IN THE SUPREME COURT OF FLORIDA

NO. 66,375
4TH DISTRICT COURT OF APPEAL
Case No. 84-1089

HERBERT WEINER,

Petitioner,

-vs-

AMERICAN PETROFINA MARKETING,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

The Petitioner is the Appellee below and the Defendant in the trial court and the Respondent is the Appellant below and the Plaintiff in the trial court.

The following abbreviations will be used:

R - Record

App - Appendix

STATEMENT OF THE CASE

Respondent filed their Complaint on October 6, 1982 seeking recovery of an account balance against Petitioner based upon a personal guaranty. (R 157-164). On October 27, 1982 and November 3, 1982, Respondent amended their Complaint. (R 165, 168-198). Petitioner filed his Answer on December 29, 1982. (R 201-202). Certain affirmative defenses were stricken by the trial court on February 8, 1983. (R 207). Peitioner filed an Amended Answer on April 27, 1983, (R 210-211), and again on November 16, 1983. (R 223-224).

A non-jury trial was held on March 29, 1984. On April 17, 1984, the trial court entered its Final Judgment in favor of Petitioner, determining that Respondent violated F. S. 679.504(3) by failing to conduct a sale in a commercially reasonable manner, thus barring any deficiency judgment. (R 256-257). Respondent filed a Motion for Re-Hearing on April 23, 1984. (R 258-259). The trial court denied the Motion for Re-Hearing on May 10, 1984. (R 411). On May 15, 1984, the Respondent filed a Notice of Appeal. (R 412). On December 12, 1984, the Court of Appeals filed an Opinion reversing and remanding the trial court's decision and certified a conflict with the First District Court of Appeals. (App. 1-2). On January 7, 1985, Petitioner filed its Notice to Invoke Discretionary Jurisdiction of the Supreme Court.

STATEMEMT OF THE FACTS

Respondent sued Petitioner for a deficiency judgment based upon a Guaranty Agreement signed by Petitioner in favor of Ray's Tires Co. (R 57-160). In September, 1982, Ray's Tires Co. defaulted on its obligation to Respondent and shortly thereafter went out of business. (R 21-22). Pursuant to the Security Agreement with Ray's Tires Co., Respondent repossessed the collateral. (R 417-418, 125). Respondent notified Petitioner that it intended to dispose of the collateral by private sale. (R 509-511). Respondent returned a portion of the collateral to Goodyear Tire & Rubber Co. (R 23). The balance of the repossessed inventory was sold to Porto Fina Oil Company of Fort Lauderdale, a wholly owned subsidiary of Respondent. (R 24-47). Respondent then sought to recover from Petitioner the sum of $133,902.44 plus interest as a deficiency judgment. (R 33). On April 17, 1984, the trial court entered a Final Judgment denying a deficiency judgment determining that Respondent had disposed of the collateral in a commercially unreasonable manner contrary to F. S. 679.504(3). (R 256-257). A Motion for Rehearing was filed and denied by the trial court. (R 258-259, 411). The Respondent filed their Notice of Appeal on May 15, 1984. (R 412). On December 12, 1984, the Court of Appeals filed an Opinion reversing and remanding the trial court's decision on the authority of the Bank of Oklahoma v. Little Judy Industries, Inc., 387 So.2d 1002 (Fla. 3rd DCA 1980); however

certifying a conflict with the First District decision of Florida First National Bank at Pennsacola v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984). (App. 1-2). On January 7, 1985, Petitioner filed its Notice to Invoke the Discretionary Jurisdiction to the Supreme Court.

ARGUMENT

THE APPELLATE COURT ERRED IN HOLDING THAT RESPONDENT SHOULD BE ENTITLED TO A DEFICIENCY JUDGMENT WHERE THE COLLATERAL WAS NOT DISPOSED OF IN A COMMERCIALLY REASONABLE MANNER RESULTING IN RESPONDENT'S FAILURE TO STRICTLY COMPLY WITH F.S. 679.504(3).

Respondent has sought a deficiency judgment against Petitioner based upon a personal guaranty the Petitioner executed in which he guaranteed payment to Respondent of the account of Ray's Tires Co. (R 416). In September, 1982, Ray's Tires Co. defaulted on its obligation to Respondent and went out of business. (R 21-22). Thereafter Respondent repossessed the collateral pursuant to a Security Agreement (R 417-418, 125). A portion of the collateral was returned to Goodyear Tire & Rubber Company. (R 23). The balance of the repossessed collateral was sold in a private sale to Porto Fina Oil Company in Fort Lauderdale, a wholly owned subsidiary of Respondent. The goods after repossession were immediately delivered to Porto Fina Oil Company's place of business and then sold by Respondent to Porto Fina several months later. (R 24-47).

The trial court determined that Respondent had not disposed of the collateral in compliance with F.S. 679.504(3) and, in fact, the sale was not commercially reasonable as "public buyers and public bids were not utilized and advertising for sale was absent and the creditor had the full control of pricing and monetary credits applied to Defendant's account." A deficiency judgment was denied. (R 256-257).

The Fourth District Court of Appeal reversed and remanded the case back to the trial court on the authority of Bank of Oklahoma v. Little Judy Industries, Inc., 387 So.2d 1002 (Fla. 3rd DCA 1980), but certified a conflict with the First District case of Florida First National Bank at Pennsacola v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984).

Initially, it should be noted that Respondent has accepted the trial court's determination that the sale was not conducted in a commercially reasonable manner pursuant to F.S. 679.504(3). On the other hand, Petitioner does not contend that he did not receive notification of the intended disposition. So, additionally, "notice" is not at issue in this appeal.

The Bank of Oklahoma v. Little Judy Industries, Inc., supra, was rendered some five years ago and has not been followed in other districts. To the contrary, the other districts have agreed that the failure to strictly comply with F.S. 679.504(3) precludes the entry of a deficiency judgment. See Hepworth v. Orlando Bank & Trust , 323 So.2d 41 (Fla. 4th DCA 1975); Bagel Break Bakery, Inc. v. Bagelman's, Inc., 431 So.2d 676 (Fla. 4th DCA 1983); Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534 (Fla. 2d DCA 1973); Hayes v. Ring Power Corporation, 431 So.2d 226 (Fla. 1st DCA 1983) and Barnett Bank of Tallahassee v. Campbell, 402 So.2d 12 (Fla 3rd DCA 1980)

In Turk v. St. Petersburg Bank & Trust Co., supra, the Second District stated "that since deficiency judgments after repossession of of collateral are in derogation of the common law, any right to a deficiency occurs only after strict compliance with the relevant statutes."

The Fifth District recently in Dependable Insurance Company v. Landers, 421 So.2d 175 (Fla. 5th DCA 1982), held ". . . that a debtor whose collateral is repossessed and is being sold lacks resources to protect himself and it is not too great a burden to require the stronger party to strictly comply with the statute.

The Fourth District has certified to this Court a conflict with the First District decision of Florida First National Bank at Pennsacola v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984). We believe that this is the majority viewpoint and the rationale of this decision should be adopted by this Honorable Court. In the above case, the trial court ruled that, as a result of the bank's failure to dispose of the boat in a commercially reasonable manner, the bank was not entitled to any deficiency judgment against Appellees. There the First District, in a well reasoned decision, held:

> "We find no reason to disturb this ruling. Deficiency judgments after repossession of collateral are in derogation of the common law and any right to a deficiency accrues only after strict compliance with the relevant statutes. * * * When seeking a deficiency judgment, the secured party (here the bank) has the burden of proving that the sale was conducted in a commercially reasonable manner or in accord with reasonable commercial practices, as required by statute, once the debtor has raised this issue. * * * Since the undisputed evidence established that the bank had not and could not carry that burden, there was no error in denying the deficiency judgment as a matter of law on the ground that the sale was not commercially reasonable. * * * Appellant contends that Barnett Bank of Tallahassee v. Campbell, 402 So.2d 12 (Fla. 1st DCA 1981), and

> Turk v. St. Petersburg Bank & Trust Co., 281 So. 2nd 532 (Fla. 2d DCA 1973)*, are inapplicable because those decisions involve the failure to give notice as required by Section 679.504(3) rather than the failure to conduct a commercially reasonable sale. In both cases, as well as in Barnett v. Barnett Bank of Jacksonville, 345 So.2d 804 (Fla. 1st DCA 1977), and Hepworth v. Orlando Bank and Trust, 323 So.2d 41 (Fla. 4th DCA 1975), the Florida courts aligned themselves with the rule that failure to comply with the statutory notice requirements preclude any action for deficiency against the debtors. These decisions support the trial court's ruling unless there is some rational basis to differentiate in this case between failing to comply with the statutory notice requirements and failing to comply with the statutory requirements for commercially reasonable disposition of the repossessed property. We see no reason to make such a distinction under the facts of this case." (emphasis added).

Petitioner disagrees with the Fourth District that there is a sufficient difference in the policies underlying the notice of sale requirement and the requirement that the sale be conducted in a commercially reasonable manner. For example, if a secured party fails to give notice of the intended disposition to the debtor buts conducts a sale in a commercially reasonable manner and obtains the best conceivable price, he is nevertheless precluded from a deficiency judgment. The rationale again, which is sound, is that the debtor is not afforded the protection given to them under the Uniform Commercial Code, and it is not unreasonable to require the stronger party, the secured creditor, to strictly comply with the statute. In the case at

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* These citations were not part of the actual quote but were added for the purpose of this brief.

bar, the Respondent merely sold the collateral to their wholly owned subsidiary which coincidently was located at the same locale that the goods had been immediately delivered to and stored upon repossession.

The requirement of the secured creditor having to strictly comply with F.S. 679.504(3) is not a penalty. In the everyday practice of law, we are governed by rules and statutes requiring strict compliance and the lack of compliance resulting in a bar to relief. If a judgment creditor fails to record a certified copy of his judgment, no lien is created and a subsequent creditor may come along and obtain the property to the detriment of the first judgment creditor. It may appear to be inequitable but the first judgment creditor had a duty to comply with the statute and did not.

A mechanic's lienor must take certain steps to perfect his lien. Again if he does not comply, he will lose his lien rights. These examples are no different than our situation requiring a secured creditor's compliance with the relevant statute.

Many other jurisdictions have followed this rationale. In Buran Equipment Company v. H & C Investment Co., Inc., 190 Cal. Rptr 878 (1 Dist., Div. 5, CAL. 1983), the court stated "that it is clear that the failure of the secured party to comply with either commercial reasonableness requirement or notice requirement of the Uniform Commercial Code precludes the secured party from recovering a deficiency judgment. In Central Bank & Trust Company v. Metcalfe, 663 SW2d 957 (Court of Appeal, Kentucky 1984), the Kentucky Court of Appeals held:

> "In order to recover a deficiency judgment resulting from the sale of collateral, all of

> the provisions of 9.504 must be complied with. The burden is on the secured party to prove it acted with commercial reasonableness in accomplishing the sale. This includes notification of the debtor of the sale."

Furthermore, the Fourth District Court of Appeals does not expound in their opinion what the sufficient difference is between the policy in the "notice" cases and the policy in the "commercial reasonableness" cases. Petitioner does not believe there is a sufficient difference to distinquish the two and would respectfully suggest that the Court continue to follow the rationale of all the cases cited herein aligned with the Florida First National Bank at Pennsacola v. Martin, supra, decision.

CONCLUSION

Since Respondent has failed to dispose of the collateral in a commercially reasonable manner pursuant to the F.S. 679.504(3) to the detriment of the Petitioner, this Honorable Court should reverse the decision of the Appellate Court and reinstate the decision of the trial court as there is no rational basis to distinquish a secured creditor's failure to give notice of a sale from a secured creditor's failure to dispose of the collateral in a commercially reasonable manner based upon the holding in Florida First National Bank at Pennsacola v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984).

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28 day of January, 1985, to WELBAUM, ZOOK, JONES & WILLIAMS, Attention: W. Frank Greenleaf, Esquire, 2701 South Bayshore Drive, Penthouse Suite, Miami, Florida 33133.

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