STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 392-6-10 Wncv

on appeal from small claims
Docket No. 685-7-09 Wnsc

North Country Federal Credit Union
Plaintiff–Appellee

v.

Julia Carpenter
Defendant–Appellant

Decision

Plaintiff North Country Federal Credit Union repossessed the car that secured a purchase-money loan guaranteed by Julia Carpenter following a default for failure to make payments.[1] North Country then sold the car at public auction and sought to recover the deficiency in small claims. Two principal issues were contested at the small claims hearing: (1) whether North Country provided Ms. Carpenter a sufficient "notification of disposition" before selling the car; and (2) whether North Country otherwise sold the car in a commercially reasonable manner. The small claims judge found that North Country's notification was "technically" deficient, but that North Country had rebutted the presumption that a compliant notification would have avoided a deficiency, and entered judgment for North Country. Otherwise, the small claims judge did not address whether the sale was conducted in a commercially reasonable manner. Ms. Carpenter appealed, principally arguing that the small claims judge erred as a matter of law on the sufficiency-of-notice issue, and the evidence was insufficient to show that the sale was conducted in a commercially reasonable manner.

Ms. Carpenter's Counterclaim

In its decision, the small claims judge explained,

> Defendant Julia Carpenter moved to amend her Answer to include a claim that Plaintiff did not state that sale of the subject motor vehicle was done in a commercially reasonable manner, that the manner of sale was not commercially reasonable, and therefore that the Plaintiff violated the consumer fraud statute. Defendant's motion to amend was granted and Plaintiff was given additional time to file a memorandum addressing this defense.

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[1] Julia Carpenter guaranteed the loan so her daughter, Jeanine, could buy the car. North Country sued both Carpenters in small claims. Jeanine filed no answer to the complaint, entered no appearance in the case, and did not appear at the small claims hearing, though her mother testified that she was expected to be there. In its decision, the small claims court found that Jeanine had not been served and dismissed the claim against her without prejudice. Neither party challenged this ruling on appeal.

Though not clear, this may reflect confusion over whether the issue of commercial reasonableness was a counterclaim and whether the answer could have been amended as it purportedly was. The issue of commercial reasonableness was not a counterclaim. Proof of commercial reasonableness was an aspect of North Country's deficiency claim. See *Chittenden Trust Co. v. Maryanski*, 138 Vt. 240, 244–45 (1980) (adopting the majority rule that "the secured party has the burden of pleading and proving that any given disposition of collateral was commercially reasonable, and preceded by reasonable notice"). It might only be viewed as a part of Ms. Carpenter's counterclaim for consumer fraud to the extent that she was entitled to bring that claim at all.

Ms. Carpenter did not file a counterclaim with the answer, and never sought to amend the answer prior to the hearing. About midway through the hearing, Ms. Carpenter, through counsel, orally requested that she be permitted to amend the complaint to include a counterclaim for consumer fraud, evidently viewing the claimed defects in notice, or commercial reasonableness generally, as a *per se* consumer fraud violation. Neither North Country nor the small claims judge acknowledged the request in any way until the last moments of the hearing. Then, North Country asked if the judge was going to do anything with the requested amendment and, if so, how North Country could respond to it. The small claims judge indicated that the amendment would be granted and North Country could follow up after the hearing with a memorandum of law addressing consumer fraud. Ms. Carpenter had never explained her consumer fraud claim other than by her passing mention that defects in notice or commercial reasonableness were consumer fraud.

It was plain error to grant Ms. Carpenter's oral motion to amend at the end of the hearing. There was never a counterclaim of any kind before the hearing and consumer fraud had never been raised in the case. North Country could not reasonably have anticipated such a counterclaim, and it was never given a fair chance to present evidence in opposition to the claim. Counterclaims require a filing fee which was never paid. V.R.S.C.P. 3(d). Moreover, all motions in small claims court are supposed to be filed in writing. V.R.S.C.P. 4. This rule helps to keep small claims proceedings "simple and inexpensive," and avoids surprise. V.R.S.C.P. 4, Reporter's Notes; see also V.R.S.C.P. 1(a) ("These rules shall be construed to secure the simple, informal, and inexpensive disposition of every action subject to them."). Of course, having found that notice was sufficient to support a deficiency judgment and not otherwise addressing commercial reasonableness, the small claims judge never reached the consumer fraud counterclaim in the decision.

The motion to amend should have been denied. The court declines to consider consumer fraud on appeal.

Sufficiency of Notice and Commercial Reasonableness

This case is controlled by Title 9A, Part 6 of Vermont's Uniform Commercial Code (UCC), which sets out the rights and obligations of secured parties, debtors, and guarantors after default. 9A V.S.A. §§ 9–601 to 9–628. The UCC requires the secured party to provide reasonable notice to the debtor or guarantor before disposing of the collateral following default. *Id.* § 9–611(b). The notification requirements differ, however, depending on whether the

underlying debt arose out of a commercial transaction or a consumer transaction.

With regard to a commercial transaction, the notification will be sufficient as a matter of law if it is not misleading and includes the following:

> (A) describes the debtor and the secured party;
> (B) describes the collateral that is the subject of the intended disposition;
> (C) states the method of intended disposition;
> (D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
> (E) states the time and place of a public disposition or the time after which any other disposition is to be made.

9A V.S.A. § 9–613(1). "The reference to 'time' of disposition means here . . . not only the hour of the day but also the date." 9A V.S.A. § 9–613, Official Comment ¶ 2. If the notification, in a commercial case, omits any of these items, its sufficiency becomes a question of fact. *Id.* § 9–613(2). That is, reasonable notification is sufficient even it deviates from the requirements of § 9–613(1).

With regard to a consumer transaction, the notification must include all items listed in § 9–613(1) *and* three additional items:

> (B) a description of any liability for a deficiency of the person to which the notification is sent;
> (C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under section 9–623 is available; and
> (D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

9A V.S.A. § 9-614(1). A notification in a consumer case that omits any of these items is unreasonable as a matter of law. *Id.*, Official Comment ¶ 2.

A "consumer transaction" is one in which "an individual incurs an obligation primarily for personal, family, or household purposes." 9A V.S.A. § 9–102(26). A car purchased for personal use is a "consumer good." 9A V.S.A. § 9–102(23); Annotation, *Secured transactions: what constitute "consumer goods" under UCC § 9–109(1)*, 77 A.L.R.3d 1225, § 5[a] (1977); 68A Am.Jur.2d *Secured Transactions* § 61. There was no finding on this issue. However, Ms. Carpenter argued at the small claims hearing that this was a consumer transaction and there was no suggestion by anyone that Ms. Carpenter's daughter bought the car for any business or commercial purpose. North Country was bound to provide the notice of disposition applicable to consumer transactions.

The small claims judge found that the actual notification was defective, and it was. The notification fails to state (1) the intended method of disposition, (2) that the debtor is entitled to an accounting of the unpaid indebtedness, and (3) the time and place of a public disposition. With regard to the method of disposition, the notification simply says that, if not redeemed, the

car may be sold either at a public auction or at a private sale without specifying. It says that any such sale will occur sometime after a specific date, but it does not say when. That may have been sufficient for a private sale, but not a public one.[2] It further instructs the debtor to contact North Country is she wishes to know more. This may have been sufficient if disposition were by private sale, and the notice so indicated, but the car was sold at a public auction. The notification is required to provide the specific date and time of a public auction. The Official Comment makes clear that "A notification that lacks any of the [required] information . . . is insufficient as a matter of law." 9A V.S.A. § 9–614, Official Comment ¶ 2.

The notification also is misleading in another way. It states, "You will have until **Friday, January 16, 2009** to payoff the entire balance along with costs of repossession, storage, towing, attorney's fees and other related fees." This clearly implies that the debtor will not be able to redeem after January 16 even though the unscheduled sale was to occur sometime after January 16; it in fact occurred about 2 weeks later. The right of redemption, however, extends as a matter of law until the actual time of disposition. 9A V.S.A. § 9–923(c)(2).

Despite all of these defects in the notification, the small claims judge ruled that the notification was reasonable. It was reasonable, she ruled, because it, along with one or more phone calls from North Country clearly advised Ms. Carpenter or her daughter that they were in default and that the car would be sold. It was undisputed that Ms. Carpenter knew that payments had not been made, that she was on the hook as guarantor, and neither Ms. Carpenter nor her daughter contacted North Country to negotiate the default or ask for details about the sale of the car. In these circumstances, concluded the small claims judge, notification was reasonable despite the statutory defects. In so ruling, the small claims judge failed to distinguish between commercial and consumer deficiencies and between public sales and private sales. Both distinctions matter in this case.

Prior to its revision in 2001, the UCC did not explicitly say what happens when a secured party fails to comply with the UCC's enforcement and disposition requirements. *Chittenden Trust Co. v. Maryanski*, 138 Vt. 240, 244 (1980). Three regimes prevailed among the states. In some states, the debtor could offset against the deficiency any proven damages caused by the noncompliance (the offset rule). Other states "held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance . . . would have yielded an amount sufficient to satisfy the secured debt" (the rebuttable presumption rule). 9A V.S.A. § 9–626, Official Comment ¶ 4. Still other courts

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[2] The small claims judge incorrectly noted that the statute requires notification of the "time and place of public disposition or the time after which such disposition is to be made." See Findings and Conclusions at 4 (emphasis removed). In fact, the statute clearly distinguishes between public sales and private sales, requiring notice of "[1] the time and place of a public disposition *or* [2] the time after which any other disposition is to be made." 9A V.S.A. § 9–613(1)(E) (emphasis added). The distinction matters. Under 9A V.S.A. § 9–610(c)(2), secured parties may bid at private dispositions only when the collateral is to be sold in a recognized market with established pricing. This protects the debtor from artificially low prices. Public auctions, on the other hand, are far more unpredictable and "about as lively as a group of mourners at a funeral," and the secured party is allowed to bid. 9C Hawkland UCC Series § 9-610:4 [Rev] (quoting Gilmore, Security Interests in Personal Property § 44.6 at 1242 (1965)); 9A V.S.A. § 9–610(c)(1). The debtor needs to know when the auction will occur to know by when the collateral may be redeemed, to be able to bid at the auction, and to "encourage prospective bidders for the collateral . . . to attend," helping to ensure a fair price. 9C Hawkland UCC Series § 9-612:2 [Rev].

simply barred a noncompliant secured party from recovering any deficiency at all (the absolute bar rule). Vermont adopted the absolute bar rule. *Maryanski*, 138 Vt. at 246–47.

The 2001 version of the UCC (the current version, which applies to this case) then incorporated a version of the rebuttable presumption rule for deficiencies arising out of *commercial* transactions. 9A V.S.A. § 9–626(a)(3). It did not do the same for *consumer* transactions, leaving "to the court the determination of the proper rules . . . ." *Id.* § 9–626(b). Section 9–626(b) specifically states that "The court may not infer from [the rule applicable in commercial cases] . . . the nature of the proper rule in consumer transactions and may continue to apply established approaches." See 9C Hawkland UCC Series § 9-626:6 [Rev] (discussing the non-applicability of the rebuttable presumption rule in consumer cases).

The small claims judge ruled that the Vermont Supreme Court abandoned the absolute bar rule, presumably in consumer cases, in *Ford Motor Credit Co. v. Welch*, 177 Vt. 563 (2004). In that case, Ford sought a deficiency after the repossession and sale of a car. The trial court found that Ford had never provided notice to the debtor that the car would be sold and barred recovery of any disposition. On appeal, Ford argued, among other things, that the 2001 revision to the UCC abrogated the old absolute bar rule. The Court did not address the argument substantively. It ruled that the 2001 revision did not apply because all of the underlying events occurred before it became effective. *Id.* at 565. It therefore applied the *Maryanski* absolute bar rule and affirmed the trial court. The reported facts of the case do not include whether the deficiency arose out of a commercial transaction or a consumer transaction. The car was sold at a private sale, which triggers different notification requirements under the 2001 revision in relation to a public sale. *Welch* simply does not stand for the proposition cited by the small claims judge.

Neither North Country nor the small claims judge cited any other Vermont Supreme Court decision abandoning the absolute bar rule in consumer transactions and the court has found none. Under 9A V.S.A. § 9–626(b), the court is left to determine the proper rule and may apply the established approach: the absolute bar rule. In the circumstances of this case, the court declines to abandon the absolute bar rule without guidance to that effect from the Vermont Supreme Court.

North Country's notification is significantly defective in several respects and is insufficient as a matter of law. The absolute bar rule thus bars a deficiency judgment.

The small claims judge expressed concern that this outcome would be unfair. The concern, however, is misplaced in a consumer case. The right to a deficiency judgment is in derogation of the common law. Secured parties are required to adhere to UCC requirements *strictly*. *Chittenden Trust Co. v. Andre Noel Sports*, 159 Vt. 387, 394 (1992); 9C Hawkland UCC Series § 9-611:1 n.2 [Rev]. "Any doubt as to what constitutes strict compliance with the statutory requirements must be resolved in favor of the debtor." *In re Downing*, 286 B.R. 900, 903 (W.D.Mo. 2002). The absolute bar rule is "simple, certain, and easily administered, and it provides greater incentive for creditors to comply with [UCC requirements], which [seek] to give debtors an opportunity to protect their interests by taking part in the sale of the collateral." *Andre Noel Sports*, 159 Vt. at 395.

For its part, North Country argued at the small claims hearing that the vicissitudes of the public auction business foreclose any reasonable way to provide a debtor with specific notice of the date and time of the auction (which responds to but one of the defects). This is questionable at best. Generally, a sale at a public auction must be advertised to the public to be commercially reasonable. 9C Hawkland UCC Series § 9–610:5 [Rev]. Certainly, if notice of a sale can be provided to the public in a reasonable manner, it can be provided to the debtor. Secured parties are free to send revised notifications when needed. 9A V.S.A. § 9–611, Official Comment ¶ 8.

The UCC includes straightforward fill-in-the-blank safe-harbor forms that allow secured creditors to provide notifications of disposition that will be sufficient as a matter of law. See 9A V.S.A. §§ 9–613 and 9–614. "Obviously, a secured party that plans to dispose of the collateral in a consumer-goods transaction is well-advised to utilize one of the safe-harbor forms so that there will be no doubt as to the compliance of that secured party with the rule of revised Section 9-611(b) [requiring notification]." 9C Hawkland UCC Series § 9-614:2 [Rev]. North Country chose to use its own form, failed to comply with UCC requirements, and now is barred from a deficiency judgment.

Because North Country is barred from seeking a deficiency, the court does not need to address Ms. Carpenter's argument that North Country otherwise failed to establish the commercial reasonableness of the sale.

Order

The small claims judgment is reversed. Judgment will be entered for Ms. Carpenter.

Dated at Montpelier, Vermont this 23 day of November 2010.

Geoffrey W. Crawford, Presiding Judge