

1997

# Larry H. Miller Leasing Group v. Karl E. Jorgenson : Brief of Appellant

Utah Court of Appeals

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Jeffrey W. Shields; Jones Waldo Holbrook & McDonough; Attorney for Plaintiff/Appellee.

John L. McCoy; Attorney for Defendant/Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 970603-CA

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LARRY H. MILLER LEASING COMPANY,  
a corporation,

Plaintiff / Appellee

vs.

KARL E. JORGENSEN,  
Defendant / Appellant

Appeal No. ~~970445~~ 970603-CA

(Civil No. 970000647cv)

Priority No. 15

---

BRIEF OF APPELLANT

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
DIVISION II, STATE OF UTAH,  
THE HONORABLE L. A. DEVER, DISTRICT JUDGE

---

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Salt Lake City, Utah 84145-0444

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COURT OF APPEALS

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### III. JURISDICTIONAL STATEMENT

This appeal is from an Order Granting Summary Judgment entered by Judge L.A. Dever of the Third Judicial District Court, Division II, State of Utah, on August 13, 1997. A copy of the Order is attached at Addendum A. Jurisdiction is proper pursuant to Utah Code Ann. § 78-2-2(3) (1953 as amended).

### IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err by granting summary judgment after the parties had filed conflicting affidavits as to the commercial reasonableness of selling a repossessed vehicle at an auto auction limited exclusively to wholesale dealers without any attempt to sell the vehicle at a higher retail price? **(Issue Preserved at R. 45-47).**

This is a question of law which should be reviewed for correctness. Higgins v. Salt Lake County, 85 P.2d 231 (Utah 1993). No deference should be afforded to the trial court's conclusion that the facts were not in dispute nor the court's legal conclusion based on those facts. Kitchen v. Cal Gas Co., 821 P.2d 458 (Utah App. 1991) (internal citations omitted). This Court should view the facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, who is the appellant in this case. Id.

2. Did the appellant produce evidence enough to create a genuine issue of material fact as to whether the sale of a repossessed vehicle at an auto auction limited exclusively to wholesale buyers without any attempt to sell the vehicle as a merchant at a higher retail price was commercially reasonable? **(Issue Preserved at R. 43-45).**

Because this matter was decided on summary judgment, the applicable standard of review is a correctness standard. Higgins v. Salt Lake County, 85 P.2d 231 (Utah 1993). No deference should be afforded to the trial court's conclusion that the facts were not in dispute nor the court's legal conclusion based on those facts. Kitchen v. Cal Gas Co., 821 P.2d 458 (Utah App. 1991) (internal citations omitted). This Court should view the facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, who is the appellant. Id.

#### **V. DETERMINATIVE AUTHORITIES**

Appellant submits that the following authorities are controlling and entitle him to judgment as a matter of law:

##### **STATUTES:**

Section 70A-9-504, Utah Code Annotated (1953 as amended);  
See Addendum B for the full provision of the statute.

Section 70A-9-507, Utah Code Annotated (1953 as amended);  
See Addendum B for the full provision of the statute.

##### **RULES:**

Rule 56, Utah Rules of Civil Procedure  
See Addendum B for the full provision of the rule.

## VI. STATEMENT OF THE CASE

### NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This appeal very simply involves the lower court's decision to accept on summary judgment, despite the fact that there were conflicting affidavits on point, that the sale of a repossessed vehicle at a dealers-only auto auction with no other attempt to sell the vehicle for a higher retail value is commercially reasonable within the meaning of the Motor Vehicles Act.

The case involved appellee Larry H. Miller Leasing Company's ("Miller") repossession of appellant Karl E. Jorgenson's ("Jorgenson") vehicle, a 1994 Plymouth Voyager van. After taking possession of the van, Miller made no attempt to sell the vehicle on its lot or by any retail means. R. 44. Instead, Miller sold the vehicle at an auto auction closed to the general public where it could only be expected to get a wholesale price. R. 45. Since the vehicle sold for below the value of Jorgenson's loan, Miller brought this action on January 21, 1997 seeking a deficiency on the loan value in the sum of \$6,160.17. R. 45.

Miller filed a motion for summary judgment on March 11, 1997 supported solely by an affidavit from a manager of its collection department stating that the auto auction was a commercially reasonable means of selling the vehicle. R. 9-17. On April 28, 1997 Jorgenson objected to the motion for summary judgment and



filed a counter affidavit by a used car dealer of sixteen years. R. 41-42. The affidavit was evidence that the usual course of business in the sale of a repossess vehicle was to first try to obtain a retail value by selling the vehicle on the sales lot, and that an automobile dealer would only resort to the auto auction in extreme situations since the value obtained for the vehicle would be at or below wholesale. R. 41-42.

Despite these counter affidavits, the trial court granted Miller's motion for summary judgment on August 13, 1997 and awarded Miller the deficiency plus interest, attorney's fees and court costs, in the sum of \$8,484.72. R. 68-69.

On September 3, 1997 Jorgenson filed a Notice of Appeal in the Third District Court, Division II, to appeal the question of commercial reasonableness and the granting of summary judgment to the Utah Supreme Court. R. 77. The supreme court poured-over the appeal to this honorable Court of Appeals on October 29, 1997.

### **III. STATEMENT OF FACTS**

On April 26, 1994 defendant/appellant Jorgenson entered into an agreement with Miller to lease a 1994 Plymouth Voyager van, VIN 1P4GH44R6RX251581 by signing the lease form provided by Miller which gives Miller all the rights provided a secured creditor under the Utah Commercial Code in the event of a default. R. 19-20.

Miller repossessed the vehicle on November 6, 1996. R. 22. However, Miller made no effort to sell the vehicle publicly at any of its retail locations or to obtain any retail sale or value for the vehicle. R. 44-45. Instead, Miller simply sent the vehicle to the Utah Auto Auction to be sold. R. 44-45.

The Utah Auto Auction is only open to dealers of vehicles who pay wholesale or less for the vehicles and thus the appellant's vehicle could not have been sold for its retail value. R. 41. Nor could appellant have attended the sale and bid on the vehicle himself. R. 45.

Jorgenson was informed on December 10, 1997 that Miller had sold the vehicle for \$11,550.00 and that Miller owed the deficiency balance of \$6,160.17. R. 23.

Miller brought this action in Third District Court Division II on January 21, 1997 to recover from Jorgenson the sum of the deficiency plus interest, costs and attorney's fees. R. 1-3.

Upon filing a motion for summary judgment March 11, 1997, Miller offered the affidavit of Michael E. Stewart, a collection manager for Miller. R. 9-17. Stewart stated, among other things, that the sale of the vehicle through the Utah Auto Auction was "a commonly used method of dispossession of used vehicles and [was] widely accepted in the industry as an effective, commercially reasonable and good faith means of disposing of repossessed vehicles." R. 13.

Jorgenson objected to Stewart's affidavit as not being admissible since Stewart was not an automobile dealer and was not qualified to testify as to commercial reasonableness by a merchant or dealer of automobiles. R. 45. Instead, Jorgenson filed in opposition to the motion an affidavit by Gary Giffin, a used car dealer of 16 years. R. 41-42. Giffin stated in his affidavit, contrary to Stewart,

the customary practice of used automobile dealers in the Salt Lake area and elsewhere [is] to hold the vehicle on a used vehicle lot, expose the same to advertising from the street or by newspaper for a period of time, usually 60 to 90 days. If the vehicle does not sell within that period of time, then the dealer will wholesale the vehicle at the Salt Lake Auto Auction or a wholesale dealer.

R. 42.

The affidavits contradicted one another as to the commercial reasonableness of selling the vehicle at the auction without any exposure to the public. R. 45-46. Despite the two conflicting affidavits, the court below signed the Order Granting Summary Judgment against Jorgenson on August 13, 1997. R. 68.

Jorgenson filed a notice appealing the summary judgment order on September 12, 1997. R. 77.

### IX. SUMMARY OF THE ARGUMENT

For the following reasons, the Trial Court was incorrect in granting the State's Motion for Summary Judgment:

1. Summary judgment cannot be granted where opposing parties have submitted conflicting affidavits on a question of fact.

2. Appellant objected that appellee's affidavit was made by one who lacked qualification to make such statements and determinations. However, appellee never objected to appellant's affidavit by used car dealer Gary Giffin, thus the Court should consider the appellant's affidavit admissible for purposes of summary judgment.

3. Since there were conflicting affidavits which raised specific evidentiary facts, there was a genuine issue of material fact and appellee was not entitled to judgment as matter of law.

4. Appellant raised the affirmative defense that appellee had sold the vehicle by commercially unreasonable means contrary to the requirements § 70A-9-504(3), U.C.A., and therefore was not entitled to the deficiency of the loan on the vehicle, which appellee never disproved.

5. The only evidence presented to the trial court as to the commercial reasonableness of the sale of the repossessed vehicle were the conflicting affidavits which alone should have precluded summary judgment.

## X. ARGUMENT

### I. THE COURT SHOULD REVERSE THE ORDER GRANTING SUMMARY JUDGMENT BECAUSE THE PARTIES HAD SUBMITTED CONFLICTING AFFIDAVITS THEREBY CREATING AN ISSUE OF FACT.

The trial court's order granting summary judgment was improper as appellant had filed an affidavit of sufficient facts without objection in opposition to appellee's Motion for Summary Judgment and supporting affidavit. Conflicting affidavits create a question of fact which must preclude summary judgment. Amica Mutual Insurance Company v. Schettler, 768 P.2d 950 (Utah App. 1989).

Appellee, in support of its Motion for Summary Judgment, offered an affidavit by an employee, Miller's collection manager, Michael E. Stewart. R. 9. Stewart stated in his affidavit that the automobile auction is "a commonly used method of disposition of repossessed vehicles and is widely accepted in the industry as an effective, commercially reasonable and good faith means of disposing of repossessed vehicles." R. 14.

Appellant objected to this affidavit in his Memorandum in Opposition to Summary Judgment as Stewart was not an auto dealer and therefore was not qualified to speak with personal knowledge as to the usual course of business of auto dealers. R. 46.

Instead, appellant offered the affidavit of Gary Giffin who had been a used car dealer for sixteen years as evidence of the usual course of business of an auto dealer to sell in a commercially reasonable manner. R. 41. Affiant Giffin's sworn

testimony was that it was not customary for auto dealers in Utah to sell a repossessed vehicle at an auto auction without first trying to sell the vehicle on their lot for a higher retail price. R. 42.

Thus, the two affidavits created a direct conflict over the commercial reasonableness of selling a repossessed car at an auto auction. This Court has held previously

If, upon review of the record, it appears there is a dispute as to a material factual issue, we are compelled to reverse the trial court's determination and remand for further proceedings on that issue. *One sworn statement under oath is all that is necessary to preclude the entry of summary judgment.*

Amica Mutual Insurance Company v. Schettler, 768 P.2d 950 (Utah App. 1989).

Rule 56 of the Utah Rules of Civil Procedure allows an order of summary judgment where "[t]he pleadings, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Thus, the trial court must consider all the pleadings and affidavits of all parties and then find that the material facts as presented create no genuine dispute so that the movant is legally entitled to relief.

Affidavits which raise specific evidentiary facts create genuine issues which preclude an order of summary judgment. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985). All it takes, then, is "one sworn statement" of sufficient factual evidence to defeat a motion for summary judgment. Amica Mutual at 957.

In this case, the affidavit offered by appellant set forth sufficient evidence of customary practice of merchants of motor vehicles for selling vehicles, and the commercial unreasonableness of relying exclusively on the Utah Auto Auction. R. 41-42. Miller never moved to stike appellant's affidavit nor did they object to the same in any way.

With an affidavit in support of summary judgment by appellee to which appellant objected as being made without the appropriate knowledge and authority, and an affidavit in opposition to summary judgment offered without objection, the trial court's order granting summary judgment was improper and should be reversed.

II. THE SALE OF A REPOSSESSED VEHICLE BY MEANS WHICH  
DO NOT ATTEMPT TO GAIN THE  
HIGHEST RESALE VALUE IS COMMERCIALY UNREASONABLE.

Selling a used vehicle at a dealers-only auction with no attempt to sell it from a used car lot, expose it to the public or otherwise obtain the highest selling price is not "commercially reasonable" under Utah Code Annotated § 70A-9-504. Appellant made this argument below, but the appellee never proved that selling appellant's repossessed vehicle through the Utah Auto Auction was a commercially reasonable public or private sale. Therefore, appellant should not have been liable for the deficiency which resulted from Miller's unreasonable sale.

Utah law requires that a repossessed vehicle be disposed of by the secured party in a commercially reasonable private or public sale. U.C.A. § 70A-9-504. The statute requires that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

Section 70A-9-507(2) further provides that

If the secured party either sells the collateral in the usual manner in any recognized market therefore or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

The Utah Supreme Court has defined a commercially reasonable public sale as "a sale in which the public, upon proper notice, is invited to participate and given full opportunity to bid upon a competitive basis for the property placed on sale, which is sold to the highest bidder." Pioneer Dodge Center, Inc. v. Glaubenskle, 649 P.2d 28, 30 (Utah 1982) (internal quotations omitted). The purpose of the 'commercially reasonable' requirement is "to get the best price obtainable for the truck." Maas v. Allred, 577 P.2d 127, 128 (Utah 1978). To that end, "The requirement of a public invitation is essential for a public sale under the Uniform Commercial Code." Pioneer Dodge Center, Inc., at 30, quoting In re Webb, 17 UCC Rep. 627, 630 (S.D.Ohio 1975). Finally, if the sale "was not conducted in a commercially reasonable manner, plaintiff is barred from obtaining a deficiency judgment." Pioneer Dodge



Center, Inc. v. Glaubenskle at 31, citing FMA Financial Corp. v Pro-Printers, 590 P.2d 803 (Utah 1979).

In Pioneer Dodge, *infra*, the plaintiff who repossessed appellant's truck, placed the vehicle for sale on its own used car sales lot, took it to several other car dealers who made bids on the vehicle, and announced to prospective buyers in its dealership that the vehicle would be sold for auction at the dealership. The Utah Supreme Court found that such actions on the part of appellee still did not rise to a level of commercial reasonableness. "These efforts do not give reasonable notice to that part of the public which would likely be interested in the sale." Id. at 31.

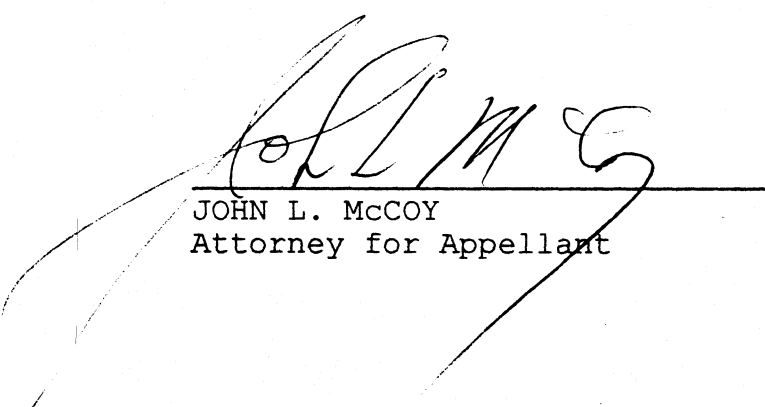
Appellant asserted below that Miller made no effort to sell appellant's vehicle through a commercially reasonable sale. R. 44. The only means Miller used to sell the repossessed vehicle was to consign it to the Utah Auto Auction lot which is closed to the public and open only to automobile wholesale buyers. R. 44-45. Appellant produced evidence showing that vehicles at the auto auction are usually sold at or below their wholesale value. R. 41-42. Clearly, the best price obtainable for the vehicle at a wholesalers-only auction would be lower than the best price obtainable from a true public or private sale at one of Miller's used car lots. As a result, Miller only obtained a price of \$11,675.00 for the vehicle at auction. R. 23.

This dispute over the commercial reasonableness of appellee's sale of the repossessed vehicle created a substantial question of fact under Utah law. Thus, pursuant to the Utah Rules of Civil Procedure, appellee's Motion for Summary Judgment must be denied.

#### **XI. CONCLUSION**

For the reasons and on the grounds stated above, appellant prays the Court to reverse the trial court's Order Granting Summary Judgment based upon the parties conflicting affidavits, to reverse the trial court's order that appellant pay appellee damages in the sum of \$8,484.72, and to remand this case to the trial court for determination based upon evidence to be produced at trial of the commercial reasonableness of selling a repossessed vehicle at a dealers-only auto auction at or below wholesale rather than selling it publicly for the highest possible price.

RESPECTFULLY SUBMITTED this 10th day of November, 1997.

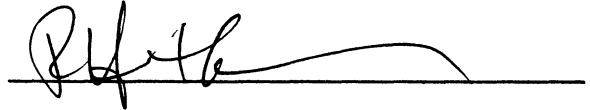


JOHN L. McCOY  
Attorney for Appellant

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on November 10, 1997 I had two true and correct copies of the Brief of Appellant mailed to the following by first class U.S. Mail, postage prepaid:

Jeffrey W. Shields  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorney for Appellee Larry H. Miller Leasing  
1500 First Interstate Plaza  
170 South Main Street  
P.O. Box 45444  
Salt Lake City, Utah 84145-0444

A handwritten signature in black ink, appearing to read "J. W. Shields", is written over a horizontal line.

## **ADDENDUM    A**

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Attorneys for Plaintiffs  
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170 South Main Street  
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IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION II,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

LARRY H. MILLER LEASING  
COMPANY, a corporation,

Plaintiff,

vs.

KARL E. JORGENSEN,

Defendant.

**ORDER GRANTING SUMMARY  
JUDGMENT**

Civil No. 970000647CV

Judge L. A. Dever

---

Plaintiff, Larry H. Miller Leasing Company ("LHM"), having filed its Motion for Summary Judgment in the above-captioned matter, and the Court having duly considered the Memoranda and Affidavits of both parties in connection with the Motion for Summary Judgment, and having rendered its Memorandum decision in accordance with Utah Code of Judicial Administration Rule 4-501, and good cause appearing therefore, it is now by the Court

ORDERED AS FOLLOWS:

1. That Plaintiff's Motion for Summary Judgment be and herewith is, granted as requested.

2. Based upon the grant of Summary Judgment, JUDGMENT IS ENTERED AGAINST DEFENDANT IN FAVOR OF PLAINTIFF AS FOLLOWS:

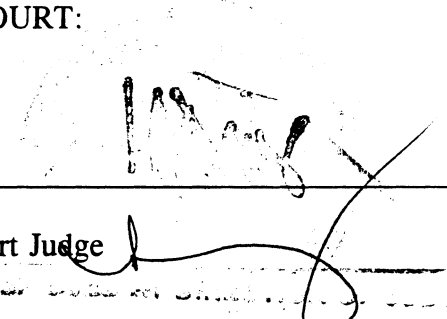
- A. For the principal sum of \$6,160.17;
- B. For costs of this Action in the sum of \$109.00;
- C. For accrued contract interest rate of 18% per annum from the date of the Complaint until July 15, 1997, in the sum of \$539.00;
- D. For interest following entry of judgment until satisfaction thereof at the contract rate of 18% per annum which is \$3.08 per day;
- E. For attorney's fees in the sum of \$1,676.55

FOR A TOTAL OF JUDGMENT IN THE SUM OF \$8,484.72

F. And it is further Ordered that this judgment shall be augmented in the amount of reasonable costs and attorneys' fees expended in collecting said judgment by execution or otherwise as shall be established by Affidavit.

DATED this 13 day of <sup>August</sup>~~July~~, 1997.

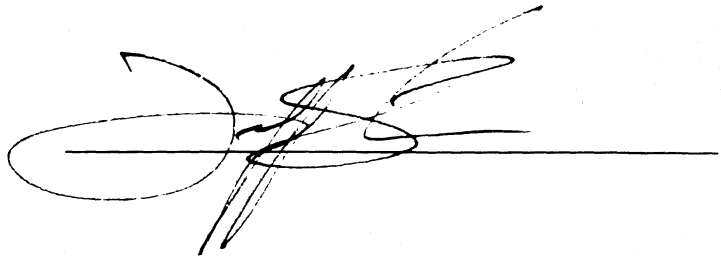
BY THE COURT:

  
\_\_\_\_\_  
L.A. Dever  
District Court Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I did cause on the 31 day of July, 1997, a true and correct copy of an **Order Granting Summary Judgment** the to be mailed via U.S. mail, first-class postage prepaid to:

John L. McCoy  
Attorney for Defendant  
310 South Main Street, #1314  
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to be "John L. McCoy", is written over a horizontal line. The signature is stylized with loops and a large "J".

## **ADDENDUM B**



**70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.**

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the chapter on Sales (Chapter 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) 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 statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. 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.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

**70A-9-507. Secured party's liability for failure to comply with this part.**

(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 the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

## Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.