O/G 10-29-86

IN THE SUPREME COURT OF FLORIDA

LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, Petitioner,	)	
v.	)	CASE NO. 68,348
GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LIMITED, ARTHUR J. BRAUER, and DONALD R. BRAUER, Respondents.	)	

REVIEW OF THE DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
IN CASE NO. 85-1112

PETITIONER'S INITIAL BRIEF

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PREFACE

Throughout this initial Brief, Petitioner, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, will be referred to as "Landmark." The Respondents/Defendants will be collectively referred to as "Respondents." References to the original record on appeal from the District Court of Appeal of the State of Florida, Fourth District, Case No. 85-1112, will be designated by the letter "R."

Two issues were presented to the Fourth District Court of Appeal when this matter was before that Court. Those issues involved: (1) whether Landmark's sale of the collateral was conducted in such a commercially unreasonable manner as to deny Landmark a deficiency judgment, and (2) whether Landmark's alleged lack of notice prior to sale of collateral should bar a deficiency judgment. Only the second issue was addressed in the Fourth District's opinion. That is the only issue as to which certiorari review was granted and the only issue which will be addressed in this Brief.

This Court has, however, recently addressed the first issue -- whether disposition of collateral in a commercially unreasonable manner will bar the creditor's right to a deficiency judgment. In Weiner v. American Petrofina Marketing, Inc., 482 So.2d 1362 (Fla. 1986), this Court held that such failure of the creditor would not

automatically, as a matter of law, preclude a deficiency judgment. The court held, however, that such misbehavior by the creditor would raise a rebuttable presumption that the fair market value of the collateral at the time of repossession was equal to the total debt. The burden of disproving that presumption would rest on the secured party.

Frequently throughout this Brief, decisions of other states, which decisions construe Uniform Commercial Code provisions, will be cited. This is in keeping with this Court's rationale that: "The Uniform Commercial Code was designed to promote uniformity of the rules of law governing commercial transactions among the states." ITT Industrial Credit Company v. Regan, 11 F.L.W. 189 (Fla. April 25, 1986).

STATEMENT OF THE CASE

On or about July 9, 1981, Landmark filed, in Broward County Circuit Court, a Verified Petition in Replevin and Complaint for damages (R. 106-110), which complaint was subsequently amended. (R. 132-141). The Amended Complaint sought recovery of personal property which had served as collateral for a security agreement, damages for breach of a promissory note and recovery from guarantors under separate guaranty agreements. (R. 132-141). Following a Show Cause hearing, a Writ of Prejudgment Replevin was issued. (R. 111-119). Landmark took possession of the collateral pursuant to that Writ (R. 37).

The Honorable J. Cail Lee entered, on February 17, 1982, a Final Summary Judgment on behalf of Landmark (R. 161-162). (See Appendix.) On or about February 26, 1982, Respondents filed a Motion for Rehearing (R. 167-169), which Motion was denied by the trial court on or about September 7, 1982. (R. 171).

On or about March 29, 1983, Respondents filed a Petition for Accounting and Setoff. (R. 196-199), which Petition was subsequently amended and styled as an Amended Petition for Declaratory Judgment and Setoff. (R. 241-245). Following an evidentiary hearing, the trial court entered a Final Judgment on that Petition and denied the relief sought by Respondents. (R. 260).

Respondents appealed that Final Judgment to the Fourth District Court of Appeal. (R. 261). Following briefing and oral argument, the Fourth District entered an opinion reversing the trial court's final judgment and remanding the matter for further consideration. (See Appendix.) Petitioner herein filed, on February 14, 1986, a Motion to Invoke Discretionary Jurisdiction, which was granted by this Court on June 16, 1986. (See Appendix.)

STATEMENT OF THE FACTS

Landmark made a commercial loan in the amount of $100,000.00 to Gepetto's Tale O' The Whale on November 30, 1979. (R. 132-141). That loan was collateralized with a security agreement in inventory, equipment, fixtures and leasehold improvements owned by Gepetto's Tale O' The Whale. (R. 132-141). The loan was guaranteed by Robinex International Limited, Arthur J. Brauer and Donald R. Brauer. (R. 132-141). Gepetto's Tale O' The Whale defaulted in the payment of that loan. (R. 132-141).

Landmark filed suit in Broward County Circuit Court seeking damages and replevin. (R. 132-141). That court entered a Prejudgment Writ of Replevin on July 23, 1981. (R. 113-119). On or about August 11, 1981, Landmark repossessed the collateral in question. (R. 24). The Respondents participated in removing the equipment from the restaurant to a warehouse where Landmark placed its lock upon the door. (R. 17-18).

Subsequent to that repossession of collateral, a Final Summary Judgment was entered by the trial court in favor of Landmark against Respondents. (R. 160-162). The Respondents, represented by counsel at that time, were informed by their attorney that the Judgment had been entered. (R. 21). In fact, depositions in aid of execution of at least one Respondent were taken. (R. 21).

In November of 1982, Landmark personnel met with Dave Betsel, of Atlantic Scale and Equipment, to inspect the equipment. (R. 41). Mr. Betsel was experienced in the business of selling restaurant equipment. (R. 42). Landmark later ran an advertisement in the Fort Lauderdale News advertising that the restaurant equipment was for sale. (R. 43). Landmark personnel responded to calls received from potential purchasers of the equipment, which calls were received in response to that advertisement. (R. 46). Three of those potential customers met with Landmark personnel and made offers to purchase portions of the collateral. (R. 46). On at least one occasion, Landmark declined an offer that had been made. (R. 85). The equipment was sold in December of 1982. (R. 24).

Following the sale of collateral, Respondents filed an Amended Petition for Declaratory Judgment and Setoff, requesting the Court to deny Landmark a deficiency judgment due to an alleged lack of notification by Landmark to Respondents of the sale of the collateral. (R. 241-245). At the hearing conducted on that Petition, Landmark presented expert testimony from David Betsel. (R. 82-98). Mr. Betsel testified that the quantity of equipment and inventory repossessed by Landmark from Respondents was insufficient to justify a public auction for its disposal. (R. 84). Mr. Betsel further testified that Landmark had

asked him if he wanted to make an offer on the property, and had, in fact, rejected an offer which he made on various items. (R. 85). Mr. Betsel also testified, as an expert, that the manner of disposal chosen by Landmark to sell the collateral in question was a normal way to dispose of that collateral "because of the limited amount of small wares as far as the quantity and also the items that were in the warehouse were not of great value to a majority of restaurants in this area." (R. 87). Mr. Betsel further testified that, in his opinion, Respondents have been notified of the sale by virtue of the Judgment entered against them in this matter. (R. 93).

SUMMARY OF ARGUMENT

The basic issue before this Court concerns whether Landmark should be allowed to recover from the Respondents amounts still due by Respondents, under the terms of the Final Summary Judgment, following sale by Landmark of the collateral for the underlying obligation. Respondents maintain that Landmark supplied no notice to them of sale of the collateral and is thus barred, as a matter of law, from obtaining a deficiency judgment against Respondents.

Landmark is not attempting to obtain a deficiency judgment against Respondents. Landmark is proceeding under a Final Summary Judgment, which sets forth certain amounts due to Landmark by Respondents. That Judgment mandated that Landmark was to sell collateral it had previously repossessed, under a Prejudgment Writ of Replevin, and to credit the amounts received from that sale to the amounts due by Respondents under that Judgment. Landmark's right to proceed against the Respondents, and to recover the amounts set forth in that Judgment, less the amount received from sale of the collateral, is a right embodied in that Judgment rather than being a right made available to Landmark under the terms of the Uniform Commercial Code. By proceeding under a right represented by that Final Summary Judgment, Landmark's actions are exempted by Florida Statute from the requirements of Article 9 of the Uniform Commercial Code.

Should this Court determine that Landmark's actions with respect to the sale of the collateral are not exempted from the provisions of Article 9 of the Uniform Commercial Code, Landmark is still entitled to recover from the Respondents. Landmark has complied with the notice requirements of that Article. Landmark forwarded to the Respondents, via their attorney, a Final Summary Judgment entered against them in that matter. Landmark was obligated, under the terms of that Judgment, to sell collateral it had previously repossessed. From the date of that Final Judgment, the Respondents were given notice that Landmark would be obliged to sell the collateral and to apply the proceeds to the amounts due under that Judgment.

Landmark's actions in supplying the Respondents with a copy of the Final Judgment comply with the general Uniform Commercial Code definitions of "notice" and giving notice. Further, the Respondents had notice, from the facts and circumstances involved, that the collateral would be sold.

Landmark's obligation to give notice of a private sale of collateral, the sale of collateral which was effected in this case, was to give reasonable notification of the date after which the collateral would be sold. Landmark complied with this requirement by forwarding a copy of the Final Summary Judgment to Respondents and should not be denied recovery of the remaining amounts due it.

Assuming arguendo that Landmark did not comply with the statutory requirements for notice of sale of collateral, the proper remedy is not denial of a deficiency judgment. That remedy is unduly harsh to Landmark and would result in an undeserved windfall to Respondents.

The majority of American jurisdictions that have considered this issue have allowed deficiency judgments to creditors who have failed to comply with the notice requirements. Those jurisdictions have followed one of two alternatives. One alternative is to allow the debtor to recover for injury caused by the lack of notice under the debtor's remedies outlined in Uniform Commercial Code Section 9-507. The second alternative allows the creditor to recover if the creditor can rebut a presumption that the collateral, at the time of sale, was worth the amount of the total indebtedness.

By adopting either of these alternative courses, this Court will be in keeping with the modern trend. It would, further, be in compliance with the general Uniform Commercial Code provision that the remedies of the Code are to be liberally administered to the end that the aggrieved party should be placed in as good a position as if the other party had fully performed.

Landmark presented expert testimony, at the hearing on Respondents' Amended Petition for Declaratory Judgment

and Setoff, that the sale of the collateral was conducted in a reasonable manner and that the collateral was not of great value to a majority of restaurants in the area. (R. 86-87). The price received for that collateral was reasonable. Respondents presented no evidence to rebut this testimony. The record establishes, therefore, that the Respondents suffered no injury whatsoever from Landmark's failure to provide them with notice of the sale of collateral.

The only injury which Respondents could have suffered from the alleged lack of notice of the sale of collateral would have occurred if the sale price was not the reasonable value of the collateral. The record reflects that this was not the case. Landmark should not be denied the opportunity to recover the remaining amounts due it under the Final Summary Judgment. Neither should Respondents be awarded an undeserved windfall by allowing them to escape from their obligations under that Judgment.

ISSUES ON APPEAL

I. WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN REVERSING AND REMANDING THE TRIAL COURT'S RULING THAT RESPONDENTS SHOULD BE DENIED A SET OFF TO THEIR JUDGMENT DUE TO LANDMARK'S ALLEGED INSUFFICIENT NOTICE OF SALE OF 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), Fla.Stat.

B. Whether The Entry of a Final Summary Judgment In This Matter And The Provision Of A Copy Of Such Judgment To Respondents Constituted Sufficient Notice Of The Subsequent Sale Of 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 WHETHER IT WOULD BE ALLOWING RESPONDENTS A SETOFF FOR THE INJURY CAUSED THEM BY THE LACK OF SUFFICIENT NOTICE.

A. Whether The Provisions Of The Uniform Commercial Code Mandate Denial Of A Deficiency Judgment To A Creditor Who Fails To Provide The Required Notice Prior To Sale Of Collateral.

B. Whether, Should This Court Find That There Had Been Insufficient Notice To Respondents, The Proper Remedy Would Be To Allow Respondents A Setoff For The Injury, If Any, Caused To Them By The Lack Of Notice.

ARGUMENT I

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN REVERSING AND REMANDING THE TRIAL COURT'S RULING THAT RESPONDENTS SHOULD BE DENIED A SET OFF TO THEIR JUDGMENT DUE TO LANDMARK'S ALLEGED INSUFFICIENT NOTICE OF SALE OF COLLATERAL.

A. Landmark's Actions With Respect to the Repossession and Sale of Respondents' Equipment Were Exempt From the Notice Requirements of §679.504(3), Fla.Stat.

Following default by a Debtor, a creditor may proceed in one of several ways: (1) he may propose to retain the collateral in satisfaction of the debt, thereby abandoning the possibility of a deficiency, pursuant to §679.504(2), Fla.Stat. (1985); (2) he may dispose of the collateral by "public" or "private" sale or by some other means under the provisions of §679.504, Fla.Stat. (1985), subject to the provision that every aspect of this disposition of collateral must be commercially reasonable; or (3) he may, pursuant to §679.501(1), Fla.Stat. "reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."

These provisions of the Uniform Commercial Code, which govern the secured party's rights and remedies when the debtor is in default under a security agreement, must be interpreted in light of the overall policy of the Uniform Commercial Code to expend creditors' remedies with respect to personal property collateral. Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. Ct. App. 1981), citing Bilar,

Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977); Alexander Dawson, Inc. v. Sage Creek Canyon Company, 37 Colo. App. 339, 546 P.2d 969 (1976). These creditors' remedies are cumulative and alternative remedies may be pursued by the secured party. Snake River Equipment Company v. Christensen, 691 P.2d 787, [38 U.C.C. Rep. 1902] (Idaho App. 1984).

In the case at bar, Landmark filed an Amended Complaint for damages and replevin. (R. 132-141). Following a Show Cause hearing, the Trial Court issued an Order directing the clerk to issue a Writ of Prejudgment Replevin. (R. 111-112). Pursuant to that Writ, Landmark repossessed the collateral in question with the assistance and cooperation of the Respondents. (R. 37). This repossession of the collateral by Landmark took place some six months prior to the entry of Final Summary Judgment in this matter. (R. 24).

By availing itself of the statutory right to replevin, Landmark was proceeding under the third of the options from which a creditor can choose in the face of a debtor's default. Landmark was proceeding by judicial process to obtain possession of the collateral and a judgment for damages due Landmark under the terms of the promissory note and guarantee agreements. Landmark was awarded, in the Judgment entered by the trial court,

possession of the collateral and a judgment for damages against Respondents. Landmark was further obligated, by the terms of that Judgment, to sell the collateral which it had previously repossessed and offset the sums due from Respondents by the amount obtained from the sale. Landmark complied with its obligation.

By utilizing judicial process to obtain a judgment against the Respondents and possession of the collateral in question, Landmark proceeded in keeping with the provisions of the Uniform Commercial Code and case law construing same. Early after the adoption of the Uniform Commercial Code, the Third Circuit Court of Appeals considered the issue of whether, under the provisions of the Code, a creditor could pursue alternate remedies. In Re Adrian Research and Chemical, Inc., 269 F.2d 734 (3d Cir. 1959). The Adrian court held that the creditor "did not waive his right to rely on the collateral when he proceeded by execution and levy to enforce the judgment on the note against the debtor." Id. at 738. Cases since Adrian continued to construe Uniform Commercial Code §9-501 as permitting the pursuit of alternate remedies by the secured party. See, e.g., Ruidoso State Bank v. Garcia, 587 P.2d 435 [25 U.C.C. Rep. 614] (N.M. 1978) (a secured party is not precluded from levying on the collateral under the security agreement by first suing on the debt and obtaining a default

judgment); Peoples National Bank of Washington v. Peterson, 498 P.2d 884 [11 U.C.C. Rep. 233] (Wash. App. 1972) (the secured party is entitled to institute an action on the promissory note and obtain judgment for the unpaid balance, to sell the collateral in the secured party's possession and, in addition, to judicially foreclose upon the security in the event the sale is abandoned).

Landmark, thus acting on rights available to it under the Uniform Commercial Code and cases construing that Code, obtained a judgment against the Respondents. Landmark had a right, as represented by that Final Summary Judgment, to recover from the Respondents the amounts set forth in that Judgment. Landmark was under a further obligation, by virtue of that same Judgment, to sell the collateral and to apply the proceeds of that sale to the indebtedness of the Respondents. Landmark's right to a deficiency following sale of that collateral was embodied in the Final Summary Judgment. In effect, Landmark had a right to proceed against the Respondents and their assets until Landmark recovered the amount for which it had obtained judgment.

This right to proceed against the Respondents, obtained by Landmark by virtue of that Final Summary Judgment, is exempted by Florida Statutes from the provisions and requirements of Uniform Commercial Code, Article 9. §679.104, Fla.Stat. provides in pertinent part

that the provisions of that Chapter do not apply: "to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral)." §679.104(a), Fla.Stat. (1985). (Emphasis added.)

Because of this exemption from the provisions of Article 9, Landmark was thus under no statutory obligation to provide notice of sale to the Respondents or to conform in any other way to the requirements of Uniform Commercial Code, Article 9. Landmark was, however, under an obligation to sell the collateral in question and to apply the proceeds to the indebtedness, which Landmark did in fact accomplish. That obligation on the part of Landmark to so sell the collateral arose, however, from the terms of the Final Summary Judgment rather than from the provisions the Uniform Commercial Code. Landmark's right to proceed against the Respondents for any amount still due following such sale also arose from the terms of the Final Summary Judgment and was a "right represented by a judgment" so as to be statutorily exempted from the provisions of the Uniform Commercial Code.

B. The Entry of a Final Summary Judgment in This Matter and the Provision of a Copy of Such Judgment to Respondents Constituted Sufficient Notice of the Subsequent Sale of the Collateral.

Even if this Court should find that Landmark was subject to the provisions of Article 9 of the Uniform Commercial Code, and that the exception set forth above is

not applicable, Landmark provided sufficient notice of the sale of the collateral to the Respondents to satisfy the requirements of §679.504(3), Fla.Stat. (1985). Landmark provided this notice by virtue of the Final Summary Judgment entered by the trial court below.

A secured party desiring to dispose of collateral after default is obligated, by the terms of §679.504(3), Fla.Stat., to give reasonable notification of the time after which a private sale of that collateral may be conducted. The Uniform Commercial Code establishes some guidelines whereby receipt and transmittal of such notice may be established. Under the Code, a person has "notice" when:

(a) he has actual knowledge; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

§671.201(25), Fla.Stat. (1985). The Code further states that a person "notifies" or "gives" a notice or notification by "taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." §671.201(26), Fla.Stat. (1985). A person receives a notice, under the general definitions of the Uniform Commercial Code, when:

(a) It comes to his attention; or

> (b) It is duly delivered at the place of business through which the contract is made or at any other place held out by him as the place for receipt of such communications.

§671.201(26), Fla.Stat. (1985).

Testimony from Respondents, at the hearing conducted before the trial court on Respondents' Amended Petition for Declaratory Judgment and Setoff, clearly established that Respondents were notified, pursuant to the Code definitions of notification, of the date after which the collateral would be sold. Respondents testified that they were notified, through their attorney, that a judgment had been entered against them in this matter. (R. 21). At the time the Judgment was entered, the Respondents were represented by counsel in that matter. (R. 21). That Judgment clearly stated that Landmark was obligated, from that day forward, to dispose of the collateral in a commercially reasonable manner by virtue of the trial court ordering that:

> Having already obtained possession of certain personal property through Pre-Judgment [sic] 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.

(R 162). The very terms of that Final Summary Judgment, as sent by Landmark to Respondents' attorney, certainly meet

the Code definitions for "notice." Respondents also had reason to know, from the facts and circumstances available to them, that the sale would take place. As experienced businessmen, Respondents could surely be held to have had knowledge that Landmark would proceed to obey the order of the Court, as set forth in the Final Summary Judgment, and would dispose of the collateral in question.

Landmark's sale of the collateral repossessed from the Respondents was a private sale, allowable under §679.504(3), Fla.Stat. (1985). Although there was an advertisement conducted by Landmark indicating that the collateral was available for purchase, there was no public announcement as to specified time and place of the sale. The sale was, in fact, conducted by securing offers from persons who responded to that general advertisement. (R. 46, 54). Under the terms of the Uniform Commercial Code, therefore, Landmark was only obligated to notify the Respondents of the date after which a private sale would be conducted. §679.504(3), Fla.Stat. (1985). The Final Summary Judgment entered by the trial court, and the forwarding of that Judgment to Respondents' attorney, demonstrates that Landmark supplied to Respondents sufficient notification of the subsequent private sale of the collateral.

It is true that, on some occasions, Florida courts have indicated that lack of notice by the creditor of the intended date of sale would operate as a bar to that creditor's securing a deficiency judgment. See, Bagel Break Bakery, Inc. v. Bagelman's, Inc., 431 So.2d 676 (Fla. 4th DCA 1983); Barnett v. Barnett Bank of Jacksonville, 345 So.2d 804 (Fla. 1st DCA 1977), declined to follow by Butte County Bank v. Hobley, 707 P.2d 513 (Idaho App. 1985); Washington v. The First National Bank of Miami, 332 So.2d 644 (Fla. 3d DCA 1976); Hepworth v. Orlando Bank and Trust Company, 323 So.2d 41 (Fla. 4th DCA 1975). Those cases are, however, clearly distinguishable from the case at bar. In the situations being considered by the courts in each of those four cases, the creditor had repossessed and sold the collateral, albeit without notification of the sale to the debtor, prior to the entry of a final judgment. In fact, those four cases dealt with situations where the sales of collateral apparently took place before the institution by the creditors of any litigation on the underlying obligation. In each of those cases, there was no reason to conclude that the debtors had notice, in any form, of the creditors' intended disposition of the collateral.

Landmark's actions in repossessing the collateral and supplying a copy of the Judgment to the Respondents complied with the Code requirements. The Respondents

clearly had reason to know that Landmark would sell the collateral. In this respect, the case at bar is readily distinguished from the cases cited above. Therefore, in this case, the Respondents not only had knowledge of the repossession of the collateral, but participated in that transfer of possession. (R. 18, 37). Six months passed from the date the collateral was repossessed until the date Final Summary Judgment was entered in favor of Landmark in this matter, during which time litigation was proceeding. At the time the judgment was entered, Respondents were represented by counsel (R. 21) and their attorney informed them that judgment had been entered against them. (R. 21). It was not until several months thereafter that the collateral in question was sold. (R. 24). During that time, Respondents demonstrated no willingness to negotiate with the bank with reference to satisfying the judgment outstanding against them, nor did they inquire as to the intended disposition of the collateral.

The case before this Court is, therefore, clearly not a matter wherein a debtor finds his property has been repossessed and is surprised to discover that he is being sued by the creditor for a deficiency judgment following sale of that collateral. Those cases, cited above, wherein Florida courts have denied recovery of a deficiency judgment in the absence of notice of sale of collateral are readily

distinguishable and the logic employed by those courts would be inappropriate given the circumstances of the matter before this Court for review.

At least one Florida court has recognized that, under certain conditions, the Buyer's actual acknowledge of the expected sale of collateral was sufficient reasonable notice. Bondurant v. Beard Equipment Co., 345 So.2d 806 (Fla. 1st DCA 1977). That court held that the purpose of notice under Section 679.504(3) is "to enable the debtor to protect his interest by paying the debt, finding a buyer or being present at the sale to bid on the property or have others do so, to the end that it would not be sacrificed by a sale at less than its true value." Id. at 809 citing Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (1979). (Emphasis added.) The Bondurant court also noted that several jurisdictions have held that oral notice to a debtor of the sale of collateral is sufficient notice. Id. at 808 citing GAC Credit Corporation v. Small Business Administration, 323 F. Supp. 795 (W.D.Mo. 1971); A. J. Armstrong Company v. Janburt Embroidery Corporation, 97 N.J. Super. 246, 234 A.2d 737 (1967); Crest Investment Trust, Inc. v. Alatzas, 287 A.2d 261 (Md. 1972); Fairchild v. Williams Feed, Inc., 544 P.2d 1216 (Mont. 1976).

The Bondurant court further held that the only notice required in the private sale of collateral is

reasonable notification and there is no requirement for the creditor to notify the debtor as to the time and place of the sale. Bondurant, supra at 808. That court also determined that, under certain circumstances, written notice to the debtor is not required for compliance with the terms of the Uniform Commercial Code. Id.

The Bondurant decision is in keeping with the decisions of sister states where courts have held that, due to the debtor's knowledge of the intended disposition of the collateral, the notice requirements had either been met or had been dispensed with or otherwise waived. See, Comfort Trane Air Conditioning Company v. Trane Company, 592 F.2d 1373 (5th Cir. 1979) (applying Georgia law); DeVita Fruit Company v. FCA Leasing Corporation, 473 F.2d 585 (6th Cir. 1973) (applying Ohio law); Credit Alliance Corporation v. David O. Crump Sand and Fill Company, 470 F. Supp. 489 (S.D.N.Y. 1979) (knowledge of sale on part of debtors received within time they would have received notice sufficient); Umbaugh Pole Building Company, Inc. v. Scott, 390 N.E.2d 320 (Ohio 1979) (participation in sale by debtor is sufficient); Chase Manhattan Bank, N.Y. v. Natarelli, 401 N.Y.S.2d 404 (1977) (guarantor had constructive knowledge of sale via notice sent to counsel for defendant corporation); and Crest Investment Trust, Inc. v. Alatzas, 287 A.2d 261 (Md. 1972).

The logic of the Bondurant court can be readily applied to the situation at hand. In the case at bar, Respondents received, via their counsel, written notification after which a private sale of the collateral would be conducted. The Respondents had an ample time frame in which they could have made inquiries, attempted to secure a purchaser, or purchased the property themselves.

By affirming the decision of the Trial Court that sufficient notification had been given by Landmark, this Court would not violate the purposes of the notice requirement as described by the First District Court of Appeal. Bondurant, supra, at 809. The record has established that the Respondents had the opportunity to protect their interest in the collateral and, further, that they took no advantage of that opportunity. To hold Landmark accountable for the Respondents' obvious disinterest in protecting that interest would be an unjust solution, particularly in light of the fact that notice that the collateral would be sold had been received by Respondents by virtue of the Final Summary Judgment.

ARGUMENT II

I. SHOULD THIS COURT FIND THAT THERE HAD BEEN INSUFFICIENT NOTICE TO RESPONDENTS, THE PROPER REMEDY WOULD NOT BE DENIAL OF A DEFICIENCY JUDGMENT BUT RATHER ACCORDING RESPONDENTS A SETOFF FOR ANY INJURY CAUSED THEM BY THE LACK OF NOTICE.

A. The Provisions Of The Uniform Commercial Code Do Not Mandate Denial Of A Deficiency Judgment To A Creditor Who Fails To Provide The Required Notice Prior To Sale Of Collateral.

Article 9 of the Uniform Commercial Code, Part V, governs the rights and remedies of the parties to secure transactions when the debtor defaults on his obligation. Section 9-504 of that Article governs resale of collateral following repossession. This Section allows a secured party to dispose of the collateral by sale, lease or other disposition and to apply the proceeds to the debtor's obligation. Subsection (2) of 9-504 requires the secured party to account to the debtor for any surplus, but also imposes liability on the debtor for any deficiency resulting after the disposition of the collateral. Subsection (3) sets forth the procedure that the secured party must follow in disposing of the collateral. In general, this subsection requires the secured party to send notice prior to the sale of collateral and further requires that every aspect of the disposition of the collateral be commercially reasonable. Neither the provisions of 9-504(2) nor 9-504(3) may be waived by the parties. §679.504(2) and (3), Fla.Stat.

(1985); §679.501(3), Fla.Stat. (1985). Other than describing the obligations of the creditor in very general terms, the provisions of the Uniform Commercial Code leave to the courts a case-by-case determination of the extent to which a creditor has complied with the provisions concerning resale.

Each analysis of creditors' actions under the resale provisions of Uniform Commercial Code must be measured against the general Uniform Commercial Code policy that the remedies provided by the Code should be liberally administered to the end that the aggrieved party may be put into as good a position as if the other party had fully performed. §671.106(1), Fla.Stat. (1985); §671.102(1), Fla.Stat. (1985). The Code specifically prohibits consequential, special or penal damages except as specifically provided in this Code or by other rule of law. §671.106, Fla.Stat. (1985). The intent of the Code, therefore, is that the aggrieved party shall be compensated to the extent of his injury, but that the breaching party should not be punished for his breach by the imposition of penal damages. At least one commentator has observed that:

> The underlying assumption [of the default provisions of Article 9] is that good faith is common and bad faith [is] rare . . .

Gilmore, Article 9 of the Uniform Commercial Code - Part V, 7 Conf. Per. Fin. L.Q.R. 11 (1952).

The common law did not permit the conditional seller a suit for a deficiency in any case. This restriction on the creditors' rights was only fair since the conditional seller was allowed to forfeit the debtor's equity in the collateral. Gilmore, supra, at 4-5. Drafters of the Uniform Commercial Code, however, explicitly provided that the debtor is liable for any deficiency. §679.504(2), Fla.Stat.(1985). See, Henssey, A Secured Creditor's Right to Collect a Deficiency Judgment Under U.C.C. §9-504: A Need to Remedy the Impossible, 31 Bus. Law. 2025, 2029-30 (1976).

The drafters of the Uniform Commercial Code, however, recognized that there was a possibility that a debtor could be harmed by a creditor's noncompliance with the disposition requirements of the Code. The drafters chose the remedies which are codified in Section 9-507 of the Uniform Commercial Code. The remedies incorporated into this Section of the Code clearly correspond to the interests the Code seeks to protect. The remedies provided in Section 9-507 both protect the debtor's redemptive rights, by providing for judicial review of sale and remedy for any loss incurred by the debtor due to creditor misbehavior, and by attempting to place both parties in as nearly whole a position as possible.

A number of courts, including the majority of District Courts of Appeal in Florida, have adhered to an absolute bar rule which holds that compliance with Section 9-504(3) requirements of notice is, in effect, a condition precedent to recovery of a deficiency judgment. E.g., Dynalectron Corporation v. Jack Richards Aircraft Company, 337 F. Supp. 659 (W.D.Okla. 1972); Atlas Thrift Company v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); Bagel Break Bakery, Inc. v. Bagelman's, Inc., supra; Barnett v. Barnett Bank of Jacksonville, supra; Washington v. The First National Bank of Miami, supra; Hepworth v. Orlando Bank and Trust Company, supra; and Camden National Bank v. St. Clair, 309 A.2d 329 (Me. 1973).

The majority of jurisdictions, however, have found that the rationale underlying the absolute bar rule is difficult to support in light of the Code's provisions for deficiency judgment and the Code's prohibition against penal damages. E.g., Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977); United States v. Whitehouse Plastic, 501 F.2d 692, 696 (5th Cir. 1974), cert. denied sub nom. Baker v. United States, 421 U.S. 912, 95 S.Ct. 1566, 43 L. Ed. 2d 777 (1975); Kobuk Engineering and Contracting Services, Inc. v. Superior Tank and Construction Co.-Alaska, Inc., 568 P.2d 1007, 1013 (Alaska 1977). At least one commentator has noted that:

> No automatic liability results from a disposition which has in some respects been improper. The complaining party must prove not only how the disposition failed to comply but also that loss resulted from that failure: that is, that the loss would not have occurred but for the failure to comply with the statutory requirement.

Gilmore, supra, at 11.

Article 9 of the Uniform Commercial Code clearly provides for a deficiency judgment. That Article just as clearly does not include denial of a deficiency judgment as a remedy to a debtor in situations of creditor misbehavior. Analysis of other Code provisions, outside Article 9, substantiates the proposition that failure to give notice should not result in a loss of a right to a deficiency judgment.

Article 2 contains notice provisions similar to Section 9-504. §672.706, Fla.Stat. (1985). Under that Section, if the buyer wrongfully rejects or revokes acceptance of goods or fails to make preliminary delivery payments, the seller has, as one potential remedy, the option of selling the goods and recovering damages. According to that Section, if the seller elects to sell the goods at a private sale, he must give the buyer reasonable notification of his intention to sell. There is no requirement, however, that the seller notify the buyer as to the time and place of the sale. The notice requirements of

Section 2-706 concerning public sales are essentially identical to the requirements of 9-504.

In Article 2, however, the drafters of the Uniform Commercial Code expressly made compliance with the notice requirements (together with the requirements of good faith and a commercially reasonable sale), an express condition precedent to the seller's right to recover the difference between the sales price and the contract price. §672.706(1), Fla.Stat. (1985). At least two courts, in construing this Section, indicated that the seller's failure to give notice of the sale results in the forfeiture of this right to recover the difference between sale price and contract price. Foster v. Colorado Radio Corporation, 381 F.2d 222 (10th Cir. 1967); Portal Galleries, Inc. v. Tomar Products, Incorporated, 302 N.Y.S.2d 871 (Sup. Ct. 1969).

Both Sections 9-504 and 2-706 of the Uniform Commercial Code require the secured party to give notice to the debtor under certain stated circumstances. Section 2.706 expressly makes this notice a condition precedent with which the seller must comply before the seller can recover the difference between the sale price and the contract price in instances where the buyer has wrongfully rejected or revoked acceptance of goods. Section 9-504 does not create any explicit condition precedent which the secured party must fulfill in order to retain his right to a deficiency judgment.

Under Section 2-706, the seller will lose his right to collect the difference between the sale price and the contract price if he does not comply with the notice provisions (as well as proceeding in good faith and conducting the sale in a commercially reasonable manner). In those circumstances, however, the seller is not without a remedy. The seller merely loses the right to use the sale price as an absolute measure of damages. The seller may still recover damages, even in instances where the seller has failed to give the requisite notice, based on the market value of the goods under Section 2-708. Thus, in an instance where the drafters of the Code specifically and expressly required notice of sale to the buyer prior to a particular remedy being available to the seller, the seller is not left remedyless in the event of failure to comply with that notice requirement. This analysis supports the argument that the drafters of the Code did not intend to deny the secured party a remedy under Section 9-504, especially as that Section contains no language making notice to the debtor of sale of collateral a condition precedent to recovery of a deficiency judgment.

Several courts have concluded, from analysis of the language of Article 9, that the drafters of the Code could not have intended that a debtor who did not receive notice would also be entitled to the additional remedy of having

the deficiency extinguished. United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir. 1974), cert. denied sub nom. Baker v. United States, 421 U.S. 912, 96 S.Ct. 1566, 43 L. Ed. 2d 777 (1975) (the Fifth Circuit noted the specificity and detail of the debtor's remedies in 9-507 and concluded that the additional remedy of extinguishment of a deficiency could not have been intended by the drafters of the Code); Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. App. 1977) (since there is no specific language directing that a secured creditor who fails to give notice will be barred from recovering a deficiency, courts should not have the authority to invoke such a sanction).

The language contained in Article 9 of the Uniform Commercial Code does not specifically establish that a seller must give notice to a debtor prior to sale of the collateral as a condition precedent to a deficiency judgment. Comparing the provisions as to notice contained in Article 9 with those provisions concerning notice in Article 2, one can conclude that the drafters of the Code intended the Article 2 notice to be a condition precedent to a remedy but did not have that same intention as to the Article 9 notice requirement. Even in that Article 2 situation, however, the misbehaving seller is not left without a remedy. Logically, the misbehaving Article 9 creditor should not be left without a remedy.

The general provisions of the Code expressly provide that the provisions of that Code are to be liberally administered so that the aggrieved party will be placed in as good a position as if the breaching party had performed. The Code further discourages the application of Code provisions so as to result in penal damages. In utilizing an absolute bar approach to the question of creditor notice to debtor prior to disposition of collateral, the Code's specifically stated policies will be thwarted. The denial of a deficiency judgment to a misbehaving creditor, in situations where the requisite notice of sale of collateral was not given, results in a windfall to the debtor. Such a windfall would be in direct contradiction to the policy statements contained in Section 1-106 of the Code, which statements indicate that the remedies provided by the Code are to be administered so that the aggrieved party may be put in as good a position as if the other party had fully performed and that penal damages are discouraged.

The Hall court, which cited favorably to this Section, noted that an analysis of the merits of each case was necessary to effectuate the underlying policies of the Code. Hall, supra at 927. The Court in Hall further noted that drafters of the Code intended to do away with rigid rules of law designed to govern all situations in favor of a case-by-case analysis. Id. Such a procedure would allow

parties to reach the merits of each case instead of becoming entangled in procedural technicalities. Id.

By utilizing a case-by-case approach to the issue in question, courts can make an inquiry into the circumstances surrounding the sale of the collateral. This inquiry will allow the court to determine whether the debtor has been harmed. If the debtor has been harmed, the court can place him in as good a position as if the secured party had complied with the notice requirement by either reducing or extinguishing the deficiency judgment. If the lack of notice did not harm the debtor, the only way a court can place the secured party in as good a position as if the debtor had fully performed is for the court to grant the creditor a deficiency judgment. The absolute bar approach does not permit this inquiry.

The provisions of the Uniform Commercial Code do not mandate denial of a deficiency judgment in the event of creditor misbehavior as to notice prior to disposition of collateral. Those provisions do require, however, that each case be analyzed on a case-by-case basis so as to determine the injury to the debtor resulting from the lack of notice by the creditor. The absolute bar approach will not provide the mechanism whereby both parties can be placed in positions as whole as possible. The absolute bar approach to this issue "smacks of the punitive and is directly

contrary to Article 9's underlying theme of commercial reasonableness." United States v. Cawley, 464 F. Supp. 192, [25 U.C.C. Rep. 1481] (E.D.Wash. 1979), quoting Clark Leasing Corporation, 535 P.2d 1077, 1081 (N.M. 1975). See, In Re Appalachian Pocahontas Coal Company, Inc., 31 B.R. 579 [36 U.C.C. Rep. 1803] (S.D.W.Va. 1983).

B. Should This Court Find That There Had Been Insufficient Notice To Respondents, the Proper Remedy Would Be To Allow Respondents A Setoff For The Injury, If Any, Caused To Them By The Lack Of Notice.

For this Court to deny Landmark the opportunity to recover a deficiency judgment against the Respondents, based upon a finding that the notice of sale had been insufficient or inadequate, would violate the basic principles underlying the Uniform Commercial Code, be in contradiction with the decisions rendered in the majority of American jurisdictions that have considered that issue, and be in conflict with the line of cases adopted and decisions rendered by the Third District Court of Appeal. The basic policies underlying the Uniform Commercial Code involve introducing a certain amount of flexibility into normal commercial transactions while at the same time protecting the respective rights of both secured parties and debtors. §§671.102(2)(a) and 671.106, Fla.Stat. (1985). This general policy will be inhibited, rather than enhanced, should Landmark be denied the ability

to recover a deficiency judgment in this matter or Respondents allowed to receive an undeserved windfall.

Forty-one American jurisdictions have considered the issues of whether insufficient notice to the creditor should operate as an absolute bar to the recovery of a deficiency judgment. The majority of those states have concluded that this would be an unduly harsh remedy for the misbehaving creditor.[1/] Of those forty-one jurisdictions, thirty-one have concluded that lack of notice by the creditor prior to the disposition of collateral should not act as an absolute bar to the recovery of a deficiency judgment.

Those jurisdictions which would allow recovery by the misbehaving creditor have utilized one of two approaches to this issue. An overwhelming majority of these states would shift the burden of proof to the creditor. As a result of the insufficient notice, the creditor would be faced with a rebuttable presumption that the collateral, at the time of sale, had a value equal to the amount of the total indebtedness. The creditor would have the burden of overcoming that presumption in order to secure a deficiency

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1/ See, notes 2 and 3, infra.

judgment.[2/] Remaining states which would allow a creditor to secure a deficiency judgment in the event of noncompliance with the notice requirement would allow the

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2/ See, United Bank Alaska v. Dischner, 685 P.2d 90 [U.C.C. Rep. 732] (Alaska 1984); Universal C.I.T. Credit Co. v. Rone, 453 S.W.2d 37 (Ark. 1970); 1st Charter Lease Co. v. McAL, Inc., 37 U.C.C. Rep. 1820 (Colo. Ct. App. 1984); Savings Bank of New Britain v. Booze, 382 A.2d 226 (Conn. Super. 1977); Liberty Bank v. Honolulu Providoring, Inc., 34 U.C.C. Rep. 1025 (Hawaii, 1982); Snake River Equipment Co. v. Christensen, 691 P.2d 787 [39 U.C.C. Rep. 1902] (Idaho, 1984); First Galesburg National Bank & Trust Co. v. Joannides, 39 U.C.C. Rep. 18 (Ill. 1984); Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. App. 1977); Westgate State Bank v. Clark, 642 P.2d 961 (Kan. 1982); McKee v. Mississippi Bank & Trust Co., 366 So.2d 234 [24 U.C.C. Rep. 1491] (Miss. 1979); Wirth v. Heavey, 508 S.W.2d 263 (Mo. App. 1974); Levers v. Rio King Land and Investment Co., 560 P.2d 917 [21 U.C.C. Rep. 344] (Nev. 1977); Conti Causeway Ford v. Jarossy, 276 A.2d 402 (N.J. Dist. Ct. 1971), aff'd 288 A.2d 872 (N.J. Super. A.D. 1971); Clark Leasing Corp. v. White Sands Forest Products, Inc., 535 P.2d 1077 (N.M. 1975); Church v. Mickler, 287 S.E.2d 131 (N.C.Ct.App. 1982); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980); All-States Leasing Co. v. Ochs, 600 P.2d 899 (Or. Ct. App. 1979); In Re U.G.M. Corp., 20 U.C.C. Rep. 827 (E.D.Pa. Bankr. 1976) (not clear, but appears to hold for presumption); Associates Capital Services Corp. v. Riccardi, 408 A.2d 930 (R.I. 1979); Mallicoat v. Volunteer Finance and Loan Corp., 415 S.W. 2d 347 (Tenn. Ct. App. 1966); O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd and remanded on other grounds, 642 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977); United States v. Cawley, 464 F. Supp. 189 (E.D.Wash. 1979); In Re Appalachian Pocahontas Coal Co., Inc., 31 B.R. 579 [36 U.C.C. Rep. 1803] (S.D.W.Va. Bankr. 1983); and Vic Hansen & Sons, Inc. v. Crowley, 203 N.W.2d 728 (Wis. 1973) (not clear, but appears to hold for presumption).

debtor to recover for his injury, if any, under the remedies available to the debtor pursuant to Uniform Commercial Code Section 9-507.[3/]

By allowing Landmark to recover a deficiency judgment, under one of the two alternatives adopted by sister states, this Court would protect the respective interests of both Landmark and the Respondents. Landmark would be entitled to recover from Respondents the amount remaining outstanding on its judgment, while the Respondents would be protected to the extent that they had suffered injury through any insufficiency of notification to them. This conclusion would be in keeping with the rationale set forth by the Texas Court of Civil Appeals in Ward v. First State Bank, 605 S.W.2d 404 (Tex. Civ. App. 1980). That court stated that:

> The rule as stated in the Whitehouse Plastics case [the rebuttable presumption rule] and adopted in the O'Neill case is far more reasonable than the simplistic 'no notice, no

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3/ See, Henderson v. Hanson, 414 So.2d 971 [34 U.C.C. Rep. 371] (Ala. Civ. App. 1982); Chapman v. Field, 602 P.2d 481 (Ariz. 1979); Abbott Motors, Inc. v. Ralston, 28 Mass. App. Dec. 35 [5 U.C.C. Rep. 788] (Mass. App. Ct. 1964); Wilson Leasing Co. v. Seaway Pharmacal Corp., 220 N.W.2d 83 (Mich. Ct. App. 1974); Chemlease Worldwide, Inc. v. Brace, Inc., 338 N.W.2d 428 [37 U.C.C. Rep. 647] (Minn. 1983); Farmers State Bank of Parkston v. Otten, 204 N.W.2d 178 (S.D. 1973); Utah Bank & Trust v. Quinn, 622 P.2d 793 [31 U.C.C. Rep. 389] (Utah, 1980).

> deficiency' rule. A creditor who fails to give proper notice should incur the additional burden of proving the fair market value of the collateral in order to demonstrate that his failure to give notice did not harm the debtor.

Ward, supra, at 406.

By adopting either of the alternatives to the absolute bar rule, either the rebuttable presumption rule or the rule which would allow the debtor to recover for his injury under Section 9-507, this Court would be in keeping with the line of cases cited with approval and followed by the Third District Court of Appeal in Bank of Oklahoma v. Little Judy Industries, 387 So.2d 1022 (Fla. 3d DCA 1980). In this case, the appellant asked the court to follow a series of cases exemplified by Norton v. National Bank of Commerce of Pine Bluff, 398 S.W.2d 538 (Ark. 1966). The Little Judy court accepted the rule as enunciated in Norton as the rule which that court should follow, thereby allowing the creditor to recover a deficiency judgment once that creditor had met his burden of overcoming the presumption that the collateral was worth at least the amount of the judgment. Bank of Oklahoma v. Little Judy Industries, supra, at 1005. The Third District Court of Appeal applied this rule, as exemplified by the Norton opinion, to a case involving the issue of commercial reasonableness of the sale of collateral. The Norton case and others which followed

it, however, were cases dealing with insufficient notice to the debtor and the creditors' right to the recovery of a deficiency judgment. The Third District Court of Appeal has, at least impliedly, approved the Norton rationale in a similar, albeit not identical, situation.

In Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank of Miami, 455 So.2d 525 (Fla. 3d DCA 1984), the Third District clearly stated its decision to depart from "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 . . . ." Id. at 527. (Citations omitted.) The Third District Court held that Section 679.507(1), Fla.Stat. (1981), provided adequate protection for the debtor. Id.

The Ayares-Eisenberg court indicated that by reaching this decision, the court was in conflict with another panel of that court. Ayares-Eisenberg, supra, at 528, citing Washington v. First National Bank of Miami, 332 So.2d 644 (Fla. 3d DCA 1976). See, also, Florida First National Bank of Pensacola v. Martin, 449 So.2d 861 (Fla. 1st DCA 1984) (acknowledging an apparent conflict); and Motorola Communications & Electronics, Inc. v. National Patient Aids, Inc., 427 So.2d 1042, 1046 n. 10 (Fla. 4th DCA 1983) (recognizing the conflict). The Third District noted that it was "bound" to reach this conflicting decision

"by the impermissible alternative of finding ourselves in conflict with the Florida legislature." Ayares-Eisenberg, supra, at 528.

This Court has before it three alternatives. The Court can adopt the absolute bar rule which would preclude Landmark from securing a deficiency judgment due to its alleged lack of notice to the Respondents of the sale of collateral. The Court can adopt the rule as enumerated in Norton v. National Bank of Commerce, supra, as approved by the Third District Court of Appeal in Bank of Oklahoma v. Little Judy Industries, supra (in a case involving commercial reasonableness of sale), and allow Landmark the opportunity to overcome a rebuttable presumption that the collateral, at the time of sale, was worth the total amount of the debt. The third alternative before the Court is to adopt the rationale of the Ayares-Eisenberg, supra, court and limit the debtor's remedies to recovery under §679.507, Fla.Stat.

Should this Court adopt either of the two latter alternatives, this Court should reverse the decision of the Fourth District Court of Appeal. Under either of these alternatives, Respondents would be entitled to no setoff of the judgment amounts. Respondents have suffered no injury due to the lack of notice and Landmark should be entitled to

proceed under its judgment against the Respondents less the amount received from sale of the collateral.

Expert testimony, presented by Landmark at the hearing on Appellants' Amended Petition for Declaratory Judgment and Setoff, clearly established that the price received by Landmark for the sale of the collateral was reasonable in view of the condition of that collateral and its value within the market place. (R. 84, 86-7). The expert testimony, presented at that hearing, established that the quantity of equipment and inventory repossessed by Landmark from Respondents was insufficient to justify public auction for its disposal. (R. 84). That expert also testified that the collateral was sold in a reasonable manner and had no great value. (R. 86-87). Respondents offered no testimony to the contrary, except for a general statement made by Respondent Arthur J. Brauer that the sale was ridiculous. (R. 28). Even if the testimony from Mr. Brauer was not discounted by his obvious interest in the outcome of the hearing, Mr. Brauer's knowledge of the condition and value of the collateral was apparently based upon the purchase price of the equipment and the condition of the equipment the last time he saw same, approximately seventeen (17) months prior to the sale of the equipment.

Landmark had established, via expert testimony, that the price received for the sale of the collateral was a

reasonable price. No testimony was presented to rebut that contention. Landmark has thus credited, against the amounts due under the Final Summary Judgment, a reasonable amount for the value of the equipment. The Respondents, therefore, can demonstrate no injury to them resulting from any insufficiency or lack of notice of the sale of collateral. Given the lack of any injury to Respondents, it would be unduly harsh to punish Landmark by denying it the right to proceed against Respondents for the remaining sums due under the terms of the Final Summary Judgment.

CONCLUSION

For the reasons set forth above, the Appellee, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, respectfully requests that this Court reverse 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 has been furnished by first-class U.S. mail, postage prepaid, to: JOHN J. MURPHY, ESQUIRE, 3880 Sheridan Street, Hollywood, Florida 33020, this 11th day of July, 1986.

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