[Cite as *First Natl. Bank of Dennison, Inc. v. Grewell*, 2004-Ohio-3986.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE FIRST NATIONAL BANK OF DENNISON, INC.	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellant	:	William B. Hoffman, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 03 AP 12 0095
GAIL GREWELL	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From New Philadelphia Municipal Court Case CVF 00 00811
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 21, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
BRAD L. HILLYER 201 North Main Street Uhrichsville, OH 44683	RICHARD RENNER 505 North Wooster Avenue Dover, OH 44622

Edwards, J.

{¶1} Plaintiff-appellant The First National Bank of Dennison, Inc. appeals from the November 17, 2003, Judgment Entry of the New Philadelphia Municipal Court.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 25, 1988, appellee Gail Smith nka Grewell executed a Note, Disclosure and Security Agreement with appellant The First National Bank of Dennison for the purchase of an automobile. Pursuant to the terms of the note, appellee agreed to pay $343.38 for thirty months commencing March 26, 1988, for a total of $10,301.40. After she was unable to make the payments on the note, appellee voluntarily surrendered the automobile to appellant. The automobile then was sold by appellant in 1988 for the amount of $3,300.00, which was less than the amount due and owing on the note.

{¶3} Approximately twelve years later, on December 6, 2000, appellant filed a complaint against appellee in the New Philadelphia Municipal Court, alleging that "[t]here is due and owing a deficiency balance in the amount of Fourteen Thousand Two Hundred Eighty Four Dollars and 16/100 ($14,284.16) plus interest at the rate of twelve and seventy five hundreds (12.75%) percent as of October 13, 2000,…" Appellee, on February 15, 2001, filed an answer and counterclaim. Appellee, in her answer, raised the defense of the doctrine of laches and also, in her counterclaim, alleged that appellant had failed to give notice of the correct date, time and place of the public sale of the automobile as required by R.C. 1309.47(C) and had failed to dispose of the automobile in a commercially reasonable manner.

{¶4} After the trial court denied motions for summary judgment filed by both parties, a bench trial before a Magistrate was held on February 1, 2002. The following testimony was adduced at the trial.

{¶5} On cross-examination, appellee Gail Grewell testified that she took out a loan from appellant in 1988 in order to purchase a Honda automobile and that, after she was unable to make the payments on the loan, she surrendered the automobile to appellant. Appellee then received a "Right to Cure Default and Notice of Sale If Default Not Cured" from appellant via certified mail[1] indicating that, in order to cure her default and regain possession of her automobile, she needed to pay a total of $1,746.90. The notice further indicated that if appellee did not cure her default by paying the same, the automobile would be sold at public sale for a minimum price of $2,500.00 at 824 Boulevard in Dover, Ohio, at 11:00 a.m. on July 9, 1988. Appellant bank is located at 824 Boulevard in Dover, Ohio.

{¶6} Thereafter, pursuant to a letter dated July 14, 1988, appellant advised appellee as follows:

{¶7} "The Repossession and Sale Notice mailed to you June 24, 1988, advised you that your 1985 Accord which had been repossessed for failure to comply with the terms of contract covering the above account, would be sold if redemption was not made by a designated date. This is to advise that since redemption was not made, the said collateral has been sold at public auction and the net proceeds of such sale have been applied to your account leaving a deficiency balance owing of $5,575.48.

{¶8} "Under the terms of your contract the above deficiency is now due and payable.

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[1] Appellee's then husband signed for the same on June 25, 1988.

{¶9} "It is of vital importance that you remit this deficiency or make satisfactory arrangements for its liquidation within ten (10) days from the date of this notice."

{¶10} At trial, appellee testified that she did not recall receiving such letter, which had been signed for by her then approximately 15 year old stepson. When questioned, appellee testified that she did not recall if she had paid anything on the loan since the July 14, 1988, letter was sent since she did not have any records going back that far. The following is an excerpt from appellee's trial testimony:

{¶11} "Q. Now how many addresses have you lived in since, since July of 1988? Just tell the Court where approximately you lived from what date to what date and, and - -

{¶12} "A. Okay, to the best of my recollection in 1988 I lived in Cadiz, Ohio. From there I lived for a short time in Salineville, Ohio and then I moved back to Tuscarawas County and lived in the county up until the present time.

{¶13} "Q. Okay, where in the county?

{¶14} "A. I lived in New Philadelphia and then - -

{¶15} "Q. And where specifically?

{¶16} "A. I lived across the street from Central Catholic High School, I'm not sure what street that is and then I lived on Second Street in New Phila[delphia] and then I lived on Beaver Avenue, Northeast in New Philadelphia. Then I moved to Dover, to Schneiders Crossing and then when I married my husband I moved to Midvale, Ohio.

{¶17} "Q. And during that time you would have been, you would have used the name Smith for a period of time, Grewell for a period of time and then you would have used the name Garbrandt then since your marriage date?

{¶18} "A. Yes.

{¶19} "Q. Okay, and the marriage date was when?

{¶20} "A. June of 1996.

{¶21} "Q. To the best of your knowledge, Mrs. Garbrandt, have you ever reported since 1988 your change of name or address to anyone at First National Bank of Dover?

{¶22} "A. No." Transcript at 18-19.

{¶23} The next witness to testify at the trial was Larry Moser, Executive Vice President at appellant The First National Bank of Dennison. Moser, who has been employed by appellant since 1985, testified that he personally conducted the public sale of the automobile on July 9, 1988, which is the date set forth in "Right to Cure Default and Notice of Sale If Default Not Cured" that was mailed to appellee. Appellee did not attend the sale. According to Moser, the vehicle was sold for $3,300.00 on such date to James Reardon, who signed a document dated July 9, 1988, stating that he understood that the vehicle that he purchased was a repossessed vehicle and was being sold in an "as is" condition. The document that Reardon signed was witnessed by Carol Dawson. Moser further testified that, after the sale, there was a deficiency balance of $5,575.48 and that appellee had not made any payments on the account since 1988.

{¶24} When asked why the bank sought payment of the deficiency in 2000, which is twelve years after the sale, Moser testified that he happened to see appellee and remembered the deficiency. Moser further testified that the last address that appellant had for appellee was Johnston Road in Cadiz, Ohio, and that he was unaware that appellee had gotten divorced and gone back to her maiden name and then was remarried. According to Moser, the title and address of appellant bank had not changed during the twelve years between the sale and the date of the complaint.

{¶25} Appellee then testified on direct examination. Appellee testified that, as of the date of the trial, she had been employed by the University of Akron and had been at such job for approximately two years. Appellee testified that she was unable to recall any of her discussions with bank personnel at the time of the repossession, what the bank told her that caused her to surrender the automobile to the bank and what payments she had made on her account. Appellee further testified that she had no records showing what her payments were and that she did not recall receiving the notice of right to cure or the notice of deficiency. On recross-examination, appellee testified that she did not make any efforts to pay the balance on the account since "I had no memory that there was anything due so I had no reason to go to the bank." Transcript at 69.

{¶26} As memorialized in a decision filed on February 25, 2002, the Magistrate recommended that judgment be granted in favor of appellant in the amount of $14, 284.16 plus interest at the rate of 12.75% from December 8, 2000, plus costs. The Magistrate, in his decision, specifically concluded that appellant "repossessed the collateral without breaching the peace, gave proper notice to the defendant of the sale

of the collateral, and sold the collateral in a commercially reasonable manner." The Magistrate further found that appellee was not materially prejudiced by the delay in filing the lawsuit.

{¶27} Both parties filed objections to the Magistrate's decision. Pursuant to a Judgment Entry filed on November 17, 2003, the trial court adopted the Magistrate's decision in part, rejected the same in part and granted judgment in favor of appellee. While the trial court agreed that appellee was given proper notice of the sale of the automobile, the court disagreed with the Magistrate's conclusion that the same was sold in a commercially reasonable manner. The trial court, in its November 17, 2003, Judgment Entry, specifically stated, in pertinent part, as follows:

{¶28} "The burden is also upon the plaintiff to prove, however, that the collateral was sold in a commercially reasonable manner. It would be necessary in establishing this requirement to prove that the public sale was actually conducted on the date, at the time, and at the place set forth in the notice…

{¶29} "The plaintiff does not meet its burden, however, in establishing that the public sale was held at the place set out in the notice. The court has examined the testimony of the plaintiff's only witness and there is no testimony as to the place that the sale actually occurred. In fact, the time of sale is only mentioned in general terms in cross examination and is not established conclusively as to this sale. The court also examined the exhibits admitted and could find no evidence of the actual time and place the sale was held. In fact, defendant's exhibit one, which is a copy of defendant's first set of interrogatories, question fifteen asks: "What was the date and place of disposition of the collateral, the price of resale, and the purchaser's name,

address and telephone number?" Plaintiff's answer is: "The name of the purchaser of the vehicle is James Reardon, we do not have any other information regarding the purchase."

{¶30} "Since the record contains no evidence to prove that the public sale of the collateral was actually held at 824 Boulevard, Dover, Ohio 44622, as set out in the notice, and because the court cannot find from the evidence in the records that the public sale was held at 11:00 A.M., the court must find that the secured party, the plaintiff, has failed to meet its burden of proof and has failed to demonstrate that the disposition of the collateral was done in accordance with the notice. Therefore, the court is unable to find that the sale was conducted in a commercially reasonable manner and in accordance with the notice."

{¶31} The trial court, in its entry, further found that the doctrine of laches did not prevent appellant from asserting its claim.

{¶32} It is from the trial court's November 17, 2003, Judgment Entry that appellant now appeals, raising the following assignment of error:

{¶33} "THE PLACE AND TIME OF THE SALE OF THE VEHICLE WAS ESTABLISHED AT TRIAL, AND THEREFORE, THE SALE WAS COMMERCIALLY REASONABLE IN ACCORDANCE WITH R.C. SEC. 1309.47(C)."

{¶34} Appellee raises the following assignments of error on cross-appeal:

{¶35} "I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT SOLD THE COLLATERAL ON JULY 9, 1988.

{¶36} "II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THIS ACTION ON GROUNDS OF LACHES."

I

{¶37} Appellant, in its sole assignment of error, argues that the trial court erred in holding that the sale of the automobile was not commercially reasonable in accordance with R.C. 1309.47(C). Appellant specifically contends that the place and time of the sale were established at trial and that, therefore, the sale was commercially reasonable in accordance with R.C. 1309.47(C). We disagree.

{¶38} We are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶39} The relevant version of R.C. 1309.47[2] stated, in relevant part, as follows:

{¶40} "(C) Disposition of the collateral may be by public or private proceedings and may be made by way of one 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. 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

[2] R.C. 1309.47 was repealed, effective July 1, 2001.

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."

{¶41} "The secured party has the burden of proving that the sale of collateral was commercially reasonable pursuant to R.C. 1309.47." *Huntington Bank v. Freeman* (1989), 53 Ohio App.3d 127, 129-130, 560 N.E.2 251, citing *First Natl. Bank v. Turner* (1981), 1 Ohio App.3d 152, 439 N.E.2d 1259; *Winters Natl. Bank & Trust Co. v. Saker* (1979), 66 Ohio App.2d 31, 419 N.E.2d 890; *Peoples Acceptance Corp. v. Van Epps* (1978), 60 Ohio App.2d 100, 395 N.E.2d 912. Compliance with the notice requirements of R.C. 1309.47 is a condition precedent to the recovery of a deficiency judgment and a creditor's failure to comply with such requirements is an absolute bar to the recovery of a deficiency judgment, even though the creditor's disposition of the collateral was otherwise commercially reasonable. *Liberty Bank v. Greiner* (1987), 62 Ohio App. 2d 125, 405 N.E.2d 317.

{¶42} In the case sub judice, the trial court, in its November 17, 2003, Judgment Entry, stated that, in order to prove that the sale of the automobile was commercially reasonable, "[i]t would be necessary …to prove that the public sale was actually conducted on the date, at the time, and at the place set forth in the notice." While the trial court found that the sale did occur on July 9, 1988, the date set forth in the notice, the court further found that there was "no testimony as to the place that the sale actually occurred." We agree.

{¶43} At the bench trial, Larry Moser, appellant's only witness, testified that appellee was sent a notice stating that, unless she cured her default, the automobile

would be sold on July 9, 1988, at 11:00 A.M. and that the automobile was sold on such date. Moser, who testified that he personally conducted the sale, testified as follows when asked if he could identify anywhere in the record where the bank produced any record or claim that the sale of the collateral occurred on July 9, 1988: "Yes, sir, I have it right here in my hand . It says right here it occurred July 9th. This sale starts at 11:00 a.m…" Transcript at 47. The "it" referred to by Moser was the notice of right to cure default that was sent to appellee prior to the sale. Thus, contrary to appellant's assertion, Moser's above testimony does not establish that the sale actually occurred at the time set forth in the notice sent by appellant to appellee.

{¶44} Furthermore, upon review of the record, we find that no evidence was presented at trial as to the location of the sale.[3] While appellant, in its brief, indicates that Moser testified that the sale "happened according to standard bank procedure, which is to hold the auctions at the bank," Moser never actually testified that such was standard bank procedure.

{¶45} Based on the foregoing, we find that the trial court did not err in holding that appellant failed to meet its burden of establishing the time and place of the sale and that the sale, therefore, was not commercially reasonable.

{¶46} Appellant's sole assignment of error is, therefore, overruled.

CROSS-APPEAL

[3] While appellant, in its brief, contends that appellee did not raise the issue of the location of the sale in her objections to the Magistrate's Decision, we note that appellee, in her objections, did argue that appellant's claim was barred due to appellant's failure to comply with R.C. 1309.47(C). Furthermore, even if no objections had been filed, the trial court had the duty to review the Magistrate's Decision for "an error of law or other defect." See Civ. R. 53(E)(4)(a).

{¶47} Appellee, in her two assignments of error on cross-appeal, argues that the trial court erred in holding that appellant sold the automobile on July 9, 1988, and erred in failing to dismiss this action on grounds of laches.

{¶48} Based on our disposition of appellant's sole assignment of error, appellee's assignments of error on cross-appeal are moot.

{¶49} Accordingly, the judgment of the New Philadelphia Municipal Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur

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JUDGES

JAE/0422

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THE FIRST NATIONAL BANK OF DENNISON, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY

GAIL GREWELL :
:
:
Defendant-Appellee : CASE NO. 03 AP 12 0095

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the New Philadelphia Municipal Court is affirmed. Costs assessed to appellant.

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JUDGES