1980

Utah Bank & Trust v. James H. Quinn and James H. Wuinn, Jr. : Brief of the Appellants

Utah Supreme Court

Edward T. Wells & David K. Robinson; Attorneys for Respondents;Layne B. Forbes; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH BANK & TRUST,
a Utah Corporation,

Plaintiffs-Appellants,

vs.

Case No. 16788

JAMES H. QUINN and
JAMES H. WUINN, JR.,

Defendants-Respondents.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

This is an appeal from the judgment of the District Court of the Third Judicial District, the Honrrable Dean E. Conder presiding, (Judgment was rendered after a jury trial on the 17th day of September, 1979,) and from a subsequent denial by the Court of Defendants' Motions for Judgment Notwithstanding the Verdict, for a remittitur, and for a new trial.

STATEMENT OF THE ISSUES

1. Is a creditor precluded from recovering a deficiency judgment in a situation where the creditor fails to give notice to the debtor of the sale of collateral as required by Utah Code Annotated, Section 70A-9-504(3).

2. Was the sale of collateral by the Bank commercially reasonable.

a. Whether the Court erred in failing to give Defendants requested instruction relating to the elements of a commercially reasonable sale.

b. Whether failure to give notice makes the sale unreasonable as a matter of law.

3. Whether it is lawful for the jury to fail to award damages after the Court has held as a matter of law that the Defendants were not given adequate notice as required by Section 70A-9-504(3) of the Utah Code.

4. Whether as a matter of law, the Defendant James H. Quinn is entitled to a remittitur on the damages down to the amount of the original guarantee signed by him because of failure of consideration for the agreement signed on December 23, 1977.

5. Did the Court err in failing to grant the Defendant's Motion for Judgment Notwithstanding the Verdict or in the alternative, for a remittitur and a new trial?

STATEMENT OF THE FACTS

The Appellant James H. Quinn, Jr. (Jay Quinn) was the President of an automobile dealership business in Salt Lake City, Utah, known as Alpine-Rennport. The flooring and financing for the dealership was supplied by the Plaintiff Utah Bank & Trust, a Utah corporation, who is the Plaintiff-Respondent in this action. Dr. James H. Quinn signed a continuing guarantee with the Plaintiff Bank which guarantee provided that he would assume responsibility for the debts of the corporation up to the amount of $180,000. (See Defendants' Exhibit 6D, Tr. page 98.)

On or about the 23rd day of December, 1977, the Defendant dealership was out of trust and the two Defendants met with Mr. Cook and Mr. Atwood of the Plaintiff Bank to discuss the situation. At that meeting, the officers of the Bank, specifically Mr. Cook, presented a note for the Defendants to sign. The Defendants signed the note. (Tr. page 11.) The purpose of the meeting was to work out a solution to the financial problems of the business. The note for

$198,270.00 was signed at that time to bring together all of the debts of Defendant Jay Quinn, Jr., and of the business. The note included $8,500.00 of a personal note of Jay Quinn and the flooring debts of the business including an advance made to the business of $40,400.00. (Tr. pages 18-19). At the time of the meeting, the Bank had repossessed the collateral which secured their notes for the business. The collateral was in the hands of the Bank at that time. (Tr.page 12). At the meeting, there were discussions regarding how the debts owed to the Bank would be paid. It was the general consensus of the parties at that meeting that the collateral which had been pledged on the notes would be sold and that any deficiency which existed would be paid by the Defendants. It was understood that the cars would be sold with the assistance of Jay Quinn, Jr. who had some specialized knowledge in the field of marketing exotic and specialty high performance cars. (Tr. 98-100, 118). The cars, which in fact had been repossessed by the Bank, were sold for the sum of $67,000. The sum of $67,000 was substantially below the amount which was listed as the value of the cars on the flooring agreement. (Tr. 166-67). The wholesale flooring cost of the cars was $102,816.66. (Tr. 167). All of the cars repossessed by the Bank were sold in the Salt Lake area after having been advertised only in the Salt Lake area papers. (Tr. 49-50). Mr. Cook, the Bank officer who handled the transaction, admitted that he knew nothing about the sale of exotic or specialized cars. (Tr. 51). Mr. Cook further admitted that no notice of the sales was given to either of the Defendants. (Tr. 47). The Court, in fact, held as a matter of law and instructed the jury, that the notice required under Section 70A-9-504(3) of the Utah Code had not been given to the Defendants.

Three people testified at the trial who had knowledge of the proper methods to obtain the highest price and properly market an exotic or specialty car. They were the Plaintiff's witness, Mr. Aagaard, the Defendants' witnesses Mr. Pellum, and the Defendant Jay Quinn, Jr. There was unanimous agreement amo all three of the expert witnesses with regard to the proper and reasonable meth of selling an exotic or specialty car. It was stated, that to reach the prope market and to get the best, but not necessarily the highest, price for a car, someone attempting to sell an exotic or specialty car would have to go out side of the State of Utah. (Tr. 80-81, 131.)

The Court allowed Mr. Aagaard, Plaintiff's witness, to be qualified as an expert witness regarding the proper method of sale for exotic and special ty cars. He had 6 years experience in the used car business and minimal exposure to the exotic car business market. Aagaard had no training of any type from any person or any dealership in the proper method of selling and marketing specialty or exotic cars. Over the Defendants' objection, Mr. Aagaard was allowed to testify that in his opinion, the Plaintiff had obtained a fair price for the vehicles. However, on cross-examination, Mr. Aagaard admitted that he was a one-man operation. (Tr. 75), that he had no training or experience in the exotic or specialty car market, and that he had taught himself the operation (Tr. 76); that in six years he had handled approximately five Ferraris which would be less than one per year, and that the exotic and specialty cars of the type we are concerned with in this case, have a national market. (Tr. 78-81). Mr. Aagaard testified that in his attempts to sell the cars repossessed by the Bank, he had advertised only in the Salt Lake papers. (Tr. 78). He admitted that the specialty car market was on a national level, and that in his opinion,

the best place to advertise the sale of a specialty or exotic car is in a specialty publication such as Auto Week (Tr. 80-81). He also testified that there would be a better market than Utah for the cars in Phoenix, Los Angeles, and San Francisco, and that any large city would have a better market for these cars than Utah (Tr. 80-81). Yet Mr. Aagaard failed to advertise the cars in any of these other areas (Tr. 81). In fact, Mr. Aagaard testified as follows:

> "Q: As a matter of fact, almost any of the larger cities surrounding Utah would be a better place to sell an exotic foreign car than Salt Lake City, isn't that true?
> A: Yes. If that's where your location was.
> Q: But you didn't advertise in any of these cities, did you?
> A: No." (Tr. 81-82.

Mr. Ray Pellum was called to testify by the Defendants. Mr. Pellum testified that he was the sales manager at Bavarian Italian Motors in Salt Lake City (Tr. 123). Mr. Pellum testified that people who buy specialty cars don't go to a regular car dealer to buy them. (Tr. 124). Mr. Pellum indicated that he had been in the used car business for 18 years and that Bavarian Italian Motors does have some dealings in exotic or specialty cars. (Tr. 124). He indicated that he had been trained in these cars through on-the-job training at the dealership because "it's a different field than just the average and domestic cars." (Tr. 124). Mr. Pellum testified that the reasonable steps which he felt a person should follow to market an exotic car were as follows:

1. Make calls out of state to dealers who specialize in exotic cars.

2. To advertise in out of state papers such as the Los Angeles Times or other large city papers, and

3. To advertise in the trade and specialty journals such as Auto Week, (Tr. 125-126).

Mr. Pellum was asked the following question:

> "Q: If I wanted to sell a specialty car and obtain the best possible price, would you confine advertising of that car to the local Salt Lake newspapers?
>
> A: No.
>
> Q: Would you, in fact, advertise in the local Salt Lake papers?
>
> A: Well, you might advertise in Salt Lake papers, but you would try to advertise, like I said, the Los Angeles paper and maybe the Denver paper. You have got to get -- there are not that many people for that kind of car. So you have really got to put it out where the people are.
>
> Q: In your opinion, would it be a reasonable method of selling the car to confine your advertising to the Salt Lake papers?
>
> Mr. Forbes: Your Honor, I object to that. Reasonable I think, is an ultimate conclusion.
>
> Mr. Wells: Your Honor, he is an expert.
>
> The Court: Overruled. He can answer.
>
> Q by Mr. Wells: Do you feel that it would be a reasonble method of marketing an exotic car to advertise only in the Salt Lake papers?
>
> A: No." (Tr. 127-128).

On re-direct examination, Mr. Pellum further testified that a person would have to go out of state to really get a market for the type of exotic or foreign cars that we are dealing with in this situation. (Tr. 131 at 15-17).

Mr. Jay Quinn, the co-Defendant, testified that the entire business of the dealership in which he was involved was the marketing, selling and buying of used high performance specialty, classical and exotic automobiles. (Tr. 132) He further testified that the market for these cars was on a national level,

and that he went all over the country buying and selling these cars. (Tr. 132-134). Mr. Quinn testified that most of his advertising of these vehicles was carried about in national publications, such as Road & Track magazine and Auto Week. (Tr. 134-135). He testified that he was presently employed as the sales manager of a dealership in Arizona which sold a lot of foreign and exotic specialty cars, and that his present employer advertised heavily in the national publications such as Auto Week and Road & Track. (Tr. 135). Mr. Quinn further testified that he had banking experience, having worked for the Continental Bank in Salt Lake City, from 1968 through 1970, where he held positions of head teller, vault teller and assistant branch manager. (Tr. 135-136). Having had experience as a banker, Mr. Quinn then explained what was meant by the floor plan arrangement and how it worked and Mr. Quinn testified that the price that a bank loans on a floor plan arrangement was generally a liquidation price. (Tr. 137). Mr. Quinn testified that the floor value of the vehicles repossessed by the Bank was $102,816.66, and that in his opinion, the actual value of those vehicles was $128,465.00. (Tr. 167). Mr. Quinn testified that the amount at which the vehicles were floored, (see Defendants' Exhibit 11D), was the reasonable liquidation value of those vehicles. (Tr. 166). Mr. Quinn testified further that if he had had actual notice of the sales, a higher price could have been obtained for all of the exotic and specialty cars. He testified that, in fact, the bank had refused to allow the Ferrari to go to Arizona where a higher price than the price realized by the Bank could have been obtained. (Tr. 216).

The Bank, in fact, sold the repossessed automobiles for approximately $67,000, and applied the equity of the sale of Mr. Jay Quinn's home to the

note, leaving the Bank with a balance owing as of September, 1979, of $148,387.61 including interest. The amount owed to the Bank before the application of interest was $132,228.61. (Tr. 41). Therefore, having applied the equity of Mr. Quinn's home and the sales price of all of the vehicles sold by the Bank, the Bank had only reduced the amount of the loan some $66,000, an amount which is less than one-half of what Mr. Quinn, Jr. felt was the reasonable value of the vehicles which were repossessed.

After having sold the collateral and applied the proceeds to the note, the Bank then sued the Defendants for the deficiency.

The Bank claims that the Defendants are indebted for a deficiency judgment in the amount of $148,387.61. The Defendants claim that since the Bank failed to give notice and allow the Defendants to protect the purchase price of the collateral vehicles which were sold, that the Bank is not entitled to recover any deficiency or if a deficiency is allowed, that the deficiency should be limited to the sum of $45,700.00, which amount would cover the difference between what the Defendants feel the vehicles could reasonably have been sold for, and the amount for which the Bank actually sold the vehicles.

ARGUMENT

THE FAILURE OF THE PLAINTIFF BANK TO GIVE NOTICE OF THE SALE OF COLLATERAL TO THE DEFENDANTS AS REQUIRED BY UTAH CODE ANNOTATED, SECTION 70A-9-504(3) PRECLUDES THE PLAINTIFF BANK FROM RECOVERING ANY DEFICIENCY JUDGMENT FROM THE DEFENDANTS.

In the present case, the Court found as a matter of law, that the Plaintiff Bank had not given the notice required of Utah Code Ann., Section 70A-9-504(3), regarding the sale of collateral. This Honorable Court, in the case of F.M.A. Financial Corporation v. Pro Printers, 590 P.2d 803, 806-807

(Utah, 1979), held "in an action for a deficiency judgment such as this, the secured party has the burden of establishing that the disposition of the property was done in a commercially reasonable manner, and that reasonable notice to the debtors was given." (Emphasis added) A secured party under the F.M.A. case to be entitled to a deficiency judgment, has the burden of proving two elements: First, that reasonable notice of the sale of collateral was given to the debtors, and second, that the collateral was disposed of in a commercially reasonable manner. Conversely, the failure of the secured party to establish either of these elements would mean that the secured party has failed to sustain the burden of proof required and that they cannot be awarded a deficiency judgment. See Chrysler Credit Corporation v. Burns, 562 P.2d 233 (Utah, 1977); First National Bank of Bellview v. Rose, 197 Neb. 392, 249 N.W.2d 723 (1977); First National Bank & Trust Company of Enid v. Holston, 559 P.2d 440 (Okla., 1977). As the Court observed in the F.M.A. case, supra, the purpose of the notice requirement is to protect the debtor by permitting him to bid at the sale or to arrange for interested parties to bid or to assure otherwise that the sale is conducted in a commercially reasonable manner. This notice requirement further inures to the benefit of the secured party by the debtor's assistance in securing a higher sale price. The precise danger, identified by the Supreme Court in the F.M.A. case, when the secured party fails to give notice, is that the property may be sold for an amount unreasonably below its market value, burdening the debtor with liability for a greater deficiency. That precise danger, which the notice requirement was designed to prevent, has occurred in this case. The uncontroverted testimony in this case is that the amount loaned by the Bank

on the flooring arrangement is a wholesale price. That it is a price which is designed to protect the Bank and a price at which the vehicles could be easily liquidated. (Tr. 53, 62, 137.) Mr. Cook, the Bank officer who conducted the sales testified that he had no knowledge about the method or business of selling exotic foreign or specialty cars. (Tr. 47.) Mr. Jay Quinn testified that the amoun for which the vehicles were floored were the reasonable liquidation prices of the vehicles. (Tr. 166) and that the vehicles were worth a minimum of $102,816.66 (Tr. 167.) Mr. Quinn further testified that in his opinion with some effort on behalf of the party trying to make the sale of the vehicles, they could have been sold for $128,465.00. (Tr. 167.) Where the Defendant has testified without contradiction that in his opinion the vehicles could have brought as much as $128,465.00, and where the Bank, which had no experience in the marketing of this specialty type of automobile, sold the vehicles for approximately $67,00 without giving notice to the Defendants of the sales or the amount of the sales, and where the uncontradicted testimony of all of the witnesses is such that the only way to reasonably market the vehicles is to go out of state and advertise in the national publications, it is clear that the Defendants were damaged by the failure to give notice. The only tenable conclusion in this case is that the failure of Plaintiff to give proper notice caused the property to be sold at a price substantially below what could have been obtained had the cars been marketed in a commercially reasonable manner and had the Defendants been allowed to come in and protect their interests by having proper notice. Plaintiff's failure to give notice to Defendants effectively prevented them from assuring that the sale be conducted in a commercially reasonable manner. In the case

of Delay First National Bank & Trust Company v. Jacobson, 19 U.C.C. Rep. 994, 998-99 (Neb., 1976), the Nebraska Supreme Court stated that "compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to the secured creditor's right to recover a deficiency." Since the Utah Supreme Court in the F.M.A. case has relied in support of its decision on some Nebraska cases, it is interesting that the Nebraska Court has held that absent notice to the debtor of the sale, the creditor cannot recover a deficiency judgment. In the Delay case, id. the Court further stated:

> ". .. we now hold that if a creditor wishes a deficiency judgment, he must comply with the law in each transaction. While this rule may seem harsh, we are persuaded by the fact that the burden is on the secured creditor to comply with the law. The act is framed in his interest. It is not onerous to require him to observe the provisions of the law. .." Id. at 1004.

The Nebraska Supreme Court stated further:

> "this is an action to recover a deficiency judgment, after the sale or disposition of the property taken by Bank under its security instruments. It is controlled by the rule enunciated in Bank of Gering v. Glover, 192 Neb. 575, 223 N.W.2d 56, (1974). We there said, 'compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.'" 19 U.C.C. Rep. at 998-99.

The Nebraska Rule is clear. Unless the creditor gives notice of the sale to the debtor as required by 9-504(3) of the Uniform Commercial Code, the creditor cannot recover a deficiency judgment. The Court stated that the reason for this rule is that

> "obviously it (the notice provision) is intended for the benefit and protection of the debtor. If he is given notice, he will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise. Even if it might be determined he could not have protected his interest, the law requires he be given the opportunity."

Id. at 999. The Nebraska Rule, "no notice-no deficiency," appears to be the majority rule in the United States.[1]

It would also appear from the F.M.A. case, supra, that the Utah Supreme Court has adopted the majority rule wherein it is held that unless the creditor gives notice to the debtor as required by the Uniform Commercial Code, the creditor cannot recover a deficiency.

[1] Delay First National Bank & Trust Co. v. Jacobson Appliance Co., supra; Turk v. St. Petersburg Bank & Trust Co., 281 S.2d 534, 13 U.C.C. Rep. 383 (Fla., 1973); First National Bank & Trust Company of Enid v. Holston, supra; Wells Fargo Bank v. Carter, 16 U.C.C. Rep. 874 (oth Cir., 1975); One Twenty Credit Union v. Darcy, 5 U.C.C. Rep. 792 (Mass. App. Div., 1968); First National Bank of Bellview v. Rose, supra; Wheeless v. Eudora Bank, 256 Ark. S.Ct 644, 14 U.C.C. Rep. 1068 (1974); Foster v. Knutson, 527 P.2d 1108, 15 U.C.C. Rep. 1127 (Wash., 1974); Beneficial Finance Co. of Black hawk County v. Reed, 212 N.W.2d 454, 13 U.C.C. Rep. 974 (1973); Braswell v. American National Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968); Babber v. Williams Ford Co., 239 Ark. 1054, 396 S.W.2d 302 (1965); Atlas Thrift Co. v. Horan, 27 Cal. App. 3rd 999, 104 Ca. Rep. 315, (1972); Commercial Credit Corp. v. Lloyd, 12 U.C.C. Rep. 15 (D.D.C., 1973); Camden National Bank v. St. Clair, 309 A.2d 329 (Maine, 1973); Leasco Data Processing Equipment Corporation v. Atlas Shirt Co., 323 N.Y.2d 13 (1971); Cities Service Oil Co. v. Ferris, 9 U.C.C. Rep. 899 (D. Mich., 1971); Skeels v. Universal C.I.T. Credit Corp., 222 F.Supp. 696 (D. Penn., 1963); vacat on other grounds, 335 F.2d 846 (3rd Cir., 1964); Aimonetto v. Keepes, 501 P.2d 1017 (Wyo., 1973); Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F.Supp. 659 (W.D. Okla., 1972); Prairie Vista, Inc. v. Cassella, 12 Ill. App. 3rd 34, 297 N.E.2d 385 (1973); Mallicoat v. Volunteer Finance & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966); Leasing Associates, Inc. v. Slaughter & Son, Inc., 450 F.2d 174 (8th Cir., 1971); In Re Carter, 511 F.2d 1203 (9th Cir., 1975

In the case of Chrsyler Credit Corp v. Burns, supra, the Court specifically held as follows:

> "Further, the District Court in its judgment dated May 17, 1976, stated that no notice of the time, date, place and manner of sale was ever given to Burns by U and S Motor Company as is normally required under statutory procedures mentioned supra. (Referring to Utah Code Annotated, Section 70A-9-504(3)). The record in this matter, because of reasons advanced in comments previously made, demonstrates that the sale was not commercially reasonable. Therefore, we hold that U and S Motor Company is entitled to no deficiency judgment, as the District Court adjudged; and that it is entitled to no attorney's fees as to which the District is reversed." 562 P.2d at 234.

Thus, it would appear, from the Chrysler Credit Corp. case, supra, that the Supreme Court has held that one of the elements of a commercially reasonable sale is notice of the sale to the debtor and that where the debtor has not received notice as required by statute, as a matter of law, the sale is not commercially reasonable and the creditor is not entitled to a deficiency. This holding seems to comply with what the Court has stated in F.M.A., supra. No deficiency judgment can be allowed where notice is not given or the sale is not commercially reasonable. Notice of the sale of collateral is one of the essential elements of a commercially reasonable sale, and absent proper notice to the Defendant of the sale, the creditor would not be entitled to a deficiency judgment.

II

WAS THE SALE OF COLLATERAL BY THE BANK COMMERCIALLY REASONABLE?

A.

THE COURT ERRED IN FAILING TO GIVE DEFENDANTS REQUESTED INSTRUCTION NO. 7 RELATING TO THE ELEMENTS OF A COMMERCIALLY REASONABLE SALE.

The Defendants requested the Court to give the following instruction

to the jury relating to the elements of a commercially reasonable sale under Article 9 of the Uniform Commercial Code:

> You are instructed that in determining if the sale of the cars and boat was carried out in a commercially reasonable manner, all aspects of the sale are to be considered. In making a determination as to commercial reasonableness of the sale, you may consider whether normal commercial practices in disposing of the particular type of cars involved were followed; you may consider the amount and type of advertising done by the Bank; you may consider any failure to advertise the cars in specialty-car publications or trade journals; you may consider whether the notice advertised by the Bank was reasonably calculated to assure such publicity that the cars will bring the best possible price; you may consider the length of time between repossession and sale, and whether any deterioration of the cars and boat was allowed to occur; you may consider the number of persons contacted by the Bank regarding the sale; you may consider whether an adequate price was obtained; and you may consider whether the method of sale conforms to accepted dealer practices. If you find after careful consideration of all aspects of the sale that the sale of the cars and boat were not carried out in a commercially reasonable manner, then you are required to find that the Bank failed to conduct the sale in a commercially reasonable manner.

The Court held in this case that notwithstanding the failure of the Bank to give proper notice as required by the Uniform Commercial Code, the jury could nonetheless award a deficiency judgment if they found that the sale was commercially reasonable. The case law regarding whether or not a sale is commercially reasonable, sets out the criteria by which a commercially reasonable sale is to be conducted and all of the elements set forth in Defendants' requested instruction no. 7 are elements which Courts have determined should be considered in making a determination as to whether or not the sale of collateral was carried out in a commercially reasonable manner. The failure of the

Court to instruct the jury with regards to the specific elements to be considered in making the determination as to commercial reasonableness, deprived Defendant of a fair trial and allowed the jury to speculate as to what the elements of a commercially reasonable sale are. There is evidence in the case which could have supported a finding by the jury that each of the specific elements set forth in Defendants' requested instruction no. 7 existed. There was adequate evidence upon which to find that the sale was not carried out in a commercially reasonable manner. The failure of the Court to properly instruct the jury with regard to the specific elements of a commercially reasonable sale denied to Defendant the right to have the jury properly determine whether the sale was commercially reasonable in light of the evidence adduced in the case.

Courts have uniformly held that in making a determination as to whether or not a sale was commercially reasonable, the jury may properly consider the amount and type of advertising done by the creditor prior to the sale of the collateral. See e.g. Liberty National Bank & Trust Co. v. Acme Tool Division of the Rucker Co., 19 U.C.C. Rep. 1288 (10th Cir., 1976); Central Budget Corp. v. Garrett, 17 U.C.C. Rep. 327 (N.Y., 1975); Harris v. Bower, 295 A. 2d 870, 11 U.C.C. Rep. 428 (Md., 1972); and Stewart v. Taylor Chevrolet, Inc., 17 U.C.C. Rep. 627 (S. D. Ohio, 1975).

In the present case, the evidence from the Bank was that the boat was advertised in the local papers only three times during a fourteen-month period, (Tr. 33). Mr. Cook further testified although he had no knowledge as to the method of sale for specialty or exotic cars, and the cars and boat were only advertised locally, no attempt was made to advertise any of the cars or

boat for sale outside of the state of Utah. The only advertisement done of the boat and cars was in the Salt Lake papers. (Tr. 49-51, 33.)

The Courts have also recognized that the failure to advertise specialty items in specialty publications or trade publications which specifically relate to that type of collateral, is sufficient to make the sale of collateral commercially unreasonable. See e.g. Liberty National Bank & Trust Co. v. Acme Tool Division of the Rucker Co., supra; Harris v. Bowers, supra; Jones v. Bank of Nevada, 535 P.2d 1279 (1975). In the present case, all three of the expert witnesses testified that the only effective method of reaching what was considered the reasonable market for exotic and specialty cars was to advertise out of state and in the trade journals. (Tr. 77-80, 124-27, 188.) In fact, both Mr. Pellum and Mr. Aagaard testified that it was not reasonable to advertise the cars only in the Salt Lake market. (Tr. 128, 80-81.)

The Courts have also held that the notice of the sale must be reasonably calculated to bring the best price. See e.g. Harris V. Bower, supra, and Jones v. Bank of Nevada, supra; Liberty National Bank & Trust Co. v. Acme Tool Division of the Rucker Co., supra. In the present case, all of the witnesses testified that a better price could have been obtained out of the state of Utah. They also testified that to reach the market, one must advertise in the specialty magazines and trade journals. However, none of this was done. Therefore, the jury could have properly found that the notice of sale and method of sale were not reasonably calculated to bring the best price.

In the case of Harris v. Bower, supra, the Court found that proper consideration should be given to the amount of time from the repossession to

the sale, and whether or not any of the collateral was allowed to deteriorate prior to the sale. In this case, there is evidence that the boat was held for some 14 months during which time it developed a cracked block. The Bank made no effort to make any repairs to the boat before it was sold. The boat was sold in an as is condition for $3,000.00, which was less than half of the price that the boat should have brought and, therefore, the jury could properly have found that the sale of the boat was not commercially reasonable had they been properly instructed.

The Court in Harris v. Bower, supra, Central Budget Corporation v. Garrett, supra, and Dynaelectron Corporation v. Jack Richards Aircraft Co., supra, determined that the number of people contacted regarding the sale was also an element that should be considered in determining whether the sale was reasonable. In the present case, the testimony is that at most, three dealers were contacted, that the bank allowed Mr. Aagaard to sell most of the vehicles and made no real effort to sell the vehicles other than through Mr. Aagaard. (Tr. 25-28, 52, 75-76.)

In Liberty National Bank & Trust, supra, and Central Budget Corporation case, supra, the Court stated that the price obtained was one of the factors to be considered. In the present case, there is conflicting testimony as to whether or not the price obtained was reasonable; however, there is adequate testimony from all of the experts that better prices could have been obtained outside the State of Utah. Therefore, the failure of the Bank to make attempts to advertise or sell the cars outside of the State of Utah could establish the fact in the jury's mind that an adequate price was not obtained. This

is bolstered by the fact that the uncontroverted testimony of Mr. Jay Quinn was that the amount for which the vehicles were floored by the Bank, to-wit $102,000 plus, was a liquidation price. Where the Bank sold the vehicles for some 60% of the accepted liquidation price, this could be sufficient evidence that the price was not adequate.

Another major problem relates to whether or not the sale as carried out by the Bank conformed to accepted dealer practices. The Court in First National Bank & Trust Co. of Enid v. Halston, supra, and the Liberty National Bank & Trust Co. case, supra, determined that one of the major aspects of a commercially reasonable sale was that the sale conform to accepted dealer practices regarding the type of collateral being sold. The uncontroverted evidence as established by the experts who testified on the point, was that dealer practices with regard to the sale of exotic and high performance cars was that the market be investigated on a national level through checking with dealers in other states as well as advertising the vehicles in national trade publications. (Tr. 79-81, 124-128, 131.) In fact, the Plaintiff's own expert witness testified as follows:

> "Q: As a matter of fact, almost any of the larger cities surrounding Utah would be a better place to sell an exotic foreign car than Salt Lake City, isn't that true?
>
> A: Yes, if that's where your location was."

(Tr. 81-82.) And the uncontroverted testimony of Mr. Ray Pellum, an expert witness called by the Defendants was that the reasonable steps taken by a person in the business of dealing in exotic and high performance cars was to call the dealers out of state, advertise out of state in specialty magazines, and trade journals, and to advertise in the large cities such as Los Angeles or Phoenix.

(Tr. 125-26.) In fact, Mr. Pellum stated that it would not be a reasonable method of selling an exotic or specialty foreign car to advertise only in Salt Lake City but that a person must go out of state for such a market.(Tr. 128, 131.)

Each of the elements set forth in Plaintiff's requested instruction no. 7 could be considered by the jury as a basis for finding the sale of collateral in this case to be commercially unreasonable. Therefore, the failure of the Court to give requested instruction no. 7 is reversible error and entitles Defendants to a new trial on the issue of whether the sale was commercially reasonable.

B.

WHETHER FAILURE TO GIVE THE NOTICE REQUIRED BY SECTION 70A-9-504(3) OF THE UTAH CODE MAKES THE SALE OF COLLATERAL BY THE BANK UNREASONABLE AS A MATTER OF LAW.

In the F.M.A. case, supra, this Court ruled that a secured party to be awarded a deficiency must sustain the burden of proof as to two elements: (1) that reasonable notice was given to the debtor as required under Section 70A-9-504 and (2) that the disposition of collateral was done in a commercially reasonable manner. In effect, the Court is stating that two elements must exist. First, notice, and second, a commercially reasonable sale. In fact, this Court in the case of Chrysler Credit Corporation v. Burns, supra, held that one of the elements, in fact, one of the essential elements, of a commercially reasonable sale was notice to the debtor and held that because there was no notice, the particular sale was not commercially reasonable and no deficiency judgment could enter. Other Courts have treated the issue of a commercially reasonable

sale in the same manner and held that notice is one of the essential elements of a commercially reasonable sale and, therefore, without notice, the sale as a matter of law cannot be commercially reasonable. See e.g. Beneficial Finance Company of Blackhawk Co. v. Reed, 212 N.W.2d 454, 13 U.C.C. Rep. 974 (Iowa, 1973 The First National Bank & Trust Co. of Enid v. Holston, supra; Foster v. Knutson 15 U.C.C. Rep. 1127, 527 P.2d 1108 (Wash., 1974); Chrysler Credit Corp. v. Burns supra, Secured Transaction: commercial reasonability of secured parties sale of collateral after default under U.C.C. Section 9-504(3), 29 Okla. L.Rev. 486 (1976).

The reasoning behind the cases is that the purpose for requiring notice to the debtor is to allow the debtor to protect himself. In Foster v. Knutson, supra, the Washington Supreme Court sets out the test for determining whether a sale was commercially reasonable. The Court states that in order for the sale to be considered commercially reasonable, there must be: (1) notice given to the debtor and the public to allow a reasonable opportunity to participate, (2) notice given to those reasonably expected to have an interest in the collateral, (3) notice sufficiently replete in describing the collateral and the amount of the obligation and (4) notice published in a manner reasonably calculated to bring the best possible price. The Court then states that if these four tests are met, the fact that a better price could have been obtained on some other occasion does not make the sale unreasonable. 15 U.C.C. Rep. 1135. It is clear that the failure to notify the debtor is a major factor which can make a sale unreasonable. See Beneficial Finance Co. of Blackhawk Co. v. Reed, supra.

In the present case, there was no notice to the Defendants and the uncontested evidence is that no attempt was made by the Bank to reach the market for exotic specialty cars and high performance cars and, therefore, obtain the best possible price. Had Jay Quinn, Jr., known the prices for which the cars were being sold, there is no question he would have bid in at the sales. He was denied that right, which is a substantial right, by the Bank's failure to notify him of the sales as required by statute. The Bank did not advertise where the real market for exotic cars existed (out of state) or in a manner designated to reach the exotic or high performance car market (Road & Track, Auto Week, etc.) To make the sale reasonable, such advertisement should have been made.

Under the cases cited above, it is clear that in the present case the sale was unreasonable as a matter of law because (1) the Bank gave no notice of the sale and therefore denied to Defendants the right to protect themselves from a sale substantially below the reasonable value of the collateral; (2) a higher price could likely have been obtained by advertising or attempting to sell the cars on a national level, (3) the sale of the cars was not carried out in the normal manner used by dealers in exotic and high performance cars. See the testimony of Mr. Pellum and Jay Quinn,(Tr. 126-131, 132-135.) There was a better market out of state. Id. (4) to reach the exotic and high performance car market, ads should go in trade journals such as Road & Track and Auto Week. See testimony of experts, supra; (5) advertisement in local papers only would not reasonably reach the potential market. See testimony of experts, supra; (6) Mr. Cook was advised that the best market was out of state, but did not make any effort to reach such market(Tr. 47, 49-51, 60, 161, 216.) Therefore, it

should be clear to the Court that the failure to notify the Defendants of the sale when coupled with the other items referred to above, make the sale of the collateral by the Bank commercially unreasonable and should preclude the Plaintiff Bank in this case from recovering a deficiency judgment on the loan secured by the collateral or in the alternative, entitle Defendants to a new trial.

III

WHETHER IT IS LAWFUL FOR THE JURY TO FAIL TO AWARD DAMAGES AFTER THE COURT HAS HELD AS A MATTER OF LAW THAT THE DEFENDANTS WERE NOT GIVEN ADEQUATE NOTICE AS REQUIRED BY SECTION 70A-9-504(3) OF THE UTAH CODE.

The Court held as a matter of law that in this case the Bank did not give the notice of sale required by the provisions of the Utah Code. The failure of the jury to award any damages at all for a wrong clearly committed is a clear violation of their duty. The uncontroverted testimony in the case was that the cars were worth substantially in excess of the price for which they were sold by the Bank. (Tr. 166-167.) The Bank offered absolutely no evidence to refute the claim of Mr. Jay Quinn that the automobiles in fact were worth at least $102,816.66, and possibly as much as $128,465.00. (Tr. 167.) The mere fact that the Bank sold the cars for substantially less than these figures is not in itself sufficient evidence to overcome the presumption that Mr. Quinn may have been able to sell the cars for a greater amount had he had notice of the intended sales by the Bank.

Those cases such as Clark Leasing Corp. v. White Sands Forest Produ Inc., 535 P.2d 1007, 16 U.C.C. Rep. 1442 (N.M., 1975) which adopt the minority view that lack of notice does not preclude a deficiency judgment, all adopt the

view that while the lack of notice does not of itself preclude a deficiency judgment, it does place upon the creditor the substantial burden of disproving the presumption that the reasonable value of the collateral was the same as the amount owed on the note. See In Re: Bishop, 482 F.2d 381 (4th Cir., 1973).

In the Clark Leasing Corp. case, supra, the New Mexico Supreme Court in accepting what it confesses to be the minority view that failure to give notice does not preclude a deficiency, makes the following statement:

> "We agree with those courts that hold that a secured party's failure to comply with Section 9-504-(3) does not result in a forfeiture to a right of a deficiency. Under these decisions, where the value of the collateral is at issue, (as in the present case), there is a presumption that the value of the repossessed collateral at resale is equal to the value of the outstanding debt. Where the sale is conducted in accordance with Section 9-504(3), the sum received at sale is evidence of the market value. But if the sale is not conducted according to the Code, the amount received is not evidence of the market value of the collateral. The secured party has the burden of proving the market value by other evidence." 16 U.C.C. Rep. at 1448. (Emphasis added).

Thus, we have only two positions with regard to what happens in the event that the creditor fails to give notice as required by the statute, the situation which exists in this case. The majority view as set forth in Paragraphs I and II above, is that the creditor, if he does not give notice, cannot recover any deficiency. The minority position as set forth in the New Mexico case of Clark Leasing Corp. v. White Sands, supra, is that in a situation where the creditor fails to give notice of the sale to the debtor, there arises a presumption that the amount of money owed on the note is the reasonable value of the security and the Bank then has to introduce evidence independent of the actual sale price to prove what in fact the market value is. In the present case,

the only evidence other than the actual sale price as to what the market value was, was the evidence introduced by Mr. Jay Quinn that in his opinion as an expert, the reasonable market value of those vehicles repossessed by the Bank, was $128,465.00.(Tr. 167.) Therefore, if this Court does not adopt the majority view that failure to give notice precludes a deficiency altogether, the failure of the jury to award damages amounting to the difference between the amount that the vehicles were actually sold for and the amount the vehicles were worth as evidenced by the uncontradicted testimony of Mr. Jay Quinn, is clearly erroneous. The failure of the jury to award any damages is contrary to the evidence and the case should be reversed and remanded for a new trial based on that fact alone.

IV

WHETHER AS A MATTER OF LAW, THE DEFENDANT JAMES H. QUINN IS ENTITLED TO A REMITTITUR ON THE DAMAGES AWARDED TO THE BANK.

After the jury returned its verdict in this case, the Defendants made a motion to the Court to grant a remittitur to Dr. Quinn in the amount of $21,543.80. James H. Quinn, Sr. originally guaranteed the debts of James Quinn, Jr. and Alpine Rennsport in the amount of $180,000. See Exhibit 6D,(Tr. 98.) Dr. Quinn has no quarrel with the fact that he made that guarantee and that he received consideration therefor. He guaranteed those debts prior to the time that the money was advanced by the Bank and agrees there was consideration for his guarantee of those particular debts to a maximum of $180,000.00. However on December 23, 1977, when the Defendants were called in to the office of the Bank and requested to sign the note in the amount of $198,240.00, no additional

consideration was given to Dr. James H. Quinn at that time for incurring the additional liability in the amount of $18,240.00. It is clear from the evidence that this note was a consolidation of debts owed by the Defendant James H. Quinn, Jr. and Alpine Rennsport. (Tr. 19.) No additional consideration was ever given for Dr. Quinn's guarantee of that note and his assumption of an addttional liability of $18,240.00. At Plaintiff's request both Defendants signed the renewal note and it is this instrument which Plaintiff has incorporated into its Complaint and upon which it has pleaded for judgment, the Bank is attempting to hold Dr. Quinn liable for an amount in excess of his original guarantee as a result of loans which were made prior to the time that he was asked to sign the new note. It is hornbook law that a guarantor of an obligation of another must receive consideration if he is to become obligated for amounts of money in excess of his initial obligation. Where in this case the Plaintiff Bank gave no consideration to Dr. Quinn to induce him to become liable for an amount greater than the $180,000 guarantee, and where the amount for which he was asked to become liable had already been advanced to Alpine Rennsport and Jay H. Quinn, Jr., it is clear that there was no consideration for the additional guarantee of Dr. Quinn and he is entitled as a matter of law to a remittitur on the amount of $18,240 plus interest accrued on that amount from the date of the note until the date of judgment. The total of the amount to which Dr. Quinn is entitled as a remittitur thus being the sum of $21,543.80.

V

DID THE COURT ERR IN FAILING TO GRANT THE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, FOR A REMITTITUR AND FOR A NEW TRIAL?

At the end of the Plaintiff's case, Defendants properly made a motion to the Court to be awarded judgment on the pleadings holding that the Bank was not entitled to any deficiency judgment because of the failure of the Bank to give proper notice to the Defendants as required by the Code, and because the evidence in the case showed as a matter of law that the sale of the vehicle was not carried out in a commercially reasonable manner. The Court denied the Defendants' motions and the Defendant then put on his case. At the end of the Defendants' case, the motion for a directed verdict were again renewed and denied by the Court. (Tr. 89-96, 234-35.) The Court denied the Defendants' motions and the jury returned a verdict in favor of the Bank for the full amount prayed for and answered the special Interrogatories that the Defendants had not been damaged by the Bank's failure to give notice as required by the statute. Defendants submitted a timely motion to the Court requesting a judgment notwithstanding the verdict and asking the Court to hold that as a matter of law the Bank was not entitled to a deficiency judgment; that the Defendant Dr. Quinn was entitled to a remittitur in the amount of $21,543.80, and that the Defendants were entitled to a new trial because of the errors committed during the trial, particularly in failing to instruct the jury properly on the question of a commercially reasonable sale and because of the Court's failure to rule as a matter of law that the Plaintiff was not entitled to a deficiency judgment. For the reasons set forth in Paragraphs I through IV above, it is the position of the

Defendants that the Court erred in not granting to the Plaintiff judgment notwithstanding the verdict to the effect that the Bank was not entitled to a deficiency judgment or in the alternative, not granting a new trial on the issue of the damages to the Defendant as a result of the failure of the Bank to properly give notice and to properly prove that the loan amount was not the reasonable value of the collateral as required by the Clark Leasing Corp. case, supra.

CONCLUSION

WHEREFORE, Appellants respectfully submit that since the Plaintiff Bank failed to notify the Defendants of the sale of collateral as required by Utah Code Ann. Section 70A-9-504(3), and because the sale of collateral was not carried out in a commercially reasonable manner causing damages to the Defendants because of the failure to sell the cars and boat properly, the judgment entered in the Third District Court should be reversed, or in the alternative, Defendants should be granted a new trial or have their damages remitted to the sum of $45,000.00.

Respectfully submitted this 18 day of February, 1980.

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