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66,375

IN THE SUPREME COURT
OF FLORIDA

NO. 66,375

FILED
SID J. WHITE
FEB 7 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

HERBERT WEINER,

Petitioner,

v.

AMERICAN PETROFINA MARKETING, INC.,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

The Petitioner, Herbert Weiner was the Appellee in the Fourth District Court of Appeal of Florida and the Defendant in the trial court. The Respondent, American Petrofina Marketing, Inc. was the Appellant in the Fourth District Court of Appeal of Florida and the Plaintiff in the trial court. For purposes of this brief, petitioner will be referred to as "Weiner" and respondent shall be referred to as "Petrofina".

The following abbreviations will be used:

R - Record

APP - Appendix

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA WAS CORRECT IN HOLDING THAT PETROFINA IS ENTITLED TO A DEFICIENCY JUDGMENT IN THE AMOUNT OF THE DIFFERENCE BETWEEN THE AMOUNT OF THE DEBT OWED BY WEINER AND THE FAIR MARKET VALUE OF THE REPOSSESSED COLLATERAL NOTWITHSTANDING THE FINDING THAT PETROFINA FAILED TO DISPOSE OF THE REPOSSESSED COLLATERAL IN A COMMERCIALLY REASONABLE MANNER PURSUANT TO §679.504(3) FLA. STAT. (1983)

STATEMENT OF THE CASE

This litigation was begun on October 6, 1982 by Petrofina's filing of its complaint, Count III of which sought recovery of an account balance due from Defendant, Weiner on a personal guaranty Weiner had executed and furnished to Petrofina as part of his business relationship with Petrofina (R.157-164). On October 27, 1982 and on November 3, 1982, Petrofina's complaint was amended (R. 165,168-198). Weiner filed an answer on December 29, 1982 (R. 201-202). Various of Weiner's affirmative defenses were stricken by the trial court on February 8, 1983 (R. 207). Weiner amended his answer on April 27, 1983 (R. 210-211) and again on November 16, 1983. (R. 223-224). Petrofina filed a reply to Weiner's amended answer on May 20, 1983. (R. 215-216).

On March 29, 1984, a non-jury trial was had of the case on the above-referenced pleadings. The trial court, after hearing the evidence of both parties and after considering trial memoranda filed and served by both parties, entered its final judgment denying the relief sought by the plaintiff on April 17, 1984 (R. 256-257). Petrofina served its motion for re-hearing on April 20, 1984, which Motion was filed on April 23, 1984. (R. 258-259). On May 10, 1984, the trial court entered its order denying Petrofina's motion for re-hearing. (R. 411).

On May 15, 1984, plaintiff timely filed its notice of appeal directed to the final judgment of the trial court. (R. 412). On December 12, 1984, the Fourth District Court of Appeal of Florida

December 12, 1984, the Fourth District Court of Appeal of Florida entered its opinion reversing and remanding the trial court's Final Judgment of April 17, 1984 and in so doing certified a conflict with a decision of the Fourth District Court of Appeal of Florida (App. 1-2). On January 7, 1985, Weiner filed his notice to invoke discretionary jurisdiction in the Supreme Court of Florida.

STATEMENT OF THE FACTS

Since Petrofina believes that facts contained in this record above and beyond those set forth in Weiner's statement of the facts are pertinent, it submits its own statement of the facts.

These proceedings focus upon Petrofina's claim in Count III of its complaint for a deficiency judgment against Herbert Weiner, who guaranteed payment to Petrofina of Ray's Tires Co.'s open account with Petrofina, as per the Statement of Ownership signed by Weiner. (R. 416). In September, 1982, Ray's Tires Company defaulted on its account obligations to Petrofina and shortly thereafter went out of business. (R. 21-22). Thereafter, pursuant to its security agreement with Ray's Tires Co. and Weiner, Petrofina repossessed all collateral on hand at Ray's Tires Co. covered by the security agreement, which consisted of Goodyear Tire & Rubber Co. (hereinafter "Goodyear") tires and tubes. (R. 125, 417-418). Pursuant to §679.504(3), Fla. Stat. (1983), Petrofina notified Weiner that it proposed to dispose of the repossessed inventory by private sale. (R. 509-511). Petrofina then returned to Goodyear in November, 1982, a portion of the repossessed inventory that Goodyear had agreed to accept upon the request of Ray's Tires Co. and Weiner before Ray's Tires Co. went out of business. (R. 23). The remaining repossessed inventory was sold to Porto Fina Oil Company of Ft. Lauderdale, Florida on or about December 21, 1982. (R. 24).

Ray's Tires Co. owed Petrofina $305,805.91 on account at the time it ceased doing business (R. 21, 256-257). As a result of the

disposition of the collateral, Petrofina gave Ray's Tires Co. and Weiner a credit in the amount of $32,404.00 for repossessed items returned to Goodyear (R. 32), and a credit of $89,222.12 for inventory sold to Porto Fina Oil Company. (R. 33). Various other credits were also allowed to the account of Ray's Tires Co. and Weiner with Petrofina (R. 34-36). After all credits were allowed to Ray's Tires Co.'s and Weiner's account, there remained due and owing by Weiner to Petrofina the sum of $133,902.44 plus interest from August 31, 1983 to the date of trial of $9,373.14, no amount of which had been paid as of the date of trial. (R. 33). Included in the $133,902.44 amount claimed by Petrofina from Weiner in this action were sums totaling $12,158.36 which Petrofina is no longer seeking to recover from Weiner. Accordingly, there remains due and owing by Weiner to Petrofina the sum of $121,744.08 plus statutory pre-judgment interest running from August 31, 1983.

Mr. William Spear, President of Porto Fina Oil Company (R. 60) and an individual with many years of experience in the wholesale and retail tire business (R. 61-62), testified that Porto Fina Oil Co. paid the fair market value of the portion of the repossessed inventory that it purchased from Petrofina. (R. 72). Mr. Spear also testified, and there is no dispute in the record, that there is presently and was in 1982 a recognized or standard market for automobile tires, truck tires, and tubes in the United States. (R. 75). Mr. Richard S. Wagner, operations manager of Goodyear's replacement tire division in Akron, Ohio (R. 265, deposition of Wagner, p. 6) and intimately familiar with tire prices since 1969 (R. 267, deposition of Wagner, p. 8),

reviewed the prices utilized in calculating the credits allowed by Goodyear to Petrofina and by Petrofina to Weiner for Ray's Tires Co. merchandise returned to Goodyear. (R. 275-276). Mr. Wagner also reviewed the records describing the repossessed inventory sold by Petrofina to Porto Fina Oil Company and the prices for same. (R. 275-276, Deposition of Wagner, pp 16-17). The documents reviewed by Mr. Wagner were the same as those offered in evidence by plaintiff at trial with regard to the repossessed inventory returned to Goodyear and the repossessed inventory sold to Porto Fina Oil Co. Mr. Wagner compared the prices reflected on the documents containing the credits allowed Weiner by Petrofina in this litigation to industry price lists prevailing in the fall of 1982, which price lists are part of the record, and found that the prices utilized in this case to value the repossessed inventory were fair and consistent with the prices prevailing in the market for Goodyear tires in the fall of 1982 (R. 277-279, 298). Mr. Wagner noted that a number of the items in the repossessed inventory were discontinued items, by which he meant tires no longer produced by Goodyear and thus no longer generally available for sale. (R. 278). He also testified that in some instances, Petrofina charged Porto Fina Oil Co. and credited Weiner for same at prices higher than the prevailing market prices. (R. 289-291, deposition of Wagner, pp. 30-32). Mr. Spear's and Mr. Wagner's testimony on the subject of the fairness of the prices used in determining the value of the repossessed inventory, and their consistency with market prices prevailing in the fall of 1982, stands absolutely undisputed in the record. Weiner offered no evidence on the subject of the prices

utilized in calculating the credits allowed on his account by Petrofina.

Notwithstanding the uncontroverted evidence substantiating the fairness of the price credits allowed Weiner by Petrofina, the trial court denied Petrofina's claim for a deficiency judgment against Weiner on his guaranty agreement with Petrofina. The trial court apparently erroneously believed that its determination that Petrofina acted in a commercially unreasonable manner in disposing of the repossessed collateral ended the matter. (R. 256-257). The Fourth District Court of Appeal of Florida disagreed with the trial court (App.1-2), and was eminently correct on legal and policy grounds in so disagreeing.

SUMMARY OF ARGUMENT

The majority of relevant judicial authorities as well as commentators approve of the rule announced by the Fourth District Court of Appeal of Florida in this case, which is that a secured creditor under the Uniform Commercial Code may recover a deficiency judgment from a debtor upon proper proof that the amount of the debt is greater than the value of the repossessed collateral, notwithstanding a finding that the secured creditor acted in a commercially unreasonable way in disposing of the repossessed collateral. In the present case, Petrofina presented substantial competent evidence as to the value of the collateral at the time of its repossession, which evidence was not disputed or rebutted by Weiner. Both legally and as a matter of policy, the decision of the District Court of Appeal of Florida was sound, in that the requirement of a commercially reasonable disposition of collateral exists under the Uniform Commercial Code in order to ensure that the debtor receives a fair credit for the value of the collateral in any deficiency judgment proceedings. Weiner has not alleged any damage to him as a result of any act or failure to act on the part of Petrofina in connection with the present repossession and sale of the collateral.

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA WAS CORRECT IN HOLDING THAT PETROFINA IS ENTITLED TO A DEFICIENCY JUDGMENT IN THE AMOUNT OF THE DIFFERENCE BETWEEN THE AMOUNT OF THE DEBT OWED BY WEINER AND THE FAIR MARKET VALUE OF THE REPOSSESSED COLLATERAL NOTWITHSTANDING THE FINDING THAT PETROFINA FAILED TO DISPOSE OF THE REPOSSESSED COLLATERAL IN A COMMERCIALLY REASONABLE MANNER PURSUANT TO §679.504(3) FLA. STAT. (1983).

The Fourth District Court of Appeal of Florida's decision in this case is sound both on a legal and on a policy basis. There exist significant differences between the policies underlying the requirement of notice to the debtor prior to the disposition of repossessed collateral and the vague requirement of a "commercially reasonable" disposition of repossessed collateral by a secured party under the Florida Uniform Commercial Code. The notice requirement, which was amply satisfied here as Weiner admits (R. 509-511), exists to protect the debtor's right to redeem as set out in §679.506 Fla. Stat. (1983). See also Dependable Ins. Co., Inc. v. Landers, 421 So.2d 175, 178 (Fla. 5th DCA 1982). The requirement of a "commercially reasonable" disposition of the collateral exists primarily to ensure that the debtor receives a fair price credit for the repossessed merchandise.

The distinction between the explicit notice requirement of §679.504(3) Fla. Stat. (1983) and the nebulous commercially reasonable sale requirement drawn by the Fourth District Court of Appeal of Florida (App. 1-2) has been recognized by courts and commentators

alike. The majority of courts which have considered the issue posed by this case have concurred with the result reached below by the Fourth District Court of Appeal of Florida.

In Bank of Oklahoma v. Little Judy Industries, Inc., 387 So.2d 1002 (Fla. 3d DCA 1980), the court upheld a finding that the secured creditor had acted unreasonably in disposing of repossessed collateral pursuant to the Florida Uniform Commercial Code. Nevertheless, the court held that the secured party was entitled to recover a deficiency judgment from the defendant debtor in the amount of the difference between the amount of the indebtedness and the fair market value of the collateral at the time of its repossession. 387 So.2d at 1005. The court indicated that such a rule, which it adopted from Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538, 541 (1966), "achieves a fair and commercially workable result without the imposition of a penalty which is not prescribed by statute." 387 So.2d at 1005. The Little Judy Industries holding was reaffirmed by the same court in Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank, 455 So.2d 525, 528 (Fla. 3d DCA 1984).

The Little Judy Industries holding is bolstered by §671.106(1) Fla. Stat. (1983) which reads as follows:

> The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential nor special nor penal damages may be had except as specifically provided in this code or by other rule of law.

The no-deficiency rule advocated by Weiner flies in the face of the above-quoted statute and is, as the Fourth District Court of Appeal points out (App.1-2) contrary to the liberal and pragmatic spirit of the Uniform Commercial Code and its movement away from "highly technical requirements." (App.1-2).

The rule of Little Judy Industries, supra, and of the Fourth District Court of Appeal in this case, which allows a secured party a deficiency judgment upon proper proof notwithstanding a commercially unreasonable disposition of repossessed collateral is consistent with the majority of decisions outside of Florida which have considered the issue. In Poti Holding Co., Inc. v. Piggott, 15 Mass. App. 275, 444 N.E.2d 1311, cert. denied, 448 N.E.2d 766 (Mass. 1983), the court, in considering whether a secured party not acting in a commercially reasonable fashion in disposing of repossessed collateral should be deprived of a deficiency judgment, first noted that the law generally frowns on forfeitures and penalties. The court then opted for the Little Judy Industries, supra, rule and held that inasmuch as the fair market value of the collateral involved in that case had been conclusively established, the plaintiff was entitled to recover a deficiency judgment in that amount and that a remand was unnecessary. The record in the instant case mandates the same result.

Also following the rule of Little Judy Industries, supra, is Associates Capital Services Corp. v. Riccardi, 408 A.2d 930 (R.I. 1979). There, following the holding of Kobuk Engineering & Contracting Services, Inc. v. Superior Tank & Construction Co. -

Alaska, Inc., 568 P.2d 1007 (Alaska 1977), the court held that as a consequence of a commercially unreasonable sale of collateral by a secured party, a presumption arises that the fair market value of the collateral at the time of the resale equals the amount of the outstanding debt, and that the secured party must then assume the burden of proving that the fair market value of the collateral was less than its presumed value. The court indicated that to prove fair market value of secured assets, a secured party can offer evidence indicating the reasonable amount that the collateral would have sold for at a proper sale and should bring forward proof of the condition of the collateral and the usual price of items of like condition. 408 A.2d at 934. The court concluded that upon providing proof that the fair market value of the collateral was less than the amount of the debt, the secured creditor was entitled to a deficiency judgment in that amount. Here, Petrofina overwhelmingly met its burden of proving that the fair market value of the collateral was less than the amount of the debt. Weiner presented no evidence to the contrary.

In Savings Bank of New Britain v. Booze, 34 Conn. Sup. 632, 382 A.2d 226 (1977), the court held that if a secured creditor disposes of collateral in a commercially unreasonable manner, the secured party can still recover a deficiency if he can prove by a preponderance of the evidence that the reasonable value of the collateral was less than the outstanding debt.

Also reaching the same result as the Little Judy Industries court is General Electric Credit Corp. v. Durante Bros. & Sons, Inc., 79 App.Div.2d 509, 433 N.Y.S.2d 574 (1st Dept. 1980). There, the

Appellate Division of the Supreme Court of New York held that despite a secured creditor's failure to conduct the sale of repossessed collateral in a commercially reasonable manner, the creditor could still recover a deficiency judgment against the debtor upon proof that the fair market value of the collateral was less than the amount of the debt. The court indicated that its holding was the view "increasingly taken by those courts that have most recently addressed the question." 433 N.Y.S.2d at 577. See also Kohler v. Ford Motor Credit Co., Inc., 93 App.Div.2d 205, 462 N.Y.S.2d 297, 300 (3d Dept. 1983), which reaches the same result.

Other courts have also adopted the rule of Little Judy Industries, supra. See Liberty Bank v. Honolulu Providoring Inc., 65 Hawaii 273, 650 P.2d 576, 582 (1982) and cases cited therein; Levers v. Rio King Land & Investment Co., 560 P.2d 917 (Nev. 1977); Roylex, Inc. v. E.F. Johnson Co., 617 S.W.2d 760 (Tex.Civ.App. 1981); State Bank of Burleigh County Trust Co. v. All American Sub, Inc., 289 N.W.2d 772 (N.D. 1980); United States v. Whitehouse Plastics, 501 F.2d 692, 695 (5th Cir. 1974), cert. denied sub nom. Baker v. United States, 421 U.S. 912 (1975); Barbour v. United States, 562 F.2d 19 (10th Cir. 1977). It should be noted that several of the above-cited cases allow the secured party to recover a deficiency judgment upon proper proof even when the secured party did not give notice regarding its plans for disposition of the repossessed collateral to the debtor. See Whitehouse Plastics, supra; State Bank of Burleigh County Trust Co., supra.

The Florida cases cited by Weiner, Hepworth v. Orlando Bank & Trust Co., 323 So.2d 41 (Fla. 4th DCA 1975); Bagel Break Bakery, Inc. v. Bagelmans, Inc., 431 So.2d 676 (Fla. 4th DCA 1983); Hayes v. Ring Power Corp., 431 So.2d 226 (Fla. 1st DCA 1983); Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534 (Fla. 2nd DCA 1973); Barnett Bank v. Campbell, 402 So.2d 12 (Fla. 1st DCA 1981); and Dependable Ins. Co., Inc. v. Landers, 421 So.2d 175 (Fla. 5th DCA 1982) are all decisions holding that a secured party's failure to give the debtor the statutory notice of the secured party's planned disposition of the repossessed collateral bars a deficiency judgment. Thus, those decisions are readily distinguishable from the present case, since Weiner admits that he received notice of the planned disposition of collateral. (R. 509-511). Likewise, Central Bank & Trust Co. v. Metcalfe, 663 S.W.2d 957 (Ky.App. 1984) and Buran Equipment Co. v. H & C Investment Co., Inc., 142 Cal.App.3d 381, 190 Cal.Rptr. 878 (1983) cited by Weiner, involve notice issues not relevant here.

The Third District Court of Appeal of Florida recognizes that the notice requirement contained in §679.504(3) Florida Statutes (1983) serves different policies than does the commercially reasonable disposition requirement of that statute inasmuch as it decided the Little Judy Industries, supra, case after Washington v. First National Bank, 332 So.2d 644 (Fla. 3d DCA 1976). The rule enunciated by the Fourth District Court of Appeal of Florida in this case, which differentiates between the notice requirement and the commercially reasonable disposition requirement, recognizes that different policies are served by the two requirements and takes into account the fact

that no clear parameters or guidelines are set forth in the statute as to what means or methods of disposition of collateral by a secured party are "commercially reasonable." The Fourth District's decision also tacitly recognizes the most important consideration in situations such as the present one to be that the debtor receive a fair credit for the value of the repossessed merchandise in the deficiency judgment proceedings.

Commentators have also recognized the fairness of the Little Judy Industries rule. In Motorola Communications & Electronics, Inc. v. National Patient Aids, Inc., 427 So.2d 1042, 1046 (Fla. 4th DCA 1983), the court quoted at length from Pass & Walker, Deficiency Judgment in Florida After a Commercially Unreasonable Sale of Collateral, 52 Fla. Bar Jnl. 720, 723-724 (1978), as follows:

> However, when applied to a simple failure to satisfy the ill-defined code concept of commercial reasonableness, the no-deficiency rule ignores the common-sense observation that commercial reasonableness is a matter of degree and opinion.
>
> If Turk [Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534 (Fla. 2nd DCA 1973)] is expanded to treat the small transgressor as harshly as those who willfully violate their code duties or who fail to provide the debtor with a simple yet fundamental element of notice, the liberal and pragmatic spirit of the code is lost. Under an expansive reading of Turk, every creditor who repossesses goods and resells them to mitigate or obviate his losses, does so with considerable peril and without satisfactory standards by which to chart his actions. The inequity of the no-deficiency rule increases during recessionary periods, which tend to foster both defaults and repossessions, while reducing the probability that even a commercially reasonable resale will bring a "good" price.

> Little, if anything, strongly favors the no-deficiency rule, except a slavish adherence to common-law policies that have been displaced by Code standards. The central irony of the no-deficiency rule is that it punishes by common-law rule of result violations of a code-imposed standard of conduct, the parameters of which have just begun to be charted.

It is submitted that the logic of the above-quoted portion of the Motorola Communications decision underscores the logic and justice of the Fourth District Court of Appeal's decision in the present case (App.1-2).

As for the case of Florida First National Bank v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984), Petrofina submits that that decision is factually distinguishable from the present case and that the rule and policy established in that case are contrary to the majority of decisions and to the spirit of the Uniform Commercial Code. The facts of the Martin decision indicate that the secured creditor allowed the collateral to deteriorate after repossession, and that the secured creditor delayed an inordinate amount of time (well in excess of one year) before selling same. The deterioration of the collateral while it was in the possession of the secured creditor prior to resale appears to have been a major factor in the Martin court's decision. Additionally, the Martin court noted that the secured creditor had failed to raise the rule of Little Judy Industries, supra, in the proceedings before the lower court and indicated that the bank had waived that argument for appellate purposes. In the present case, Little Judy Industries, supra, was cited to the trial court and otherwise presented to it for consideration (R. 96-97, 143). Additionally, the

record in this case reflects that Petrofina acted within a reasonable time to dispose of the repossessed inventory, returning a portion of same to Goodyear in November, 1982 pursuant to an authorization earlier obtained by Weiner and Ray's Tires Co. (R. 23-24), and selling the remaining repossessed inventory to Porto Fina Oil Company on December 21, 1982. (R. 24). Thus, in this case, all of the collateral was promptly disposed of and there exists no evidence in this record that any of same deteriorated between the time of its repossession and the time of its disposition. Additionally, Weiner has made no claim at any time, pursuant to §679.507(1) Fla. Stat. (1983), or otherwise, that anything Petrofina did or did not do in connection with this repossession and sale actually caused him damage.

Additionally, the Martin rule does not represent sound policy inasmuch as it penalizes secured creditors who violate a nebulous standard of "commercial reasonableness" in disposing of repossessed collateral, even conceivably in situations in which a fair price has been obtained for the collateral. It is submitted that this court should disapprove of the Martin decision and adopt as the law of Florida the rule set forth in Little Judy Industries, supra, and adopted by the Fourth District Court of Appeal in this case.

CONCLUSION

Petrofina submits that the rule announced by the Fourth District Court of Appeal in the present case is correct and should be adopted as the law by this court. However, a remand and further hearing are not necessary in this case given the fact that Petrofina presented substantial competent evidence as to the value of the repossessed collateral at the time of its repossession which stands unrebutted in the record. Accordingly, it is submitted that this case should be reversed with instructions to enter judgment for American Petrofina Marketing, Inc. and against Herbert Weiner in the amount of $121,744.08, plus statutory interest from August 31, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Neil G. Frank, Esquire, FRANK & FLASTER, P.A., 7770 West Oakland Park Boulevard, Suite 303, Ft. Lauderdale, Florida 33301, this 6th day of February, 1985.

W. Frank Greenleaf

W. FRANK GREENLEAF