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Mack Financial Corporation v. Nevada Motor Rentals : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MACK FINANCIAL CORPORATION,
Plaintiff,

vs.

NEVADA MOTOR RENTALS, INC.,
Defendant-Appellant.

Case No.
13603

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE BRYANT CROFT, JUDGE

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STATEMENT OF NATURE OF CASE

By its complaint, filed June 11, 1970, (R. 240), Plaintiff seeks to recover from Defendants the sum of $127,603.05, together with interest and attorney's fees which Plaintiff then claimed was the balance due and owing on seven Mack Cabs and Chassis which had originally been sold under contract to Nevada Motor Rentals by Plaintiff's assignor, Mack Trucks, Inc., the purchase price of which had been guaranteed by W. J. Digby, individually.

The complaint as filed also named Scott Trucking and Lee Scott of Boise, Idaho, as other defendants on the basis that the seven trucks in question had been sold by

Nevada Motor Rentals, Inc. to Scott Trucking under a transfer agreement, with Lee Scott inidividually guaranteeing on behalf of Scott Trucking. Service of Summons on Scott was quashed by Court Order for lack of jurisdiction over Scott.

Both Defendants, W. J. Digby and Nevada Motor Rentals denied that this Court had jurisdiction over them. Such issue was previously raised in this court by a motion to quash the Service of Summons upon said Defendants (R. 271 through 303) which motion was denied by Judge Stewart M. Hanson on November 24, 1970, although granted as to Lee Scott dba Scott Trucking.

Defendants then moved the Court to dismiss for failure to join an indispensable party (Lee Scott, dba Scott Trucking). This motion was denied by Judge Aldon J. Anderson on January 6, 1971 (R. 303). Thereafter, both Defendants (Nevada Motor Rentals and W. J. Digby, Inc.) filed their answer and counterclaim on January 22, 1971.

Defendant Nevada Motor Rentals, Inc. by its answer admitted allegations of the complaint relating to the sale, but denied any liability to plaintiff thereunder, and by way of affirmative defense and counterclaim alleged plaintiff had negligently failed to dispose of the seven trucks and that as a result thereof, said defendant was damaged by the amount of any deficiency and would be entitled to a judgment on its counterclaim as an offset against any deficiency and in an amount no less than any deficiency (R. 305 through R. 310).

W. J. Digby by his answer and counterclaim made similar allegations and then by way of an amended answer and counterclaim asserted that the transactions in question were all covered by the Uniform Commercial Code then in effect in Arizona, Colorado and Nebraska, that no notice of sale was given to Digby, that such sales were not made in a reasonably commercial manner as required by the code, and that Digby was entitled to a judgment on his counterclaim in an amount equal to the difference between the amount owed on the contracts by Nevada Motor Rentals and the net proceeds received upon the ultimate sale of the trucks in 1972 (R. 311 through R. 315).

DISPOSITION IN THE LOWER COURT

In the course of getting the case at issue, the question of jurisdiction was raised and an interim appeal filed with the Supreme Court, at which time the Supreme Court declined to hear the issue of jurisdiction over Nevada Motor Rentals, Inc. and W. J. Digby.

After extensive discovery, the case was tried on the 16th day of April, 1973, before the Honorable Bryant H. Croft, one of the judges of the Third Judicial District Court. Following the trial, Findings of Fact, Conclusions of Law and a Judgment Decree were entered in favor of the Plaintiff. From this judgment, the Defendant appeals (R. 688 through R. 695).

RELIEF SOUGHT ON APPEAL

Defendant Nevada Motor Rentals seeks the following relief on appeal.

1. A determination that the Court had no jurisdiction over Nevada Motor Rentals, Inc., or that the Court did have jurisdiction over Lee Scott dba Scott Trucking.

2. The Court having determined that the method of disposition of the secured trucks by the Plaintiff, Mack Financial, was not made in a commercially reasonable manner, no deficiency can be assessed and the case should be dismissed.

3. The Plaintiff gave no notice of sale to the Defendants for which reason no deficiency may be charged against Defendants and the case should be ordered dismissed.

4. In the event a deficiency judgment is allowed:

(a) The Defendant should have full credit of $16,000 for each 1968 vehicle and $15,000 for the 1967 vehicle, the price at which each could have been sold had the Plaintiff allowed their sale in a timely manner, and

(b) No interest should be allowed the Plaintiff on the credits which should have been given at date of timely sale.

STATEMENT OF FACTS

1. Mack Trucks, Inc., a Delaware Corporation, at

all times material hereto owned all of the outstanding shares of stock of Mack Financial Corporation which thus is a wholly owned subsidiary of Mack Trucks, Inc. (R. 30). The purpose of Mack Financial is to provide financing, when desired, to customers purchasing trucks from Mack Trucks, Inc. Mack Financial Corporation has no authority or supervisory powers over the activities performed by a Mack Truck outlet, and while not a Utah corporation, is authorized to and does business within the State of Utah and operates an office at 2525 South Main, Salt Lake City, Utah (R. 9, R. 124, R. 125).

2. Nevada Motor Rentals, Inc. is a foreign corporation whose outstanding stock is entirely owned by defendant W. J. Digby and his wife (R. 77). The business consists of renting or leasing trucks, tractors and trailers and is conducted out of W. J. Digby's home in Scottsdale, Arizona. Its truck equipment is rented principally to Digby Truck Line, a corporation owned by James Digby and Latisha Carston, son and daughter of W. J. Digby. W. J. Digby has not owned stock in Digby Truck Line since 1959. Both James Digby and Donald Digby, another son of W. J. Digby, hold the office of Vice President in Nevada Motor Rentals, Inc. (R. 78, R. 133).

3. On August 31, 1967, a conditional sales agreement was executed between Mack Trucks, Inc. of Denver, Colorado, as vendor, and Nevada Motor Rentals of Omaha, Nebraska, as vendee, whereby it was agreed that the vendor sold to said vendee three Mack cabs and

chassis in accordance with the terms and conditions therein stated, including chassis No. 1974 (Exhibit 1 P).

4. On January 23, 1968, a second conditional sales agreement was executed between the said parties by which Mack Trucks, Inc. sold to Nevada Motor Rentals nine new Mack cabs and chassis in accordance with the terms and conditions therein stated, including six bearing chassis numbers 2355, 2356, 2357, 2358, 2359 and 2360 (Exhibit 2 P).

5. On each of the respective dates indicated above, the two conditional sales agreements described in 1 and 2 were duly assigned by Mack Trucks, Inc. to Mack Financial Corporation of Oakland, California and Nevada Truck Rentals, Inc. duly signed a vendee's receipt of notice of such assignment (Exhibits 1 P, 2 P).

6. On January 23, 1968, and on February 15, 1968, Plaintiff and Defendant Nevada Motor Rentals executed extensions of conditional sales agreements relating to the agreements described in 1 and 2 by which terms of payment were adjusted in accordance with the provisions thereof, which in effect readjusted the finance charges due and owing and increasing the amount of the monthly payments due on each of the two conditional sales agreements (Exhibits 3 P, 4 P). None of the exhibits (1 P, 2 P, 3 P or 4 P) were executed in the State of Utah.

7. W. J. Digby as an individual signed an undated contract of guaranty by which he agreed as guarantor to absolutely and unconditionally guarantee the full,

prompt and faithful payment of any and all indebtedness of Nevada Motor Rentals to Mack Financial Corporation and/or Mack Trucks, Inc. and his guaranty applied to the conditional sales agreements (Exhibits 1 P, 2 P).

8. As of January 19, 1970, Nevada Motor Rentals was delinquent in its monthly payments due Plaintiff under the conditional sales agreements (R. 5).

9. Don Digby (Vice President of Nevada Motor Rentals) talked to Roy Adams about an arrangement to transfer the vehicles to Scott Trucking (R. 5). This conversation took place in Mack Financial's office and was the only contact which Nevada Motor Rentals had in the State of Utah (R. 5, R. 35).

10. Roy Adams called from Salt Lake City to Lee Scott of Scott Trucking and confirmed that a transfer agreement had been worked out (R. 5).

11. Seven transfer agreements were executed by which it was agreed as to each of the seven vehicles whose chassis numbers are set forth in 1 and 2 above that Nevada Motor Rentals transferred and assigned to Scott Trucking all of Nevada's right, title and equity in and to each of said seven vehicles (R. 5, R. 6). By such transfer agreements, Mack Financial Corporation consented to such transfer upon the terms and conditions stated in the agreements. Six of the contracts provided for the payment to Plaintiff of $18,653.20 on each truck and the seventh provided for a payment of $15,683.85 for a total of $217,603.05, the amount of which represented the un-

paid balance remaining due and owing to Plaintiff under the conditional sales agreement described in 1 and 2 above, and the amount which Plaintiff sought to recover from Defendants in its complaint (Exhibits 10 P through 16 P).

12. Roy Adams (for Mack Financial) flew to Boise to have the transfer agreements executed by Lee Scott of Scott Trucking and to Denver where they were executed by Jim Digby and Walter Klus for Nevada Motor Rentals.

13. The transfer agreements were payable in Salt Lake City, Utah (Exhibits 10 P through 16 P).

14. As to each of said transfer agreements, Lee Scott individually signed a contract of guaranty identical in terms to that signed by W. J. Digby as mentioned in paragraph 7 above.

15. At the time of the execution of the seven transfer agreements on January 19, 1970, the seven vehicles covered thereby were delivered to Scott Trucking and taken to Boise, Idaho, from Denver, Colorado, where they had been in the possession of Digby Truck Lines under lease or rental from Nevada Motor Sales (R. 13).

16. Following transfer of the vehicles to Scott Trucking that Company made one payment on each of the trucks, totaling $3,246.09 (Exhibit 17 P and R. 37).

17. Thereafter, no further payments were made by Scott Trucking and beginning on or about February 1, 1970, and in the ten days thereafter, each of the seven

vehicles were driven to Denver, Colorado, by Scott Trucking drivers and were taken to the premises of Digby Truck Lines and were then driven to the premises of Mack Trucks, Inc. where they were left and where they remained for approximately the next two years (R. 14, R. 18, R. 139).

18. Plaintiff promptly learned of the return of the trucks to Denver by Scott Trucking and of their location at Mack Trucks, Inc. in Denver (R. 14, R. 38).

19. On June 11, 1970, Plaintiff filed its complaint in this case (R. 240).

20. Mack Financial was advised that Nevada Motor Rentals was having financial difficulties when the trucks were returned (R. 16, R. 33).

21. Don Digby discussed selling the trucks with Roy Adams and Roy Adams was also contacted by Collins of Mack Trucks and by Harold Olsen of Mack Trucks. No method of disposing of the trucks was arranged (R. 16, R. 42).

22. The trucks were appraised for value by various persons at different times as follows:

(a)

	Date	Value 1967 Model	Value 1968 Models-each
By John C. Roddy, Employee Mack Trucks (Wholesale)			
Exhibit 19 D	4/3/70	$10,500.00	$11,500.00
Exhibit 20 P	12/10/70	$ 8,500.00	$ 9,800.00

(Also stated that wholesale is 20% less than retail.)

(b)			
By Don Digby, Vice President, Nevada Motor Rentals (R. 142) (Retail)	About 4/10/70	$15,000.00	$16,000.00
(c)			
John James Alward, Truck Sales from J. T. Jenkins, Kenworth Dealer (Wholesale) (R. 172, 173, 174)	1 or 2/70	$15,000.00	$16,000.00
(Also stated that as rule of thumb 25% off for first year, 15% for second year and 10% for each year thereafter.)			
(d)			
Lee Scott (R. 139, 132) (Exhibits 10 P through 16 P)	1/70	$17,683.85	$20,653.20
(Sales price to Scott.)			

23. The following persons sought to purchase one or more of the vehicles during the period that they were stored:

Charles W. Weart, ... Employee of W. J. Digby	4/70	Willing to pay $18,000.00
Hollis E. Rosch, ... Employee of W. J. Digby	9/70	Willing to pay $16,000.00 or $17,000.00
Russell B. Malcolm, ... Employee of Rightway Transportation (Robert Digby)	6/70	Willing to pay $16,000.00 or $17,000.00

24. The trucks were ultimately sold by Plaintiff on

January 25, 1972 at public auction in Denver, Colorado, as follows:

Purchaser	Chassis No.	Price
William Sharp Brighton, Colorado	2358-1968	$ 6,900.00
Wheeler Sales Las Vegas, Nevada	2356-1968	6,000.00
J. K. Merrill & Sons Pocatello, Idaho	2358 and 2360	12,900.00 (6,450.00 each)
Interstate Mack	1947-1967	18,900.00 (6,300.00 each)
Boise, Idaho	2357-1968 2359-1968	
		$44,700.00

(Exhibit 17-P)

ARGUMENT

POINT I.

UTAH COURTS HAVE NO JURISDICTION OVER DEFENDANT NEVADA MOTOR RENTALS, AND THE DISTRICT COURT ERRED IN FAILING TO GRANT DEFENDANT NEVADA MOTOR RENTAL'S DISMISSAL.

One of the puzzling features of this case has been the selection of the State of Utah as the jurisdiction for trial by the Plaintiff. It would seem that the State of Utah would be the most inappropriate state in which the action could be brought.

Lee Scott of Scott Trucking had contact with Mack Financial only by telephone, and Mack Financial's agent Roy Adams carried the transfer agreements to Boise for the signature of Lee Scott (R. 5). W. J. Digby, who had signed the continuing guarantee had never had any contact within the State of Utah and was subject only to a telephone call from Mack Financial to his home in Phoenix (R. 7). Nevada Motor Rentals could not be found under any stretch of the imagination to be doing business in the State of Utah with the exception of one visit when Mr. Donald Digby, Vice President of Nevada Motor Rentals appeared in Mack Financial office to propose the transfer agreements with Scott Trucking (R. 5). Evidently, Mack Financial did not feel that Donald Digby could sign for Nevada Motor Rentals, as Mack Financial's agent, Roy Adams, carried the documents to Denver for their signature and later acquired a Power of Attorney from W. J. Digby authorizing the signature of the documents for and on behalf of Nevada Motor Rentals (R. 8).

The only contact with the State of Utah upon which Plaintiff can rely for jurisdiction was the conversation of Don Digby with Roy Adams of Mack Financial Corporation in Mack Financial's office in Salt Lake City (R. 5), and at this time no actual business was performed. Documents were later prepared which were signed in Boise by Lee Scott and in Denver for Nevada Motor Rentals. Those documents designated Salt Lake City as a place

for performance. In this respect, they were equally as binding on Scott Trucking as on Nevada Motor Rentals.

The Defendant Nevada Motor Rentals could not be characterized as having done business within the State of Utah unless the activities of Nevada Motor Rentals fall within the limitations of Title 78-27-24, which reads as follows:

> *78-27-24, Jurisdiction over nonresidents—Acts submitting person to jurisdiction.*—Any person, notwithstanding section 16 - 10 - 102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) The causing of any injury within this state whether tortious or by breach of warranty;
>
> (4) The ownership, use, or possession of any real estate situated in this state;
>
> (5) Contracting to insure any person, property or risk located within this state at the time of contracting.
>
> (6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.

In this case the contact between Nevada Motor Rentals and Mack Financial was one of a conversation in an office. The question then arises whether this conversation constituted the transaction of business within the State. If it was the transaction of business, the Defendant respectfully submits that such a conversation could not be the transaction of business. The business actually being transacted constituted the signing of the transfer agreements which did not take place within the State of Utah.

No case has been found in which a contact as slight as that relied on in this case for "transaction of business" as in this case. The rule is cited in *Hill* v. *Zale Corporation*, 25 Utah 2d 357, 482 P. 2nd 332, in which the Court states:

> "The question is whether the corporation is doing business within the state in a real and substantial sense."

Defendant Lee Scott, dba Scott Trucking and Nevada Motor Rentals should be subject to the same rule of law. Whatever it is. The dismissal of the action as against Lee Scott, dba Scott Trucking was prejudicial to Nevada Motor Rentals, and the facts of jurisdiction would appear to be the same.

Title 78-27-26 specifically limits the claims to those claims arising out of the acts enumerated in 78-27-24.

> 78-27-26. Jurisdiction over nonresidents—Only claims arising from enumerated acts may be

asserted.—Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act.

POINT II.

THE COURT ERRED IN FAILING TO FIND THAT NO DEFICIENCY BE ASSESSED WHERE THE SALE OF SECURITY IS FOUND TO BE "NOT COMMERCIALLY REASONABLE."

The Lower Court found that the sale of the trucks was not a commercially reasonable disposition. It therefore follows:

1. The court has a choice under the Uniform Commercial Code as construed by the Courts of either:

(a) Denying a deficiency judgment altogether and dismissing the action by entering a judgment for the Defendant, or

(b) Presuming that the damages to be awarded Defendant under 70A-9-507(1) are equal to the amount of the deficiency.

The majority of courts have taken the view that the failure to conduct a commercially reasonable disposition deprives the debtor of *any* deficiency and ends the case. The leading cases are: *Braswell* v. *American National Bank*, 161 S. E. 2d 420 (Ga.); *Leasco Data Processing Equipment Corporation* v. *Atlas Shirt Co., Inc., Defen-*

dant, 66 Misc. 2d 1089, 323 N. Y. S. 2d 13 (N. Y. 1971); *Skeels* v. *Universal C. I. T. Credit Corporation*, 222 F. Supp. 696 (W. Dist. Pa. 1963).

The viewpoint is supported by the fact that Section 70A-9-504 creates both the right to a deficiency, in 70A-9-504(2), and the rules regarding the disposition that is a condition precedent to a deficinecy, in 70A-9-504(3). There obviously cannot be a deficiency until there has been a disposition and if the disposition has not been commercially reasonable than a deficiency has not been properly established and the right to a deficiency necessarily dissolves.

The minority view awards damages to the debtor under Section 70A-9-507(1) which are presumed to be equal to whatever deficiency could originally have been established. This view is evidenced by the Arkansas court in *Barker* v. *Horn*, 432 S. W. 2d 21 (Ark.), *Martin* v. *National Bank of Commerce of Pine Bluff*, 398 S. W. 2d 538 (Ark. 1966). The Code provisions can be read to support either viewpoint and the comments do not indicate the correct choice. Certainly the majority view of denying a deficiency gives full effect to the requirement of commercial reasonableness and its adoption by all courts would tend to "shape up" creditors for everyone's benefit. Certainly a creditor cannot complain if his exercise of the required duty enhances the proceeds of the collateral.

Perhaps the real distinction between the two provisions can be learned from cases construing similar provisions of the Uniform Conditional Sales Act. Section

23 provided that where there is no resale the buyer is discharged of all obligation under the contract, similar to the election under 70A-9-505(2). Section 24 provided that the buyer shall be liable for the contract price only after a resale as in Section 70A-9-504(2). Section 25 provided that the buyer may recover his actual damage if the seller fails to comply with the statutory requirements as to resale, and in no event less than one-fourth of all payments made under the contract with interest, as in Section 70A-9-507(1). The Conditional Sales Act, as construed, and the Uniform Commercial Code are thus parallel in appearing to provide two remedies to the debtor — a denial of the deficiency judgment and a right to damages which may be equal to the amount of the original deficiency. The courts, however, did not have the same difficulty in reconciling the two provisions as shown by an analysis of two cases decided in the same jurisdiction, *Underwood* v. *Raleigh Transportation Equipment and Construction Company*, 102 W. Va. 305, 135 S. E. 4 (W. Va. 1926) and *Commercial Investment Trust* v. *Browning*, 108 W. Va. 585, 152 S. E. 10 (W. Va. 1930). Both cases are cited in 49 A. L. R. 2d, the current annotation on rights and duties of parties to conditional sales contracts as to resale of repossessed property. *Commercial Investment Trust, supra,* is cited for the proposition that the seller loses any claim to a recovery of the deficiency if he fails to properly carry out the resale under Section 24. *Underwood* v. *Raleigh Transportation Equipment and Construction Company, supra,* is cited for the proposition that the buyer may recover his actual dam-

ages under Section 25 if the seller fails to comply with the statutory requirements.

> In *Underwood* v. *Raleigh Transportation Equipment and Construction Company, supra,* where the defendant was the vendor under a conditional sales agreement and the plaintiff had defaulted after having paid $305 of a $600 contract, and where the plaintiff proved that the defendant had resold the vehicle for $668, thereby establishing the amount by which he was damaged, it was held that the defendant should have accounted to the plaintiff for the price obtained by it on resale of the automobile under Section 25 of the Act. There was, of course, no requirement to give him the minimum provided by Section 25 since he had proved his actual damages.
>
> In *Commercial Investment Trust* v. *Browning, supra,* where the plaintiff was a conditional vendor of a Nash automobile sold for $1,100 and where the balance due at the time of repossession was approximately $200 but the plaintiff's improper resale resulted in proceeds of $1, it was held that the plaintiff's failure to conduct the resale in accordance with the statute precluded a deficiency judgment.

The comparison of these cases decided by the same court under provisions of the Uniform Conditional Sales Act that are substantially the same in intent as the relevant provisions of the Uniform Commercial Code show the correct interpretation of both statutes.

The *damage provision of* 70A-9-507(1) *is to be ap-*

plied when the resale returns more to the secured party than the balance that was due him under the secured agreement from the debtor. The *denial of a deficiency judgment is to be applied* when the sale is in some way irregular and therefore commercially unreasonable and the proceeds of the sale are therefore less than the deficiency due from the debtor. This reconciliation justifies the majority view that has been taken in the construction of the Uniform Commercial Code.

POINT III.

THE COURT ERRED IN FAILING TO FIND THAT NO DEFICIENCY JUDGMENT MAY BE ASSESSED WHERE NOTICE OF SALE IS ABSENT OR DEFICIENT.

Although the Court seems to have found that the sale of the security by Plaintiff was not a "commercially reasonable" sale, the same result could have been reached for failure to give proper notice of the sale.

Plaintiff has failed to both plead and prove that it sent notice required by 70A-9-504(3):

"Shall be sent by the secured party to the debtor . . ." and in fact the record fails to disclose any attempt to do so. Plaintiff contends that published notice (Exhibits 5 P and 6 P) satisfies the statute. On its face it does not.

The burden of pleading and proving compliance with the notice requirements of § 70A-9-504 is on the secured

party. *Mallicoat* v. *Volunteer Finance & Loan Corp.*, 415 S. W. 2d 347 (Tenn. App. 1966); *Foundation Discounts, Inc.* v. *Serna*, 81 N. W. 474, 468 P. 2d 875 (1970); *Skeels* v. *Universal C. I. T. Credit Corp.*, 222 F. Supp. 696 (W. D. Pa. 1963), *mod. other grds.*, 335 F. 2d 846 (3rd Cir. 1969).

The courts have consistently held that there must be strict compliance with the notice requirements in § 70A-9-504(3); substantial compliance is insufficient. For example, in *Morris Plan Co. of Bettendorf* v. *Johnson*, 271 N. E. 2d 404 (Ill. App. 1971), it was held that a general notice that the collateral would be sold, without specifying the time, date or place of the sale, was insufficient to satisfy the requirements of § 70A-9-504(3), even where the secured party had notified the debtor of its intention to effect a resale. The same result obtained in *Braswell* v. *American National Bank*, 117 Ga. App. 699, 161 S. E. 2d 420 (1968), where the secured party notified the debtor that unless he paid off the balance due, the collateral would be put up for bid and sold to the highest bidder and the debtor would be responsible for any deficiency. Similarly, in *Charley* v. *Rico Motor Co.*, 82 N. M. 244, 480 P. 2d 404 (1971) notice which stated that the collateral would be sold, but which contained no information as to the time or place of the proposed sale, was deemed insufficient. Accord, *Edmondson* v. *Air Service Co.*, 123 Ga. App. 310, 180 S. E. 2d 589 (1971). See also, *Moody* v. *Nides Finance Co.*, 115 Ga. App. 859, 156 S. E. 2d 310 (1967).

Claimant's Failure to Give Notice as Required by the Uniform Commercial Code is an absolute Bar Against a Deficiency Judgment both Under Applicable Case Law.

Where a secured party fails to give the notice required by 70A-9-504(3), he is not entitled to recover from the debtor the difference between the amount remaining due on the contract and the proceeds of the sale. *Leasco Data Processing Equipment Corp.* v. *Atlas Switch Co., Inc.*, 323 N. Y. S. 2d 13 (N. Y. Civ. App. 1971). The rationale for this rule was well-articulated in *Leasco*, where following repossession of the collateral, solicitation of bids, and public sale of the equipment to the highest bidder for an amount equal to the then fair market value, the secured party sought a deficiency judgment for the amount remaining due on the original contract, notwithstanding its failure to notify the defendant of the time after which any private sale or other intended disposition was to be made, "as explicitly required by UCC 70A-9-504(3)" 323 N. Y. S. 2d at 14. The court rejected the claim for a deficiency judgment, stating:

> "It surely has meaning that the very section (9-504) that affirms the right to a deficiency judgment after sale of a repossessed article also describes in simple and practical terms the rules governing disposition as well as the pertinent notice requirements. If a secured creditor's right to a deficiency judgment were intended to be independent of compliance with those rules, one

> would surely expect that unusual concept to be delineated with clarity. The natural inference that the right depends upon compliance is forcefully underlined by the joining of the two provisions in the one section." *Id.* at 16.

Characterizing as "tenuous" plaintiff's contention that a secured creditor's right to a deficiency judgment under the described circumstances was limited only by the debtor's remedies set forth in 70A-9-507, the court further reasoned:

> "Preliminarily, it may be noted that 70A-9-507 makes no direct allusion to the circumstances under which a right to a deficiency judgment may arise.
>
> "More significant is the special nature of the language used: 'The Debtor or any person entitled to notification . . . has a right to recover from the secured party any loss caused by failure to comply with the provisions of this part.' If this were intended to authorize a defense to an action for a deficiency judgment, it is hard to imagine language less apt to that purpose . . . [I]t is unlikely that the experienced authors of the UCC intended by the above language to provide a limited defense to an action for a deficiency judgment based on a sale that had violated the simple and flexible statutory procedure.
>
> "It seems far more probable that this latter section has nothing whatever to do with defenses to an action for a deficiency, since it was never contemplated that a secured party would

recover such a judgment after violating the statutory command as to notice." *Id.* at 16.

Beyond this, the court derived some measure of support for its holding from the position taken by the courts with respect to similar provisions in the Uniform Conditional Sales Act, which as in the UCC did not specifically link the right to secure a deficiency judgment with the notice provisions but did specifically declare the debtor's right to recover damages in the event of a violation of the sections regulatting sale and notice of sale:

> "Significantly, the principle became firmly established . . . in virtually all states that adopted the Uniform Conditional Sales Act, that the right of the conditional vendor to secure a deficiency judgment was dependent upon precise compliance with the statutory requirements as to notice [citations omitted]." *Id.* at 15.

The court added that if the authors of the UCC had desired to overthrow this firmly established and generally accepted rule,

> "they surely would have manifested that intent in clear and unambiguory language . . . The conclusion is inescapable that the prior interpretation continues to be applicable under the UCC, and that the failure of this plaintiff to follow the quiet modest notice requirements of 70A-9-504(3) defeats absolutely the claim herein asserted." *Id.* at 15-16.

Finally the court explained that its conclusion —

namely, that the right to a deficiency judgment depends upon strict compliance with the statutory requirements concerning dispositions of collateral and notice thereof — did not impose an onerous burden on a secured creditor. Rather, it merely requires a secured creditor who "wishes a deficiency judgment [to] obey the law, the relevant provisions of which are now simpler and more flexible than before. If he does not obey the law he may not secure a deficiency judgment." *Id.* at 17.

Having failed to obey the law as to notice of sale, Claimant has forfeited any right it may have had to a deficiency judgment against the Debtor. For this Court to rule otherwise would allow Claimant to escape the provisions of the UCC in general, and its notice requirements in particular, and thereby "permit a continuation of the evil, which the Commercial Code sought to correct." *Skeels* v. *Universal C. I. T. Credit Corp., supra,* 222 F. Supp. 696 (W. D. Pa. 1963), *mod. other grds.,* 335 F. 2d 846 (3rd Cir. 1969).

The *Skeels* court added: "[I]t must be held that a security holder who sells without notice may not look to the debtor for any loss." 122 F. Supp. at 702.

POINT IV.

UNDER ANY VIEW OF THE EVIDENCE THE VALUES OF THE VEHICLES SHOULD BE DETERMINED TO BE $15,000 FOR THE

1967 VEHICLE AND $16,000 FOR THE 1969 VEHICLES.

A summary of the testimony with respect to values of the vehicles is set out on page .... of the Statement of Facts. Here it is sufficient to recite that on the 10th day of January 1970, Lee Scott purchased the vehicles at $17,683.85 for the 1967 vehicle and $23,653.20 for each of the 1968 vehicles. The vehicles were then returned beginning on February 1, which was exactly twenty days later. This fact argues strongly that the vehicles had a value commensurate with that which was paid by Lee Scott on January 10, 1970. Donald Digby gave the vehicles a value of $15,000.00 for the 1967 vehicle and $16,000.00 for the 1968 vehicles. He characterized this valuation as one of retail, indicating:

> "Well, I have never had the occasion to total wholesale equipment as was testified here yesterday by the Mack people. My figure is set on a retail level; however, not the high level by any means, because I did have the trucks sold in excess of $18,000.00 for Scott."

The vehicles were appraised by John James Alward, wholesale, at $15,000 for the 1967 vehicle and $16,000 for the 1968 vehicles. Alward also stated the formula by which he arrived at his valuation and indicated that his company was willing to hold their appraisal for six months after an appraisal offer was given.

More persuasive is the fact that three individuals came forward and gave testimony, Charles B. Weart, that he was willing to pay $18,000 for one of the vehicles; Hollis E. Rosch, in September, 1970, was willing to pay $16,000 or $17,000 for one of the vehicles; Russell B. Malcolm indicated he was willing to pay $16,000 or $17,-000 for one of the vehicles. In all cases, giving the benefit of the doubt to taking the least advantageous figure, the evidence would indicate the values of $15,000 for the 1967 vehicle and $16,000 for the 1968 vehicles were not unreasonable values. The testimonies of Charles B. Weart, Hollis E. Rosch and Russell B. Malcolm stand unopposed and unconverted in the record. It is also worthy of note that the trial court did not accept the low valuation given by John C. Roddy.

It is respectfully submitted that in the event any deficiency is allowed, the basis for the finding of the amount that the vehicles should have sold for on June 30, 1970, should be: $15,000 for the 1967 vehicle and $16,000 for the 1968 vehicles.

Under either theory, (a) that no deficiency be allowed; or (b) that a proper valuation be allowed for each of the vehicles (the return at the proper valuation would have been $111,000.00) there should and would be no deficiency assessed.

POINT V.

THE OUT-OF-POCKET EXPENSES OF $2,-477.31 WERE DIRECTLY RELATED TO

THE DELAY IN THE SALE AND IN THE EVENT A DEFICIENCY IS ALLOWED, THE OUT-OF-POCKET EXPENSES SHOULD NOT BE REIMBURSED TO THE PLAINTIFF.

While it is conceivable that there could have been some slight repairs and reconditioning services on the seven trucks delivered to the Mack Truck lot around the first of February, 1970, the record is void of any testimony concerning such reconditioning. What testimony is in the record concerning the reconditioning clearly indicates that the reconditioning was related to the time delay of two years in the determination to sell the vehicles. As such, the out-of-pocket expenses are clearly colored with the fact that the sale was not a commercially reasonable sale and should not be allowed.

POINT VI.

THE COURT HAS ERRONEOUSLY CALCULATED THE INTEREST IN SUCH A FASHION THAT THE DEFENDANT IS FORCED TO PAY INTEREST ON PRINCIPAL WHICH WOULD HAVE BEEN PAID ON JUNE 30, 1970, HAD THE SALE BEEN CONDUCTED IN A COMMERCIALLY REASONABLE MANNER.

The Plaintiff has calculated his judgment as set out in paragraphs 15, 16, 17 and 18, in the Findings of Fact:

No.	Chassis No.	Pay-off as of April 15, 1970
G181 7778-1	FL773LST 1947	$ 13,518.51
G181 7778-2	FL773LST 2355	16,025.91
G181 7778-3	FL773LST 2356	16,025.91
G181 7778-4	FL773LST 2357	16,025.91
G181 7778-5	FL773LST 2358	16,025.91
G181 7778-6	FL773LST 2359	16,025.91
G181 7778-7	FL773LST 2360	16,025.91
		109,673.97
Plus 2½ months interest to June 30, 1970 at 10.5%		2,399.11
TOTAL INTEREST AND PRINCIPAL TO 6/30/70		112,073.08
Less Proceeds of sale		44,700.00
		67,373.08
Less $40,750 (additional amount which vehicles would have sold for on June 30, 1970		40,750.00
		26,623.08
Plus out-of-pocket expenses		2,477.31
		29,100.39
Plus interest on $26,623.08 to June 10, 1972, at 10.5%		5,590.84
Plus interest on $29,100.39 from June 10, 1972, through May 31, 1973		3,055.53
TOTAL JUDGMENT		$ 37,746.76

CONCLUSION

The method by which the Court has entered the amount of judgment would require the defendant to pay interest on the sums which were not paid as a result of the commercially unreasonable delay in sale, and in effect would be charging the Defendant interest on the Plaintiff's failure to timely credit the account.

The foregoing is respectfully submitted.

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