STATE OF MICHIGAN

COURT OF APPEALS

CIT GROUP/EQUIPMENT FINANCING, INC.,

Plaintiff-Appellant,

v

JOHN K. ELLIOTT,

Defendant-Appellee.

UNPUBLISHED
July 19, 2005

No. 260883
Wayne Circuit Court
LC No. 03-324558-CK

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff, an equipment-financing company, appeals as of right from the circuit court's order granting summary disposition to defendant, president of a now-bankrupt trucking corporation. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant personally guaranteed repayment of a loan that plaintiff's predecessor in interest provided to his trucking company for purchase of a freightliner, with the freightliner itself serving as collateral. The trucking company went bankrupt and surrendered the collateral to plaintiff. Plaintiff disposed of the freightliner through a private auction, then filed suit against defendant to recover amounts remaining on the loan. Defendant sought summary disposition on the ground that plaintiff had failed to provide the required notice of the sale. The trial court granted the motion.

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). We accept as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

"[A] secured creditor's failure to give notice of the disposition of collateral, as required by . . . the Uniform Commercial Code, [MCL 440.1101 *et seq.*,] operates as an absolute bar to

the recovery of a deficiency judgment." *Honor State Bank v Timberwolf Const Co*, 151 Mich App 681, 683; 391 NW2d 442 (1986). In that case, we construed MCL 440.9504(3) as it then read, which stated that "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 . . . ." Defendant makes much of the fact that the Uniform Commercial Code was substantially recast after the loan was executed but before the instant litigation commenced. However, the current version of the statutory language quoted above appears at MCL 440.9613(a)(v) and requires that a notice of sale state "the time and place of a public disposition or the time after which any other disposition is to be made." The substantial similarity in the former and current versions of this statutory language obviates any need to determine which governs the transaction or proceedings in this case.

Plaintiff argues, and presents exhibits to show, that it meticulously followed the form and service requirements for providing notice. Defendant does not dispute the adequacy of form or service, but challenges the substance of the notice provided on the ground that plaintiff did not specify the time or place of the private auction that disposed of the collateral. The trial court agreed, stating from the bench that "[o]ne of the reasons for providing notice of the time and places of sale is . . . so that the guarantor can guard against unreasonable sale or one below market value." The trial court did not otherwise identify any other way in which the notice was deficient.

However, as both parties plainly indicate, the sale that took place in this instance was private, not public. Therefore, under either version of the Uniform Commercial Code, plaintiff was not obligated to provide notice of the time and place of sale, but was only obligated to provide notice of the date after which the sale would take place. The "or" in the statutes clearly indicates that when the goods are sold at a non-public sale or disposition, the exact time, date, and place of the "other disposition" are unnecessary. MCL 440.9613(a)(v); *Honor State Bank*, *supra*; see also *People v Gatski*, 472 Mich 887, 888-889; 694 NW2d 57 (2005) (holding that the word "or" should be read in its disjunctive form whenever the reading "makes sense"). This holding is bolstered by the bifurcated sample form provided at the end of MCL 440.9613, which contains separate sections for public and private sales. The portion devoted to private sales states, in part, "[For a private disposition:] We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date]." MCL 440.9613(e), bracketed portions in original. It is undisputed that plaintiff's notice conformed to this portion of the statute. Of course, our holding also comports with the interpretation of this law and the way business has been done for at least twenty years. See *First Missouri Bank & Trust Co v Newman*, 680 SW2d 767, 769 (Mo App, 1984); see also *Lake Shore Nat'l Bank v McCann*, 78 Ill App 3d 580, 584-585; 396 NE2d 1301 (1979). Because the trial court erroneously applied a requirement for public disposition of collateral to a case involving a private sale and failed to acknowledge the important statutory distinction, we reverse the result below and remand this case for further proceedings.

Because we disagree with the trial court, the dissent accuses the majority of stripping defendant of valuable "due process" rights. We note that the dissent fails to cite any authority for the proposition that a defaulted debtor must receive notice of the date and time of a private sale before a creditor may recover a remaining deficiency. The cases and statutes clearly explain that in a private sale the only notice required is "the time after which any other disposition is to

be made." MCL 440.9504(3); see *First Missouri Bank, supra*. This was the only "process" that was "due" defendant.

In fact, it is the dissent that would strip plaintiff of its due process rights. Under the current law, a creditor who fails to provide adequate notice forfeits the debtor's remaining obligation without providing any procedure for asserting the bona fide validity of the sale or granting any hearing on how the lack of notice damaged the debtor. *Honor State Bank, supra*. The dissent would apply this harsh remedy even though plaintiff's statutory notice was sufficient. Therefore, in stark contrast to the dissent's assertions, it is the dissent that would shed plaintiff's right to a jury, leaving it with no redress, while the majority drapes both parties in the modest procedural protections that enshroud our jury system. Although the dissent feels that defendant got a raw deal, applying the statute's plain language reveals that plaintiff adhered to the notice requirement in noble fashion, providing much more information than the bare essentials.

We express no opinion regarding the general reasonableness of how plaintiff liquidated the collateral, whether plaintiff properly credited defendant with the proceeds of that sale, or other fact-sensitive questions not yet resolved below.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Bill Schuette