Opinion issued August 31, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00060-CV

JOHNNY WILLIAMS, Appellant

V.

ENERGY CAPITAL CREDIT UNION, Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 1129904

MEMORANDUM OPINION

Johnny Williams appeals from a deficiency judgment rendered in favor of Energy Capital Credit Union ("Energy Capital"), which repossessed and sold a vehicle that Williams had purchased with proceeds of a loan from Energy Capital.

In one issue on appeal, Williams contends Energy Capital did not present legally sufficient evidence that its disposition of the collateral was commercially reasonable.

We affirm.

Background

In 2015, Williams executed a motor vehicle sales installment contract with Energy Capital for the purchase of a vehicle, a Chevrolet Cruze. As collateral for the loan, Williams provided Energy Capital a security interest in the vehicle. After Williams failed to make payments on the loan, Energy Capital attempted to repossess the vehicle without the need for judicial intervention. But that attempt failed, and Energy Capital sued Williams, seeking a writ of sequestration permitting it to take possession of the vehicle and damages for the balance owed on the loan.

Within one month of the filing of Energy Capital's original petition, Williams surrendered the vehicle to Energy Capital. Energy Capital gave Williams notice of its intention to sell the vehicle and apply the sale proceeds to the balance owed on the loan. Energy Capital then sold the vehicle at auction and amended its petition to request the deficiency balance. In his answer, Williams alleged that the sale of the vehicle was not conducted in a commercially reasonable manner and, therefore, Energy Capital was not entitled to a deficiency judgment.

At a bench trial, the trial court admitted numerous exhibits and heard the testimony of a single witness in support of Energy Capital's request for a deficiency

judgment.[1] Randall Jack, custodian of records for Energy Capital, testified that the motor vehicle sales installment contract required Williams to make monthly payments. After Williams stopped making payments on the loan, Energy Capital notified Williams of the default and acceleration of maturity of the loan, obtained possession of the vehicle, and notified Williams the vehicle would be sold at auction. Jack testified that the vehicle was sold at auction for $4,000, which he described as "the highest bid we could get at the time." After the sale proceeds were applied to the balance owed on the loan, a deficiency of $11,769.37 remained unpaid by Williams.

The exhibits admitted by the trial court consisted of Energy Capital's business records, including the following:

- a copy of the motor vehicle sales installment contract executed by Williams;
- a record of Williams's payment history and default;
- the notice of Energy Capital's intention to sell the vehicle;
- a printout from the National Auto Dealers Association Guidebook ("NADA") purporting to show the vehicle's value as between $4,300 and $9,425, depending on the circumstances of the sale and the vehicle's condition; and
- Energy Capital's notice to Williams explaining its calculation of the deficiency balance after application of the auction sale proceeds.

[1] Energy Capital's attorney also testified in support of its request for attorney's fees.

In addition, the trial court admitted as an exhibit a copy of a "vehicle summary" or "vehicle record," which indicates it was created by "Jack, Randy" in AutoIMS, an internet-based vehicle listing, and includes some notes on the auction process. Although Jack did not elaborate on or explain the meaning of any information recorded in this exhibit in his testimony, the exhibit includes notes that on May 2, 2019, "Randy Jack" contacted America's Auto Auction and asked that the vehicle be picked up, washed, vacuumed, and sold at auction. Per the exhibit, the vehicle was delivered to America's Auto Auction on May 6, 2019. The vehicle's odometer indicated that the vehicle had been driven 115,241 miles, and the notes record structural and visible frame damage. The exhibit further indicates the vehicle was sold at auction on May 16, 2019, at "America's Auto Auction – Houston," and includes the following auction notes:

05/17/2019 3:06 PM EDT	EDI Auction (AUC)	Days run: 2; Highest Bid Recorded by Auction: $3600
05/16/2019 4:29 PM EDT	EDI Auction (AUC)	Days run: 1; Highest Bid Recorded by Auction: $3600
05/13/2019 11:23 AM EDT	EDI Auction (AUC)	Days run: 1; Highest Bid Recorded by Auction: $3750
05/09/2019 5:21 PM EDT	EDI Auction (AUC)	Days run: 0; Highest Bid Recorded by Auction: $3750

Williams did not present any evidence at trial. In his closing statement, Williams argued that Energy Capital failed to satisfy its burden of proving that the sale of the vehicle was commercially reasonable. Williams asserted that Jack's

testimony was "not sufficient evidence" of commercial reasonableness because it did not provide any information about the method, manner, time, place, or terms of the sale. The trial court indicated its disagreement with Williams's position on the record, stating its belief that "there was sufficient evidence."

The trial court rendered judgment against Williams and in favor of Energy Capital for the deficiency balance and Energy Capital's attorney's fees. Neither party requested findings of fact and conclusions of law following the trial court's decision. Williams appealed.

Legal Sufficiency of the Evidence

Williams presents one issue on appeal: Whether the trial court erred by rendering judgment for Energy Capital because Energy Capital "failed to present competent evidence that [Energy Capital's] disposition of the collateral was commercially reasonable." We presume, under a liberal construction of Williams's brief, that this issue challenges the legal sufficiency of the evidence of commercial reasonableness.[2]

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[2] Our presumption is drawn from consideration of Williams's brief as a whole, including his request for rendition of a judgment in his favor—an appropriate remedy for a successful legal sufficiency challenge—and his multiple assertions that no evidence supports commercial reasonableness. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005) (describing legal sufficiency review as involving a "no evidence" standard); *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176 (Tex. 1986) (noting proper remedy for legal insufficiency is rendition of judgment); *see also McKeehan v. Wilmington Savs. Fund Society, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (concluding appellant challenged legal

A. Standard of Review

When, as here, findings of fact and conclusions of law are not requested or filed after a bench trial, we imply all findings necessary to support the trial court's judgment. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). But when the appellate record includes the reporter's and clerk's records, the sufficiency of the evidence to support these implied findings may be challenged. *Id.* We apply the same standard of review as that applied in our review of jury findings. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989).

A legal sufficiency challenge concerning an issue on which the appellant did not have the burden of proof at trial is reviewed under the "no evidence" standard:

> "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.

City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005). Evidence does not exceed a scintilla if the factfinder "would have to guess whether a vital fact exists." *Id.* at 813. The "final test" for legal sufficiency is whether the evidence at trial, viewed in the light most favorable to the verdict, "would enable reasonable and fair-minded

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> sufficiency of evidence based on review of brief and prayer for rendition of judgment).

people to reach the verdict under review." *Id.* at 822, 827; *Regal Fin. Co., Ltd. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010). Generally, the proper remedy for legal insufficiency is rendition of judgment for the appellant. *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176 (Tex. 1986).

B. Commercial Reasonableness

Article 9 of the Uniform Commercial Code provides that when a debtor defaults on an obligation, a secured creditor may take possession of collateral, dispose of it, and apply the proceeds to help satisfy the obligation. TEX. BUS. & COM. CODE §§ 9.609, 9.610, 9.615; *Regal Fin. Co.*, 355 S.W.3d at 596–97. If the proceeds are insufficient to satisfy the obligation, and the secured party wishes to obtain a deficiency judgment for the amount still owing on the obligation, "[e]very aspect of [the] disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." TEX. BUS. & COM. CODE § 9.610(b); *see Regal Fin. Co.*, 355 S.W.3d at 599. Thus, a secured creditor that seeks to recover a deficiency must prove that it acted in a commercially reasonable manner in disposing of collateral. *Regal Fin. Co.*, 355 S.W.3d at 599; *Greathouse v. Charter Nat'l Bank-Sw.*, 851 S.W.2d 173, 176 (Tex. 1992).

Article 9 provides several examples of commercially reasonable dispositions, which are commonly referred to as safe harbors. TEX. BUS. & COM. CODE § 9.627(b); *Regal Fin. Co.*, 355 S.W.3d at 599. These safe harbors include:

(1) dispositions made "in the usual manner on any recognized market;"

(2) dispositions made "at the price current in any recognized market at the time of the disposition;" and

(3) dispositions made "in conformity with reasonable commercial practice among dealers in the type of property that was the subject of the disposition."

TEX. BUS. & COM. CODE § 9.627(b)(1)–(3). But they are not the exclusive means of proving commercial reasonableness. *See id.* § 9.627 cmt. 3; *Regal Fin. Co.*, 355 S.W.3d at 599.

At its core, commercial reasonableness is a fact-based inquiry that requires balancing Article 9's two competing policies—one being the desire to prevent creditor dishonesty and the other being the need to minimize interference in honest dispositions. *Regal Fin. Co.*, 355 S.W.3d at 602. Courts have considered several nonexclusive factors in addressing the term, including:

> (1) whether the secured party endeavored to obtain the best price possible; (2) whether the collateral was sold in bulk or piecemeal; (3) whether it was sold via private or public sale; (4) whether it was available for inspection before the sale; (5) whether it was sold a propitious time; (6) whether the expenses incurred during the sale were reasonable and necessary; (7) whether the sale was advertised; (8) whether multiple bids were received; (9) what state the collateral was in; and (10) where the sale was conducted.

Id. at 601–02. The ultimate purpose of the commercial reasonableness inquiry is to ensure the creditor realizes a satisfactory price. *Id.* at 602. A satisfactory price is not necessarily the highest price, and courts have recognized that "secured creditors

frequently sell in the low end of the wholesale market." *Id.*; *Airpro Mobile Air, LLC v. Prosperity Bank*, No. 05-19-00579-CV, 2020 WL 2537196, at *4 (Tex. App.—Dallas May 19, 2020, pet. denied) (mem. op.); *see also* TEX. BUS. & COM. CODE § 9.627(a) (fact that higher price could have been obtained is not preclusive to finding of commercial reasonableness).

According to Williams, Energy Capital's evidence was legally insufficient to satisfy these standards for commercial reasonableness. Williams asserts that Jack's testimony was no evidence of commercial reasonableness because it was based on his review of Energy Capital's business records, not his personal knowledge, and failed to address the method, manner, time, place, and terms of the sale. Williams further asserts that Energy Capital failed to present any evidence that the sale at auction fell within any Article 9 safe harbor.

In *Regal Finance*, the Texas Supreme Court reviewed the legal sufficiency of the evidence to support a jury finding on the commercial reasonableness of the disposition of 906 repossessed vehicles. 355 S.W.3d at 597. Several witnesses testified about the dispositions of the repossessed vehicles, including the individual hired by the secured creditor to evaluate and dispose of the vehicles. *Id.* at 602. This witness testified that he inspected each vehicle, completed a condition report, and then used that information to produce a separate report of the vehicle's features and an estimated value. *Id.* He would attempt to solicit—sometimes unsuccessfully—at

least two bids from wholesalers; however, most of the sales were made privately to a small number of trusted automobile wholesalers because the generally poor condition and high mileage of the vehicles limited the price that could be obtained by selling to non-wholesalers. *Id.* at 602–03. The record also contained the vehicle loan files showing evidence of the time, place, and other terms of each of the 906 dispositions, and while not all files were complete, a complete file would contain the loan note, a copy of the certificate of title, a loan payment record, a repossession affidavit, a vehicle condition report, a NADA form estimating value, and any bids tendered for the vehicle. *Id.* at 602. Copies of various negotiable instruments identifying the collateral's buyer and containing the date, time, and price were also entered into evidence. *Id.* The Supreme Court determined that the secured creditor's "testimony on the method and manner of its sales coupled with loan files evidencing time, place, and other terms create[d] more than a suspicion or surmise that at least a portion of Regal's sales were commercially reasonable." *Id.* at 603.

Because the record of commercial reasonableness in this case is not as developed as in *Regal Finance*, we look to additional case law for further guidance on sufficiency of the evidence in commercial reasonableness cases. We find two of the cases cited by Williams instructive in evaluating his contention that the evidence of commercial reasonableness is legally insufficient. *See Foley v. Capital One Bank,*

N.A., 383 S.W.3d 644 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Havins v. First Nat'l Bank of Paducah*, 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ).

Havins addressed a challenge to the commercial reasonableness of a sale of cattle. 919 S.W.2d at 180. The evidence regarding the disposition of the cattle was limited to testimony that the cattle were in poor condition when the secured creditor took possession of them and that within six weeks they were sold at a public auction—"a large cow sale, stocker sale"—at which similar cattle were sold. *Id.* at 181. The record also included testimony as to the amount of the proceeds received by the secured creditor. *Id.* at 181–82. Though it described this evidence as "min[u]scule," the appellate court concluded it was "*some evidence* of commercial reasonableness" and thus survived the appellant's legal sufficiency challenge. *Id.* at 182 (emphasis in original). The court ultimately remanded the matter for a new trial because the evidence, though legally sufficient, was "too weak to survive scrutiny under the microscope of factual sufficiency." *Id.* at 182, 185.

In contrast to *Havins*, our sister court in Houston concluded the secured creditor's evidence of commercial reasonableness was not legally sufficient. *Foley*, 383 S.W.3d at 648. In *Foley*, the secured creditor repossessed a truck, sold the truck, and sued the debtor for the deficiency amount after applying the sale proceeds to the balance due on a loan. *Id.* at 646. But the secured creditor did not present any evidence at trial about the disposition of the truck, other than "business records

indicating [the truck] was sold for $4,700 sometime between December 26, 2009 and February 16, 2010." *Id.* at 648. As described by the court, the record did not indicate how the truck was sold or otherwise contain any evidence of the commercial reasonableness of "the method, manner, time, place and other terms" of the sale or of the reasonableness "safe harbors" that Article 9 provides. *Id.* at 648.

Viewed in the light most favorable to the trial court's decision, the evidence in this case is more than in *Foley* and in line with what the court concluded was legally sufficient in *Havins*. That is, though the evidence presented here might also be described as "minuscule," it passes the test for legal sufficiency. *See Havins*, 919 S.W.2d at 181 ("[A]t the very least, and irrespective of what factors are considered, the evidence presented at trial must describe the method, manner, time, place and terms of the sale."). The evidence regarding commercial reasonableness included business records indicating when and where the vehicle was sold—on May 16, 2019, at an auction in Houston. They also indicate that the vehicle was inspected, washed, and vacuumed before sale. In addition, the record indicates the days on which the vehicle was available at auction, and that the $4,000 paid by the buyer was the highest offer received. Although the sales price was about $300 less than the lower end of the price range recommended in the portion of the NADA guidebook admitted at trial, that does not preclude a finding of commercial reasonableness. *See* TEX. BUS. & COM. CODE § 9.627(a); *Regal Fin. Co.*, 355 S.W.3d at 602; *see also Nichols*

v. Ed Tutwiler Cadillac, No. 01-87-01099-CV, 1988 WL 125201, at *3 (Tex. App.—Houston [1st Dist.] Nov. 23, 1988, no writ) (not designated for publication) (considering NADA "Blue Book" as valuation evidence for used car and concluding trial court's finding of value less than Blue Book was supported by sufficient evidence). The NADA guidebook indicates price varies according to the vehicle's condition, and Williams's vehicle had structural damage, visible frame damage, and more than 115,000 miles on the odometer.

We disagree with Williams that Jack's testimony that $4,000 was the highest price that could be obtained must be excluded from our legal sufficiency review because it is not based on personal knowledge and, thus, not competent evidence. It is undisputed that Jack is a custodian of records for Energy Capital. The business records admitted at trial indicate Jack served as Energy Capital's representative for the vehicle's disposition. As to the vehicle's disposition then, the record sufficiently indicates that Jack had personal knowledge. *See* TEX. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see, e.g., Rockwall Commons Assocs. Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 510–11 (Tex. App.—El Paso 2010, no pet.) (summary-judgment affidavit identifying affiant as custodian of records and establishing her relationship with facts of case satisfied personal knowledge requirement).

In sum, Jack's testimony and the business records admitted into the evidence at trial create more than a suspicion or surmise that Energy Capital's disposition of the vehicle was commercially reasonable. *Regal Fin. Co.*, 355 S.W.3d at 603; *City of Keller*, 168 S.W.3d at 810. We thus must reject Williams's legal sufficiency challenge, and thereby overrule Williams's sole issue on appeal. *See Regal Fin. Co.*, 355 S.W.3d at 603.

Conclusion

We affirm the judgment of the trial court.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Guerra, and Farris.