O/A 10-29-86

IN THE SUPREME COURT OF FLORIDA

LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, PETITIONER, VS. GEPETTO'S TALE O' THE WHALE OF OF FORT LAUDERDALE, INC., ROBINEX INTERNATION, LTD., ARTHUR J. BRAUER AND DONALD R. BRAUER, RESPONDENTS.	CASE NO. 68,348 RESPONDENTS ANSWER BRIEF

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PREFACE

Throughout this answer brief, the Respondents, GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LTD., ARTHUR J. BRAUER and DONALD R. BRAUER will be referred to collectively as Respondents, and LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, will be referred to as Petitioner.

For purpose of clarity, Respondents submit the following definitions not standard to the Court:

(R)	denotes a page number from the Original Record on Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, in Civil Action No. 81-13446 Judge Lee (CD)
(T P_ L_)	denotes a reference to the transcript of hearing before the Honorable Judge J. Cail Lee, as Judge of the Circuit Court, in and for Broward County, Florida, at the Broward County Courthouse, Fort Lauderdale, Florida, on February 28, 1985, commencing at 11:30 o'clock A.M.; T meaning transcript; P meaning page; L meaning line.

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OFFICIAL TEXT-1978 WITH COMMENTS AND APPENDICES

STATEMENT OF FACTS

Respondents, GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LTD., ARTHUR J. BRAUER AND DONALD R. BRAUER, would like to clarify the statement of the facts as prepared by Petitioner, by including the following facts developed at the evidentiary hearing or contained in the Record On Appeal:

(i) Arrangements were made with the Landlord to secure the Release of the collateral at a cost to Respondents of Twenty Eight Thousand Five Hundred Dollars ($28,500.00) (T P17 L12-21).

(ii) The collateral was in useable condition, less than two (2) years old, with a value of approximately Sixty Thousand Dollars ($60,000.00) to Seventy Thousand Dollars ($70,0000.00) (T P20 L18-23).

(iii) The collateral was replevied by the secured party party/Petitioner on August 11, 1981 (T P17 L1-3). The collateral was sold December 3, 1982 by Petitioner for a total sum of Thirteen Hundred and Fifty Dollars ($1,350.00), sixteen months after the same had been repossessed and nine months after the Summary Final Judgment was entered.

(iv) The debtor and guarantors, Respondents herein, never received any notice of the intended disposition of the collateral (T P21 L10-13; T P31 L9-13); and (T P51 40-16).

(v) The security agreement sought to be foreclosed, provided:

> "...Any notice of sale, disposition or other intended action by Secured Party, sent to Borrower at the address of Borrower specified above, or at any other address shown on the records of Secured Party at least five days prior to such action, shall constitute reasonable notice to Borrower...." (R-110).

(vi) William B. Crawford, the employee of the Petitioner charged with the responsibility of conducting the sale neither conducted an inventory (T P41 L 1-7) nor secured an appraisal of the collateral (T P42 L 15-17). William B. Crawford had no experience in the conduct of a sale of restaurant equipment. (T 40 L 14-20)

(vii) There was a theft of an unknown portion of the collateral while in the care, custody and control of the Petitioner (T P31-32 L 14-1).

(viii) One advertisement appeared in the Fort Lauderdale News for a period of one (1) week: "Misc Restaurant Equipment - & glassware. Call Bill Crawford at Landmark Bank 771-8220."

SUMMARY OF ARGUMENT

The sale conducted by Petitioner, Landmark First National Bank of Fort Lauderdale, was not noticed and the lack of same deprives said sale of the essential element - fairness. The entire transaction, when taken as a whole reflects an arrogance and a flagrant disregard for the debtor's and guarantors' rights.

The arguments propounded by Petitioner are untenable. Petitioner contends that the Fourth District Court of Appeal erred in reversing the trial court's decision due to Petitioner's lack of notice of the intended sale, or disposition of collateral. It's contention is based on a two-fold argument: initially, that Petitioner is exempt from the provisions of Florida Statute 679.504 (3) because of the exclusion contained in Florida Statute 679.104 (h), or, because the notice provision was complied with by virtue of the language contained in the Summary Judgment. Petitioner's protestations that they are excluded from Chapter 679 of the Florida Statutes by virtue of 679.104 (h) are unfounded. The trial court anticipated further procedures in conformance with Florida Statute Chapter 679, and clearly if one secures collateral pursuant to a prejudgment Writ of Replevin, it only stands to reason that the collateral must be disposed of pursuant to the Statutes under which it was replevied.

The second prong of Petitioner's initial argument that entry of the Final Summary Judgment and the providing of a copy of same to Respondents constitutes notice, is factually, and legally, incorrect. The Summary Final Judgment was entered eight (8) months prior to the sale of the collateral. The collateral was sold approximately sixteen (16) months after it was replevied. The length of time between the replevin and the sale, as well as the time between the Summary Final Judgment and sale, are unreasonably long. Further, the Summary Final Judgment itself clearly is not notice of an impending sale, but rather an instruction to Petitioner to dispose of the collateral as secured party, in a commercially reasonable manner.

The second argument raised on appeal is interesting, but without merit. Petitioner contends that the lack of notice should be remedied by a set off to, rather than a complete bar to a deficiency judgment. The majority rule in Florida is that the secured party's failure to properly notify the debtor and guarantors of the intended disposition of the collateral or sale is a bar to the obtainment of a deficiency judgment by the secured party. Article 9-507 of the Uniform Commercial Code provides that if a secured party has disposed of collateral in a commercially unreasonable manner, the debtor and/or guarantors have a right to recover from the secured party for a loss that has been sustained or to prevent an unreasonable disposition of collateral. Although Petitioner argues otherwise, Article 9-507 of the Uniform Commercial Code is inapplicable to the case at bar, which is based on a failure of the secured party to provide notice of the intended disposition of collateral.

ISSUES ON APPEAL

I. Whether the Fourth District Court of Appeal erred in reversing and remanding the trial court's ruling due to Landmark's lack of notice of the intended disposition of the collateral.

   A. Whether Landmark's actions with respect to the repossession and sale of Respondents' equipment were exempt from the notice requirements of 679.504(3), Florida Statutes.

   B. Whether the entry of a Final Summary Judgment in this matter, and the providing of a copy of same, constituted notice of the disposition of the collateral.

II. Whether, if this Court should find that there had been insufficient notice to Respondents, the proper remedy would be denial of a deficiency judgment or the proper remedy would be to allow Respondents a setoff for the injury caused them by the lack of notice.

ARGUMENT I

I. The Fourth District Court of Appeal did not err in reversing and remanding the trial court's ruling due to Landmark's lack of notice of the intended disposition of the collateral.

A. Landmark's actions with respect to the replevin and subsequent disposition of Respondents' inventory and equipment were not exempt from the notice requirements of 679.504(3), Florida Statutes.

Petitioner contends that its action with respect to the replevin and disposition of Respondents' inventory and equipment, which was the secured collateral, was exempt from the notice requirements under Section 679.504 (3) Florida Statutes. The Uniform Commercial Code is devoid of official commentary interpreting UCC 9-104 (h). It is inexplicable, and ludicrous, that Petitioners could argue that they were permitted to replevy collateral as a secured party under the provisions of the Uniform Commercial Code adopted by the Florida Legislature, but when they disposed of the same, it was not incumbent upon them to comply with the code requirements. In the vernacular, the Petitioner wishes to have his cake and eat it, too.

The Summary Final Judgment (R-161-162) anticipated and directed Petitioners to dispose of the collateral in a commercially reasonable manner. The court stated:

> "Having already obtained possession of certain personal property through pre-judgment writ of replevin, the Plaintiff shall dispose of same as a secured creditor in a commercially reasonable manner and credit any sums received against the above damages."(Emphasis added)

The trial court did not envision that the execution of the Final Summary Judgment would dispense with the requirements of the Uniform Commercial Code. The Court, in adopting the language of the Uniform Commercial Code quoted above, directed further procedures in conformance with the Code. It was neither anticipated by the Court, nor authorized by law that upon the entry of the Summary Final Judgment, the code requirements would be extinguished. This is further evidenced by Final Judgment on the Amended Petition for Declaratory Relief and Set-off (R-260), which did not hold that notice was not required, but rather:

> "the court finds from the evidence that the lack of notice complained of by Gepetto's is not dispositive of this case for the reason that under the facts of this case the entering of the Final Judgment dated February 17, 1982, and the providing of a copy of said judgment to the Petitioners herein, constituted notice and no further specific notice of sale was required." (R-260)

The trial court held that Petitioners complied with the notice provision of Section 679.504 (3), Florida Statutes, not that the notice provisions are not required. The argument of Petitioner is not supported by the facts, nor by law.

Arguendo, if the Court holds that Petitioner is excluded under Section 679.104 (h), under what law is Petitioner governed? Is it the law of executions? Did the Petitioner comply with the law of executions? There was no writ of

execution issued by the Court. There was no Sheriff's sale pursuant to a writ of execution. Florida Statute 56.21 states:

> "Notice of all sales under execution shall be given by advertisement once each week for 4 successive weeks in a newspaper published in the county in which the sale is to take place or, if there is no newspaper published in the county, by posting notices at the door of the courthouse of the county and at three other public places in the county for thirty (30) days;... on or before the date of the first publication or posting of the notice of sale, a copy of the notice of sale shall be furnished by certified mail to the attorney of record of the judgment debtor, or to the judgment debtor..." (Emphasis added)

Failure to publish the notice has been held to deprive the sale of the essential element of fairness, constituting fraud, mistake, collusion, suprise, misconduct or irregularity that would justify setting aside the sale. Levy v. Gourmet Masters, Inc. (1968, Fla App D3) 214 So.2d 82.

It should also be remembered that the security agreement plainly states:

> "...Any notice of sale, disposition or other intended action by Secured Party, sent to Borrower at the address of Borrower specified above, or at any other address shown on the records of Secured Party at least five days prior to such action, shall constitute reasonable notice to Borrower...." (R-110).

Consequently, whether the Petitioner is required to conform with the Uniform Commercial Code, the law of executions or the security agreement, it clearly should have provided some notice, which it plainly did not.

B. The entry of a Final Summary Judgment in this matter, and the providing of a copy of same, did not constitute notice of the intended disposition of the collateral.

Plaintiff contends that the entry of a Final Summary Judgment, and the providing of a copy of same to Respondents, constituted notice of the intended disposition of the collateral. This argument must be summarily rejected.

The Fourth District Court of Appeal summarily rejected the trial court's findings, that:

> "the court finds from the evidence that the lack of notice complained of by Gepetto's is not dispositive of this case for the reason that under the facts of this case the entering of the Final Judgment dated February 17, 1982, and the providing of a copy of said judgment to the Petitioners herein, constituted notice and no further specific notice of sale was required." (R-26D)

And held:

> "The summary final judgment in the case at bar does not provide the information required by the code. As indicated, it was entered on February 17, 1982, and directed the bank to conduct a sale. It did not specify, however, the time or place of the sale, nor did it indicate whether the sale would be public or private. In fact, the sale occured on December 11, 1982, eight months after the entry of the final judgment. Thus, the Trial Court findings are neither factually nor legally correct. Indeed, the evidence is undisputed that the bank failed to provide any notice to the guarantors."

In the case at bar, the secured party's employee, Mr. Crawford, who conducted the sale advised that he did not deliver any notice to the debtor nor the guarantors (T P51 L10-15).

Further, Mr. Donald R. Brauer, as President of Gepetto's Tale O'The Whale, as well as an individual guarantor of the promissory note, testified that he never received notification of the intended disposition of the collateral (T P31 L9-13). Mr. Arthur J. Brauer also testified on behalf of himself, that he never received any notice from the secured party/Petitioner, regarding the intended disposition of the collateral. (T P21 L10-16).

The rationale behind the notice requirement is that the debtor and guarantors have a vested interest in the outcome of the sale and therefore would avail themselves of every opportunity to protect their interests. This could be accomplished by the debtor's either purchasing the collateral at the sale, or securing ready, willing and able bidders to insure that a fair price is obtained for the collateral. In either event, the amount of a deficiency judgment, if any, would be substantially reduced.

ARGUMENT

II. Whether, if this Court should find that there had been insufficient notice to Respondents, would the proper remedy be denial of a deficiency judgment or would the proper remedy be to allow Respondents a setoff for the injury caused them by the lack of notice.

Florida courts have uniformly taken the position that the secured parties' failure to comply with the statutory notice provisions of Section 679.504 (3) Florida Statutes 1983, precludes, and is a bar to any action for a deficiency judgment against the debtor. In Barnett v. Barnett Bank of Jacksonville, N.A. 345 So2d 804 (Fla 1st DCA 1977) the secured party brought an action against guarantors seeking recovery under a promissory note guaranteed by them and secured by commercial equipment. The guarantors contended that they were released by the secured party's action in selling the collateral without notice to them, thus denying them an opportunity to redeem the collateral. The First District Court of Appeal held failure of the secured party to give requisite notice prior to sale or disposition of the collateral precluded, and was a bar to the secured party's obtaining a deficiency judgment against the guarantor.

In Turk v. St. Petersburg Bank and Trust Company 281 So2d 534 (Fla 2nd DCA 1973), the secured party used and sold automobiles belonging the debtor. The secured party then sought to recover a deficiency. The Second District Court of Appeal stated:

> "the language is clear that before a secured party (in this instance the bank) can obtain a deficiency against the debtor (in this instance Turk) a debtor must be given notice of what is about to occur. This is as it should be because the debtor in this instance, Turk, could have done many things. He could have purchased the automobiles himself; he could have paid the extent of the liability, i.e. $20,000.00; he could have secured purchasers for the automobiles. He was not afforded the opportunity to do anything."

The Court held that in the absence of the required notice by the secured creditor pursuant to Section 679.504 (3) Florida Statutes 1983, the creditor forfeits his right to any deficiency against the debtor.

In Bagel Break Bakery Inc. vs. Bagelman's Inc., at 431 So.2nd 676, (Fla App 4D DCA 1983) the Court of Appeal, stated:

> "Section 679.504(3), Florida Statutes (1981) requires reasonable notification of the time after which any private sale or other disposition is to be made of the property. We hold that under the circumstances of this case two days notice is not reasonable. Failure to give notice does not vitiate the sale, but it precludes the creditor from recovering a deficiency...."

In Dependable Insurance Company, Inc. v. Landers 421 So2D 175 (Fla 5th DCA 1982) an assignee of a secured creditor brought an action against a debtor seeking deficiency judgment. The Fifth District Court of Appeal ruled that a secured creditor repossessing collateral, but failing to give reasonable notice of sale to debtor before selling collateral, loses its right to sue the debtor for a deficiency.

In Washington vs. First National Bank of Miami, at 332 So.2nd 644 (Fla App 3D DCA 1976) the Court of Appeals stated:

> "We hold that before a secured party can obtain a deficiency against a debtor or consignor of an installment sales contract, the debtor must be given notice of what is about to occur... The Bank failed to give the required notice of the sale to the appellant and although the bank was permitted by statute to dispose of the collateral (repossessed automobile) without judicial process or notice to the appellant, it was not entitled to a deficiency against the appellant who was not so notified."

The decision in the Washington v. First National Bank of Miami was apparently overturned by the Third District Court of Appeal in later decisions (See Ayres Eisenberg Perine Datsun, Inc. v. Sunbank of Miami (Fla 3rd DCA 1984) 455 So2d 525, and Bank of Oklahoma v. Little Judy Industries Inc. (Fla 3rd DCA 1980) 387 So2d 1002).

In Ayres Eisenberg Perine Datsun, Inc. v. Sunbank of Miami, a secured party brought an action against debtors and gurarantors to recover on an overdue note after repossessing collateral which was secured thereby. The Third District Court of Appeal held:

> "it would be unnecessary to remand this action for further proceedings were we able to follow the majority rule in Florida that failure to give the notice required by Section 679.504 (3) precludes an action to recover the balance owed on a note after disposition of the collateral. We find however that the legislature has provided other relief which will require a remand for further proceedings... In Bank of Oklahoma, N.A. v. Little Judy Industries, Inc., 387 So.2d 1002, 1005 (Fla.3d DCA 1980), this court, construing Section 679.507 (1), adopted the following language from Norton v. National Bank of Commerce of Pine Bluff, 240 Ark. 143, 149, 398 S.W.2d 538, 541 (1966). We do not agree

> with [the] contention that the bank's failure to give... notice of the intended sale completely discharged [the debtor's] obligation. For the most part the Code follows the theory formerly applicable to mortgages by which the debtor was entitled to any surplus realized upon foreclosure and was liable for any deficiency..."

The Ayres Eisenberg Perine Datsun, Inc. v. Sunbank of Miami and Bank of Oklahoma v. Little Judy Industries Inc. decisions follow the rationale that where the notice of the intended diposition or sale of collateral has not been provided in accordance with the requirements of 679.504 (3), the spirit of commercial reasonableness dictates that the secured party not be arbitrarily deprived of his deficiency by the automatic bar. This is the ultimate conflict between the Florida decisions, and this is the issue which must be decided by the Court.

The law in Florida, excepting the Third District Court of Appeal, is and has been that the failure of the secured party to provide notice required under 679.504 (3) Florida Statute 1983, precludes and is a bar to the secured party from obtaining any deficiency against the debtor.

The rationale behind the majority rule in Florida is that the secured creditor's non-compliance with the notice provisions deprives the debtor of his right of redemption. The secured creditor who fails to comply with the notice requirements of the Uniform Commercial Code should not be entitled to a deficiency judgment when, by his actions he has effectively and

unilaterally extinguished the debtor's right of redemption. As previously discussed, the right of redemption is an important right which allows the debtor to regain the collateral by payment of the debt, thereby eliminating any deficiency or by securing ready, willing and able bidders to purchase the collateral at the sale, thereby assuring an adequate price for the collateral and diminishing the amount of deficiency judgment, if any.

The reasoning behind the Ayres Eisenberg Perine Datsun, Inc. v. Sunbank of Miami and Bank of Oklahoma v. Little Judy Industries Inc. decisions an the reasoning of Petitioner is flawed. The Petitioner alleges that any failure on its part to provide the notice required under Article 9-504 (3) of the Uniform Commercial Code can be remedied by a credit or setoff for damages which the debtor is entitled under Article 9-507 of the Uniform Commercial Code. The official commentary interpreting this provision does not support Petitioner's argument.

The official commentary of UCC 9-507 sets forth the following:

> "The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner. See Section 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been

> concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery."

In light of the foregoing official commentary, Petitioners argument that Section 679-507 Florida Statutes 1983, provides an adequate remedy is unpersuasive. A plain reading of Uniform Commercial Code 9-507 and the official commentary included therein contemplate an affirmative action to prevent a commercially unreasonable disposition of collateral, or the recovery of a loss that has already been sustained, rather than a defense to an action for deficiency. Uniform Commercial Code 9-507 has nothing whatsoever to do with defenses to an action for a deficiency. Nowhere under Article 9 of the Uniform Commercial Code does it contemplate that a secured creditor could recover a deficiency judgment after violating the code requirements regarding notice. Article 9-507 of the Uniform Commercial Code is inapplicable in the instant cause. This view has been adopted by courts in a number of jurisdictions. (See Cal-Atlas Thrift Co. v Horan (1972) 27 Cal App 3d 999, 104 Cal Rptr 315, 59 ALR3d 389., DC-Commercial Credit Corp. v Lloyd (1973, Dist Col Super Ct) 12 UCCRS 15., Ga-Braswell v. American

Nat. Bank (1968) 117 Ga App 699, 161 SE2d 420; Edmondson v. Air Service Co. (1971) 123 Ga App 263, 180 SE2d 589., Iowa-Twin Bridges Truck City, Inc. v. Halling (1973, Iowa) 205 NW2d 736., Me-Camden Nat. Bank v. St. Clair (1973, Me) 309 A2d 329.,Mich-Cities Service Oil Co. v. Ferris (1971, Mich DC) 9 UCCRS 899., NM-Foundation Discounts, Inc. v. Serna (1970) 81 NM 474, 468 P2d 875., NY-Leasco Data Processing Equipment Corp. v. Atlas Shirt Co. (1971) 66 Misc 2d 1089, 323 NYS2d 13., Jefferson Credit Corp. v. Marcano (1969) 60 Misc 2d 138, 302 NYS2d 390., Pa-General Electric Credit Corp v. Schaffer, 34 Leh LJ 84., Skeels v. University C.I.T. Credit Corp. (1963, DC Pa) 222 F Supp 696, vacated on other grounds (CA3 Pa) 335 F2d 846., Wyo-Aimonetto v. Keepes (1972, Wyo) 501 P2d 1017.)

Arguendo, if this Court should rule that the lack of notice as proscribed by Section 679.504 (3), Florida Statutes 1983, entitles Respondents to a set-off, or creates a rebuttable presumption that the collateral is worth at least the amount of the debt, the Court would still be unable to enter a deficiency judgment in the case at bar. This is so because the sale was conducted in a commercially unreasonable manner, as evidenced by the information previously provided in the Statement of Facts, Supra.

CONCLUSION

For the reasons set forth above, the Respondents, Gepetto's O' Tale the Whale, Inc., Robinex International Limited, Arthur J. Brauer and Donald R. Brauer, respectfully request that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was furnished to Robert A. Ware, Esq., English, McCaughan & O'Bryan, P. O. Box 14098, Fort Lauderdale, Flroida 33302-4098, by mail this 28 day of July, 1986.

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