

FILED

MAY 23 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITIZENS SAVINGS BANK,)

Plaintiff-Appellee,)

vs.)

PATRICK J. WELCH,)

Defendant-Appellant.)

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9-121
88-927

Appeal from the Iowa District Court for Sac County
(16646), Allan L. Goode, Judge.

Defendant appeals a district court judgment granting the bank a deficiency judgment against him and dismissing his counterclaim based on the bank's failure to properly notify him of the sale of the secured property. **AFFIRMED.**

Lon R. Tullar, Sac City, for defendant-appellant.

Charles A. Schulte of Schulte & Graven Law Firm, Sac City; and Steve Hamilton of the Hamilton Law Firm, Storm Lake; for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ. Habhab, J., takes no part.

SCHLEGEL, J.

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Defendant, Patrick J. Welch, and plaintiff, Citizens Savings Bank, entered into a consumer credit transaction wherein the bank financed Welch's purchase of a car. Welch became delinquent in his payments. The bank sent him a notice to cure default, to which Welch did not respond. Following some additional inquiry by the bank, Welch voluntarily surrendered the car to the bank. Thereafter, the bank sent to Welch, the following letter:

As you are aware, Citizens Savings Bank is now in possession of the 1986 Mazda. You now have a period of ten (10) days in which to redeem this vehicle or we will then offer this vehicle for sale.

In order to redeem, we will need a cashier's check in the amount of \$13,140.92 which is payment in full on the loan. As I stated above, you do have the ten days before we advertise this unit for sale. Should we not receive the amount needed to pay in full, you will be held responsible for the BALANCE.

Welch made no effort to redeem the car, and following the ten days referred to in the letter, the bank advertised the vehicle in several newspapers. Several bids were made, all of which were below the amount the bank sought to recover. The bank negotiated with one person who made a bid, and ultimately sold the car for \$10,500. The bank brought this action to recover the deficiency resulting after the sale. The trial court awarded judgment to the bank for the amount sought by the bank. Welch appeals. We affirm.

Welch contends that the notice given to him was insufficient, because he claims the bank conducted a public sale. He also claims that the sale was not commercially reasonable. In a counterclaim, Welch seeks damages, under Iowa Code section 554.9507(1), because of the inadequacy of the notice given to him.

The bank concedes that the transaction between it and Welch was a consumer transaction and that it bears the burden to plead and prove compliance with the statutory notice requirements before becoming entitled to a deficiency judgment after the repossession of collateral. It further concedes that the sale of repossessed collateral must be commercially reasonable. Iowa Code § 554.9504(3).

The principal issue in this case is whether the disposition of the collateral in this case involved a public or private sale. Iowa Code section 554.9504(3) provides, in part:

Unless collateral is perishable or threatens to decline speedily in value or is of 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 the debtor has not signed after default a statement renouncing or modifying the debtor's right to notification of sale.

It is clear that the statute makes a distinction between public and private sales. In the instant case, if the sale be deemed to be public, Welsh was entitled to receive

notice of the time and place the public sale was to be held. On the other hand, if, as the trial court found, the sale was private, the bank's notice to Welch that the sale would take place after the passage of ten days following its letter to him was adequate.

The purpose for the notice, contained in section 554.9504(3), as recognized by our supreme court, is:

[O]bviously intended for the benefit and protection of the debtor. It affords him at least an opportunity to bid at the sale and protect himself from an inadequate sale price. A debtor unable or unwilling to exercise his 554.9506 redemption right may still wish to bid on the property or encourage others to do so to insure a fair sale price which would minimize or eliminate a deficiency. Even if it might be determined he could not have protected his interest the law requires he be given the opportunity.

John Deery Motors v Steinbronn, 383 N.W.2d 553, 555 (Iowa 1986).

Our supreme court has considered the definition of "public sale" versus "private sale", as it applies to section 554.9504(3), in several cases. Defendant directs us to the case of Beneficial Finance Company v. Reed, 212 N.W.2d 454, 458 (Iowa 1973), upon which he places substantial reliance. In that case, the Iowa Supreme Court, in dictum, stated:

[B]eneficial in fact conducted a public sale as the car allegedly was advertised in the local newspaper. Accordingly, reasonable notification of the time and place of the sale should have been sent to Reed.

In that case, the court did not attempt to define the terms, "public sale" or "private sale". Instead, the court found that no appropriate notice was given, whether the sale was private or public.

In addressing the question of private versus public sale, the Iowa Supreme Court stated in Lloyd's Plan, Inc. v. Brown, 268 N.W.2d 192, 194 (Iowa 1978):

We do not agree the sale was public. The fact the car was displayed for sale in a public place did not make the sale itself public. Private offers were taken and the vehicle was sold privately. The essence of a public sale is that the public is not only invited to attend and bid but also is informed when and where the sale is to be held. See In re Bishop, 482 F. 2d 381, 384-85 (4 Cir. 1973); 2 G. Gilmore, Security Interests in Personal Property 1242 (1965); Restatement of Security sec. 48, comment c at 139-140 (1941). (Emphasis added).

Our supreme court also had occasion to consider the distinction between public and private sales in John Deery Motors, 383 N.W.2d at 555. In that case, the repossessed automobile was displayed at the Deery dealership for several months without a buyer being found. Finally, the car was taken to an auction open only to licensed dealers. In ruling that it was a private sale, the Iowa court held that a public sale "is one that is accessible to or shared by all members of the community." Although the automobile had been offered for sale on the public lot of John Deery Motors for a period of time, the court did not find that such display did not make it a public sale. The court did not consider the dictum found in Beneficial Finance, supra.

In the case at bar, the fact that Welch's automobile was advertised in newspapers does not require a finding that it was sold at a public sale. It is obvious from the record here that the bank advertised the car in the newspaper to obtain the largest number of bids for it. From the bids received, the bank negotiated a final sale price and sold the car at private sale. We believe that the notice provided was adequate. As stated in John Deery Motors, 383 N.W.2d at 556:

Defendants were entitled by section 554.9504(3) to receive reasonable notice of the time after which Deery would dispose of the automobile by private sale as a predicate to entry of a deficiency judgment. They received such a notice.

Welch also urges us to find that the sale was not commercially reasonable, although his brief is silent upon why he feels it was not. The trial court found that the sale was commercially reasonable. This finding of fact is binding upon us if it is supported by substantial evidence. Iowa R. App. P. 14(f)(1). In this case, the bank advertised the car for sale, not only in the newspaper, but also by displaying it in a public place, seeking to obtain offers for its purchase. Welch had knowledge that the bank intended to sell it ten days after the date he received the letter. He contends he turned down an offer of \$11,800, but made no effort to advise the bank of such offer or the person making it. The bank proceeded in a commercially reasonable manner to obtain the

best price available. The court was not in error in finding that the sale was commercially reasonable.

In view of our holding in this case, Welsh is not entitled to damages for the bank's failure to give proper notice. We therefore find his counterclaim to be without merit.

AFFIRMED.