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| NATIONSBANK, | ) | |
| | ) | |
| Plaintiff/Appellant, | ) | Appeal No. |
| | ) | 01-A-01-9510-CH-00469 |
| v. | ) | |
| | ) | Davidson Chancery |
| FREDERICK N. CLEGG, SR., | ) | No. 94-461-II(III) |
| | ) | |
| Defendant/Appellee. | ) | |

**FILED**

**April 10, 1996**

**Cecil W. Crowson**
**Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

THE HONORABLE ROBERT S. BRANDT, CHANCELLOR

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

## OPINION

On February 16, 1994, Nationsbank sued the Appellee, Frederick Clegg, for a deficiency resulting from the sale of collateral used in an installment loan. The chancery court concluded that Nationsbank did not dispose of the collateral in a commercially reasonable manner, and denied it recovery.

On May 7, 1990, Mr. Clegg bought a new 1990 Volkswagen from a Nashville car dealer and financed $14,839.00 of the $18,459.00 purchase price with Sovran Bank. In February of 1992, while still current on his obligation, Mr. Clegg contacted Sovran to inform them that he no longer could make the monthly payments and wished to surrender the collateral. Mr. Clegg also volunteered to deliver the vehicle to his lender. Sovran Bank informed Mr. Clegg that it would retrieve the vehicle itself in accord with its own internal procedures for repossession, and that he was not to deliver the car to them.

Sovran Bank never recovered the vehicle. The car sat undriven, at Mr. Clegg's daughter's home in Rutherford County, Tennessee, for more than thirteen months. During the time the car lay idle two events transpired: Mr. Clegg moved to Kansas; and Sovran Bank merged with another institution to become Nationsbank. Prior to leaving Tennessee Mr. Clegg informed Sovran Bank of his new address.

On March 11, 1993, Nationsbank repossessed the unused vehicle. (In oral argument Nationsbank claimed the delay was caused by "bureaucratic snafus" associated with the merger.) On March 30, 1993, Mr. Clegg received a certified letter in Kansas

from Nationsbank in North Carolina. The letter, dated March 16, 1993, informed Mr. Clegg that the car would be sold unless he contacted the bank within 10 days of March 16, or March 26. Mr. Clegg phoned Nationsbank regarding the letter on March 31 and was informed that the car had been sold.

In its brief and argument the Appellant argued that the letter sent to Mr. Clegg in Kansas was initially received by him on March 23. The Court of Appeals reviews findings of facts made by trial courts sitting without juries "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding unless the preponderance of the evidence is otherwise." *Tenn. R. App. P.* 13(d). After reviewing the record this Court cannot find any evidence in the record which supports the Appellants assertion that the letter was received on March 23, 1993, and not March 30, 1993, as the Chancery Court concluded. Thus, we accept the trial court's finding of fact on this issue as the preponderance of the evidence is not otherwise.

*Analysis*

This suit is governed by Chapter 9 of Tennessee's Uniform Commercial Code, which applies to any transaction designed to create a security interest in personal property. In this case a lender sought a deficiency judgment after repossessing collateral which secured a loan used to acquire a car. Deficiency judgments generally seek damages measured by the difference between the outstanding loan balance and the resale price after repossession.

*Tenn. Code Ann.* § 47-9-503 states in relevant part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. . . .

*Tenn. Code Ann.* § 47-9-504(1) states in relevant part:

> 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. . . .

The Uniform Commercial Code does not define "default." In the absence of a definition in the security agreement, the term "default" has been given the ordinary meaning of failure to pay. *Jefferds v. Ellis,* 486 N.Y.S.2d 649, 655 (N.Y.Sup.Ct. 1985). *Mobile Discount Corp. v. Price,* 656 P.2d 851,852, 35 UCC Rep. Serv. 850. What constitutes default may also be determined by the obligation imposed by the security agreement, a breach of which constitutes default. *Barsco, Inc. v. H.W.W. Inc.,* 346 So.2d 134,135 (Fla.Dist.Ct.App.D1 1977). Although the security agreement between the parties on appeal was not in the technical record, Mr. Clegg was most likely in default when he failed to pay a monthly installment for his vehicle, most likely in March of 1992.

Unlike most debtors in default, Mr. Clegg offered to deliver the collateral to the secured party prior to going into default. When the collateral has been voluntarily surrendered to the creditor after default the debtor’s right to possession ceases, unless he later chooses to redeem the property. *See Cordova v.*

*Lee Galles Oldsmobile, Inc.* 668 P.2d 320,322, 36 UCC Rep. Serv. 1456 (N.M.Ct.App. 1993). However, simply because the debtor voluntarily surrenders the collateral does not remove the transaction from the operation of the Uniform Commercial Code. *Tajalli v. Gharibi,* 758 P.2d 190,191 (Colo. Ct. App. 1988). Most importantly, the fact that the surrender of the collateral is voluntary does not alter the character of the transaction as a repossession of collateral. *Id. Accord Linberg v. Williston Industrial Supply Corp.*, 411 N.W.2d 368,372, 4 UCC Rep. Serv. 2d 739 (N.D. 1987). Of course, a secured creditor is not required to repossess upon default; he may refuse surrender and sue for the debt. *Tenn. Code Ann.* § 47-9-501. However, if he chooses to repossess, he is bound by the provisions of the statutes regarding repossession. *Tenn. Code Ann.* §§ 47-9-501, 47-9-503, 47-9-504.

*Tenn. Code Ann.* § 47-9-207(1) requires the secured party, both before and after default to use "reasonable care in custody and preservation" of collateral. The determination of who has possession of the collateral with regard to *Tenn. Code Ann.* § 47-9-207 is one of fact. *E.g., First Nat'l Bank v. Milford,* 718 P.2d 1291, 1296 (Kan. 1986). Strict physical possession is not required, and the obligation found in *Tenn. Code Ann.* § 47-9-207 has been imposed if the secured party merely has constructive possession of the collateral. *See The Bank of Josephine v. Conn.,* 599 S.W.2d 773,774 (Ky.Ct. App. 1980). Possession has been described as including "the right to control goods in the physical possession of another." *In Re Ault*, 6 Bankr. 58, 65, (Bankr. E.D. Tenn. 1980).

In *First Nat'l Bank v. Helwig*, the court found constructive possession of the collateral where the secured party did not take

physical possession after the debtor "agreed to turn over" mortgaged inventory and equipment to the bank. *See* 464 S.W.2d 953,954-5 (Texas Civ. App. 1971). Thereafter, the plant housing the collateral was damaged by fire. The Court held that the bank had sufficient control at the time of the loss so as to constitute "possession." *Id.* at 955.

After reviewing these authorities we conclude that the two banks in this case had sufficient "right to control" of the car after Mr. Clegg's default to constitute constructive possession since they could have retrieved the vehicle at any time. Also, the car was in close geographic proximity to the secured parties at all times after default, and the record contains no evidence which suggests the secured parties experienced any hardship or difficulty in recovering the collateral.

*Tenn. Code Ann.* § 47-9-504(3) states in relevant part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of (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. . . .

To determine whether this sale was commercially reasonable this Court must consider whether the disposition is in keeping with prevailing trade practices among reputable firms engaged in similar business activities. *American City Bank of Tullahoma v. Western Auto Supply.,* 631 S.W.2d 410,421 (Tenn. App. 1981);

*Mallicoat v. Volunteer Finance & Loan Corp.*, 415 S.W.2d 347,350 (Tenn. App. 1966).

Of concern to this Court is the fact that the secured parties in this instance permitted an automobile to sit idly for over 13 months after default. The UCC does not state particular time limits for a secured party to take possession of the collateral, or to proceed with a sale following the taking of possession. The determination of whether delay is commercially unreasonable requires a consideration of all surrounding circumstances, including market conditions, the possible physical deterioration of the collateral, its economic deterioration through obsolescence, and the time required to assemble the collateral and prepare it for sale. *Erickson v. Marshall,* 771 P.2d 68,70, 9 UCC Rep. Serv. 2d 418 (Idaho Ct. App. 1989).

The policy of the Uniform Commercial Code, as to the disposition of collateral, is to balance and protect the rights of both debtor and creditor, while maximizing the recovery from disposition of the collateral for the benefit of all parties. *See Bryant v. American Nat'l Bank & Trust Co.,* 407 F.Supp. 360,364, 19 UCC Rep. Serv. 1217 (N.D. Ill. 1976). *See also In re Zsa Zsa Ltd.,* 352 F.Supp. 665, 671 (S.D.N.Y. 1972).

We have found no evidence in the record, or other authority which indicates that the 13 month delay in selling the automobile, a depreciating asset, is "in keeping with the prevailing trade practices among reputable firms engaged in similar business activities," in Tennessee. Thus, the delay appears unreasonable to this Court. *See Moran v. Holman,* 514 P.2d 817,820 (Alaska 1973)(a motor vehicle is a depreciating asset and a secured party who has taken possession cannot wait an

inordinate period and then elect to sue for the full amount). *See also Mack Financial Corp., v. Scott,* 606 P.2d 993,997 (Idaho 1980)(unexcused delay of nearly 2 years between the secured party's repossession of trucks and its sale at public auction resulted in a reduced price as a consequence of depreciation and constituted a commercially unreasonable disposition of the collateral).

In exercising its rights upon default, Nationsbank is bound by the good faith requirement applicable throughout the Uniform Commercial Code. *Tenn. Code Ann.* § 47-1-203. *American City Bank of Tullahoma v. Western Auto Supply.,* 631 S.W.2d 410,420 (Tenn. App. 1981). The obligation of good faith required the secured parties in this instance to have sold the car with greater haste. That the lender here was engaged in a merger does not absolve it from being responsible for maximizing the recovery from the sale of the car at auction. Mr. Clegg, the debtor here, should not have to pay a greater deficiency judgment because his lender delays in retrieving the depreciating collateral due to its merger with another bank.

*Tenn. Code Ann*. § 47-9-504(3) also states in part:

> . . . Unless the collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. . . .

For Uniform Commercial Code purposes, a used automobile is not considered perishable, nor the type of collateral which declines speedily in value. *Wheeless v. Eudora Bank,* 509 S.W.2d 532,534 (Ark. 1974). In 1966 the Arkansas Supreme Court decided *Norton v. National Bank of Commerce*, a case which stood for the proposition that used cars are not the type of collateral customarily sold on a recognized market. 398 S.W.2d 538 (Ark. 1966). *See also Bob Bales Ford, Inc. v. Martin,* 31 UCC Rep. Serv. 789,791 (Tenn.App. 1981). In *Norton*, a car dealer sold a vehicle to a consumer and assigned the contract to the creditor bank. After default the bank repossessed the car, sold it at private sale without notice to either Norton or the consumer, and sued Norton for the deficiency. The Court denied that a used car was the type of collateral customarily sold on a recognized market, stating:

> We cannot approve the bank's contention that a used car falls in this category. Obviously the Code dispenses with notice in this situation only because the debtor would not be prejudiced by want of notice. Thus a "recognized market" might well be a stock market or a commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation. . . . What one 1957 Oldsmobile sells for does not fix the amount a different one may be expected to bring.

*Id.* at 540.

In fact, the recognized market exception has been interpreted very narrowly. Stock, bond, and commodities exchanges are virtually the only markets deemed to receive "recognized market" treatment. *See Kitmitto v. First Pa. Bank, N.A.,* 518 F.Supp. 297,302 (E.D. Pa. 1981)(privately held stock); *See Bankers Trust Co. v. J.V.Dowler & Co.,* 390 N.E.2d 766,769 (N.Y. App. Div. 1979)(municipal bonds). Because the collateral involved in this appeal is not perishable, not likely to decline speedily in value, nor a type of collateral sold on a recognized market, notice was required.

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 or have others do so, to the end that it be not sacrificed by a sale at less than its true value." *Mallicoat v. Volunteer Finance & Loan Corp.*, 415 S.W.2d 347,350 (Tenn. App. 1966). Notice also provides the debtor with an opportunity to seek a judicial injunction if it objects to the form of the sale. Lastly, a notified debtor can attend the disposition and testify later if litigation ensues. The failure to provide proper notice can have significant consequences on a secured party, including the award of damages to the creditor and the impairment of the right to recover a deficiency judgment.

Whether the notice given by the creditor is sufficient is a question for the trier of fact (*McCoy v. American Fidelity Bank & Trust Co.,* 715 S.W.2d 228,231 (Ky. 1986), with the secured party bearing the burden of proof of proving this, and all elements of the commercially reasonable sale. *Mallicoat v. Volunteer Fin.& Loan Corp.,* 415 S.W.2d 347 (Tenn. App. 1966); *Investors*

*Acceptance Co. of Livingston, Inc. v. James Talcott, Inc.,* 454 S.W.2d 130,140 (Tenn. App. 1969); *Cullum & Maxey Camping Center, Inc. v. Adams,* 640 S.W.2d 22,25 (Tenn. App. 1982).

With regard to timing, the Code does not define "reasonable notification" but Official Comment 5 of *Tenn. Code Ann.* § 47-9-504(3) provides that at a minimum [notice] must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire. Not surprisingly, notice provided after the sale is not considered valid. *Wells v. Central Bank, N.A.,* 347 So.2d 114,119 (Ala. Civ. App. 1977); First State Bank v. Northrop, 519 S.W.2d 161,162 (Tex. Civ. App. 1975). However, the creditor will not forced to take responsibility for lost mail or the debtor's refusal to accept properly delivered mail. *See First Nat'l Bank & Trust Co. of Lincoln v. Hermann,* 286 N.W.2d 750 (Neb. 1980), 28 UCC Rep. Serv. 604, 607 *quoting* White and Summers, *Uniform Commercial Code* § 26-10 p. 984-5.

In *Mallicoat v. Volunteer Fin.& Loan Corp.,* the Eastern Section of this Court held that the requirement of notice of public sale was not satisfied where the creditor sent notice by registered mail, but was aware that the debtor had not received notice since the letter was returned. 415 S.W.2d 347 (Tenn. App. 1966). Additionally, the debtor lived in the creditor's city and the creditor had information as to where the debtor was employed but made no further effort to comply with the notice requirement. Here, Nationsbank sent notice of the public sale of the collateral to Mr. Clegg dated March 16, 1993, informing him that the disposition would take place within 10 days. Mr. Clegg received the notice on March 30, 1993, and phoned Nationsbank the

following day, only to be told that the collateral had been sold.

Nationsbank did not provide Mr. Clegg with sufficient time to take the steps he could have to protect himself in the sale of what formerly was his car. Mr. Clegg is entitled to more than one day of notice of the pending auction. In this instance Nationsbank only made one attempt at informing Mr. Clegg of the sale and was unaware of whether that notice had been received.

While absolute proof of receipt of notice may not be required in every instance, a creditor, who only makes one attempt to contact the debtor, and is left uncertain of receipt of the notice, has not fulfilled its obligation to the debtor when it proceeds with a disposition less than two weeks from mailing its first notice.

*Conclusion*

The notice sent to Mr. Clegg, the debtor, was not sufficient and the sale of the collateral was not effected in a commercially reasonable manner. We therefore affirm the decision of the chancery court in denying Nationsbank's request for a deficiency judgment. Costs on appeal are taxed to the Appellant and the case is remanded to the chancery court for any further proceedings necessary.

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SAMUEL L. LEWIS, J.

CONCUR:

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HENRY F. TODD, P.J., M.S.

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BEN H. CANTRELL, J.