IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

DECATUR COUNTY BANK,

Plaintiff-Appellee,

Vs.

ROBERT T. SMITH,

Defendant-Appellant.

FILED

December 27, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

Decatur Circuit No. 2365
C.A. No. W1999-02022-COA-R3-CV

FROM THE DECATUR COUNTY CIRCUIT COURT
THE HONORABLE C. CREED MCGINLEY, JUDGE

J. Michael Ivey of Parsons
For Appellee

Terry J. Leonard of Camden
For Appellant

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

Plaintiff/appellee, Decatur County Bank (hereinafter Bank), filed its complaint on December 23, 1997, against defendant/appellant, Robert Smith, seeking the past due balance remaining on promissory notes. Bank's complaint alleged that Smith executed and delivered two promissory notes and defaulted in the payment thereof for which judgment is sought.

Smith's answer denies receipt of consideration for the notes, his execution of the notes, and further denies any default in payment thereof. He also avers that certain real and personal property of Paul Turnbo and S&T Logging, Inc., secured the payment of the notes, that Bank disposed of the collateral in a commercially unreasonable manner, and that he was not furnished any notice of the sale of the collateral.

The record indicates that Bank loaned money to S&T Logging, Inc., as evidenced by promissory notes dated November 19, 1994 and December 19, 1995, respectively. In the 1994 note, the borrower is designated as S&T Logging, Inc., and was executed as follows:

> S&T Logging, Inc.
>
> /s/ Paul Turnbo, President
> /s/ Robert T. Smith, Jr., Secretary and Treas.
> /s/ Robert T. Smith, Jr., Surety
> /s/ Paul Turnbo, Surety

The 1995 note designates the borrower as S&T Logging and is executed as follows:

> /s/ Paul Turnbo, President
> /s/ Robert I. Smith, Jr., Sec. and Treas.
> /s/ Paul Turnbo, Surety
> /s/ Robert T. Smith, Jr., Surety
> /s/ Shirley Turnbo

Security agreements were executed giving Bank security interests in a 1974 truck, 1973 truck, 1971 truck, 1963 trailer, 1967 Mack truck, 1991 trailer, 1967 CAT D-6 dozer, all miscellaneous tools, chainsaws and equipment owned by S&T Logging. The security agreements were executed for S&T Logging, Inc., by Paul Turnbo as president and Robert T. Smith, Jr., as secretary. Bank also held as security for the indetbedness a deed of trust executed by Paul and Shirley Turnbo on their residential property, and another deed of trust executed by the Turnbos, together with other parties, for a second mortgage on the commercial real estate. The record indicates no property for Smith was placed as collateral for the indebtedness.

Paul and Shirley Turnbo filed bankruptcy and were discharged of their personal liability on the indebtedness. The Bank sold the residential real estate of Paul and Shirley Turnbo, which consisted of 22.5 acres at a foreclosure sale, and $37,348.50 in proceeds were applied to the S&T Loan. The Bank also sold the 251 acres of commercial real estate on which it also holds a first mortgage for other indebtedness, but there were no excess funds to apply to the S&T Logging debt. The Bank sold the 1990 Honda four wheeler for $2,200.00, the 1967 Mack truck for $1,000.000, and the 1963 lowboy trailer for $400.00, with the proceeds applied to S&T Logging's indebtedness.

The proceeds from the sale of the collateral were not sufficient to satisfy the balance of S&T Logging's indebtedness on the note, and Bank filed its complaint for the past due balance remaining on the promissory notes. The trial court held that the sale of collateral by Bank was reasonable and that Smith owed Bank $51,252.46. Smith appeals and presents two issues for our review. The issues for review, as stated in appellant's brief, are:

> 1. Whether the trial court erred in awarding the Plaintiff a judgment against the Defendant when the Plaintiff failed to present proof as to whether the collateral was disposed of in a commercially reasonable manner.
>
> 2. Whether the trial court erred in awarding the Plaintiff a judgment against the Defendant when the Plaintiff released collateral without adequate consideration.

The appellee also presents the following issue for our review:

> 1. Whether Defendant remains liable for the indebtedness pursuant to the terms of the contract as provided by notes signed by Defendant.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Smith contends that the judgment of the trial court should be reversed, and the Bank should be barred from receiving a deficiency judgment. Smith argues that the

Bank did not notify him of the sale of the collateral and that Bank failed to prove that the sale was commercially reasonable. Bank asserts that it was the course of dealing between the Bank and S&T Logging for Bank to deal with Paul Turnbo.

T.C.A. § 47-9-504 (1996) provides in part:

> **47-9-504. Secured party's right to dispose of collateral after default - Effect of disposition.-** (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.
> . . .
> . . .
> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.
>
> **T.C.A. § 47-9-507. Secured party's liability for failure to comply with this part. -** (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part.
>
> (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

The secured creditor is restricted by two standards. ***Investors Acceptance Cp. V. James Talcott, Inc.***, 454 S.W.2d 130 (1969). First, in exercising his rights upon default, the secured party is bound by the good faith requirement applicable throughout the Uniform Commercial Code. ***See*** T.C.A. § 47-1-203. The secured party must also exercise his rights on default in a commercially reasonable manner. T.C.A. § 47-9-504. The burden of proving that a sale of collateral is commercially reasonable under these statutes is on the secured party seeking the deficiency judgment. ***Cullum and Maxey***

Camping Center, inc. v. Adams, 640 S.W.2d 22 (Tenn. App. 1982); ***Investors Acceptance Co. of Livingston, Inc. v. James Talcott, Inc.*** 61 Tenn. App. 307, 454 S.W.2d 130 (1969). A commercially reasonable sale is tested by the procedures employed for the sale rather than the proceeds received; however, the terms of the sale bear scrutiny. ***In re Four Star Music Co. Inc.***,2 B.R. 454 (Bankr. M.D. Tenn. 1979). These procedures, including the purchase price received, were listed by the Court in ***Four Star Music Co., Inc.***:

> Although the statute has not attempted to define the parameters of the term "commercially reasonable", case law has specified six factors by which the statute requirements may be measured:
>
> (1) the type of collateral involved; and
>
> (2) the condition of the collateral; and
>
> (3) the number of bids solicited; and
>
> (4) the time and place of sale; and
>
> (5) the purchase price received or the terms of the sale; and
>
> (6) any special circumstances involved.

2 B.R. at 461.

In this case, the record establishes the following facts concerning the sale of the collateral: The bank did not notify Smith of the sale of collateral. Mr. Don Moore, Vice President of Bank, testified that he attempted to notify Smith by phone but was unable to do so. He further testified that Bank used its best efforts to sell the collateral. Mr. Moore further stated that the following collateral had been sold and applied to the indebtedness: the residential real estate of Paul and Shirley Turnbo for $ 37,348.50, the 1990 Honda four wheeler for $2,200, the 1963 lowboy trailer for $400.00 and a 1967 Mack truck for $1,000.00. Mr. Moore further testified that the location of the tools and equipment, as well as the 1973 International truck, was unknown. Paul Turnbo, President of S&T Logging, testified that he helped Bank sell the collateral and that he thought Bank received a fair price. He further stated that the unsold collateral was "junk" and basically of no monetary value.

One element bearing on this question of whether the sale was "commercially reasonable" is lack of notice to the debtor known to the creditor. ***Mallicoat v.***

Volunteer Fin. & Loan Corp., 415 S.W.2d 347, 351 (1966). However, notice by itself is not conclusive on the question of whether a sale was commercially reasonable. The purpose of notice is to enable the debtor to protect his interest in the property by paying the debt, finding a buyer, or being present at the sale to bid on the property. To this end, the collateral will not be sold at less than its true value. ***Id.*** at 350.

We believe that the appellant's rights were adequately protected. Paul Turnbo helped in the sale of collateral and testified that the Bank received a fair price for the items sold. As to the unsold trailer, Mr. Turnbo testified that it had no value. Under Tennessee law, in the event the creditors foreclose upon security interest in collateral and conduct a commercially unreasonable sale, there is a presumption that the debtor is damaged to the extent of the deficiency claimed. The fact of an unreasonable sale does not result in the extinguishment of any deficiency whatsoever. ***Federal Deposit Insurance Corp. v. Morgan***, 727 S.W.2d 500 (Tenn.Ct.App. 1986). This presumption shifts the burden of proving to the creditor the amount that should reasonably have been obtained through sale conducted according to the law. ***ITT Industrial Credit Co. v. Rector***, 1982 WL 170990 (Tenn.Ct.App.). The presumption is a presumption of law, and is a burden shifting device, requiring the party who is in a better position, to go forward with the evidence. Where evidence is presented sufficient to rebut the presumption, creditors are entitled to recover the deficiency. ***Id.*** In the instant case, Smith put on no proof. The proof on the part of Bank included the testimony of the Bank officer in charge of the transaction and Paul Turnbo, one of the debtors and owner of a substantial part of the collateral for the debt. Tumbo testified that the prices received by the bank for the items sold were fair and reasonable. Under the state of this record, we feel that this evidence rebuts the presumption.

Further, Smith questions the disposal of the real estate. The statutory provisions relied upon dealing with secured transactions do not apply to real estate. ***See*** T.C.A. § 47-9-104 (j)(1996). The residential real estate of Paul and Shirley Turnbo was sold at a foreclosure sale pursuant to the terms of a deed of trust. There is no proof that the property brought less than its value. However, if there had been such proof, the inadequacy of consideration received on foreclosure, even if "shockingly inadequate,"

does not justify voiding the sale, if the sale is legal in all other respects. ***Holt v. Citizens Central Bank***, 688 S.W.2d 414 (Tenn. 1984).

In his second issue, Smith asserts that Bank released collateral without adequate consideration, and therefor, he, as a surety, is discharged from liability on the note pursuant to T.C.A. § 47-3-605 (e), which states:

> (e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

Bank asserts Smith is not an accommodation party, but we disagree with this assertion. The note signed by Smith individually designates him as surety. T.C.A. § 47-3-419 provides in pertinent part:

> **47-3-419. Instruments signed for accommodation.** - (a) If an instrument issued for value given for the benefit of a party to the instrument ("accommodation party") and another paty to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."
>
> (b) An accommodation party may sign the instrument as maker, drawer, acceptor, or endorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.
>
> (c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in § 47-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the

instrument for accommodation.

* * *

The comments to the official text state:

> An accommodation party is a person who signs an instrument to benefit the accommodated party either by signing at the time value is obtained by the accommodated party or later, and who is not a direct beneficiary of the value obtained. An accommodation party will usually be a co-maker or anomalous endorser. Subsection (a) distinguished between direct and indirect benefit. For example, if X cosigns a note of corporation that is given for a loan to Corporation, X is an accommodation party if no part of the loan was paid to X or for X's direct benefit. This is true even though X may receive indirect benefit from the loan because X is employed by Corporation or is a stockholder of Corporation, or even if X is the sole stockholder so long as Corporation and X are recognized as separate entities.

However, the fact that Smith is an accommodation party does not release him of liability. T.C.A. § 47-3-605 (i) provides:

> A party is not discharged under this section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

The notes signed by Smith specifically state:

> I understand that my obligation to pay this loan is independent of the obligation of any other person who has also agreed to pay it. You may without notice, release me or any of us, give up any right you may have against any of us, extend new credit to any of us, or renew or change this note one or more times and for any term, and I will still be obligated to pay this loan. You may without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

The language of the instruments signed by Smith is unambiguous. He has waived any defense based on impairment of collateral.

Accordingly, the judgment of the trial court is affirmed, and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against appellant, Robert T. Smith.

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W. FRANK CRAWFORD,
PRESIDING JUDGE,W.S.

CONCUR:

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DAVID R. FARMER, JUDGE

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HOLLY KIRBY LILLARD