**[Cite as *Fifth Third Bank v. Werner*, 2010-Ohio-4689.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94781**

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## FIFTH THIRD BANK

PLAINTIFF-APPELLEE

vs.

## JASON WERNER

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-668629

**BEFORE:** Gallagher, A.J., Kilbane, J., and Jones, J.

**RELEASED AND JOURNALIZED:** September 30, 2010

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SEAN C. GALLAGHER, A.J.:

**{¶ 1}** This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

**{¶ 2}** Appellant, Jason Werner, appeals the decision of the Cuyahoga County Court of Common Pleas that granted judgment in favor of appellee, Fifth Third Bank ("Fifth Third"). For the reasons stated herein, we affirm.

**{¶ 3}** On August 25, 2008, Fifth Third filed a replevin action against Werner. Fifth Third asserted that Werner had defaulted on a promissory

note. It sought a money judgment along with the right to possession of the collateral for the note, a 2005 Chrysler 300-V8. Werner was granted leave to file a counterclaim.

**{¶ 4}** On September 25, 2008, the trial court granted Fifth Third possession of the vehicle. After the vehicle was repossessed, the vehicle was sold at a private sale.

**{¶ 5}** The trial court ultimately granted Fifth Third summary judgment and awarded Fifth Third a deficiency judgment in the amount of $9,253.96, plus fees and interest. The trial court found that Fifth Third had provided adequate notice of the sale of the collateral and that the sale occurred in a commercially reasonable manner.

**{¶ 6}** Werner timely filed this appeal. He raises two assignment of error for our review, which provide as follows:

**{¶ 7}** "I. The trial court erred when it resolved an issue of material fact in a summary judgment proceeding."

**{¶ 8}** "II. The trial court erred when it made a finding that the sale of the collateral was accomplished in a commercially reasonable manner when there is no evidence contained within the record that sale was commercially reasonable."

**{¶ 9}** Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185,

2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

**{¶ 10}** R.C. 1309.610 permits a secured party to dispose of collateral after default, by public or private sale, provided that "every aspect" of the disposition is commercially reasonable. Pursuant to R.C. 1309.611, the secured party must "send a reasonable authenticated notification of disposition" to the debtor. A notification sent after default and ten days or more before the earliest time of disposition set forth in the notification is deemed timely. R.C. 1309.612.

**{¶ 11}** For a consumer goods transaction, R.C. 1309.614 describes the content and form of the notification. R.C. 1309.614(A)(1)(a) requires the notice of disposition to include the information specified in R.C. 1309.613(A)(1), a description of any liability for a deficiency, a telephone number from which the

amount that must be paid to redeem the collateral is available, and a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available. R.C. 1309.613(A)(1), in turn, mandates that the notification describe the debtor, secured party, and collateral; state the method of intended disposition; inform the debtor of the right to, and the charge for, an accounting of the unpaid indebtedness; and include the time and place of a public disposition "or the time after which any other disposition is to be made."

**{¶ 12}** R.C. 1309.14(B) provides a sample form for each type of sale that "when completed, provides sufficient information" to comply with the notice requirement. A review of Fifth Third's notice, which was introduced into evidence, reveals that it contains similar language to the sample notice for a private sale provided in R.C. 1309.14(B) and contains all of the required information for a private sale.

**{¶ 13}** To the extent that Werner claims the trial court applied R.C. 1309.613, which relates to non-consumer goods, rather than 1309.614, which applies to consumer goods, this argument is disingenuous in that Werner's brief in opposition to summary judgment relied upon the notification requirements of R.C. 1309.613. In any event, our review is de novo and, as discussed above, R.C. 1309.614 requires that the notification contain the information specified in R.C. 1309.613(A)(1).

**{¶ 14}** Although Werner avers in his affidavit that he did not receive the

notice, it is well-established law that actual receipt of the notice is not required. *Ford Motor Credit Co. v. Potts* (1989), 47 Ohio St.3d 97, 99, 548 N.E.2d 223 (decided under the analogous former R.C. 1309.47); *FirstMerit Bank, N.A. v. Miller*, Franklin App. No. 09AP-264, 2009-Ohio-4842, ¶ 10-11 (decided under R.C. 1309.611). Rather, all that is required is that the creditor take reasonable steps to notify the debtor of his intention to resell repossessed collateral. *Ford Motor*, supra. Here, the record reflects that the notice was timely dated, that it was proper as to its contents, and that it was addressed to Werner's correct address.

**{¶ 15}** Nevertheless, Werner asserts that the notice is dated July 4, 2009, a holiday, and that there is no evidence in the record establishing when or if the notice was actually mailed. Fifth Third argues that Werner never asserted failure to provide notice as an affirmative defense and waived the issue. Ohio law prohibits a defendant from asserting an affirmative defense not raised in a responsive pleading for the first time in a motion for summary judgment. See *Midstate Educators Credit Union v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641, 886 N.E.2d 893, ¶ 11-12. Further, Werner did not allege that he intended to redeem the vehicle or show that he was prejudiced by the sale. When the amount that would have been realized upon proper notice is the same as the amount actually realized, which is less than the secured obligation, the secured party remains entitled to a deficiency judgment. See id. at ¶ 33, citing *In re Gatson* (Apr. 21, 2006), B.R. N.D.Ohio No. 04-22668.

**{¶ 16}** Werner also contends that Fifth Third failed to establish that the sale was commercially reasonable. When a debtor raises the issue of commercial reasonableness, the secured party carries the burden of proof on the issue. R.C. 1309.626.

**{¶ 17}** Fifth Third submitted an affidavit of a recovery specialist who averred to Fifth Third's goal of selling repossessed collateral for the highest price possible, its use of reputable remarketing entities, and its valuation of the subject collateral using a black book value. In this case, the price that Fifth Third obtained exceeded the minimal acceptable bid and the retail value of the vehicle. R.C. 1309.627(B) provides that "[a] disposition of collateral is made in a commercially reasonable manner if the disposition is made * * * [a]t the price current in any recognized market at the time of the disposition[.]" In the absence of contrary evidence in the record, with respect to the private sale, we find no genuine issue of material fact on the issue of commercial reasonableness. For this reason, together with our analysis of the other issues raised, we find no error in the trial court's grant of summary judgment to Fifth Third. Werner's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR