IN THE SUPREME COURT OF FLORIDA
DISTRICT COURT OF APPEAL
FOURTH DISTRICT

LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, PETITIONER, VS. GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ET AL RESPONDENT.	CASE NO. 68,348 FOURTH DISTRICT COURT OF APPEAL CASE NO. 85-1112 RESPONDENT'S REPLY BRIEF

JOHN J. MURPHY
PALLOTTO, HAYSON & MURPHY
ATTORNEY FOR RESPONDENT
SUITE 401
4600 SHERIDAN STREET
HOLLYWOOD, FLORIDA 33021
Telephone: (305) 962-6666
FLORIDA BAR NO. 230707

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PREFACE

For purpose of clarity, Respondent submits 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 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.

TABLE OF CITATIONS

STATEMENT OF THE CASE

Respondents, GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LTD., ARTHUR J. BRAUER and DONALD R. BRAUER jointly and severally file this, their reply to Petitioner's, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, brief on jurisdiction.

Petitioner instituted this action in the form of a Verified Petition in Replevin and Complaint for Damages (R 116-110) which sought to foreclose a Security Agreement executed by GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., as well as a direct action against guarantors, ROBINEX INTERNATIONAL LTD., ARTHUR J. BRAUER and DONALD R. BRAUER. The Petitioner, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, obtained a Final Summary Judgment on February 17, 1982 in the principal sum of $69,950.99 (R 161-162). The Final Judgment contained the following legend:

> "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."

Thereafter, Respondents filed a Petition for Accounting and Set-Off (R 196-199). The same was later amended as an Amended Petition for Declaratory Judgment and Set-Off (R 241-245). On April 16, 1985, after a hearing on the merits, the lower court entered its Final Judgment on the Amended Petition for Declaratory Judgment and Set-Off and denied the relief prayed for therein (R 260).

Respondents, GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LTD., ARTHUR J. BRAUER and DONALD R. BRAUER filed their Notice of Appeal. In their appeal, the Respondents alleged that the Trial Court erred, among other things, in ruling that the Final Summary Judgment constituted notice of the intended disposition of the collateral, to Respondents. The Fourth District Court of Appeal held that the Petitioner's failure to comply with the Statutory Notice requirements of Section 679.504 (3) precluded it from obtaining a deficiency judgment against the guarantors. From this decision, the Petitioner filed its Notice to Invoke the Discretionary Jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030 (2)(A)(iv).

STATEMENT OF THE FACTS

On or about November 30, 1979, Respondent, GEPETTO'S TALE O'THE WHALE OF FORT LAUDERDALE, INC. executed a Promissory Note in the original principal sum of $100,000.00 and a Security Agreement (R 110) in favor of the Petitioner, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE. Respondent, ARTHUR J. BRAUER and DONALD R. BRAUER executed Guarantee Agreements in favor of, and to further secure, Petitioner (R 140-141).

On April 6, 1981, Petitioner, through its Vice President Charles S. Morris, delivered a demand letter to Donald R. Brauer, President of Gepetto's Tale O' The Whale of Fort Lauderdale, Inc., accelerating the unpaid principal balance and all accrued interest due and owing on the aforementioned promissory note, and further making demand for payment of the same (R 135-139).

On July 9, 1981, Petitioner filed its Verified Petition in Replevin and Complaint for Damages with Exhibit attached thereto (R 116-110).

On July 23, 1981, the lower Court issued its Order authorizing the Clerk to issue a Pre-Judgment Writ of Replevin (R-111-112) and pursuant thereto, a Writ of Replevin was issued on July 24, 1981 (R 113-119).

On August 11, 1981, the collateral, which was the subject of the Security Agreement executed by Respondent in favor of Petitioner, was repossessed by Petitioner (T P17 L18).

The evidentary hearing developed the following:

(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). The collateral was sold by Petitioner for a total sum of Thirteen Hundred and Fifty Dollars ($1,350.00).

(iii) 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).

(iv) 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).

(v) 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).

(vi) 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

Petitioner's brief cites language from the opinion of the Fourth District Court of Appeal in the instant action to support its position that there is a conflict between the decision of the Court in this case, and the decisions of the Third District Court of Appeal in Bank of Oklahoma N.A. v. Little Judy Industries Inc. 387 So.2d 1002, (Fla App. 3d DCA 1980) and Ayares-Eisenberg Perine Datsun, Inc. v. Sun Bank of Miami 455 So.2d 525 (Fla. App. 3d DCA 1984). The facts, issues on Appeal, and rule of law stated in the decisions of the Third District Court of Appeal are distinguishable from the case at bar. The decisions of the Third District Court of Appeal are not in conflict with the decision of the Fourth District Court of Appeal.

RESPONDENT'S ARGUMENT

Section 679.504 (3) Florida Statutues (1983) provides that:

> "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor if he has not signed after default a conspicuous statement renouncing or modifying his right to notification of sale and, except in the case of consumer goods, to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state. The secured party may buy at any public sale and, if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale."

Subsection (b) of the Final Summary Judgment (R 161-162) provided:

> "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 a Final Judgment dated February 17, 1982 and providing of a copy of said Judgment to Petitioner's herein constituted notice and no further specific notice of sale was required."

The Fourth District Court of Appeal at pages 3 and 4 of its opinion stated:

> "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's finding is neither factually nor legally correct. Indeed, the evidence is undisputed that the bank failed to provide any notice whatsoever to the guarantors."

The case at bar holds that the failure of a creditor to provide notification consistent with Section 679.504 (3) Florida Statutes is a complete bar to a deficiency judgment against either a debtor or guarantor. This is the majority opinion in Florida. (See Bagel Break Bakery, Inc. v. Bagelman's Inc. 431 So.2d 676 (Fla. App. 4th DCA 1983); Barnett v. Barnett Bank of Jacksonville, N.A. 345 So2d 804 (Fla. App. 1st DCA 1977); Hepworth v. Orlando Bank & Trust Co. 323 So. 2d 41 (Fla. App. 4th DCA 1975); Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534 (Fla. App. 2d DCA 1973); and Washington v. First National Bank of Miami 332 So.2d 644 (Fla. App. 3d DCA 1976).) Petitioner bases it's appeal solely upon two cases emanating from the Third District Court of Appeal to wit: Bank of Oklahoma N.A. v. Little Judy Industries Inc. 387 So.2d 1002, (Fla. App. 3d DCA 1980) and Ayares-Eisenberg Perine Datsun, Inc. v. Sunbank of Miami 455 So. 2d 525 (Fla. App. 3d DCA 1984).

The Bank of Oklahoma decision was not predicated upon a lack of notice from a creditor to a debtor. The issue on appeal was whether the sale of the collateral was conducted in a commercially reasonable manner, not whether a lack of Notice, as required by Florida Statute 679.504 (3), bars a creditor from obtaining a deficiency judgment. The facts, the issue on appeal

and the rule of law decided in Bank of Oklahoma and the instant action are distinguisable. The Bank of Oklahoma decision is not in conflict with the instant action.

The second case cited by the Petitioner is the Ayares-Eisenberg decision. The Third District Court of Appeal held:

> "Sun Bank does not deny that it failed to give the requisite notice before disposing of the collateral, but a question of material fact remains as to whether the disposition was commercially reasonable.
>
> 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 collateral . . . We find, however, that the legislature has provided other relief which will require a remand for further proceedings."

The decision of the Court in the case at bar, gives the appearance of being in conflict with the decision reached in Ayares-Eisenberg. Interestingly enough, however, the cases are distinguishable. In the instant action notice of the the intended disposition of the collateral was never given to Respondents. In Ayares-Eisenberg notice was initially given to the debtor and guarantor. When no buyer for the collateral was found, the collateral was donated to a non-profit entity without further notice to the debtor and guarantors. Two (2) months thereafter, the collateral was retendered to the debtor. In the instant action a portion of the collateral was sold for a ridiculous sum and the remainder was discarded, all without notice to Respondents.

In Ayares-Eisenberg the debtor and guarantors suffered no real loss as the secured collateral was retendered to the debtor. The debtor and guarantors were in same position they were prior to the disposition of the collateral.

In the instant action, the debtor and guarantors suffered an economic loss. The collateral which was valued at between Sixty Thousand Dollars ($60,000.00) and Seventy Thousand Dollars ($70,000.00) was sold for One Thousand Three Hundred and Fifty Dollars ($1,350.00). In Ayares-Eisenberg the debtor and guarantors retained their right of redemption. Conversely, in the case at bar, the debtor and guarantors' right of redemption was extinguished.

The dissent in Ayares-Eisenberg recognized and distinguished the factual circumstances and stated as follows:

> "I would not reach the controversial issues involved in the court's discussion of the legal effect of the creditor's failure to give proper notice of the initial disposition of the collateral or the fact that it did not occur in a commercially reasonable manner. This is because neither of these factors has caused any real loss to the debtor. The record shows that after the computer was given to the School Board, it proved unusable even for its purposes and was both reclaimed by the bank, and of decisive significance here, was retendered to, but predictably not accepted by the appellants. Under these circumstances, the posture of the case is no different than if the computer had not been seized in the first place. . . "

CONCLUSION

In summary, the facts, issues on Appeal, and rule of law stated in the decisions of the Third District Court of Appeal are distinguishable from the case at bar. The decisions of the Third District Court of Appeal are not in conflict with the decision of the Fourth District Court of Appeal.

In Bank of Oklahoma N.A. v. Little Judy Industries Inc. 387 So.2d 1002, (Fla App. 3d DCA 1980) the issue was not whether the failure to give notice as required by Section 679.504 (3) precludes an action for a deficiency. The issue concerned the commercial reasonableness of the sale.

In Ayares-Eisenberg Perine Datsun, Inc. v. Sun Bank of Miami 455 So.2d 525 (Fla. App. 3d DCA 1984) the facts evidenced that there was no real loss to the debtor and guarantors. The collateral which was disposed of without notice by the creditor, was retendered to the debtor. The debtor was not damaged. In the instant action, the facts evidenced that there was a real and substantial loss to the debtor. For these reasons, Respondents respectfully request that this Court refuse to accept Jurisdiction of this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was furnished to Robert A. Ware, Esq., English, McCaughan & O'Bryan, P. O. Box 14098, Fort Lauderdale, Florida 33302-4098, by mail this 19 day of March, 1986.

JOHN J. MURPHY
PALLOTTO, HAYSON & MURPHY
ATTORNEY FOR RESPONDENT
SUITE 401
4600 SHERIDAN STREET
HOLLYWOOD, FLORIDA 33021
Telephone: (305) 962-6666
FLORIDA BAR NO. 230707