RENDERED: FEBRUARY 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000301-MR

WILLIE R. BROCK — APPELLANT

V.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE
CIVIL ACTION NO. 02-CI-00626

COMMUNITY TRUST BANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR JUDGE.[1]

MINTON, JUDGE: Willie Brock defaulted on the monthly payments due under a retail installment contract and security agreement held by Community Trust Bank. So the bank repossessed and sold its collateral, Brock's SUV. When the bank sued Brock to

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

recover a deficiency judgment, Brock defended on grounds that the bank's sale of the collateral was unreasonable. Specifically, Brock claimed that the bank's Notice of Sale of Collateral cut short his redemption rights by placing a deadline on his ability to redeem the collateral, which was three days before it was scheduled for auction. Brock argued that under the applicable provisions of the Uniform Commercial Code, his redemption rights extended to the actual sale of the collateral to a buyer. Brock also claimed that the bank violated the Kentucky Motor Vehicle Installment Sales Contract Law by including a processing fee in the original principal balance financed. The circuit court rejected both of Brock's arguments and granted summary judgment for the bank. We agree with the circuit court and affirm.

After repossessing Brock's SUV, the bank sent Brock a letter on January 5, 2001, informing him of the impending sale of the collateral. The letter stated:

> The 1997 GMC Jimmy . . . in which we hold a security interest, has been repossessed and we hereby notify you that this collateral will be sold for cash by public sale on the 18th day of January, 2001, at the hour of 10:00 A.M. eastern time, or thereabout. The sale will be conducted by ADESA of Lexington Auto Auction, 672 Blue Sky Parkway, Lexington, Kentucky, 40509.
>
> You may redeem the described collateral by payment in full of the balance of your security agreement which is now $19,967.26

> plus any fees incurred on or before January 15, 2001, at 5:00 P.M. eastern time. Any personal property that may be located in the collateral must be redeemed by January 15, 2001 at 5:00 P.M. eastern time . . . . If the amount realized from the sale fails to pay your entire indebtedness, cost of retaking, storage and sale preparation, you will be held liable for the deficiency. Community Trust Bank reserves the right to bid.

The auction took place, as scheduled, on January 18, 2001. Brock's GMC Jimmy was sold, but the sums realized from the sale were insufficient to cover all of Brock's debt. So on December 9, 2002, the bank filed an action for a deficiency judgment against Brock in the amount of $10,279.46, plus interest and attorney's fees.

In his answer, Brock asserted that the notice he received from the bank regarding the proposed sale of his vehicle was insufficient. Specifically, Brock argued that the notice "prematurely terminated his redemption rights and was, therefore, unreasonable as a matter of law, thereby estopping the Bank from recovering the deficiency and/or entitling him to statutory damages that would exceed the debt."

The bank filed a motion for summary judgment. And on January 29, 2004, the Perry Circuit Court granted summary judgment to the bank in the amount of $10,183.13, plus interest and attorney's fees in the amount of $1,541.91. This appeal follows.

Summary judgment is only appropriate if the movant's "right to judgment is shown with such clarity that there is no room left for controversy."[2] Summary judgment must be "cautiously applied," and the trial court should not render a summary judgment "if there is any issue of material fact."[3]

Brock's first argument is that the bank's notice of sale did not conform to the requirements of the Uniform Commercial Code. Brock argues that the applicable statutory requirements mandate that a debtor's right of redemption remains valid until the time of sale. Because the bank informed Brock that he must redeem his collateral by paying the default in full by January 15, 2001, rather than the actual date of sale, January 18, 2001, he argues the notice was deficient. As a consequence of this defective notice, the sale was not commercially reasonable; and the bank is barred from recovering its deficiency. The bank argues in opposition that Brock was properly notified because his redemption rights terminated at the time it entered into a contract with ADESA for the "disposition" of the vehicle.

Because this case involves Brock's default on an installment sales contract, the Uniform Commercial Code (UCC) controls. The UCC, as incorporated in this state through

---

[2] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991).

[3] *Id.* at 480.

Kentucky Revised Statutes (KRS) sections 355.1-101 through 355.10-102, was amended in July 2001. Since the relevant events affecting the outcome of this case occurred in January 2001, we note that the statutes cited in this opinion refer to the "old," pre-amendment version of the UCC.

With regard to the proper disposition of collateral, KRS 355.9-504(3) states:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but **every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.** Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, **reasonable notification of the time and place of any public sale . . . shall be sent by the secured party to the debtor** if, except in the case of consumer goods, he has not signed after default a statement renouncing or modifying his right to notification of sale. (Emphasis added.)

In the comments following UCC 9-504, which is identical to KRS 355.9-504, the drafters explain that the section "does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of——subject of course to the general requirement . . . that all aspects of the disposition be 'commercially reasonable[.]'"

KRS 355.9-506 further provides that a debtor in default has the right to redeem the repossessed collateral; however, any such redemption must be completed "before the secured party has disposed of collateral or entered into a contract for its disposition under KRS 355.9-504 . . . ."[4]

We must disagree with Brock's argument regarding the deficiency of the bank's notice. First, Brock was given proper notice of both the termination of his right of redemption and the time and place of the sale. KRS 355.9-504(3) only requires that notification to the debtor include "the time and place of any public sale." The bank gave Brock adequate warning of the date, time, and location of the public auto auction. As such, the bank's notice cannot be considered statutorily deficient.

Second, as noted in the comment to UCC 9-504, the "disposition" of collateral is not limited to sale. Rather, collateral may be "sold, leased, **or otherwise disposed of**" so long as the disposition is commercially reasonable.

As previously stated, KRS 355.9-506 says that a debtor's right of redemption exists until "the secured party has disposed of collateral or entered into a contract for its disposition." The record indicates that the bank contracted for the disposal of Brock's vehicle on January 15, 2001, so that it could be prepared for sale by ADESA at a public auto auction.

[4] KRS 355.9-506.

The auction in this case was a commercially reasonable means of disposition; and the bank's actions in transferring the vehicle to ADESA two days before the auction were necessary and rational to ensure the sale's commercial viability.[5]

Since the bank reasonably contracted for the disposal of the vehicle on January 15, 2001, in anticipation of its commercially reasonable sale at auction, we hold that Brock's right of redemption was terminated at the time the bank transferred it to ADESA. Had the ensuing sale been commercially unreasonable, it is arguable that Brock would have retained the right to redeem. But because the auto auction was a commercially reasonable means of conducting a sale, Brock's redemption rights were properly terminated when the bank contracted with ADESA for the vehicle's disposition.

Brock's second argument is that the bank did not offer sufficient evidence of its contract with ADESA. Again, we disagree.

Included with the bank's motion for summary judgment was the affidavit of its collection manager, Kim Boggs. In her affidavit, Boggs stated that she had personal knowledge of the bank's records concerning Brock's account; that Brock was in default; that on or before January 15, 2001, the bank entered

[5] The vehicle, which was assumedly located in Perry County, had to be transferred to Lexington and cleaned in preparation for sale.

into a contract with ADESA; and that pursuant to the contract, the collateral was delivered by the bank to ADESA and subsequently sold.

Brock argues that the affidavit is "objectionable hearsay and non-admissible non-expert opinion regarding statutory interpretation" because it "purports to describe the contents of a contract that the Bank has failed to enter into evidence." But we fail to see how the affidavit amounts to hearsay, and we do not believe that Boggs represents herself as an expert on the proper interpretation of the UCC.

In Smith v. Hillard,[6] the Court held that "'[o]n the whole affidavits are the least satisfactory form of evidentiary materials on which to base a summary judgment . . . . Nevertheless it is well settled that a summary judgment may be rendered solely on the basis of affidavits . . . ."[7] Because Brock has not offered any "countervailing affidavits" to oppose Boggs's statements, we believe the circuit court properly relied on Boggs's affidavit in granting summary judgment.

Finally, Brock argues that the bank violated the Kentucky Retail Installment Sales Contract Act[8] and the Kentucky

---

[6] 408 S.W.2d 440 (Ky. 1966).

[7] *Id.* at 442.

[8] KRS 371.210 – 371.990.

Motor Vehicle Installment Sales Contract Act.[9] Specifically, Brock claims that the bank improperly assessed a $75.00 "Processing Fee to Creditor" in the principal balance on his financing statement. Because the MVISCA "limits the principal balance to the cash sale price minus the down payment plus amounts for insurance and other benefits and official fees," Brock argues that the bank's assessment of the $75.00 fee was inappropriate; therefore, Brock asserts that all finance charges should be forfeited because of the bank's "intentional violations of the statute."[10]

We find this argument completely flawed. Brock claims that the processing fee violates RISCA and MVISCA because it is "a cost of doing business that the creditor is passing on to the consumer." But, as the bank argues:

> [Brock] received a benefit from [the bank] by virtue of the $75.00 fee. A full credit report was required due to [Brock's] economic circumstances and consequently administered for the fee. Without a credit report, [Brock] could not have contracted to purchase the vehicle. . . . If [Brock] had chosen another method to contract for the vehicle (e.g. if [he] had paid cash for the automobile) then a credit report would not have been necessary and the fee would not have been charged.

[9] KRS 190.090 – 190.990.

[10] *See* KRS 371.990 and 190.990.

Furthermore, as the bank mentions, Brock was never actually assessed the processing fee. After looking at the parties' retail installment contract, it is clear that the $75.00 fee was not financed as part of the principal of the loan. Although the $75.00 fee was initially added into the balance, it is subsequently deducted on the line titled, "Less: Prepaid Finance Charges." So the $75.00 processing fee was not included in Brock's principal balance, and there is no evidence that the bank violated the RISCA or the MVISCA.

For these reasons, we agree with the Perry Circuit Court's decision to grant summary judgment in favor of the Bank and affirm the deficiency judgment against Brock in the amount of $10,279.46, plus interest at the rate of 13.5% per annum, and attorney's fees of $1,541.91.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Karen Alfano
Hazard, Kentucky

BRIEF FOR APPELLEE:

David M. Knights
D. Lyle McQuinn
Lexington, Kentucky