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Haggis Management, Inc. v. Turtle Management, Inc., Jeoffrey Meacham, Stephen Mccaughey And Dan Lee Briggs : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

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HAGGIS MANAGEMENT, INC., a Utah corporation,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 19017
TURTLE MANAGEMENT, INC., JEOFFREY MEACHAM, STEPHEN McCAUGHEY and DAN LEE BRIGGS,	:	
Defendants-Respondents.	:	

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RESPONDENTS' BRIEF

AN APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, GRANTING SUMMARY JUDGMENT

THE HONORABLE PHILLIP R. FISHLER, DISTRICT COURT JUDGE, PRESIDING

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v.	:	
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NATURE OF THE CASE

This is an appeal of an order granting a summary judgment in favor of Respondents, dismissing Appellant's complaint against three guarantors for the balance due under a secured promissory note.

DISPOSITION IN THE LOWER COURT

Appellant sued the principal debtor, Turtle Management, Inc., and three guarantors, to recover the balance due under a promissory note. The note was secured by collateral comprised of all of the assets of a private club and restaurant known as The Haggis. A default judgment was entered against the principal debtor and it subsequently declared bankruptcy. The Respondents answered and defended claiming, among other things, that the Appellant was barred from recovering a deficiency judgment

against them because the Appellant was required to dispose of the collateral in a commercially reasonable manner. Based upon discovery, which included interrogatories, depositions, extensive memoranda and oral argument, the Trial Court entered its order granting Respondents' Motion for Summary Judgment and dismissed the complaint. Pursuant to stipulation, an Amended Summary Judgment was entered, certifying the judgment as final in accordance with the provisions of Rule 54(d) of the Utah Rules of Civil Procedure. Appellant now appeals the Trial Court's granting of that summary judgment.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the Trial Court's Amended Summary Judgment dismissing Appellant's complaint and an award of Respondents costs incurred in connection with this appeal.

STATEMENT OF FACTS

The Appellant's Statement of Facts is, in substantial part, a superficial and, at times, an inaccurate recitation of the relationship between the parties to this action. Only collaterally does the Appellant discuss the undisputed material facts that were the foundation of the Trial Court's summary judgment. While the Appellant makes a number of bare contentions, only one conclusion may be drawn from the undisputed, material facts surrounding the repossession and

disposition of the collateral -- it was commercially unreasonable as a matter of law.

On July 7, 1978, Turtle Management, Inc., purchased a restaurant and private liquor club, doing business as "The Haggis", from the Appellant. The promissory note executed by Turtle Management, Inc., and guaranteed by Respondents Meacham, McCaughey and Briggs (RECORD pg. 6, 8-10), was secured by an agreement which, in part, provided:

> Security for the Note. As security for the payment of the unpaid part of the purchase price as evidenced by the Note, the Buyer hereby grants to Seller a security interest in Purchaser's furniture, fixtures, equipment, inventory, accounts receivable and proceeds therefrom. To further evidence such security interest, the parties, concurrently with the execution hereof, shall execute a security agreement in the form attached hereto as Exhibit "F" (the "Security Agreement") vesting in the Seller such security interest. [Emphasis added.] (RECORD pg. 12)

The security agreement granted the Appellant

> . . . a security interest in and to the collateral described on Exhibit "A" hereto which is incorporated herein by reference, which collateral is now owned or hereafter may be acquired by the debtor; the proceeds, increases, products of such collateral; accessions thereto; and any property which the debtor may receive on account of such collateral . . . [Emphasis added.] (RECORD pg. 16)

The Appellant incorrectly states the promissory note was secured "only by the equipment and furniture" on the premises (Appellant's Brief, page 3). The promissory note was secured by virtually every item of tangible or intangible property used by or located in the business sold to the Respondents. Exhibit "A" to the Security Agreement included all fixtures, decorations,

paintings, mirrors, signs, light fixtures, fans, bar stools, chairs, brass rails, safe, rugs, the spittoon, stuffed heads, a stereo, antique bar, sinks, ice bins, metal storage tables, juice mixers, curtains, plants, booths, tables, dishwashers, coat racks, piano, blenders, brass boarders, grill, ovens, vent and hood system, sandwich counter, meat cutter, broilers, fryers, freezers, cassettes, walk-in refrigerators, storage bins, silverware, glasses and even the knives and forks. (See Exhibit "E" to Deposition of Terrell Wesley Smith.) The Appellant sold the entire business and, pursuant to the security agreement, repossessed the entire business; not just equipment and furniture.

The total sales price of the business was $350,000, of which $300,000 was represented to be the net worth of the hard assets (fixtures, furniture, equipment, inventory, accounts) and $50,000 to be the value of the going business concern. [Deposition of Jeoffrey Meacham, p.29-30]. Appellant received a cash down payment of $100,000 and 22 monthly payments of $4,950, for a total cash paid of $208,900 up to the date of Turtle Management's default.

The Appellant also received a guarantee of the promissory note executed by Respondents, under which they jointly and severally guaranteed to Appellant the payment of the promissory note signed by Turtle Management. (RECORD pg. 8)

Turtle Management operated the business until July, 1980, when business conditions forced its closure and the subsequent filing for the liquidation in the bankruptcy court (In re: Turtle Management, Inc., United States Bankruptcy Court for the District of Utah, Case No. 80-01829.) Payments upon the promissory note ceased. This lawsuit was filed July 29, 1980. (RECORD pg. 2)

In August, 1980, the Appellant repossessed the business premises and, with minor exceptions, all property covered under the security agreement. (RECORD pg. 260; Deposition of Terrell Wesley Smith, pg. 34) The Trustee of Turtle Management's bankruptcy recognized the security agreement and repossession by abandoning the bankruptcy estate's interest in all assets comprising The Haggis Club and Restaurant.

On September 8, 1980, and on October 13, 1980, the Respondents filed their Answers to the Complaint alleging, among other things, the Appellant's duty to dispose of the repossessed collateral in a commercially reasonable manner. (RECORD pg. 26, 41)

In October, 1980, the Appellant disposed of the business and all of its assets to Eelsew, an unincorporated association of the principals of the Appellant, Steve Strasser; Howard Landa, an attorney; Terrell Smith, an attorney; and John Landon. The Appellant received no consideration for this transfer (RECORD pg. 255), gave no notice to Respondents or the public and did not advertise the assets as being for sale.

In January, 1981, the business and its assets were again disposed of, this time to Eelsew, Inc., a corporation whose officers and shareholders were those same principals. Again, the Appellant received no consideration, gave no notice to the Respondents or the public and conducted no advance advertising of the sale.

The Appellant admits the August, 1980, repossession of the business was because of Turtle Management's default upon the note and security agreement [Deposition of Howard Landa, p.55]; that the business and its assets were conveyed without consideration to Eelsew, the unincorporated association [Deposition of John Franklin Landon, p.19-20; Deposition of Howard Landa, p.56]; that Eelsew's entire interest in the repossessed business and property was then assigned to Eelsew, Inc. [Deposition of Howard Landa, p.55]; and, that this conveyance was a private sale of which Turtle Management and the guarantors were given no notice [Deposition of Howard Landa, p.56, p.63]. It is also admitted that Eelsew, Inc., the corporation, was, with the exception of Howard Landa, operated by the same principals as the Appellant [Deposition of John Franklin Landon, p.20].

Eelsew, Inc., operated the club and restaurant until July, 1981, when the same business and assets were again transferred and sold, a third time, to Chianti Management Company, Inc., another Utah corporation, for $110,000. (RECORD pg. 261) There was no allocation of the $110,000 purchase price to inventory,

equipment, leasehold improvements, goodwill, etc. (RECORD pg. 261, 262) No notice of this private sale or of the other two previous private sales was given to the Respondents (RECORD pg. 264), even though this lawsuit was pending and each guarantor had formally appeared and was represented by counsel known to the Appellant. None of the three sales had the benefit of advertisement, public notice, or solicitation of offers to purchase. (RECORD pg. 266)

Appellant admits that, with a few minor exceptions, it repossessed the same business and assets originally sold to Turtle Management [Deposition of Terrell Wesley Smith, pg.34]. While the business required some rehabilitation in the form of cleaning and painting, primarily painting [Deposition of John Franklin Landon, lines 7 and 8, pg.19], no basic changes were made to the business or its assets before any of the three sales.

Appellant's Brief alleges it expended approximately $80,000 in rehabilitation of the premises. (page 7) However, the record establishes only $34,000 in rehabilitation costs [RECORD pg.353], and Appellant admits certain capital improvements were performed at the time of repossession and that the $34,000 includes both improvements and clean-up [Deposition of Terrell Wesley Smith, pg.26-27]. Appellant is unable to allocate the cost of improvement from the cost of clean-up though it has conceded that the business only required a general cleaning and painting.

It is undisputed and admitted that the Appellant retook the same business and the same assets it had originally sold to Turtle Management [Deposition of Terrell Wesley Smith, p.41] and that the promissory note was secured by the entire business and its assets. Most important, however, is the Appellant's admission that the hard assets which it repossessed had a replacement value of between $400,000 and $500,000 [Deposition of Terrell Wesley Smith, pg.36,37].

Based upon the foregoing, Respondents made Motions for Summary Judgment on the grounds that, under these undisputed facts, Appellant was barred from recovering a deficiency judgment against the guarantors. Those Motions were granted. Appellant then filed a Supplemental Motion to Vacate Summary Judgment. (RECORD pg. 378-379) The content of that motion is clearly demonstrative of Appellant's unreasonable handling of the collateral. The following excerpt reveals that Appellant was willing to and could do <u>almost anything</u> with the collateral, even though title to the same had changed hands three times.

> . . . on the further grounds that Plaintiff can arrange to reassume possession and ownership of the collateral or its proceeds which is the subject matter of the Security Agreement.
>
> <u>Plaintiff moves this Court that a sale be held in a reasonable manner within 30 days</u>.
>
> As grounds for this Motion, Plaintiff states that it can obtain the collateral for sale to protect the Defendants' interest. <u>The collateral is not the type to have diminished in value and, in fact, may have increased in value</u>.

> By ordering the sale of the collateral the rights of the Defendants will be protected and no prejudice can result from this disposition.
>
> In the alternative Plaintiff states that there has been a mistake and apparently the collateral has not been "sold" by the Plaintiff and, therefore, the Summary Judgment was improper. [Emphasis added] (RECORD pg. 378-379).

A copy of the Supplemental Motion has been included in the Appendix to this Brief.

That Supplemental Motion was properly denied by the Trial Court. Appellant now appeals the granting of Summary Judgment.

ARGUMENT

POINT I

IF THE SALE OF COLLATERAL OCCURS WITHOUT NOTICE TO THE DEBTOR AND IS COMMERCIALLY UNREASONABLE, THE SECURED PARTY MAY NOT RECOVER A DEFICIENCY.

A secured party's duties in disposing of collateral are set forth in Section 70A-9-504(3) Utah Code Ann., (1953). This Court, in FMA Financial Corp. v. Pro-Printers, Inc., 590 P.2d 803 (Utah, 1977), restated that statute, in part, and emphasized its important requirements related to a disposition of collateral:

> Disposition of 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. . . . 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 . . . 590 P.2d at 806 citing §70A-9-504(3) Utah Code Ann., (1953) [All emphasis is supplied by the Court.]

Likewise, the duties imposed on the secured creditor by this section are owed not only to the principal debtor but also to any guarantors of the obligation. Zion's First National Bank v. Hurst, 570 P.2d 1031 (Utah, 1977), FMA Financial Corp., supra.

In granting Summary Judgment, the Trial Court was required to analyze the pertinent provisions of the Utah Uniform Commercial Code as interpreted by this Court. It also considered the following undisputed acts of Appellant in disposing of the collateral.

July 1980 - Turtle defaults

July 28, 1980 - Complaint filed

August 1980 - Appellant repossesses collateral, including the business, leasehold improvements, furniture, fixtures, equipment and inventory.

September 8, 1980 - McCaughey and Briggs Answer filed alleging collateral must be disposed of reasonably

October 13, 1980 - Meacham's Answer filed alleging collateral must be disposed of reasonably

* * * * *

October 28, 1980

FIRST TRANSFER — Haggis, Inc., transfers club and assets to Eelsew (an association of the principals of Haggis, Inc.) This transfer had:

(1) NO consideration;
(2) NO advertising;
(3) NO notice to guarantors or their counsel.

January 23, 1981

SECOND TRANSFER — Eelsew transfers club and assets to Eelsew, Inc. (a Utah corporation incorporated January 23, 1981). This transfer had:
(1) NO consideration;
(2) NO advertising;
(3) NO notice to guarantors or their counsel.

July 22, 1981

THIRD TRANSFER — Eelsew, Inc., transfers club and assets to Chianti, Inc. (a Utah corporation). This transfer had:
(1) a $110,000 purchase price;
(2) NO advertising;
(3) NO notice to guarantors or their counsel.

The end result of that analysis was the Trial Court's correct conclusion that these actions, when considered cumulatively, and in conjunction with §70A-9-504(3), Utah Code Ann., (1953), constituted a commercially unreasonable disposition of the collateral as a matter of law.

Appellant's first argument appears to be that §70A-9-507(1) Utah Code Ann., (1953), which allows a debtor to seek damages from the secured creditor in the event of a commercially unreasonable sale, is the exclusive remedy for a debtor against a creditor who has not complied with the provisions of the Uniform Commercial Code. This position is simply not supported by the cases which have interpreted this section of the Code. In FMA

Financial Corp., supra, the trial court entered an order denying the creditor a deficiency judgment. On appeal, the creditor asserted that the exclusive remedy of the debtor was to claim damages. This Court disagreed with the creditor, affirmed the trial court, and stated:

> Although the Uniform Commercial Code does not expressly provide for the following remedy, many courts have held the secured party may obtain no deficiency from the creditor if it fails to give the debtor reasonable notice. [footnote] Other courts have held that the debtor's exclusive remedy is set out in Article 9.
>
> > . . . If the disposition has occurred, the debtor or any person entitled to notification . . . has a right to recover from the secured party any loss caused by the failure to comply with the provision of this part [citing §70A-9-507(1) Utah Code Ann., (1953)].
>
> While we noted the existence of the above section in Zion's First National Bank v. Hurst, supra note 7, we do not believe it to be the debtor's exclusive remedy. Id. at 807.

In spite of Appellant's claim, that decision was in no way affected by this Court's decision in Utah Bank and Trust v. Quinn, 622 P.2d 793 (Utah, 1980), inasmuch as the opinion did not deal with the statute relied upon by Appellant. In short, the law in Utah presently allows a debtor to sue a creditor for damages connected with improper collateral disposition but that is a remedy separate and apart from the question of whether or not a secured creditor may recover a deficiency judgment from a debtor when the creditor has not followed the rules prescribed for him by the Uniform Commercial Code.

In its Brief, Appellant appears to argue that the sole basis for the Trial Court's decision barring a deficiency against Respondents was the undisputed fact that no notice of any of the dispositions of the collateral was given to the guarantors. In making that argument, Appellant chooses to ignore the other facts which the Trial Court chose not to ignore, namely: the number of transfers; the absence of consideration; the lack of public advertising; the failure to solicit bids; and the private nature of each of the three transfers. In short, Appellant claims the Trial Court adopted a "no notice, no deficiency" rule and, in so doing, misinterpreted the line of decisions handed down by this Court. Such is simply not the case as is evidenced by analysis of the applicable Utah cases.

The question of the propriety of a deficiency judgment in a case such as this has been addressed many times by this Court. The following historical analysis of those cases demonstrates and supports the proposition that at the very minimum if no notice of a disposition of collateral is given and if the sale is commercially unreasonable, then the secured party may not recover a deficiency.

In Zion's First National Bank, supra, Plaintiff, the secured creditor, failed to give notice to the Defendant, a personal guarantor of the obligation, of the sale of the certain collateral. Defendant claimed that failure to so notify precluded the Plaintiff from obtaining any deficiency judgment

against him. The Supreme Court felt that Plaintiff should have given the Defendant notice, but stated that:

> . . . The usual rule is that failure to so notify does not release the debtor from any deficiency that may arise; but upon such failure he may get credit for (or recover) only for any loss caused by the failure to so notify. Id. at 1033, 1034.

The Court cited §70A-9-507 Utah Code Ann., (1953), as authority for this conclusion and upheld the deficiency.

This Court subsequently modified Zion's First National Bank, supra, in FMA Financial Corporation, supra. In this case, the Defendant-debtor orally requested the Plaintiff, secured creditor, to take the equipment and sell it. Plaintiff did take the equipment, stored it in a garage for eight months and without notifying Defendant, eventually sold the equipment. The Court stated that even though the Defendant had requested Plaintiff to pick up and sell the equipment, this, in no way, constituted a waiver of Defendant's right to notice of the time and nature of the disposition. Id. at 807. The Court then stated that:

> . . . The purpose of the notice requirement is for the protection of the debtor, by permitting him to bid at the sale, or 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. Id.

In holding for the Defendant, the Court concluded that:

> Because FMA did not give the required notice, and did not conduct the sale in a commercially reasonable manner, it is barred from obtaining a deficiency judgment. Id. at 808.

Although the Court never so stated, the definite implication of this decision was that if a secured party did not give notice of a sale of collateral to the debtor, it is barred from obtaining a deficiency judgment.

Then, in Utah Bank and Trust, supra, this Court discussed a refined position on the no notice, no deficiency rule. In that case, a father guaranteed certain obligations of his son which were secured by "exotic" cars. When the son defaulted, the father agreed that the Bank could place the cars on used car lots to be sold individually. The cars were advertised in local newspapers and the father even signed off on some of the titles when requested to do so. The proceeds were applied to the debt and a deficiency resulted. The father challenged the deficiency on the grounds of no notice and commercial unreasonableness in disposing of the collateral, but, under those facts, this Court upheld the deficiency and discussed in depth the manner in which §70A-9-504(3), supra, has been applied.

The Court first noted the following three positions as to the effect of failure to give notice under the Commercial Code.

1. Where there is no notice, there can be no deficiency judgment.

2. Failure to give notice puts the burden of proof on the creditor to show that the sale of collateral took place in a commercially reasonable manner.

3. Where there is a failure to give notice, a rebuttable presumption arises that the collateral had a value equal to, or greater than, the debt. Id. at 796.

In Utah Bank and Trust, supra, the Court held, under the facts of that case, the "no notice, no deficiency" rule was not applicable, but noted that in FMA Financial Corp., supra, even though no notice was given to the debtor, the decision not to grant a deficiency judgment was also based on the fact that sale of the collateral was not conducted in a commercially reasonable manner and that there was evidence that the collateral was of a value equal to, or greater than, the debt. Id. at 796. In any event, Appellant's reliance on Utah Bank and Trust, supra, is misplaced given the fact differences between that case and the case presently before the Court.

After Utah Bank and Trust, supra, this Court in the case of Strevell Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah, 1982), elaborated in dicta the significance of the holding in FMA Financial Corp., supra, and the importance of the notice requirement imposed upon the creditor -- especially in cases of private sales.

> In Pro-Printers [FMA Financial], we barred a deficiency judgment against guarantors where the creditor already had repossessed the secured property and sold it at a private sale in a manner which was not commercially reasonable. The creditor had failed to give the guarantors notification of the sale, making it impossible for them to protect their subrogation rights and other interest in the outcome of the sale. The rule in Pro-Printers defines the duties of creditors

who repossess collateral. Id. at 743. [Emphasis added].

In the case presently before the Court, there were three private sales and the guarantors were not notified of any. Consequently, "it was impossible for them to protect their subrogation rights and other interests in the outcome of the sale[s]". Id. [Brackets added]

The Appellant relies extensively upon Clark Leasing Corporation v. White Sands Forest Products, Inc., 87 N.M. 451, 535 P.2d 1077 (1975), claiming that Utah Bank and Trust, supra, and the "vast majority of states" adopted the rule pronounced in Clark Leasing, supra. That case points out the Uniform Commercial Code's two requirements in the disposition of collateral after a repossession: The first is that notice be given to the debtor; and the second is that the sale must be commercially reasonable in all respects, including method, manner, time, place and terms. Both of these requirements are meant to see that a reasonable price is received for the collateral and to protect the debtor against any unfairly low price. Likewise, the holdings in those cases are not contrary to the Trial Court's decision in this case.

Most recently, this Court in Pioneer Dodge Center, Inc., v. Glaubensklee, 649 P.2d 88 (Utah, 1982), reversed the trial court's entry of a deficiency judgment for the creditor and held as a matter of law that where there was not a commercially

reasonable sale then the creditor is not entitled to a deficiency judgment. This Court succinctly stated:

> Because the sale in the instant case was not conducted in a commercially reasonable manner, plaintiff is barred from obtaining a deficiency judgment. Id. at 31.

The issue then becomes: "Was the sale, or more accurately were the sales commercially unreasonable as a matter of law given the fact that Appellant has admitted that no notice of any of the three transfers of the collateral was ever given to the Respondents?"

POINT II

APPELLANT'S DISPOSITION OF THE COLLATERAL IN QUESTION WAS COMMERCIALLY UNREASONABLE AS A MATTER OF LAW

In spite of the arguments contained in Appellant's Brief, its disposition of the collateral in question was commercially unreasonable as a matter of law. It is undisputed that Appellant did not give any notice of the three transfers of the collateral; it is also undisputed that it did not advertise any of the three transfers and it received no consideration for either of the first two transfers.

Of most importance is the fact that the Appellant itself has admitted the unreasonable nature of the disposition of the collateral when it requested the following of the Trial Court in its Supplemental Motion to Vacate Summary Judgment (Record 389-379; see also Appendix to this Brief)

> Plaintiff moves this court that a sale be held in a reasonable manner within 30 days. [Emphasis added]

Section 70A-9-504(3), supra, imposes two obligations and one restriction on the secured creditor. First he must notify the debtor of any intended disposition of the collateral. In this case, it is admitted that no notice was given to any of the guarantors or their counsel of any of the three sales. Secondly, the secured party must be certain that every aspect of the disposition be commercially reasonable. Third, while a secured party may purchase the collateral at a public sale, he may not buy at a private sale unless the collateral is of such nature as to allow its value to be easily ascertainable.

> . . . 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 a private sale. Id.

The commercially reasonable public sale of §70A-9-504, supra, was recently defined by this Court in Pioneer Dodge, supra:

> . . . 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.'" (Citations) . . . The requirement of a public invitation is essential for a public sale under the Uniform Commercial Code. (Citations) . . . It is fundamental that a public sale presupposes posting public notices or advertising. (Citations) . . . 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". . . .

> Presumably the essence of a 'public sale' is that the relevant public is not only invited to attend but is also informed, by whatever means of publicity may be appropriate, when and where the sale is to be held. If the sale has not been appropriately publicized, it would not be a public sale no matter where it was held or how it was conducted. Id. at 30. [Emphasis added]

In Pioneer Dodge, supra, the secured party gave notice of the intended sale to the debtor and then took the collateral, a truck, to five or six other dealers and obtained oral bids. It was also offered to wholesalers. Several days later, it announced over a loudspeaker at its place of business that the sale of the truck was about to take place at auction. The secured party bought the truck. In reversing a deficiency judgment against the debtor as a matter of law, this Court held:

> These efforts did not give reasonable notice to that part of the public which would likely be interested in the sale. Id. at 31.

It is also interesting to note that the Court in this case cited FMA Financial Corp., supra, with approval and barred the deficiency judgment solely on the grounds that the sale was conducted in a commercially unreasonable manner.

It is impossible to conceive how any of the three transfers made by Appellant were done under the auspices of a commercially reasonable sale. The transfers of the club and its assets from Haggis, Inc., to Eelsew, an association, then to Eelsew, Inc., a corporation, and then to Chianti, Inc., entities separate and distinct from Appellant, were devoid of public notice. None of

the three guarantors or their counsel received any notice of any of the three dispositions. There were no invitations to, nor opportunity for, the general public to bid competitively. Moreover, the first two transfers were made without consideration, surely an element of any commercially reasonable sale -- public or private. One cannot argue that the sale without consideration of the club and its assets from Appellant to Eelsew to Eelsew, Inc., comports with commercial reasonableness, when, but two years earlier, Appellant had sold the club to Turtle Management, Inc., for $350,000. It is now not justifiable to allow Appellant to claim that these transfers were only for convenience inasmuch as the title to the club and assets passed by virtue of the transactions thereby diluting, if not entirely eliminating, any chance of the Respondents to protect their rights in the collateral.

The third transfer from Eelsew, Inc., to Chianti, Inc, was, as with the others, made without notice to the Respondents and without benefit of advertisement or public auction. Appellant, like the creditor in Pioneer Dodge, supra, did not give notice to that part of the general public who might be interested in the purchase of restaurant and private club equipment. In fact, Appellant did not formally solicit bids from anyone but Chianti, Inc. (RECORD pg. 255, 281), thereby excluding any other prospective buyers who could have increased the bidding price.

A commercially reasonable public sale is required to ensure a proper disposition of the assets at a fair and correct price as was stated in FMA Financial Corp., supra:

> The purpose of the notice requirement is for the protection of the debtor, by permitting him to bid at the sale, or 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 benefitted, because the prospect of recovering any deficiency is usually dubious. Id. at 807.

Appellant's refusal to give Respondents or any part of the general public or the business community an opportunity to bid on the assets was in direct violation of the standards imposed by Pioneer Dodge, supra, and, therefore, commercially unreasonable as a matter of law.

Section 70A-9-504, Utah Code Ann., (1953), also permits a secured party to purchase collateral at a private sale but only if the collateral is of a type customarily sold in a recognized market or of a type which is the subject of widely distributed standard price quotations. This is for the protection of the debtor to assure arm's-length transactions in the sale of the collateral and to permit the debtor to test the fairness of the sale by comparison of the price paid by the secured party to standard price quotations. The characterization of collateral as of a type customarily sold in a recognized market or the subject

of widely-distributed, standard-price quotations cannot apply to an ongoing business of a private liquor club. Even Appellant admits in its Brief, page 16, that a private club is an unusual item "much like the exotic cars in Utah Bank and Trust v. Quinn . . ." Appellant also admits that Eelsew and Eelsew, Inc., were associations of the Appellant's principals and that the collateral was privately transferred to those associations.

The facts of this case are very similar to the facts of Jackson State Bank v. Beck, 577 P.2d 168 (Wyo., 1978), where the Wyoming Supreme Court affirmed a trial court's summary judgment barring a secured creditor's claim for a deficiency judgment. In that case, the Bank gave notice to the debtor that it intended to conduct a private sale of the automobiles it had earlier repossessed. Thereafter, the Bank consummated the sale by making an entry on its books that $50,000 had been applied as a credit towards the principal obligation. The Bank then concluded it could not legally enter into the automobile business and, therefore, transferred the collateral to a corporation formed and managed by two officers of the Bank. The collateral was ultimately liquidated in that business for $18,000.

In holding for the debtor, the Court noted that the critical issue was whether or not the secured creditor had complied with the requirements of §34-21-963(c) W.S.A, (1977), [§70A-9-504(3) Utah Code Ann. (1953)] regardless of its motive. It concluded

that it had not because of the way it had disposed of the collateral.

> We would make the point that a secured creditor who purchases the collateral from himself, unless he can bring himself within the "recognized market" or "standard price quotation" exceptions, is in the same direct violation of the requirements of the statute as is the creditor who fails to give notice. Id. at 170.

In the case before this Court, Appellant did not give notice as was done in Jackson State Bank, supra. It transferred the "unique" collateral privately twice unilaterally giving Respondents a credit of approximately $30,000 on the principal debt. It then sold privately to a third person again without notice to Respondents all in violation of §70A-9-504(3), supra.

In summary, the reason the Trial Court concluded that Appellant's disposition of the collateral was commercially unreasonable as a matter of law was that the Appellant did absolutely nothing it was required to do, either under the Commercial Code or under the cases of this Court, interpreting those provisions. It did not give notice to any of the guarantors or their counsel; it privately transferred the collateral, which was unique in nature, first to Eelsew, the association, then to Eelsew, Inc., the corporation, and then, finally, to Chianti, Inc., a corporation; it did not formally advertise any of the sales; it did not solicit bids; and the public was not "invited to participate upon a competitive basis for the property placed on sale", Pioneer Dodge, supra, at 30,

and it unilaterally determined the credit that was to be given Respondents.

Appellant claims that the issue of commercial reasonableness of the disposition of the collateral is a factual issue and not proper for resolution by summary judgment. That claim flies directly in the face of the undisputed facts set forth above. Appellant cannot point to even one act on its part which would fulfill any one of the requirements imposed upon it by the Commercial Code in connection with the disposition of the collateral. That conclusion is further clearly supported by Appellant's Supplemental Motion to Vacate Summary Judgment, which shows the true nature of Appellant's handling of the collateral.

The Trial Court concluded that the "gerrymandering" of the collateral by Appellant was not to be tolerated and the undisputed blatant disregard of the obligations imposed upon it under the Commercial Code were of such a nature as to require the conclusion that the disposition of the collateral was commercially unreasonable as a matter of law.

POINT III

THIS COURT MAY AFFIRM A TRIAL COURT'S DECISION UPON ANY CORRECT BASIS WHETHER OR NOT THAT BASIS WAS RELIED UPON BY THE TRIAL COURT.

In Goodsel v. Department of Business Regulations, 523 P.2d 1230 (Utah, 1974), the trial court granted a Summary Judgment and declared certain portions of the Plumbers Registration and

License Law unconstitutional. In affirming the trial court's decision, this Court cited with approval 5 C.J.S., Appeal and Error, §1464, and stated:

> The appellate court will affirm the judgment, order or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court. Id. at 1232.

Therefore, if the trial court reaches the correct result in its decision even though there was another basis for it not relied on by the court below, then the Appellate Court will affirm.

In this case, there are several grounds which will sustain the Trial Court's decision. Some are contained in the Pioneer Dodge, supra, decision, which was referred to by the Trial Court in its Memorandum Decision. Other related but independent grounds exist because of Appellant's failure to comply with the provisions of the Commercial Code. Regardless of what specific grounds were relied upon by the Trial Court, the undisputed facts appearing in the record when analyzed in conjunction with the provisions of the Commercial Code and the decisions of this Court clearly show that the Trial Court's Summary Judgment was proper and should be affirmed.

CONCLUSION

The evolution of the law as it pertains to deficiency judgments against debtors has reached at least the level that when there is no notice to the debtor of the sale of the collateral and the secured creditor acts in a commercially unreasonable manner in disposing of the collateral, there can be no deficiency judgment against the debtor. That is not to say that in some cases there may be facts where the failure to notify the debtor of the sale alone may be sufficient grounds to bar the deficiency judgment.

The errors and omissions of the Appellant in disposing of the collateral in question were so grievous and so inconsistent with the requirement set forth in Pioneer Dodge, supra, and other related cases, as to allow the Trial Court to conclude, as a matter of law, that Appellant was not entitled to deficiency judgment against the Respondents.

The Trial Court's Amended Summary Judgment should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 31 day of August, 1983.

DART & STEGALL

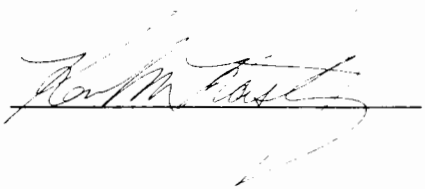
B. L. DART, ESQ.

GUSTIN, ADAMS, KASTING & LIAPIS

KENT M. KASTING, ESQ.

DELIVERY CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Respondents' Brief was placed with "The Runner Service" for delivery to Robert Felton, Esq., at 324 South State Street, Suite 220, Salt Lake City, Utah 84111, this 16th day of September, 1983.



APPENDIX

EXHIBIT 1

ROBERT FELTON
Attorney for Plaintiff
220 Coordinated Financial Center
124 South State Street
Slat Lake City, UT 84111
Telephone: 359-9216

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

HAGGIS MANAGEMENT, INC., a Utah corporation,

Plaintiff,

vs.

TURTLE MANAGEMENT, INC., JEOFFREY MEACHAM, STEPHEN McCAUGHEY and DAN LEE BRIGGS,

Defendants.

SUPPLEMENTAL MOTION TO VACATE SUMMARY JUDGMENT

Civil no. C 80-5763

---oooOooo---

Plaintiff hereby supplements its Motion to Set Aside or Amend the Summary Judgment and requests this Court to vacate said Order based on the further grounds that Plaintiff can arrange to reassume possession and ownership of the collateral or its proceeds which is the subject matter of the Security Agreement.

Plaintiff moves this Court that a sale be held in a reasonable manner within 30 days.

As grounds for this Motion, Plaintiff states that it can obtain the collateral for sale to protect the Defendants' interest. The collateral is not the type to have diminished in value and, in fact, may have increased in value.

By ordering the sale of the collateral the rights of the Defendants will be protected and no prejudice can result from this disposition.

In the alternative Plaintiff states that there has been a mistake and apparently the collateral has not been "sold" by the Plaintiff and, therefore, the Summary Judgment was improper.

NOW, WHEREFORE, Plaintiff prays as an alternative to their earlier motion, that this Court order that a sale occur thirty (30) days from now and that notice be given in a reasonable fashion or as otherwise ordered by the Court and that the Summary Judgment be vacated.

SIGNED this 22 day of December, 1982.

Robert Felton

MAILING CERTIFICATE

I hereby certify that on this 22nd day of December, 1982, I mailed a copy of the foregoing Supplemental Motion to Kent Kasting, 9 Exchange Place, Suite 1000, Salt Lake City, UT and B. L. Dart, 430 Ten Broadway Building, Salt Lake City, UT 84101.