

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SHANNON P. HICKLIN,)	
)	
Defendant-Below, Appellant,)	
)	
v.)	
)	C.A. No. 07A-09-004 MMJ
ONYX ACCEPTANCE CORP.,)	
a Delaware corporation,)	
)	
Plaintiff-Below, Appellee.)	
)	
)	

Submitted: April 1, 2008
Decided: June 2, 2008

On Appeal from Decision of Court of Common Pleas.

AFFIRMED.

MEMORANDUM OPINION

Douglas A. Shachtman, Esquire, Douglas A. Shachtman & Associates, LLC,
Wilmington, Delaware, Attorney for Appellant.

Jeffrey P. Wasserman, Esquire, Daniel C. Kerrick, Esquire, Ciconte &
Wasserman, LLC, Wilmington, DE, Attorneys for Appellee.

JOHNSTON, J.

PROCEDURAL CONTEXT

On October 5, 2005, Onyx filed suit against Hicklin in the Court of Common Pleas (“CCP”) to recover a \$5,018.88 deficiency balance plus interest. On November 17, 2005, Hicklin filed an Answer and Counterclaim based on violations of Article 9 of the Uniform Commercial Code.

Trial was held on March 15, 2007. On May 23, 2007, the CCP issued a written decision in favor of Onyx. Hicklin was ordered to pay \$5,018.88 plus interest and costs. On June 4, 2007, Onyx filed a motion to alter or amend the judgment. On August 27, 2007, the judgment was amended to include attorneys’ fees.

On September 24, 2007, Hicklin appealed to this Court.

STATEMENT OF FACTS

On July 6, 2000, Shannon Hicklin purchased a 1993 Ford Explorer. On September 18, 2000, Hicklin was issued title to the Explorer. The Explorer’s odometer read 84,030 miles. The value of the vehicle was estimated as \$6,390.

The Explorer was financed through the Onyx Acceptance Corporation. Hicklin was required to make 60 monthly payments of \$348.45. Hicklin subsequently defaulted on the payments. On February 11,

2004, Onyx repossessed the Explorer. At the time of repossession, the odometer on the Explorer read 57,708 miles (over 25,000 miles less than when Hicklin purchased the vehicle). On March 24, 2004, the Explorer was sold through ABC Washington-Dulles, LLC (“ABC”) Auction. The Explorer had a cracked windshield, dings, scratches, and a “check engine” message. ABC estimated that the Explorer needed repairs in the amount of \$1,365. The Explorer sold for \$1,500.

ANALYSIS

In considering appeals from the Court of Common Pleas to the Superior Court, factual issues are reviewed on the record and are not tried *de novo*.¹ This Court's role is to correct errors of law and to review the factual findings of the court below to determine if such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process.² Questions of law are reviewed *de novo*.³

Hicklin claims: (1) Onyx failed to demonstrate that the sale was commercially reasonable; (2) the trial court incorrectly applied the judicially created sheriff's sales standard instead of the Uniform Commercial Code (“UCC”) commercially reasonable standard; and (3) the trial court

¹ H11 *Del. C.* § 5301H.

² HLevitt v. Bouvier, 287 A.2d 671, 673 (Del.1972)H.

³ HEnsminger v. Merrit Marine Const., Inc., 597 A.2d 854, 855 (Del. Super.1988)H.

erroneously admitted hearsay evidence which was critical to the findings of the court.

Commercially Reasonable

Section 9-610 of title 6 of the Uniform Commercial Code provides in relevant part:

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

Hicklin argues that: (1) there was no evidence to demonstrate the place of sale was commercially reasonable; (2) there was no evidence to demonstrate the method or manner of sale was commercially reasonable; and (3) the record demonstrates that Onyx did not follow standard procedure to increase the Explorer's sales price.

During trial, the court heard evidence and considered the testimony of Onyx employee Jimenez. The trial court found the Explorer was sold at a private auction in Dulles, Virginia by ABC. Although, there were several closer auction sites, Onyx choose ABC. Jimenez testified that ABC was an auction house previously used by Onyx. Jimenez testified that private

auctions, in which dealerships bid on vehicles, net stronger bids.⁴ Onyx choose to deliver the Explorer to auction without making any repairs. ABC estimated the Explorer needed \$1,365 in repairs. Onyx usually makes minor repairs prior to sale; however it decided to sell the Explorer “as is.” The trial court also considered the value of the vehicle and the price obtained at auction.

The trial court based its factual finding on evidence presented at trial and concluded the sale was commercially reasonable. The Court finds the trial courts findings were based on substantial evidence.⁵ Therefore, this court affirms the findings of the trial court.

50% Test

Hicklin argues the trial Court erred by evaluating the sale of the Explorer according to the common law sheriff sale standard and not the more strict standard outlined in the UCC. Delaware courts have adopted a

⁴ The Court notes that the UCC comments provide that § 9-610, Disposition of Collateral after Default, “encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned.”

⁵ *Adessi v. Wilmington Trust Company*, 530 A.2d 1128 (1987).

“decisional standard” in which property sold at a sheriff’s sale for less than fifty percent of its fair market value, justifies the setting aside of the sale.⁶

Hicklin argues the Court used the “50% test” instead of the commercially reasonable UCC test in evaluating the sale of the Explorer.

Hicklin highlights the trial court’s reasoning, which states:

Although the auction price of \$1,500.00 was less than fifty percent of the \$4,150 wholesale price quoted for a vehicle with a mileage of 57,762, the evidence shows that the mileage was 84,030 in September 2000, and was likely higher after being in Hicklin’s possession for over three years.

The Court is convinced that the Explorer had a fair market value of \$3,200.00 less \$1,365.00 for the cost of repairing the dents, dings, and cracked windshield. Thus, the \$1,500.00 price fetched at private auction was more than fifty percent of the Explorer’s adjusted fair market value of \$2,335.00.

Courts have used the “50% test” in conjunction with other factors when assessing commercial reasonableness.⁷ The trial court did not rely solely on the sales price to determine commercial reasonableness. The court considered several factors, including, the testimony of Jimenez, the documentary evidence and the inaccurate odometer.

⁶ *Burge v. Fidelity Bond and Mortg. Co.*, 648 A.2d 414, 419 (Del.1994).

⁷ *Friendly Finance Corp. v. Hector*, 1999 WL 1847424, at *1 (Del. Com. Pl.).

In the alternative, Hicklin argues the trial court did not properly apply the “50 % test” to the facts of the case. Specifically, Hicklin argues that the trial court should have used the Kelley Blue Book value of \$6,390.⁸

The evidence presented at trial demonstrates that the Explorer’s mileage was substantially higher than recorded on the odometer. The trial court estimated the value of the Explorer was \$2,335.00. This figure is supported by the evidence on the record. Therefore, this Court upholds the findings of the trial court as to the value of the Explorer at the time of repossession.

Business Record Evidence

Hicklin claims the trial court erred in admitting documents under the business records exception to hearsay. Specifically, Hicklin argues that Onyx employee Jimenez had “no personal knowledge of any information” relating to plaintiff’s exhibits: (1) proof of service/repossession notice; (2) activity/call notes report; (3) vehicle report 2/11/04; and (4) deficiency statement.

Delaware Rule of Evidence 803(6) provides:

Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by,

⁸ This figure is based on the assumption the Explorer’s odometer had not been tampered with and the correct mileage was 57,708.

or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with D.R.E. 902(11), D.R.E. 902(12) unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The trial court admitted the documents in conjunction with the testimony of Jimenez. The court found that Jimenez was an employee of Onyx for over ten years. Jimenez' job duties included underwriting loans, making credit decisions, collecting delinquent accounts and assigning accounts for repossession. The trial court determined Jimenez was a qualified witness pursuant to D.R.E. 803(6).

(a) Proof of Service/Repossession Notice

The repossession notice was sent from Onyx headquarters in California. Jimenez works in the Philadelphia office. Hicklin argues Jimenez is not a proper custodian of the repossession notice. During trial Hicklin objected to the introduction of the repossession notice stating:

We start off with the basic fact that this is hearsay unless this is an exception. The exception that they are offering is that it is a business record. And they don't, they obviously, they don't have the person who mailed it here. They also don't have someone from the office where they mailed it.

The trial court noted that Jimenez reviewed the documents prior to testifying. Also, Jimenez identified the proof of service and repossession

notice and testified the document was the type of document created in the normal course of business.

(b) Activity/Call Notes Report

Hicklin objected to the admission of the activity report during trial. Hicklin argued certain portions were blacked out and thus he did not obtain the full record. The trial court questioned Onyx counsel and discovered portions of the activity report were blacked out due to attorney client privilege. Hicklin then stated: “Okay. Well, if that’s the case then I accept that...we have no further objection.”

On appeal, Hicklin does not provide specific argument as to why the trial court erred in admitting the activity report. The trial court found that the activity report satisfied the business record exception.

(c) Vehicle Report

The vehicle condition report summarizes the condition of the Explorer. Jimenez testified that vehicle reports are maintained in the regular course of business for Onyx by Onyx employees or agents of Onyx. The vehicle report was made by an agent of Onyx, identifies the VIN number of the Explorer, and was kept on record at Onyx. The trial court found that the vehicle condition report satisfied the business record exception.

(d) Deficiency Statements.

The deficiency statement lists the total deficiency amount Hicklin owed Onyx. Jimenez testified that deficiency statements are maintained through the Onyx corporate office and sent to customers in order to give them an exact breakdown of fees. Hicklin argues the statement was not created by Jimenez. Also, Jimenez cannot definitely prove the document was ever sent to Hicklin. The trial court found that deficiency statements are regularly maintained by Onyx and Jimenez was a qualified witness within the business record exception.

Notification

Finally, Hicklin states Onyx violated the notification requirements outlined in 6 *Del. C.* § 9-611. Hicklin offers nothing further in support of this argument. Therefore, the Court finds Hicklin is not entitled to statutory damages for Onyx's alleged violation of 6 *Del. C.* § 9-611.

CONCLUSION

The Court finds that the trial court did not commit an error of law in admitting the four exhibits under the business records exception to the hearsay rule. Jimenez testified that the exhibits were the type of records kept by Onyx during repossession cases. The trial court properly established

that Jimenez was a qualified witness due to his employment history with the company.

The trial court correctly applied the UCC standard in considering whether the repossessed collateral was sold in a commercially reasonable manner.⁹ The sheriff's sale "50% test" was only one of the factors utilized by the Court of Common Pleas. The evidence demonstrates that Onyx' actions were "in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises enjoyed in the same or a similar business."¹⁰

The findings of the trial court are sufficiently supported by the record and the product of an orderly and logical deductive process.

THEREFORE, the Court affirms the decision of the trial court.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

⁹ 6 *Del. C.* § 9-610(b).

¹⁰ *Associates Financial Services Co., Inc. v Di Marco*, 383 A.2d 296, 300 (Del. Super. 1978).