STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SUNMARK FEDERAL CREDIT UNION,

Plaintiff,

-against-

DOUGLAS E. WILKINSON,

Defendant.

DECISION and ORDER
INDEX NO. 7534-11
RJI NO. 01-12-106112

Supreme Court Albany County All Purpose Term, October 12, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Overton, Russell, Doerr & Donovan, LLP
Thomas McCormick, Esq.
Attorneys for Plaintiff
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Clifton Park, NY 12065

Anthony Pietrafesa, Esq.
Attorney for Defendant
210 Bell Court
Schenectady, New York 12303

TERESI, J.:

In March 2007 Plaintiff loaned to Defendant $24,636.28 (hereinafter "the loan"), secured by Defendant's 2006 Volkswagen Jetta (hereinafter "Jetta"). Defendant made only three payments and surrendered the vehicle to Plaintiff. Thereafter, Plaintiff sold the Jetta for less than the principal sum of the loan.

Plaintiff commenced this action to recover the deficiency. Issue was joined, discovery is complete and a jury trial date certain is set. Plaintiff now moves for summary judgment. Defendant opposes the motion and cross-moves for summary judgment, damages, costs and

disbursements. In the alternative, if Plaintiff's motion is granted Defendant seeks to amend his answer. While Plaintiff failed to demonstrated its entitlement to judgement as a matter of law granting its claim, Defendant established his entitlement to partial summary judgment.

On a motion for summary judgment, the moving party bears the initial burden of establishing, with "proof in admissible form" (Ulster County v CSI, Inc., 95 AD3d 1634, 1636 [3d Dept 2012]), that "no material issues of triable fact exist and that it is entitled to judgment as a matter of law." (U.W. Marx, Inc. v Koko Contr., Inc., 97 AD3d 893, 894 [3d Dept 2012]). "Once this burden has been met, it becomes incumbent upon the opponent to come forward with competent, admissible evidence creating a genuine triable issue of fact." (Wells v Ronning, 269 AD2d 690, 691 [3d Dept 2000]). Additionally, all "facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v. Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]).

In this deficiency judgment action, Defendant's uncontested default is insufficient to demonstrate Plaintiff's prima facie entitlement to summary judgment. Rather, "[a] secured party seeking a deficiency judgment from the debtor after sale of the collateral bears the burden of showing that the sale was made in a 'commercially reasonable' manner." (Assoc. Commercial Corp. v Liberty Truck Sales & Leasing, Inc., 286 AD2d 311, 312 [2d Dept 2001], quoting Mack Fin. Corp. v Knoud, 98 AD2d 713 [2d Dept 1983]; GMAC v Jones, 89 AD3d 985 [2d Dept 2011]; Ford Motor Credit Co., Inc. v Racwell Const., Inc., 24 AD3d 500 [2d Dept 2005]; Ford Motor Credit Co. v Hernandez, 210 AD2d 656 [3d Dept 1994]).

On this record, Plaintiff failed to sufficiently demonstrate that the Jetta was sold in a commercially reasonable manner. In support of its motion, Plaintiff submits the affidavit of its

Manger in charge of Collections (hereinafter "Manger"). Although she alleged that the Jetta was sold to the highest bidder, she did not explain the basis of her knowledge of such fact or provide any details about the auction that led to the highest bid. Instead, she alleged that the Jetta was "advertised for sale on the repossession agent's website... [and] displayed on the repossession agent's lot." With no affidavit from the "repossession agent" who handled the sale, the Manger's allegations are hearsay and inadmissible. Nor did the Manager proffer a proper foundation for submitting the "list of the bids received." The Manager also failed to establish the value of the Jetta. She proffered no proof of her own expertise in car valuations and failed to demonstrate the reliability of the "Galves Value" printout. Moreover, conspicuously absent from Plaintiff's submission is an expert's valuation of the Jetta. Because Plaintiff failed to proffer proof in admissible form of the Jetta's sale or its value, it failed to demonstrate that such sale was commercially reasonable.

Accordingly, Plaintiff failed to demonstrate its prima facie entitlement to judgment and its motion is denied.

Turning to Defendant's motions, he first seeks summary judgment dismissing the complaint claiming that when he surrendered the Jetta Plaintiff either waived its right to a deficiency judgment or accepted the vehicle in full satisfaction of its claim. This "accord and satisfaction" argument requires Defendant to establish that the parties entered a contract for such waiver/satisfaction. Defendant, however, failed to establish that the parties' "had a meeting of the minds to resolve the disputed claim." (Rose Inn of Ithaca, Inc. v Great Am. Ins. Co., 75 AD3d 737, 739 [3d Dept 2010] lv to appeal denied, 15 NY3d 713, 938 NE2d 1012 [2010]; Sorrye v Kennedy, 267 AD2d 587 [3d Dept 1999]). Rather, Defendant relies on inferences

drawn from the Jetta's surrender, subsequent notices and lack of communication. Because such proof fails to demonstrate the requisite meeting of the minds, Defendant did not establish his entitlement to this portion of his summary judgment motion.

Defendant demonstrated, however, his entitlement to partial summary judgment on his "reasonable notification" affirmative defense.

Defendant first established, by his own uncontradicted affidavit, that his purpose in owning the Jetta and entering the loan was personal, not business related, and constituted a "consumer goods transaction." (UCC §9-102 [23, 24 and 26]). Because of such showing, Plaintiff was required to provide Defendant, prior to the Jetta's sale, with a "reasonable authenticated notification of disposition." (UCC §9-611[b]). Such notice must "state the method of intended disposition;... state[] that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting;... state[] the time and place of a public disposition or the time after which any other disposition is to be made... a description of any liability for a deficiency of the person to which the notification is sent." (UCC §§9-614[a][2] and [a][1] incorporating 9-613[a][3, 4 and 5])

On this record, Defendant established that Plaintiff failed to comply with UCC §9-614(a) (1 and 2)'s notice requirements. Defendant alleged that after he surrendered the Jetta he received a single letter from Plaintiff, and attached it to his motion. Such letter was dated July 6, 2007 and titled "Notice of Right to Redeem." Despite UCC §9-614(a)(1)'s unequivocal requirements, Plaintiff's July 6, 2007 letter did not state that Defendant was "entitled to an accounting" or the "time and place of a public disposition or the time after which any other disposition is to be made." (UCC §9-613[a][4 and 5]). Nor did such letter describe Defendant's "liability for a

deficiency." (UCC §9-614[a][2]). The letter also insufficiently presents the "method of intended disposition," because it failed to identify how the Jetta would be sold. (UCC §9-613[a][3]). Rather, without distinguishing between the only two options, it states that the Jetta "will be sold at a public or private sale." The above deficiencies render Plaintiff's notice "insufficient as a matter of law." (Official Comment 2 to UCC §9-614).

With the burden shifted, Plaintiff failed to raise a triable issue of material fact. Because its attorney's reply is not based upon personal knowledge it is of no probative value. (Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]). Moreover, the partial deposition testimony Plaintiff submitted discussed no additional "notice" and Plaintiff submitted no additional "notice" letter. Such non-submission essentially concedes that Plaintiff's July 6, 2007 "Notice of Right to Redeem" letter constitutes Plaintiff's only UCC §§9-611(b) notice, which, as set forth above, is insufficient. As such, no triable issue of fact was raised and this portion of Defendant's motion is granted.

Due to Plaintiff's defective notice, Defendant also demonstrated his entitlement to statutory damages. As is applicable here, UCC §9-625(c) provides that "if the collateral is consumer goods, a person that was a debtor... 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 charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price." According to Official Comment 4 to UCC §9-625, subdivision (c) "is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted."

On this record, as set forth above, Defendant (a debtor) demonstrated that the Jetta (the

collateral) constituted "consumer goods." (UCC §9-102 [23]). Defendant also established that Plaintiff (the secured party) failed to comply with its UCC §9-611(b) obligation, to provide Defendant with "reasonable authenticated notification of disposition."

Because of such failure, Defendant is entitled to "an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation." Defendant demonstrated, and Plaintiff did not contest, that the credit service charge equals $7,715.00. He also established, as uncontested, that 10% of the principal amount of the obligation is $2,463.00. Accordingly, Defendant established his entitlement to statutory damages in the amount of $10,178.00, and Plaintiff raised no triable issue of fact.

Turning to that portion of Defendant's motion that seeks summary judgment on his actual damages claim (UCC §9-625[b]), his wholly unsupported and conclsusory assertion that he is entitled to $1,700 in attorney's fees fails to establish his entitlement to judgment. Nor did defendant demonstrate his entitlement to summary judgment dismissing Plaintiff's deficiency claim due to its non compliance with UCC §9-611(b). (Cent. Nat. Bank, Canajoharie v Butler, 294 AD2d 881 [4th Dept 2002]; Sec. Trust Co. of Rochester v Thomas, 59 AD2d 242 [4th Dept 1977]; Kohler v Ford Motor Credit Co., Inc., 93 AD2d 205 [3d Dept 1983]). Lastly, as Defendant sought to amend his complaint only if Plaintiff's motion was granted, this portion of Defendant's motion is moot because Plaintiff's motion was denied.

This Decision and Order is being returned to the attorney for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 18, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 11, 2012; Affidavit of Michele DeGraw, dated September 19, 2012, with attached Exhibits A-K.
2. Notice of Cross Motion, dated October 3, 2012; Affirmation of Anthony J. Pietrafesa, dated October 3, 2012; affidavit of Douglas Wilkinson, dated October 2, 2012, with Exhibits 1-18;
3. Affirmation of Thomas R. McCormick, dated October 10, 2012, with attached exhibits A-O.