

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ORIX CREDIT ALLIANCE, INC.,)
)
 Plaintiff)
)
 v.) **Civil No. 90-0195 P**
)
 NELSON EQUIPMENT SALES, INC.,)
 et al.,)
)
 Defendants)

**MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT¹**

The plaintiff, Orix Credit Alliance, Inc. ("Orix"), seeks summary judgment against defendant Theodore Mundy, Sr.,² based on his personal guaranty, for a deficiency owed in connection with the purchase of a Freightliner truck and two Landoll bottom dump trailers, as well as on accruing interest and costs of collection, including reasonable attorney fees. The defendant argues that the plaintiff forfeited its right to a deficiency by selling the repossessed vehicles at public auctions in a commercially unreasonable manner in violation of 11 M.R.S.A. ' 9-504(3). For the reasons enumerated below, I grant the plaintiff's motion.

I. SUMMARY JUDGMENT STANDARDS

¹ Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² Theodore Mundy, Sr. remains as the only defendant in this action and is variously referred to in this opinion as "Mundy" and "the defendant."

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTUAL CONTEXT

The plaintiff is a corporation engaged in the business of commercial equipment financing and is the successor in interest by merger to Credit Alliance Corporation and First Interstate Credit

Alliance, Inc.³ Affidavit of Peter Hurstak in Support of Plaintiff's Motion for Partial Summary Judgment ("Hurstak Affidavit I") & 3. Nelson Equipment Sales, Inc. ("Nelson Sales") is a corporation dealing in used construction equipment, including commercial trucks, and T.N. Enterprises, Inc. ("T.N.") is a corporation engaged in used equipment sales. First Amended Complaint ("Amended Complaint") §§ 2-3; Affirmative Defenses and Answer to Amended Complaint, Answer Section & 2. In September 1987 Nelson Sales and T.N. executed a conditional sales contract note in connection with their purchase of a new Freightliner truck from A. J. Cole & Sons, Inc. ("Cole"). Hurstak Affidavit I & 8; Exh. D to Hurstak Affidavit I. According to the terms of the note, Nelson Sales and T.N. were to pay for the truck in 60 monthly installments, with interest, and were responsible for any late fees and costs of collection, including attorney fees of 20 percent. Hurstak Affidavit I §§ 9-10; Exh. D to Hurstak Affidavit I. Cole assigned the note and all its right, title and interest in the truck to Orix without recourse.⁴ Hurstak Affidavit I & 12; Exh. E to Hurstak Affidavit I.

³ For the sake of simplicity these entities will hereafter be referred to without distinction as "Orix."

⁴ Although the note provided that title to the truck was to remain in the holder until full payment was made, the certificate of title filed with the Secretary of State listed T.N. as owner. Exhs. D, G to Hurstak Affidavit I. In any event, Orix held a perfected security interest in the vehicle. Hurstak Affidavit I §§ 13-14.

In March 1990 Nelson Sales and T.N. ceased making payments on the note and ignored Orix's written demand for accelerated payment of the entire balance owing. Hurstak Affidavit I && 15-17; Exh. H to Hurstak Affidavit I. In August Orix repossessed the truck pursuant to a writ of replevin and in February 1991 notified Nelson Sales and T.N. that it would sell the truck at a public sale on March 8, 1991 at 10:00 a.m. at the premises of Dan's City Truck & Auto Repair in Manchester, New Hampshire. Hurstak Affidavit I && 18-19; Exh. I to Hurstak Affidavit I. The week before the sale Orix advertised the event on three different dates in three separate newspapers published in Portland, Maine, Providence, Rhode Island and Manchester, New Hampshire and once in a truck-exchange trade publication. Hurstak Affidavit I & 20; Affidavit of John Ruffo in Support of Plaintiff's Motion for Partial Summary Judgment ("Ruffo Affidavit") & 6. Orix also notified individuals and businesses it considered from its experience likely to have a potential interest in purchasing the truck. Hurstak Affidavit I & 21; Ruffo Affidavit & 7. The notices and advertising were consistent with practice in the industry for disposition of equipment of this kind and were designed to attract as many bidders at the auction as possible. Hurstak Affidavit I & 22; Ruffo Affidavit & 9. The terms of the sale required a down payment of 25 percent of the bid and the balance of the purchase amount in twenty-four hours. Ruffo Affidavit & 8. No bidders appeared at the sale and so John Ruffo, who conducts public auctions of repossessed vehicles for Orix in his capacity as regional sales manager, purchased the truck on behalf of a subsidiary of Orix for \$30,000 basing the purchase price on the so-called Blue Book, newspaper advertisements for similar vehicles in like condition and the opinions of other local dealers. *Id.* && 2, 12. Orix credited Nelson Sales and T.N. with this amount, minus advertising and storage costs.⁵ Hurstak Affidavit I && 23, 26-27. Subsequently, Orix credited

⁵ Costs to Orix relating to the sale were \$28.14 for advertising and \$441.92 for storage. Affidavit of Theodore Mundy, Sr. & 3.

Nelson Sales and T.N. with the larger amount of \$45,000, minus the same costs, in order to eliminate an issue in the case deriving from the fact that, post-auction, Orix's subsidiary sold the truck for \$45,000 with a lower downpayment and financing to an individual, Darrell L. Beard, who was unable to bid due to the terms of the auction.⁶ Ruffo Affidavit && 13-14; Affidavit of Darrell L. Beard && 6-7, 9-11; Supplemental Affidavit of Peter Hurstak in Support of Plaintiff's Motion for Partial Summary Judgment ("Hurstak Affidavit II") & 5. In a separate transaction which occurred in December 1987 Nelson Sales sold to one Robert Levesque, pursuant to the terms of a conditional sales contract note, two Landoll bottom dump trailers it had purchased at a dealer price of \$30,000 each. Affidavit of Theodore Mundy, Sr. ("Mundy Affidavit") & 7; Hurstak Affidavit I & 30; Exh. J to Hurstak Affidavit I. Levesque took delivery of only one of the two trailers; Nelson Sales retained possession of the other. Hurstak Affidavit I & 34. Nelson Sales assigned the note and all of its right, title and interest in the trailers to Orix with recourse. *Id.* & 35; Exh. J to Hurstak Affidavit I. Levesque failed to make any payments and ignored Orix's written demand for accelerated payment of the entire unpaid balance and collection charges and expenses. Hurstak Affidavit I && 36-38; Exh. L to Hurstak Affidavit I. Levesque returned the one trailer to Nelson Sales. Hurstak Affidavit I & 40. Nelson Sales then assumed liability under the recourse agreement by executing on or about November 30, 1988 a demand promissory note in the original principal amount of \$59,083.54, with interest. Hurstak Affidavit I && 41-42; Exhs. A, N to Hurstak Affidavit I. The note, which was secured in part by the trailers, provided for the payment of reasonable attorney fees, stated to be 20 percent, in the event it was placed with an attorney for collection. Hurstak Affidavit I & 44; Exh. N to Hurstak Affidavit I. In connection with the assumption of liability, the defendant on the same day executed a personal

⁶ The parties dispute whether Beard made a standing offer to purchase the truck for that amount prior to the auction. Beard Affidavit & 5; Ruffo Affidavit & 5.

guaranty of the new note as well as all obligations -- past, present and future --of Nelson Sales to Orix. Hurstak Affidavit I & 43; Amended Complaint & 41; Pretrial Memorandum of Defendant Theodore N. Mundy, Sr. at 1-2; Exh. O to Hurstak Affidavit I. By agreement, Nelson Sales retained both trailers for resale purposes. Hurstak Affidavit I & 40.

Soon Nelson Sales defaulted under the terms of the note leading Orix to repossess the trailers and notify Nelson Sales and Mundy that it intended to sell them at a public sale on May 25, 1991 at 10:00 a.m. at Oxford Equipment, Inc. in North Oxford, Massachusetts. Hurstak Affidavit I && 45-47, 49; Exhs. P, R to Hurstak Affidavit I. The terms of the sale required a down payment of 25 percent of the bid and the balance of the purchase amount in twenty-four hours. Exh. P to Hurstak Affidavit I. In the two weeks preceding the sale Orix advertised the event once in two general-circulation newspapers and twice in one truck-exchange trade publication. Hurstak Affidavit I & 50. In addition, as in the case of the truck, Orix provided notice of the sale to individuals and businesses it considered from its experience likely to have a potential interest in purchasing the trailers. *Id.* & 51. These notices and advertising were likewise consistent with industry practice for disposition of this kind of equipment and were designed to attract as many bidders at the auction as possible. *Id.* & 52. At the time of the sale one trailer had never been used and the other trailer had carried only three or four loads. Mundy Affidavit & 7. Orix purchased both trailers at the public sale for a total of \$10,000 yielding, after expenses, a net deficiency as of then of \$61,335.50.⁷ Hurstak Affidavit I && 53-56. Thereafter Orix resold the trailers for the sum of \$30,450.44 and substituted this amount for its own \$10,000 bid as a credit against the deficiency. Hurstak Affidavit II && 13-15. Mundy, whose thirty-

⁷ Costs to Orix relating to the sale were \$250 for a lien search, \$2,000 for advertising and \$1,500 for storage. Mundy Affidavit & 4. According to Peter Hurstak, assistant secretary and an operations manager of Orix, these costs were higher than those relating to the Freightliner truck because the trailers' unique construction and limited use reduced Orix's ability to quickly resell them. Hurstak

years experience in the construction equipment business includes attending many auctions and assisting in many sales, estimates the value of each trailer at \$20,000. Mundy Affidavit & 7.

The total deficiency owing as of the date hereof is \$35,352.85 on the truck and \$52,400.12 on the trailers. *See* Hurstak Affidavit II && 10-11, 15-16.

III. LEGAL ANALYSIS

Affidavit II && 2, 17.

Orix contends that no genuine material issue of fact is in dispute and on that basis seeks summary judgment against Mundy for the total deficiency owed by Nelson Sales to Orix on the truck and two trailers, including interest and reasonable attorney fees. Amended Complaint (Count II); Memorandum of Law in Support of Motion for Partial Summary Judgment ("Plaintiff's Memorandum") at 1-5. The plaintiff bottoms its claim on Nelson Sales' failure to abide by the terms of payment according to the truck purchase contract note, the trailers recourse agreement and promissory note and Mundy's personal guaranty of Nelson Sales' obligations to Orix. *Id.* Mundy asserts as a defense that Orix sold the three repossessed vehicles in a commercially unreasonable manner in violation of 11 M.R.S.A. ' 9-504(3). Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendant's Memorandum") at 2-4. In particular, Mundy asserts that the terms of the auctions were unreasonably restrictive because they required a 25 percent down payment and the balance within twenty-four hours.⁸ *Id.* at 2. In addition, he contends that the sale prices of the truck and the trailers were unreasonable because they were below fair market value, which he argues was \$45,000 for the Freightliner and \$20,000 for each of the two trailers.⁹ Defendant's Memorandum at 2; Statement of Disputed Material Facts ("Defendant's Statement") & 17; Mundy Affidavit & 7. Mundy also asserts, but without appropriate record citation support, *see* Local Rule 19(b)(2), that the advertising for the auction of the trailers was inconsistent with industry practice. Defendant's Statement & 15. Furthermore, he contends that the advertising, storage and search expenses for the trailers were unreasonable because they were significantly higher than those for the

⁸ The defendant notes that the truck auction was held on a Friday. Defendant's Memorandum at 2. The suggestion is that this timing presented potential bidders with an insufficient opportunity to arrange financing within the following twenty-four hours. *See* Beard Affidavit & 7.

⁹ This argument was mooted as to the truck when Orix agreed to credit \$45,000 against the deficiency. *See* p. 5 *supra*.

truck. Defendant's Memorandum at 3; Defendant's Statement && 11-14. Mundy contends that the consequence of these commercially unreasonable sales is that the plaintiff forfeits its right to any outstanding deficiency on either the truck or the two trailers. Defendant's Memorandum at 4. Finally, the defendant asserts that the plaintiff's motion for partial summary judgment must be denied because there is a genuine dispute as to whether the auctions were conducted in a commercially reasonable fashion. *Id.* at 1-4.

The Maine Uniform Commercial Code ("MUCC") requires that when a secured party disposes of repossessed collateral "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." 11 M.R.S.A. § 9-504(3). "[T]he primary focus of commercial reasonableness is not the *proceeds* received from the sale but rather the *procedures* employed" *Nadler v. Baybank Merrimack Valley, N.A.*, 733 F.2d 182, 184 (1st Cir. 1984) (quoting *In the Matter of Zsa Zsa Limited*, 352 F. Supp. 665, 671 (S.D.N.Y. 1972) (emphasis in original), *aff'd without op.*, 475 F.2d 1393 (2d Cir. 1973)) (applying identical Massachusetts UCC provision). Therefore, the factfinder is to "consider all aspects of the sale, not just any disparity between the market price of the collateral and the value realized from the disposition." *United States v. Terrey*, 554 F.2d 685, 693 (5th Cir. 1977) (citation omitted) (applying Texas UCC provision virtually identical to MUCC section 9-503(3)). The MUCC provides further guidelines for determining commercial reasonableness:

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.

11 M.R.S.A. ' 9-507(2). "If the secured creditor makes certain that conditions of the sale, in terms of the aggregate effect of the manner, method, time, place and terms employed conform to commercially accepted standards, he should be shielded from the sanctions contained in Article 9." *In the Matter of Zsa Zsa Limited*, 352 F. Supp. at 671. Although the price obtained from a sale may be a relevant factor, the fact that it was too low does not *a fortiori* establish commercial unreasonableness. *Nadler*, 733 F.2d at 184. *See also Maine National Bank v. Jopet Jewelers, Inc.*, 538 A.2d 270, 272 (Me. 1988). Under the MUCC the plaintiff bears the burden of proving that it acted in a commercially reasonable manner. *Camden National Bank v. St. Clair*, 309 A.2d 329, 331, 333 (Me. 1973).

Orix has made a prima facie showing that it executed the sales of the truck and the two trailers in a commercially reasonable manner. Its experience in repossession and resale of collateral serves as a sound basis for the opinion of its officers as to what the industry practice is for various aspects of resale. After repossessing the vehicles, which the defendant does not challenge here, the plaintiff stored them pending their resale. Orix provides a reasonable and unrebutted explanation for the higher costs associated with storing, advertising and reselling the trailers than the truck, namely that they have a unique design and limited use and are therefore more difficult to sell. Furthermore, its advertising and notice of sale comported with industry practice for disposition of equipment of this kind. In its effort to resell the vehicles Orix separately advertised the truck and the two trailers in newspapers of general circulation and trade journals close in time to each of the sales. Its advertisements included the time, date, location and terms of sale and were designed to attract as many bidders as possible. It further notified businesses and individuals who in its experience would likely have a potential interest in purchasing the vehicles. In compliance with section 9-504(3), Orix also

properly notified the defendant of the upcoming sales. It then held the public sales as advertised and, as the high bidder at both sales, purchased all three vehicles.

In response to this portrait of commercial reasonableness, the defendant provides no evidence of specific deficiencies in the plaintiff's conduct. Rather he merely asserts that Orix acted in a commercially unreasonable manner and that the price of purchase was below market value. However, "[u]nsupported allegations are insufficient to create a genuine dispute." *Ortega-Rosario*, 917 F.2d at 73. Mundy contends that the advertising and the terms of the bidding were unreasonable, but he fails to detail or support his allegations. Nor does he provide evidence rebutting the plaintiff's explanation for the higher costs of advertisement, storage and a lien search for the trailers.

The defendant also fails to offer convincing evidence that the terms for purchase at the sales were unreasonably restrictive. Mundy's claim that the unreasonable character of the auction terms is established by Beard's inability to meet them is fallacious. The plaintiff's showing that the terms were reasonable cannot be challenged simply by evidence that one potential bidder was financially unable to meet them. There must be convincing evidence that the terms were unusual for the industry and that therefore Beard's ability to bid at the auction was unreasonably hampered. Instead, Beard was apparently unable to purchase the truck for the price that defendant now asserts is its fair market value except on an installment credit basis which Orix provided him. The court is unaware of any precedent which obligates a secured party to provide sale terms that are favorable to the debtor, such as the low down payment and financing that Beard received from Orix after the auction. Rather, a creditor is simply required by section 9-504(3) to provide reasonable terms of sale; Mundy has not met his burden of showing in what manner Orix failed to act in compliance with this responsibility.

Finally, as the United States Court of Appeals for the First Circuit made clear in *Nadler*, the commercial reasonableness of a secured party's sale conduct does not turn on a discrepancy between

the value of the vehicles and the resale purchase price. *Nadler*, 733 F.2d at 184. `` It has long been recognized that property does not bring its full value at forced sales, and that price depends on many circumstances from which the debtor must expect to suffer a loss." *In re Application of Nicholas Bickel*, 14 Ill. App. 3d 813, 815, 303 N.E.2d 541 (1973) (citation omitted). Even courts that treat as suspicious a wide discrepancy between the fair market value of collateral (which has not been established in this case) and its resale price, hold that such a discrepancy is not determinative of unreasonableness, even where the seller is also the purchaser. Rather, such a finding puts the court on notice to more closely scrutinize the procedures to be certain that such discrepancies are not an indication of underlying commercially unreasonable procedures. *E.g., Connex Press, Inc. v. International Airmotive, Inc.*, 436 F. Supp. 51, 56 (D.D.C. 1977) (applying Maryland law), *aff'd without op.*, 574 F.2d 636 (1978). The record reveals no such inadequacy in the plaintiff's resale procedures.

In conclusion, I find that the plaintiff has met its burden of showing that it conducted both sales in a commercially reasonable manner and that such showing has not been rebutted. Thus, there remains no genuine dispute as to any material issue of fact in this case.

IV. CONCLUSION

For the foregoing reasons, Orix's motion for partial summary judgment is hereby **GRANTED**. Judgment shall enter for \$87,752.97 in principal and accrued interest through the date of judgment, plus reasonable attorney fees.

Counsel shall confer forthwith and attempt to agree upon reasonable attorney fees. If they are unable to agree, the parties shall file written submissions on the issue on or before February 14, 1992 and the court will resolve the matter on the basis of the written submissions.

Dated at Portland, Maine this 21st day of January, 1992.

David M. Cohen
United States Magistrate Judge