1983

K. J. Scharf, dba Western Leasing v. BMG Corporation, Vernon R. Erickson, Michael R. Erickson, And Bruce v. Erickson : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

K. J. SCHARF, dba WESTERN LEASING, Plaintiff-Respondent, vs. BMG CORPORATION, VERNON R. ERICKSON, MICHAEL R. ERICKSON, and BRUCE V. ERICKSON, Defendants.	)	Case No. 18963
VERNON R. ERICKSON, Defendant-Appellant.	)	

RESPONDENT'S BRIEF

Appeal from a Decision of the Third
Judicial District Court of Salt Lake County
Honorable David B. Dee, Judge

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Plaintiff-Respondent,	)	Case No. 18963
vs.	)	
BMG CORPORATION, VERNON R. ERICKSON, MICHAEL R. ERICKSON, and BRUCE V. ERICKSON,	)	
Defendants.	)	
VERNON R. ERICKSON,	)	
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STATEMENT OF NATURE OF CASE

This is an action to recover a deficiency judgment after repossession and sale of two machines that had been leased to BMG Corporation under two separate lease agreements, both of which had been guaranteed by Vernon R. Erickson, Michael R. Erickson, and Bruce V. Erickson.

DISPOSITION IN LOWER COURT

At the commencement of trial, on plaintiff's motion, the action was dismissed as against BMG Corporation, Bruce V. Erickson, and Michael R. Erickson, and proceeded against Vernon R. Erickson before Honorable David B. Dee, without a jury. The court entered judgment against Vernon R. Erickson for $57,810.21 plus costs.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment, and the award of an attorney's fee for services in connection with the appeal.

STATEMENT OF FACTS

Respondent agrees with the first paragraph of appellant's "Statement of Material Facts" but does not agree with the remaining paragraphs or with the statement as a whole because of the omission of much material evidence.

In paragraph 2, page 2, of his brief, appellant quotes a portion of a demand letter from Miss Scharf, dba Western Leasing, which is intended to create the impression, and support argument on page 10 of the brief, that Miss Scharf had a total lack of concern for the amount to be received upon sale of the equipment. A reading of the entire letter (Exhibit 3) gives an opposite impression:

Dear Mr. Erickson:

With reference to our telephone conversation last week, this letter is to inform you that the above leases which you have guaranteed are now in default, and we must ask you to bring the enclosed statements current.

As we discussed with you, the machinery is being picked up and is being advertised for sale. We are willing to wait for the best offer we feel we can get to sell the equipment; however, we have to make up all of the back payments to the bank and cannot afford to do so any longer.

Therefore, we must ask you to make substantial reductions of the balances due on both leases; this will give us some time to look for the highest possible bids for sale of the equipment. If a payment is not received in our office before April 30, 1980, we will be forced to sell the equipment as quickly as possible for what ever we can get and ask you to make up any deficiencies on the balances of the leases. [Emphasis added.]

The next paragraph of the brief states that after repossession of the equipment, Western Leasing "published an advertisement" to sell the equipment. The statement is true but bare-boned. The testimony was that Western Leasing published advertisements in the Salt Lake Tribune, the Deseret News, and the Ogden Standard Examiner, and ran them for three weeks in each (R. 114-115). The advertisements (Exhibit 5) read as follows:

TAKE OVER LEASE PAYMENTS
OR MAKE OFFER ON

1) Summit Hydraulic Shear
2) Victor Lathe 16" by 60"
3) Model XL Hyd. Iron Worker
4) Enterprise Model L-2 Lathe

ALL IN EXCELLENT CONDITION

Call 295-2412.

This advertisement appeared in the classified section under the heading "Machinery, Pipe, Tools."

Appellant is correct in pointing out that the machinery was in good condition at the time of sale, but neglected to mention that some of the dies were missing from the shear (R. 121); and two chucks (a three-jaw chuck and a four-jaw chuck), a taper attachment, and accessories were missing from the lathe (R. 120, 138). Although Miss Scharf testified that the useful life of the equipment would be 30 years if it were properly cared for and maintained, appellant's expert witness testified that the useful life for both the Victor Lathe and the Summit Shear was about ten years (R. 195).

Appellant correctly states that the lathe was purchased new for $18,000 in the summer of 1979; he does not mention that although Miss Scharf paid for a 24 x 60-inch lathe, BMG Corporation, by some arrangement with the seller, Tan-Dem Machinery, agreed to accept a much less expensive 16 x 60-inch lathe, apparently for some consideration back from Tan-Dem Machinery (R. 141, 142, 145).

Appellant correctly points out that a "written appraisal by an independent, qualified appraiser" was not obtained by Western Leasing; he fails to mention that Miss Scharf had the equipment priced independently by two qualifed persons who were familiar with the Summit brand shears and Victor brand lathes (R. 125-127), and that

the appraisal for the shear was $18,500 and the appraisal for the lathe was $5,255. The shear was sold for $19,000 and the lathe for $6,000 (R. 118), which were the highest offers received (R. 119). The appellant stresses evidence of its expert witness that the equipment "would have a minimum fair market value of at least 80% of the purchase price" (R. 193-199), but the testimony of that witness, Peter Robert Grisley, was not that clear and was of doubtful validity. He said he would value machinery of this type at 80% of its "market value" and that would be the lowest that his company would sell it for (R. 199). The 80% to which he referred is what his company would buy equipment for (R. 203) but his company would not buy a used piece of equipment such as the Victor Lathe (R. 204). The witness had had no experience in buying or selling Victor Lathes or Summit Shears, had not seen any of the equipment before testifying, did not know the selling price of a 16 x 60-inch Victor Lathe, and had never seen a price list for either it or a 24 x 60-inch lathe made by Victor (R. 206-207).

In all, the appellant has referred almost exclusively to evidence that he considers helpful to his case. Set out below are some additional facts bearing upon the adequacy of the notice and the commercial reasonableness of the sale as presented to the trial judge.

Miss Scharf made serious attempts to work out some type of payment program with the Ericksons (R. 107). Commencing in May 1980, she had numerous conversations with appellant. She told him

that the sons were going to leave the equipment at Tan-Dem Machinery, where the machines would be under power and prospective buyers could come in, run the machines, and see how well they performed and the kind of condition they were in, also that his sons were going to attempt to sell the machines (R. 110). In August she talked to Vernon Erickson and his sons about picking up the machinery, moving it to a different location, doing the advertising, and disposing of the equipment (R. 111) Following this she placed the newspaper ads, she distributed flyers; she notified some of the dealers that she had dealt with in Salt Lake City, Denver, and Albuquerque that the machinery was available for sale; she contacted several of her customers in the machine tool industry, sellers of such equipment, to notify them that she had equipment for sale. In Salt Lake City she contacted Neway Products, Rosskelley Supply, and Utah Machine Tool. Tan-Dem Machinery had already been notified. In Denver she contacted F. J. Leonard Company; and in Albuquerque she contacted an individual, Vitus Cranberg (R. 112). She contacted various of her customers and remembers interest being shown by Atwood Stamping, Arc Manufacturing, R & B Fabrication, Jacobs Machinery, International Stamping Company, and Utah Tool and Die. It was her practice in this type of situation to contact each one of her customers (R. 114-115).

As a result of the newpaper advertising, she received telephone calls from various individuals indicating they would like to look at the equipment. She would go with them to look at the equipment or

arrange (R. 115) for someone to be there so they could inspect the equipment and look at it. Several people inspected the machinery without ever making an offer on it. She received some verbal offers and some written offers. During normal business hours someone was there to show the machinery, and if the potential purchasers wanted to come after work or on a weekend, plaintiff would make arrangements to meet them so they could see the machinery (R. 116). Machinery of this kind is often sold through machinery dealers and through newspaper advertising. Frequently, lessors place the machinery with a dealer in the area and give him responsibility for selling it (R. 119), but plaintiff took an active part in this case because dealers customarily charge a 10% commission, and by eliminating the dealer she would be able to obtain a higher net return (R. 120).

Absence of the chucks, taper attachment, and other accessories substantially limited plaintiff's ability to sell the lathe. "It was like trying to sell a car without wheels." Without a chuck, the machine will not produce any parts, and before it could be used the purchaser would have to buy a chuck and the attachments. The price received was a reasonable one, probably even higher than someone else would have received under other circumstances, because the purchaser had another machine with the same type of tooling, could use the tooling for both machines, and would not have to buy more tooling for the BMG lathe (R. 121). The price at which the shear was sold represented its reasonable value or market value. Smaller machine

shops and fabricating companies are the ones who, in Miss Scharf's experience, were generally most likely to be interested in buying used equipment of the type involved. The people who made bids on the machinery were for the most part people who would be using the machines in their normal course of business; they were not people who would be likely to resell the equipment (R. 122).

She didn't attempt to hold a public auction for the machinery because an auctioneer usually charges a high premium which only further reduces the amount recoverable for the machine. She notified people in the industry to find out if they were interested in buying the machine or if they were aware of anyone else interested in buying them (R. 134). She talked to several purchasing agents from local manufacturing companies and she gave notice of availability in the form of flyers as well as by the newspaper advertising.

The letter of September 11, 1980, was not the only notice given to appellant. She also contacted him by telephone (R. 132). On September 30 she called him and told him that Tan-Dem Machinery had made the highest bid of $17,000 and that she was willing to accept that because it appeared to be the highest bid she could obtain. In reply appellant said, "Fine." Nothing was done by BMG or any of the Ericksons to delay the sale or obtain a higher price for the equipment.

The trial judge, after considering all of the evidence, made Findings of Fact and Conclusions of Law, among them the following:

> 6. On or about September 11, 1980, plaintiff made written demand upon BMG Corporation and the Ericksons for full payment of the indebtedness due under the leases. Plaintiff also informed them that failure to meet the demand would result in the equipment being sold on September 30, 1980.
>
> 7. Plaintiff promptly advertised the equipment for three weeks in the Salt Lake Tribune, the Deseret News, and the Ogden Examiner under the classified advertisement heading, "Machinery, Pipe and Tools." In addition, plaintiff made several telephone calls to possible purchasers and asked the Ericksons to try to find a buyer or lessee.
>
> 8. From these efforts plaintiff received written bids from nine potential purchasers, and several other oral bids which were not confirmed and none of which were as high as the price for which the equipment was sold.
>
> 9. Plaintiff made herself available on a regular basis in order to show potential purchasers the equipment.
>
> 10. During this period plaintiff continued to encourage the Ericksons to find a buyer or lessee for the equipment. Defendants failed to produce even one possible purchaser or lessee for the equipment during this time.
>
> * * *
>
> 13. The prices that plaintiff received from the respective sales of the equipment was the reasonable market value for the equipment.
>
> * * *
>
> CONCLUSIONS OF LAW
>
> 1. Plaintiff's written demand, dated September 11, 1980, requiring defendants to make full payment of the indebtedness due under the leases or to have the equipment sold on September 30, 1980, was sufficient notice as required pursuant to § 70A-9-504(3), Utah Code Annotated (1980), wherein plaintiff was only required to give "reasonable notification of the time after which any private sale is to be made * * *."

2. Plaintiff's sale of the property on October 1, 1980, and October 9, 1980, is inconsequential, given that the sale was a private sale pursuant to § 70A-9-504(3), Utah Code Annotated (1980).

3. Plaintiff, as secured party, has met its burden under the analysis set forth by the Utah Supreme Court in Pioneer Dodge Center, Inc. v. Glaubenskee, 649 P.2d 28 (Utah 1982), of conducting a commercially reasonable sale pursuant to § 70A-9-504(3), Utah Code Annotated (1980).

4. Defendants were not prejudiced by any inadequacies of the notice because plaintiff made every reasonable effort to conduct the sale in a commercially reasonable manner and there was nothing defendants could have done or would have done to enhance the value of the equipment sold. Plaintiff received the market value for the equipment sold. * * *

On the basis of the findings and conclusions, the court entered judgment against Vernon R. Erickson for $54,310.21 plus attorney's fees of $3,500 and costs.

ARGUMENT

I

SALE OF THE EQUIPMENT WAS CONDUCTED IN A COMMERCIALLY REASONABLE MANNER.

Under the provisions of 70A-9-504(3), Utah Code Annotated 1953, sales of collateral must be commercially reasonable. The section reads as follows:

> 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. * * * 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.

The term "commercially reasonable" is not defined in the Code, and appellant has attempted to impose standards that go far beyond those that have been utilized by the courts. He says that the secured party must use "every effort" to sell the collateral under "every possible advantage of time, place, method and manner in order to obtain the highest realization possible." He suggests that an independent written appraisal must be obtained and professionals hired; that a seller must not let possible buyers know that repossessed property is being sold; and that, in this case, the secured party should have waited until 1984 to sell the equipment in the hope that at a later date, a better price might be obtained.

Appellant even goes so far as to suggest that the examples of commercially reasonable sales set out in 70A-9-507(2) Utah Code Annotated 1953 are the only examples of commercially reasonable sales. The section provides:

> 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 creditor's 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.

Much of appellant's brief is devoted to the argument that a sale is not commercially reasonable unless it is sold in one of the ways referred to in the foregoing quotation. The official Code comment does not take that position:

> In view of the remedies provided the debtor and other creditors in subsection (1) when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditor's committee or a representative of creditors, approval of a proposed method of disposition as a commerically reasonable one. Subsection (2) states rules to assist in the determination, and provide for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer -- a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of subsection (2). However, none of the specific methods of disposition set forth in subsection (2) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

In support of the argument that Western Leasing was obligated to use professionals in selling the property, appellant cites Liberty National Bank v. Acme Tool Division, 540 F.2d 1375 (10 Cir. 1976). That case, however, involved a situation in which the secured party, Liberty National Bank, had had no experience in selling oil drilling rigs, and when it repossessed an oil rig its officers inquired and investigated as to the usual manner of making such sales. It was told that the ordinary method for selling a drilling rig was to employ an auctioneer to move the rig to a convenient location, clean it and paint it, notify interested persons, and advertise the sale in trade journals and newspapers. The bank didn't do any of those things. The rig was neither cleaned, painted nor dismantled. The bank did not move it to a convenient site but sold it during a snowstorm at the place where it had been. The sale was conducted by one who had never conducted an auction of an oil rig or any oil field equipment and lacked experience in the oil business. And the court was unfavorably impressed by the fact that the bank had inquired as to the recognized methods for selling an oil rig, but after weighing the situation made a decision not to follow them. The rig was sold for substantially less than what the court found to be its value, and the evidence indicated that the bank was interested only in getting enough out of the oil rig to pay its indebtedness although there were other security holders.

The appellant complains that the persons asked to make offers on the equipment knew that it was a "distress sale." It was not a distress

sale in the sense that the property was to be sold regardless of price offered. The persons with whom Miss Scharf dealt must have known that she was looking for the best possible price for the equipment. Appellant states, without any support from the record, that "potential bidders concluded that a bid less than fair market value would be entertained by the lessor," and with similar lack of evidence or suggestion at the trial that "common knowledge dictates that one rarely makes a bid on equipment being sold in a distress sale which closely approximates the equipment's actual fair market value unless the bidding is competitive." In the present case the bidding was "competitive" in the sense that more than one person was being contacted for the showing of interest in purchase of the equipment but was not competitive in the sense that it was a public auction.

At page six of his brief, appellant states that the drafter's comments state that a private sale "must" use regular commercial channels, and then quotes a comment to the effect that a particular feature of the Code was designed to "encourage" disposition by private sale through regular commercial channels.

There are only two types of sales contemplated by the Code, a private sale and a public sale. The trial court found and the evidence required a finding that the sale in this case was a private sale. Appellant has attempted to put Miss Scharf in an impossible position. If she had not sought offers ("bids") from a large number of possible

purchasers, the argument would certainly have been made that the failure to do so made the sale commercially unreasonable, but since he could not legitimately do that, he takes the position that because a number of offers were sought, the private sale was somehow converted into a public sale, and therefore the notice of the sale was not proper, and the sale was not commercially reasonable because it did not follow the format of other public sales.

In Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28, 30 (Utah 1982), the court distinguished between public sales and private sales:

> * * * A public sale after default "has traditionally meant '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.'" * * * The requirement of a public invitation is essential for a public sale under the Uniform Commercial Code. * * * It is fundamental that a public sale presupposes posting public notices or advertising. * * * The Restatement of Security § 48 Comment (1941) defines a public sale as "one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold." [Citations omitted.]

There is no way the sale in this case could be considered to be a public sale.

Appellant also takes the position, without supporting evidence, that if there had been competitive bidding, "the price realized would have approximated the fair market value of 80% (eighty percent) of the purchase price." Although the appellant's expert testified with respect

to 80% of market value, he never did define market value or tie it to the purchase price of a new piece of equipment. Moreover, the trial court was not required to accept the testimony of the person presented to it as an expert, particularly in light of the reasons given for his opinions and the admissions made by him in cross-examination. See 31 Am.Jur.2d, Expert and Opinion Evidence, § 183; Holly v. Federal-American Partners, 29 Utah2d 212, 507 P.2d 381, 383 (1973).

Miss Scharf had been in the business of buying and leasing these particular types of machines. Approximately 70% of her business was in machine tools such as those involved in this case (R. 100). She testified that the prices obtained for the machine represented their market value, and she also testified as to the appraisals obtained from two knowledgeable equipment dealers, which appraisals were slightly lower than the prices actually received for the equipment on its sale.

It has also been suggested by appellant that in order for the sale to have been commercially reasonable, Miss Scharf should have delayed the sale until the end of the lease, hoping for a better price. Placing such a burden on a secured party is not reasonable. Lessor must pay for the purchased property whether any income is being received from it or not, and only lessors with great financial resources would be able to continue business while following such a procedure.

In Hertz Commercial Leasing Corp. v. Dynatron, Inc., 37 Conn.Sup. 7, 427 A.2d 875 (1980), one of the cases cited by the appellant, the court took the view that delaying a sale for 15 months following repossession made the sale commercially unreasonable, observing that "the substantial lapse of time obviously persuaded the 1978 buyer to make a reduced offer, because of the increased age of the machine, the additional depreciation thereof, for many months, and other related factors, which would influence a buyer to lower his bid. Unreasonable delay in the sale may produce a violation of § 9-504."

In summary, the standards set out by the appellant are his own. Although appellant has found some language here and there from which he takes solace, the cases cited have not applied such standards. Weiss v. Northwest Acceptance Corporation, 546 P.2d 1065 (Ore. 1976), with respect to commercial reasonableness, dealt primarily with the admissibility of evidence relating to the preparation of the goods for sale and of demanding a cash or certified check, holding that evidence with respect to these matters was relevant and admissible on the question of commercial reasonableness, but the court recognized that the determination of what is commercially reasonable is a determination left in the first instance to the trier of fact.

Community Management Association v. Tousely, 32 Colo.App. 33, 505 P.2d 1314 (1973), dealt with the provisions of § 9-504(3), Uniform Commercial Code, dispensing with the requirement of reasonable

notification if the collateral is of a type customarily sold on a recognized market.

The courts have generally have not adopted the standards as espoused by Grant Gillmore, quoted on page 5 of appellant's brief, the test of commercial reasonableness being somewhat more flexible. It has been said that a secured party acts in a commercially reasonable manner when, in process of disposing of repossessed security, he acts in good faith and in accordance with commonly accepted commercial practices which afford all parties fair treatment, Wilkerson Motor Co., Inc. v. Johnson, 580 P.2d 505, 509 (Okl. 1978); and that the qualifying disposition of collateral must be made in a good faith attempt to accomplish disposition to the parties' mutual best advantage, Hertz Commercial Leasing Corp. v. Dynatron, Inc., 37 Conn.Sup. 7, 427 A.2d 872 (1980), cited by appellant.

In the present case Miss Scharf went out of her way to attempt to obtain a high price for the equipment. She advertised in newspapers; attempted to have appellant and his sons find a buyer; and contacted numerous dealers in Salt Lake City, Denver, and Albuquerque and several of her customers in the machine tool industry who were sellers of such equipment. To obtain a higher net return, she set about selling the equipment herself in order to avoid the costs incident to placing the machinery in a dealer's place of business or with an auctioneer. She sold the machinery at a higher price than that for

which it had been appraised by responsible equipment dealers; and she gave to appellant reasonable notice of the date after which the property would be sold. There is no evidence that the Ericksons, or any of them, attempted to find a buyer for the machinery or that they could have obtained a better price for the machinery. Whether a sale has been conducted in a commercially reasonable manner is a question of fact, and the fact finder had before him ample of evidence from which he could and did find that the sales were conducted in a commercially reasonable manner.

II

THE LETTER OF SEPTEMBER 11, 1980, CONSTITUTED REASONABLE NOTIFICATION TO APPELLANT OF THE DATE AFTER WHICH THE PROPERTY WOULD BE SOLD.

The provisions for notification of a sale by a secured party are set out in 70A-9-504(3) Utah Code Annotated 1953:

> * * * 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, * * * .

On September 11, 1980, Miss Scharf's counsel sent a letter to appellant setting out the defaults and making a demand for full payment of the indebtedness under the leases. Copies of the letter were sent to Michael R. Erickson and Bruce V. Erickson, the principals in BMG Corporation. The next to the last paragraph of the letter read as follows:

> The equipment covered by the leases is now in the possession of Western Leasing and will be sold on September 30, 1980, unless the amounts due under the lease agreement have been paid. If they have been paid, the leased equipment will be turned over to you or to BMG Corporation, if not, the sale proceeds, after deduction of costs and expenses, will be applied to the indebtedness and Western Leasing will look to you and your co-guarantors for payment of the difference.

The appellant takes the position that because the letter stated that the property would be sold on September 30, 1980, instead of that it would be sold after September 29, 1980, the notification was so defective that it did not comply with the requirements of 70A-9-504(3).

Any reasonable reading of the letter would certainly suggest to the reader that he had only through September 29, 1980, within which to do something about finding a suitable buyer or a suitable price for the equipment.

The validity of the notice has to be considered in light of the purpose of such a notice. This court discussed the notice requirement in FMA Financial Corporation v. Pro-Printers, 590 P.2d 803, 807 (Utah 1979):

> The purpose of the notice requirement is for the protection of the debtor, by permitting him to bid at the sale, or to arrange for interested parties to bid, and to otherwise assure that the sale is conducted in a commercially reasonable manner. The danger resulting from not notifying the debtor of the sale of secured property is that the property may be sold for an amount unreasonably below its market value, burdening the debtor with liability for the deficiency. Ironically, the notice requirement acts to the secured party's advantage; if the debtor helps secure a higher sale price, the secured party is benefited, because the prospect of recoverying any deficiency is usually dubious.

Inasmuch as the sale in this case was a private sale, the only notice required was to let the debtor (and the guarantors) know the date after which the property would be sold. In support of his argument, appellant cites Liberty National Bank of Fremont v. Greiner, 62 OhioApp.2d 125, 405 N.E.2d 317 (1978), to the effect that a notice similar to the one given by Western Leasing was inherently misleading and therefore did not constitute proper notice of a private sale. The brief quotes the following as the faulty notice to the debtor:

> You are hereby given notice that the property * * * will be sold on the tenth day after receipt of this letter at Fremont, Ohio, and the minimum price for which the secured party may be sold is $4,000.00."

On this basis, it is argued, the court found that the creditor's letter had elements of both notice of public sale and notice of private sale. But the appellant failed to quote the whole notice, and what was left out was very material to the court's holding:

> Any person may appear at the time and place of sale and bid on said property.

It was that language that led the court to the conclusion that the notice was patently ambiguous. It had no problem with the fact that the notice stated a specific date on which the sale would be held rather than an "after" date. The court said:

> A reading of the first quoted portion of the notice would indicate that the vehicles were to be sold through a private sale. The information therein conveyed, i.e., the date after which the property would be sold, would satisfy the notice requirements of R.C. 1309.47(C) for a private sale. The last line of the notice letter, however, indicates that a public sale with competitive bidding would be held. Thus, aside from

> any other deficiency, the notice was patently ambiguous as to what type of sale would be held. * * *

In the present case the notice did what it was supposed to do Appellant knew how much time he had within which to find a buyer for the equipment, or to make some other arrangments for its disposition. No time and place of sale was set out to give an indication to him that he might be protected because the sale would be a public auction. The sale was conducted in a commercially reasonable manner and at any time prior to September 30, 1980, he could have taken some steps to see that a higher price, if obtainable, would be obtained.

Appellant's position is not supported by Benton-Lincoln Credit Service, Inc. v. Giffin, 48 Ore.App. 559, 617 P.2d 662 (1980), cited in his brief. In that case the secured party notified the debtor only that it intended to apply for a certificate of title and that immediate action might be taken for recovering the indebtedness, including costs of repossession and other costs. The letter pointed out what remedies were available to the secured party and that the exercise of the rights might be avoided by paying the balance due. Nowhere in the letter, however, was it stated that the property would be sold.

The court said:

> The letter sent to plaintiff did not serve the purpose of the notice required by ORS 79.5040(3). He was not informed that the truck would be sold either at public sale at a given time and place or at private sale, but only that sale was "among the remedies reserved to the contract holder," and that he

> must pay the balance due within ten days to avoid " * * * the exercise of these rights * * * ." The only action of which he was notified was the secured party's intention to apply for a certificate of title.

Citizens State Bank v. Sparks, 202 Neb. 661, 276 N.W.2d 661 (1979), also cited by appellant, does not support his argument. In that case the only notice given to the debtor was that the property would be repossessed, after which it would sold and the money would be applied to the note with the remaining balance, if any, taken to small claims court. There was no statement at all as to the time after which the sale would be made.

In Hertz Commercial Leasing Corp. v. Dynatron, Inc., 37 Conn.Sup. 7, 427 A.2d 872, 876, (1980), the notice given did not specify whether it was a public or private sale. It did meet all the requirements of a public sale notice, but a public sale was not held. The court decided the notice was ambiguous, misleading and confusing. This is different from our case in that the notice was of a public sale. It is arguable, though by no means clear, that when a debtor receives notice that the sale is going to be a public sale he may assume that competitive bidding will bring the highest price available and see no reason to take other steps to protect himself. That is not our case, because the notice sent to appellant did not have the requirements for a public sale notice. Neither time nor place was mentioned, and there was no suggestion of receiving bids. In Simmons Machinery Company, Inc. v. M & M Brokerage, Inc., 409 So.2d 743, 16 ABR 138, 33 UCC

Rep. 419 (Ala. 1981), also relied upon by appellant, the notice did not state that the property would be sold. The material language, as seen by the Alabama Supreme Court was that, "after this date the drill will be elgible [sic] for resale." The Alabama court regarded it as "tentative" and more of the nature of a demand for payment. In our case appellant was told that the property would be sold.

Appellant correctly points out that in Associates Financial Services Co., Inc. v. DiMarco, 383 A.2d 296 (Del. Superior Ct. 1978), the court held that the notice of a private sale was not sufficient to support a public sale that actually took place. The notice had specified a private sale but the secured party conducted a public sale. In holding that the notice was defective, the court said:

> * * * Here the notice specified no place of sale and stated the items would be offered for sale "after 5:00 p.m. on the [* * *] day of May, 1975 and day to day thereafter until sold." This failed to specify a time of sale. Finally the notice specifically referred to private sale. This of necessity had the effect of eliminating the possibility of bidding by defendant or any bidders whom he might have produced. Clearly, an important function of a public sale notice is to afford the debtor the opportunity to be present and bid at the sale and also to encourage others to be present and bid. * * *

The case also dealt with notices of private sales that were conducted. With respect to these the court noted the different purposes of the two notices:

> * * * the objective of notice where a private sale is contemplated is to afford a reasonable time within which the debtor can protect his property by paying off the debt or by finding a buyer for the property.

Spillers v. First National Bank of Arenzville, 81 Ill.App.3d 199, 400 N.E.2d 1057 (1980), cited by appellant, involved two sales, notice having been given with respect to only one of the items of equipment. The court held that notice had to be given with respect to each sale.

Stewart v. Taylor Chevrolet, Inc., 17 UCC Rep. 627 (S.D. Ohio 1975) the creditor gave notice that collateral was to be sold at a public sale and the bankruptcy court held that the notice was invalid where the property was not sold at a public sale but was sold at a private sale. The notice given in the present case, however, was not notice of a public sale since there was no mention of the time or place of the sale. The Code does not require the notice to contain a statement that the sale will be "public" or "private" if the nature of the sale can be determined by the terms of the notice. See All-States Leasing Co. v. Ochs, 42 Or.App. 319, 600 P.2d 899, 906 (1979); DeLay First National Bank v. Jacobsen Appliance Co., 196 Neb. 398, 243 N.W.2d 745 (1976).

III

ANY INSUFFICIENCY IN THE FORM OF THE NOTICE DID NOT RESULT IN INJURY TO THE APPELLANT.

Assuming the notice was not sufficient to comply with the provisions of the UCC, it does not follow that the lessor is foreclosed from recovering a deficiency. In Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28, 29 (Utah 1982), Pioneer Dodge sent notice to the debtor that a truck would be sold and that she could make her

bid on April 30, 1976, at Pioneer Dodge at 11:00 a.m. The debtor defended against a deficiency judgment on the ground, among others, that the notice was not adequate in that the sale of the truck occurred at 10:00 a.m. instead of 11:00 a.m. The court disposed of this argument by saying:

> On the facts of this case, defendant cannot claim any benefit from the error in the notice of sale. Although the auction actually commenced at 10:00 on the day specified defendant did not appear at 11:00 a.m., the time stated in the notification. Because defendant took no action -- indeed, did not even appear personally -- to protect her interest in the sale at the later time stated in the notice to her, she was not prejudiced by the error in the designation of the hour of sale.

See, also Zions First National Bank v. Hurst, 570 P.2d 1031, 1033 (Utah 1977).

Vernon Erickson is in much the same position as Marlene Glaubensklee. Although he was notified of the day on which the property was to be sold, he took no steps to make a bid for the property himself, to arrange for other financing, to attempt to re-lease the property, or to find a buyer for it.

Appellant acknowledged receiving the letter of September 11, 1980. But he didn't do much to protect his interest. He testified that

> After I received the letter I worked with Tan-Dem trying to -- or they worked with Tan-Dem trying to get them to sell it. And I didn't do too much any more than that, other than I figured when the 30th came, why, I would hear what we could do to maybe buy it or work -- get somebody there to buy it when the sale was taking place. (R. 192)

In addition to having the notice of September 11 sent to the debtors, Miss Scharf called appellant on the telephone. On September 30, 1980, she called him by telephone and told him Tan-Dem Machinery had made the highest bid of $17,000 for the shear and that she was willing to accept that because that was the highest bid she could obtain, whereupon appellant said, "Fine."

It is of some importance that the sale took place after the lessor, Miss Scharf, had for weeks been trying to cooperate with the Ericksons in getting someone to purchase the machine or enter into a new lease for it, and during all that time they had been unable to accomplish anything. Not only was appellant not injured by the failure to receive proper notice of the sale, when he was called about, he acquiesced in the sale at a price $2,000 lower than that for which it was ultimately sold.

CONCLUSION

The trial court after hearing all of the evidence, found that the sale was commercially reasonable and that the notice was adequate to advise the appellant of the date after which a private sale would be made. There was abundant evidence to support the findings,

conclusions, and judgment of the trial court, and the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 1983, I served the foregoing Respondent's Brief upon Roy G. Haslam, attorney for defendant-appellant, by depositing two copies thereof in the United States mails, postage prepaid, addressed as follows:

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