it was repossessed or at the time it was sold which would explain such a substantial difference. The record also contains no evidence as to whether the Credit Union, prior to the sale, obtained any "independent appraisals [or] valuations . . . to establish the market value of the collateral." Papadopoulos, 168 Vt. at 623. Moreover, the record contains no admissible evidence about the auction itself. How was the auction publicized? How many bids were there for the car? The court thus lacks sufficient facts upon which to determine whether the sale of the car was commercially reasonable. The Credit Union is not entitled to summary judgment.

Order

The motion for judgment on the pleadings as to Counts Two and Three of the complaint is granted. The motion for partial summary judgment on Count One is denied. A one hour evidentiary hearing will be scheduled to address the commercial reasonableness of the sale.

Dated at Burlington, Vermont, this 11th day of August, 2015.

Helen M. Toor
Superior Court Judge