IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,348

LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE,	:
Petitioner,	:
v.	:
GEPETTO'S TALE OF THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL, LIMITED, ARTHUR J. BRAUER and DONALD R. BRAUER,	:
Respondents.	:

PETITIONER'S REPLY BRIEF

Review Of Decision Of Florida Court Of Appeal,
Fourth District Case No. 85-1112

CONSTANCE G. GRAYSON
ENGLISH, McCAUGHAN & O'BRYAN
Attorneys for Petitioner
100 N.E. 3rd Avenue, Suite 1100
Post Office Box 14098
Fort Lauderdale, Florida 33302-4098
Telephone: (305) 462-3300
Miami line: (305) 947-1052

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS AND AUTHORITIES	ii
PREFACE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS AND AUTHORITIES

Cases	Page
Associates Capital Service Corporation v. Riccardi, 408 A.2d 930 (R.I. 1979)	9
Chase Manhattan Bank v. Natarelli, 401 N.Y.S.2d 404 [23 U.C.C. Rep. 539] (1977)	5
Clark Leasing Corporation v. White Sands Forest Products, Inc., 535 P.2d 1077 (1975)	8,9
Fetters Corporation v. Taylor, 473 F. Supp. 961, 978 (D.Minn. 1979)	9
First National Bank of Denver v. Cillessen, 29 U.C.C. Rep. 1714, 1717 (Colo. Ct. App. 1980)	5
H. P. Bondurant v. Beard Equipment Company, 345 So.2d 806 (Fla. 1st DCA 1977)	5,10
Hall v. Owen County State Bank, 370 N.E.2d 918, 927 (Ind. App. 1977)	9
Hodges v. Norton, 223 S.E.2d 848, 851-52 (N.C. App. 1976)	9
Mack Financial Corporation v. Scott, 606 P.2d 993, 995-96 (Idaho 1980)	9
Rushton v. Shea, 423 F. Supp. 468 [22 U.C.C. Rep. 274] (Del. 1976)	5

Other Authorities	
U.C.C. §1-106	7,9
U.C.C. §9-501	6
U.C.C. §9-507	6,7,12
U.C.C. §9-504(3)	7

PREFACE

Throughout this Reply Brief, the Petitioner, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, will be referred to as "LANDMARK." 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."

For purposes of this Reply Brief, Petitioner stands by its position on Argument I as contained in Petitioner's Initial Brief and will discuss only Argument II herein.

SUMMARY OF ARGUMENT

The circumstances giving rise to the case at bar, do not constitute, as Respondent would argue, "a flagrant disregard for the debtors' and guarantors' rights." This case involves, rather, a situation in which a creditor "misbehaves" by failing to provide notice to the debtor prior to sale of collateral. This misbehavior, an apparently common occurrence given the commercial realities of creditor/debtor relationships in a complex world, should not be unduly punished by giving the debtors an undeserved windfall and denying LANDMARK a right to proceed under its Final Summary Judgment.

The entire structure and philosophy underlying the Uniform Commercial Code is designed to simplify commercial transactions and to deal with those transactions in the face of commercial realities and common practices. Punitive damages and other penal measures are discouraged by the general policies of the Uniform Commercial Code. The philosophical underpinning of the Code supports remedies, for both creditor and debtor, buyer and seller, that will place the aggrieved party in as whole a position as possible. These remedies are designed to protect the aggrieved party, but at the same time avoid undue punishment to the breaching party.

Assuming arguendo that LANDMARK is not exempt from the provisions of Article 9 of the Uniform Commercial Code and that the terms of the Final Summary Judgment did not comply with the notice requirements of that Code, the issue before this Court involves whether or not the current law of Florida, as decided by the Florida Courts of Appeal, should be changed to bring it into compliance with the majority of American jurisdictions. Given the undisputed facts of this case, such change in the law would be necessary to avoid unduly punishing LANDMARK for a simple negligent error. This change would also be necessary to avoid giving Respondents a windfall far in excess of any loss caused to them by LANDMARK's acts or omissions.

It is undisputed, in the record before this Court, that Respondents did execute a security agreement and guaranty agreement and did borrow a substantial sum of money from LANDMARK. It is also uncontroverted that Respondents defaulted in the repayment of that indebtedness to LANDMARK. LANDMARK then sold the collateral it had previously replevied and applied the amount received from that collateral to the indebtedness. LANDMARK stands before this Court attempting to proceed to collect the remaining amount due it under the terms of the Final Summary Judgment entered below.

Allowing LANDMARK to proceed on its Judgment under either of the two options utilized in similar situations by a majority of American jurisdictions would make Respondents whole for any loss, if any, caused to them. Under either the rebuttable presumption rule or the U.C.C. §9-507 rule, the Respondents would be compensated for the difference between the amount which the collateral would have brought at a sale conducted in compliance with the notice requirements and the amount for which the collateral was actually sold. This is the only loss which can have been suffered by Respondents. Utilizing either of these approaches would make Respondents whole for any loss caused to them and would not unduly punish LANDMARK. To utilize the absolute bar approach, as advocated by a majority of Florida jurisdictions, would, however, vastly overcompensate Respondents and work as a penal measure against LANDMARK.

ARGUMENT

The purpose of the notice requirement of Section 9-504(3) of the Uniform Commercial Code is:

> [T]o enable the debtor to protect its interest by paying the debt, finding a buyer or being present at the sale to bid on the property or have others to do, to the end that it not be sacrificed by a sale at less than its true value.

H. P. Bondurant v. Beard Equipment Company, 345 So.2d 806 (Fla. 1st DCA 1977). (Emphasis supplied.) The notice requirement is designed so that the property in question may not be sacrificed by sale at less than market value and that the deficiency, if any, may be minimized. The provisions for notice, as outlined in the Uniform Commercial Code, should be construed and applied in a manner to effectuate that purpose. First National Bank of Denver v. Cillessen, 29 U.C.C. Rep. 1714, 1717 (Colo. Ct. App. 1980), citing Chase Manhattan Bank v. Natarelli, 401 N.Y.S.2d 404 [23 U.C.C. Rep. 539] (1977), and Rushton v. Shea, 423 F. Supp. 468 [22 U.C.C. Rep. 274] (Del. 1976).

The notice requirement of the Uniform Commercial Code is in keeping with the entire philosophical structure of that Code. The notice requirement is designed to protect the debtor from incurring a loss due to the creditor's sale of collateral at less than its market value. The notice

requirement would enable the debtor to protect his interest by either paying the debt prior to the time of the sale or finding a buyer or having buyers present at the sale to bid on the property. That basic purpose of the notice requirement, to protect the debtor from incurring unnecessary loss due to sale of collateral at less than market value, would also be preserved if this Court should adopt either the rebuttable presumption rule or the U.C.C. §9-507 rule. Under either of those approaches to a situation in which notice was not given as required by the Code, the debtor would be able to recover for any "loss" caused to him by that lack of notice and the creditor would be protected to the extent that the creditor is justified in obtaining a deficiency judgment against the debtor.

Nowhere in those sections of the Uniform Commercial Code which concern debtor defaults, U.C.C. §9-501 et seq., is it provided that a lack of notice bars a deficiency judgment. Nor is it provided anywhere in the Code that proper notice is a condition precedent to the bringing of a deficiency action. In fact, Section 9-507 explicitly states consequences which are to follow a failure to comply with the provisions of Part V of the Code. In relevant part, that section provides:

> (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered

> or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to this disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part.

Section 9-507 thus creates a remedy for any loss caused by the creditors' failure to comply with the provisions of Part V of the Uniform Commercial Code, including the notice requirement contained in Section 9-504(3). It should be noted, however, that Section 9-507 does not provide that a failure to comply with Part V bars the creditor from bringing an action to recover any deficiency. In fact, no basis for an "absolute bar" principle is found anywhere in Article 9.

The absolute bar rule is also contrary to the general policies underlying the Uniform Commercial Code that penal damages or results are to be avoided, unless specifically authorized, and that the aggrieved party is to be placed in as good a position as if the other party had fully performed. U.C.C. §1-106. The absolute bar rule, by barring a deficiency judgment, regardless of whether the debtor has suffered damage from the lack of notice, provides a windfall for the debtor and arbitrarily penalizes the creditor.

Such an undeserved windfall would occur in the case at bar should this Court adopt the absolute bar rule. There is no absolutely no evidence in the record before this Court that the Respondents had any interest in attending the sale or in purchasing any of the collateral or that they had the financial means to do so. Expert testimony presented at the hearing below established that the sale of this collateral was conducted in a commercially reasonable manner. The Respondents have, therefore, suffered no loss or damage due to any alleged lack of notice prior to sale and they should not be released from liability for any deficiency. Depriving LANDMARK of the right to proceed under its Final Summary Judgment would give the Respondents an unjustified windfall.

Such a result would also be out of step with the majority of Florida's sister states. The majority of American jurisdictions, that have considered the effect of lack of notice on a deficiency judgment, oppose the automatic forfeiture of such deficiency judgment. These decisions are based on the Uniform Commercial Code general policies of commercial reasonableness and abhorrence of penal forfeitures. Often, the courts have used strong language to oppose the absolute bar on deficiency judgments. In Clark Leasing Corporation v. White Sands Forest Products, Inc., 535 P.2d 1077 (1975), that court stated:

> We consider this rule [allowing forfeitures] repugnant to the spirit of the U.C.C. The complete denial of a deficiency smacks of the punitive and is directly contrary to Article 9's underlying theme of commercial reasonableness.

Id. at 1081. Accord, e.g., Mack Financial Corporation v. Scott, 606 P.2d 993, 995-96 (Idaho 1980); Hall v. Owen County State Bank, 370 N.E.2d 918, 927 (Ind. App. 1977); Fetters Corporation v. Taylor, 473 F. Supp. 961, 978 (D.Minn. 1979) (applying Minnesota law); Hodges v. Norton, 223 S.E.2d 848, 851-52 (N.C. App. 1976). Other courts, construing the notice provision of the Uniform Commercial Code, have held that the Code does not require an absolute ban on deficiency judgments in the face of inadequate notice to debtor. Those courts emphasized the Code's general disdain for punitive damages as codified in Section 1-106. E.g., Associates Capital Service Corporation v. Riccardi, 408 A.2d 930 (R.I. 1979).

A majority of Florida's District Courts of Appeal have held that the lack of notice by a creditor to his debtor prior to the sale of collateral will result in an absolute bar to any deficiency judgment. Those cases, as cited in Respondent's Answer Brief, all involve situations, however, in which the collateral was sold prior to entry of judgment and, apparently, prior even to the commencement of any litigation. In those instances, the circumstances did

not fulfill any purposes of the notice requirement as elucidated by the H. P. Bondurant court, supra. In situations such as these, a debtor is faced with the creditor repossessing collateral, selling it without notice, and then filing suit for a deficiency. At no point in this scenario does the debtor have the opportunity to either pay for the collateral or find another buyer to purchase the collateral thus protecting the debtor's interest.

In the situation at bar, however, the sale of the collateral did not take place until after Final Summary Judgment had been entered in this matter. Litigation had been ongoing for some time between the parties and the Respondents were aware that the collateral had been repossessed and that LANDMARK was under a court Order, by virtue of the terms of the Final Summary Judgment, to sell that collateral. The record is devoid of any evidence to establish that the Respondents desired to purchase the collateral, had a buyer or could find a buyer to purchase the collateral, or that the Respondents had the financial means with which to purchase the collateral. In fact, throughout the period following the entry of the Final Summary Judgment and the sale of the collateral, the Respondents were deposed in aid of execution and represented by an attorney. The record again is without any testimony or evidence to support a contention that the Respondents sought to protect their interests or were able to do so.

In the case at bar, therefore, the Respondents had the opportunity to find a buyer or to purchase the collateral themselves, but made no effort to do so. LANDMARK's simple negligence in failing to give proper notice, if such in fact occurred, did not undermine any of the purposes of the notice requirement. The giving of a separate notice by LANDMARK, as Respondents apparently allege was required, would have provided no greater protection to Respondents' interests than did the terms of the Final Summary Judgment.

To absolutely bar LANDMARK from proceeding on the remainder of the amount due them under the terms of the Final Summary Judgment would be unduly harsh to LANDMARK. Such an approach would also allow the Respondents to realize an undeserved windfall due to LANDMARK's simple omission. This result of enhanced punishment for LANDMARK and exaggerated recovery for Respondents would go far beyond placing Respondents in as good a position as they would have occupied had notice been given. The absolute bar approach would dramatically overcompensate Respondents and run contrary to the Code's prohibition against penal damages.

If this Court should adopt either of the other two approaches -- the rebuttable presumption approach or the U.C.C. §9-507 approach -- a more equitable result would occur. Either of these approaches would afford protection

to the debtor on a case-by-case basis without being unduly punitive.

The automatic forfeiture of the right to a deficiency, without an examination of the circumstances of a particular case, is contrary to the policy of the Code, which discourages the assessment of penal damages. Either of the alternatives would avoid this highly penal result. Under either of these approaches, the debtor would be protected for any loss he suffered due to lack of notice prior to sale of collateral, but he would not be able to collect an undeserved windfall. The misbehaving creditor, on the other hand, would be "punished" to the extent of any loss his error or omission inflicted on the debtor, but he would not be punished more than the amount of the loss to the debtor.

Using either alternative would place both parties in the best possible position and in a position as good as each party would have occupied had notice, in fact, been given prior to the sale of the collateral. This case-by-case analysis is a more equitable approach to the issue of the effect of lack of notice on a deficiency judgment and is more in compliance with the general policies of the Uniform Commercial Code than is the absolute bar approach currently adopted by a majority of Florida's District Courts of Appeal.

CONCLUSION

For the reasons set forth above, Petitioner, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, respectfully requests that this Court reverse the decision of the Fourth District Court of Appeal.

ENGLISH, McCAUGHAN & O'BRYAN
Attorneys for Petitioner
100 N.E. 3rd Avenue, Suite 1100
Post Office Box 14098
Fort Lauderdale, Florida 33302-4098

Telephone: (305) 462-3300
Miami line: (305) 947-1052

By: Constance G. Grayson
Constance G. Grayson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by first class U.S. mail, postage prepaid to John J. Murphy, Esq., Pollotto, Hayseon and Murphy, Attorneys for Respondents, 4600 Sheridan Street, Suite 401, Hollywood, Florida 33021, this 15th day of August, 1986.

ENGLISH, McCAUGHAN & O'BRYAN
Attorneys for Petitioner
100 N.E. 3rd Avenue, Suite 1100
Post Office Box 14098
Fort Lauderdale, Florida 33302-4098

Telephone: (305) 462-3300
Miami line: (305) 947-1052

By: Constance Grayson
Constance G. Grayson

Pet. Reply Br.