

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
KENT COUNTY COURTHOUSE
38 THE GREEN
DOVER, DELAWARE 19901
PHONE: (302) 735-3910

CHARLES W. WELCH, III
JUDGE

November 2, 2012

Maggie R. Clausell, Esq.
9 E. Loockerman St., Ste. 205
Dover, DE 19901

Seth H. Yeager, Esq.
Lyons, Doughty and Veldhuis, P.A.
15 Ashley Place, Suite B
Wilmington, DE 19804

RE: M & T Bank v. Shirley M. Bolden
C.A. No.: CPU5-10-001029

Decision on Award for Defendant's Counterclaim

Dear Ms. Clausell and Mr. Yeager:

Plaintiff, M & T Bank, brought this civil action against the defendant, Shirley M. Bolden (hereinafter "Bolden"), seeking to collect a deficiency balance on a car loan. Bolden contended that the car was not sold in a commercially reasonable manner as required by 6 *Del. C.* § 9-610 and, therefore, contested recovery on the deficiency balance. Additionally, Bolden filed a counterclaim against M & T Bank for statutory damages pursuant to 6 *Del. C.* § 9-625 for M & T Bank's alleged failure to comply with 6 *Del. C.* § 9-610. A trial was held for this matter, after which the parties provided written closing arguments, and the Court reserved decision.

In an opinion dated July 11, 2012, the Court held that M & T Bank had failed to meet its burden to prove that the sale of Bolden's car was completed in a commercially

reasonable manner as required by 6 *Del. C.* § 9-610 by a preponderance of the evidence. Therefore, M & T Bank was not entitled to a deficiency judgment against Bolden. The Court further ordered both parties to submit supplemental briefing regarding whether an award of statutory damages to Bolden pursuant to 6 *Del. C.* § 9-625 is appropriate in this case, and, if so, the amount that should be awarded. After receiving and reviewing the supplemental briefing on that issue, the Court enters judgment for the plaintiff, M & T Bank, on Bolden's counterclaim.

The only issue before the Court is whether Bolden is eligible to recover statutory damages under 6 *Del. C.* § 9-625 as a result of her allegation that her car was not sold in a commercially reasonable manner after it was repossessed by M & T Bank. In pertinent part, 6 *Del. C.* § 9-625(c) provides as follows:

- (c) *Persons entitled to recover damages; statutory damages in consumer-goods transaction.* – Except as otherwise provided in Section 9-628:
- (2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service plus 10% of the principal amount of the obligation or the time-price differential plus 10% of the cash price.

In its decision of July 11, 2012, the Court found that Bolden's repossessed car was a consumer good and that the secured party, M & T Bank, failed to comply with the relevant part of the Uniform Commercial Code when it was unable to prove that it had sold the car in a commercially reasonable manner as required by 6 *Del. C.* § 9-610.

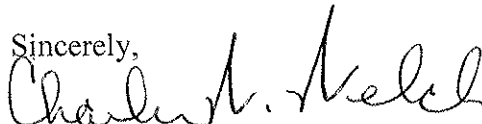
Bolden contends that she is, thus, entitled to statutory damages pursuant to 6 *Del. C.* § 9-625.

Whenever a party seeks to recover damages pursuant to 6 *Del. C.* § 9-625(c) in a counterclaim, it bears the burden of proof, by a preponderance of the evidence, that it is

entitled to such damages.¹ It is not sufficient that the creditor has failed to prove, by a preponderance of the evidence, that it has complied with 6 *Del. C.* Section 9-610, by selling collateral in a commercially reasonable manner. Therefore, Bolden has the burden of proving, by a preponderance of the evidence, that M & T Bank failed to sell her repossessed car in a commercially reasonable manner in violation of 6 *Del. C.* § 9-610 before she can recover statutory damages under 6 *Del. C.* § 9-625(c). She has failed to meet this burden.

In this case, M & T Bank provided an expert witness who testified about its sale of Bolden's car at one of the world's largest sales facilities for automobiles. Although his testimony was not able to meet the burden to prove that the car was sold in a commercially reasonable manner, it certainly did not prove that it was not sold in a commercially reasonable manner. He simply did not provide enough evidence to show that the sale of the car was commercially reasonable. Bolden was not able to elicit enough information from M & T Bank's expert witness to prove that the sale of her car was not completed in a commercially reasonable manner. Furthermore, she did not provide any additional evidence showing that the sale of the car was not commercially reasonable. Therefore, her counterclaim for statutory damages under 6 *Del. C.* § 9-625 is denied and judgment is entered for the plaintiff, M & T Bank, on the counterclaim.

IT IS SO ORDERED.

Sincerely,

Charles W. Welch, III

¹ Unless otherwise provided, any party presenting a counterclaim bears the burden of proving his or her allegations by a preponderance of the evidence. *See MetroDev Newark, LLC v. Justice of the Peace Court No. 13*, 2010 WL 939800, at *5 (Del. Super. Feb. 18, 2010).