STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

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WELLS FARGO DEALER SERVICES,

Plaintiff/Appellee,

v

File No. 10-8430-AV
HON. PHILIP E. RODGERS, JR.

SARAH NEAL,

Defendant/Appellant.
_____/

Margaret A. Schiano (P67322)
Attorney for Plaintiff/Appellee

Mark Messing (P29745)
Attorney for Defendant/Appellant

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**DECISION AND ORDER DENYING APPEAL**

On October 15, 2010, the trial court granted the Plaintiff/Appellee's Motion for Summary Disposition, stating that there remained no contested issues for a trier of fact to decide. Subsequently, the Defendant/Appellant appealed claiming that a secured creditor cannot obtain a deficiency judgment after a sale of the collateral without giving notice of that sale to the debtor and, further, that the trial court erred by failing to apply the Uniform Commercial Code.

The Plaintiff/Appellee and the Defendant/Appellant signed a Retail Installment Contract and Security Agreement on or about November 12, 2006. In reliance on the contract, the Plaintiff/Appellee loaned the Defendant/Appellant $12,672.44 and the Defendant/Appellant gave the Plaintiff/Appellee a security interest in her 1999 Chevrolet Suburban. The Defendant/Appellant was to pay $257.71 to the Plaintiff/Appellee monthly for a term of 60 months.

On or about July 27, 2009 the Defendant/Appellant breached the contract by failing to make timely payments. On October 8, 2009, the Plaintiff/Appellee obtained the collateral vehicle. Prior to its repossession, the vehicle was involved in an accident. On November 4,

2009, the vehicle was sold at auction for $1,800. The Plaintiff/Appellee also settled the collision insurance claim.

At time of sale the Defendant/Appellant owed the Plaintiff/Appellee $6,877.89 under the contract. Additionally, the Plaintiff/Appellee incurred fees of $568.85 to repossess the collateral. These additional fees brought the total owed by the Defendant/Appellant to $7,446.74. After deducting the amount the Plaintiff/Appellee received in insurance proceeds, $1,414.50, the Defendant/Appellant was left owing $4,232.24.

The Plaintiff/Appellee moved for summary disposition under MCR 2.116(C)(10) and submitted the affidavit of Ms. Allevato, an agent of the Plaintiff/Appellee, asserting there existed no genuine issue of material fact as to the amounts owed to the Plaintiff/Appellee. The Defendant/Appellant opposed the Motion for Summary Disposition claiming that the Plaintiff/Appellee had failed to give reasonable notice to Defendant/Appellant of the sale of the vehicle and that the Plaintiff/Appellee failed to use commercially reasonable care in the preservation and sale of the collateral. Further, the Defendant/Appellant claimed that the Plaintiff/Appellee unreasonably compromised the insurance claim.

On February 28, 2011, this Court heard the oral arguments of counsel and took the matter under advisement. The Court now issues this decision and order and, for the reasons stated herein, denies the Defendant/Appellant's appeal and affirms the decision of the trial court.

This case involves a commercial goods transaction. According to MCL § 440.9101 *et seq*., there is no specific time limitation imposed on a secured party who notifies the debtor regarding a proposed sale of collateral. The notification must only be sent within a "reasonable time." Furthermore, no particular phrasing is required so long as the pertinent information is included pursuant to MCL § 440.9614. In compliance with MCL § 440.9614, Plaintiff/Appellee, as the secured party, sent to the Defendant/Appellant a document entitled "Notice of Our Plan to Sell Property," dated October 12, 2009. The Notice described the debtor as "*Sarah Neal*" and the secured party as "*Wachovia Dealer Services, Inc.*," described the collateral that was the subject of the intended disposition as a "*1999 Chevrolet Suburban* [VIN number] *3GNFK16R3XG189496*," stated the method of intended disposition as "*private*

*sale* [to occur] *sometime after 10/23/09,"* stated that the debtor was entitled to an accounting of the unpaid indebtedness and stated the charge, if any, for an accounting.

The Notice specifically stated "*You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us.*" Additionally the Notice stated the time after which an intended private disposition would be made, in lieu of the time and place of a public disposition. The Notice described the debtor's liability for a potential deficiency in the following language:

> *The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you will still owe us the difference (unless, you are entitled to protection under the United States Bankruptcy Code). If we get more money than you owe, you will get the extra money unless we must pay it to someone else.If you want us to explain to you in writing how we have figured out the amount that you owe us, you may call us at 1-888-937-9992 (or write us at REINSTATEMENTS CA6382, Wachovia Dealer Services, Inc., P.O. Box 3659, Rancho Cucamonga, CA 91729) and request a written explanation.*"

Further, the Notice provided a telephone number the secured party could call to learn the amount necessary to redeem the collateral. A telephone number and mailing address were also provided should the debtor desire additional information concerning the disposition of the collateral. On this point, the Notice stated, "*If you need more information about the sale, call us at 1-888-937-9992 or write us at REINSTATEMENTS CA6382, Wachovia Dealer Services, Inc., P.O. Box 3659, Rancho Cucamonga, CA 91729.*"

To be "commercially reasonable" and likewise in "good faith," collateral must be disposed of in a usual manner, in a recognized market, at the current market price, or otherwise in conformance with reasonable practices among dealers of the same type of property. In a private sale, good faith means honesty in fact in the conduct or transaction. A private sale is conducted in a commercially reasonable manner if the amount of goods sold, the time, the place, terms, method and manner of sale are all commercially reasonable and the seller gives reasonable notification of its intention to sell. M Civ JI 140.31. In a public sale, good faith means honesty in fact in the conduct or transaction. A public sale is conducted in a commercially reasonable manner if:

1. the amount of goods sold, the time, place, terms, method, and manner of sale are all commercially reasonable.
2. The sale is made at a usual place or market for public sale if one is reasonably available.
3. The seller gives the buyer reasonable notice of the time and place of resale.
4. The goods are within the view of those attending the sale/The notice of sale states the place where the goods are located and provides for reasonable inspection by prospective bidders. M Civ JI 140.32.

The fact that a greater amount could have been obtained by collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner and the debtor has the burden of establishing that proceeds from the sale of the collateral are significantly below the range a similar disposition would have brought at sale.

In this case, the Plaintiff/Appellee, as the secured party, had authority to repossess and dispose of the subject collateral, either via public or private sale and at any time and place and on any terms subject only to the rule of commercial reasonableness. However, the Defendant/Appellant claims that the secured party failed to provide adequate notice of intent to dispose of the collateral.

The Notice indicated the collateral would be sold at a private sale after October 23, 2009. In fact, it was sold on November 5, 2009 by Manheim Auctions. Plaintiff/Appellee claims the collateral was sold at a private auction open only to car dealers.[1] A reading of MCL § 440.9614 in conjunction with § 440.9613, clarifies that the notification must indicate the "method of **intended** disposition." (Emphasis added.)

When the Notice was sent, the Plaintiff/Appellee met the requirements of stating the method of intended disposition, by private sale, and the time after which the sale would occur, on October 23, 2009. While there was no second notice sent to indicate the collateral would be sold at an auction open only to car dealers, it appears that the first notice was sufficient because the secured party provided the information required under the statute based on their *intention* at that time. Furthermore, a person has "notice" of a fact when:

[1] Plaintiff/Appellee does not complain that the sale failed to conform with "reasonable practices among dealers of the same type of property."

> [H]e or she has received a notice or notification of it; or from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists. A person "knows" or has "knowledge" of a fact when he or she has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act. A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when 1 of the following occur:
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> (a) It comes to his or her attention.
>
> (b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him or her as the place for receipt of such communication. *Luhellier v Bolline Constr, Inc*, 157 Mich App 131; 403 NW2d 522 (1987)

It is disingenuous for the Defendant/Appellant to assert she did not receive notice because clearly the secured party provided statutorily sufficient notice.

Appellant also takes issue with the timing of the notice. However, the statute requires no specified time for sending a notice in a consumer transaction. The only requirement is that the notification is sent within a reasonable time. Therefore, because the notice was sent within a reasonable time prior to the disposition of the collateral Defendant/Appellant's argument is irrelevant.

The Defendant/Appellant suggests that the disposition of the collateral was commercially unreasonable based on the sales price/proceeds received. Yet, the statute states the fact that a greater amount could have been obtained is not of itself sufficient to preclude a secured party from establishing that the disposition was made in a commercially reasonable manner. The Defendant/Appellant has not provided any additional evidence to demonstrate that the disposition was commercially unreasonable. Furthermore, the Defendant/Appellant has not met her burden of establishing that the proceeds from the sale of the collateral were significantly lower than a similar public sale might have brought.

Based on the facts, it appears the Plaintiff/Appellee was properly awarded a deficiency judgment because sufficient notice of sale was provided to the Defendant/Appellant prior to the disposition and no evidence has been provided that the sale was commercially unreasonable. Moreover, if a creditor has sold collateral in a commercially unreasonable manner that fact

alone is not an absolute bar to the creditor's recovery of a deficiency judgment. *Wilson Leasing Co v Seaway Pharmacul Corp*, 53 Mich App 359; 220 NW2d 83 (1974). Even if a creditor disposes of collateral in violation of the UCC, the debtor is not entitled to completely avoid its obligation to the creditor. *Id.*

This Court affirms the finding of the 86th District Court. As such, the Court denies the Defendant's appeal for the reasons stated herein. This case is hereby remanded back to the 86th District Court.

IT IS SO ORDERED.

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HON. PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____