

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Deere Credit, Inc.

Court of Appeals No. WD-13-034

Appellee

Trial Court No. 2012-CV-0332

v.

Timothy D. Spitler

DECISION AND JUDGMENT

Appellant

Decided: March 14, 2014

* * * * *

Erin M. Callihan, for appellee.

Daniel T. Spitler and Carl Ireland, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a summary judgment granted to appellee, Deere Credit, Inc., by the Wood County Court of Common Pleas. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} In 2007, Indiana Golf and Sports Turf, LLC (“Indiana Golf”), entered into two separate purchase agreements, with appellee, for five items of golf course maintenance equipment. Each agreement contained a co-lessee addendum signed by appellant, Timothy D. Spitler, as an individual guarantor for each purchase agreement. One agreement was for \$54,745 and the second agreement was for \$16,975. When, in 2009, Indiana Golf failed to make payments pursuant to the agreements, appellee repossessed and sold the equipment.

{¶ 3} On May 7, 2012, appellee commenced this present action seeking a judgment against appellant in the amount of \$31,946.05, the amount of the deficiency following the sale of the equipment. Appellee filed a motion for summary judgment and on April 16, 2013, the court granted appellee’s motion. Appellant now appeals setting forth the following assignments of error:

I. Failure to give proper notice of the manner, time and place of resale will operate as a complete bar to recovery.

II. Excluding non-wholesaling entities from a public sale is not commercially reasonable.

{¶ 4} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 5} In his first assignment of error, appellant contends that there exists a genuine issue of material fact as to whether or not appellee gave proper notice of the manner, time and place of the equipment sale. R.C. 1309.610 permits a secured party to dispose of collateral after default, provided that “every aspect” of the disposition is commercially reasonable. The statute allows for public or private sale, and pursuant to R.C. 1309.611, the secured party must notify the debtor before the disposal occurs.

{¶ 6} R.C. 1309.613(A)(1) specifically provides:

The contents of a notification of disposition are sufficient if the notification:

- (a) Describes the debtor and the secured party;
- (b) Describes the collateral that is the subject of the intended disposition;
- (c) States the method of intended disposition;

(d) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(e) States the time and place, by identifying the place of business or address or by providing other information that, in each case, reasonably describes the location, of a public disposition or the time after which any other disposition is to be made.

{¶ 7} Appellant acknowledges that appellee gave him proper notice of a private sale. However, appellant contends that the actual nature of the sale was conducted in a public manner. Thus, appellee's notice for a private sale did not comply with R.C. 1309.613 and appellee is therefore barred from recovering a deficiency judgment.

{¶ 8} Neither the Ohio Revised Code nor The Uniform Commercial Code ("UCC") define private sale. The UCC does provide that every aspect of a private sale must be commercially reasonable. *John Deere Constr. & Forestry Co. v. Mark Merritt Constr. Inc.*, 297 Ga.App. 744, 678 S.E.2d 183, 184 (2009). "As a practical matter, this means that the creditor must send proper notice, the sale must occur after the time stated in the notice, and the sale price must be fair and reasonable." *Colonial Pacific Leasing Corp. v. N & N Partners, LLC*, N.D.Ga. No. 3:12-cv-143-TCB, 2013 WL 5880590, *5 (Nov. 4, 2013).

{¶ 9} The evidence in this case shows that the collateral at issue was sold on an online auction via a secured site only accessible to authorized John Deere Agricultural dealers and approximately 80 used equipment brokers. Given the fact that the bidding

was only open to designated bidders, we find that the nature of the sale conducted by appellee was indeed private. As the trial court aptly stated: “[a] private auction conducted on the internet is not substantially different from a private auction conducted when all parties are physically present in the same location.”

{¶ 10} Appellant’s first assignment of error is found not well-taken.

{¶ 11} In his second assignment of error, appellant contends that appellee conducted a public sale of the collateral in a commercially unreasonable manner. Appellant states: “[T]he public sale system used here excluded non-wholesale bidders and thus is inherently commercially unreasonable in a public sale.” Appellant focuses his attention on the price discrepancy between the original sale and the resale as well as the fact that appellee did not employ an outside appraiser to value the collateral before resale.

{¶ 12} As we concluded, in appellant’s first assignment of error, the nature of the sale at issue was private rather than public. Thus, what is deemed “commercially reasonable” in the context of a public sale is irrelevant for purposes of this case.

{¶ 13} In any event, we find that the private sale of the collateral was conducted in a commercially reasonable manner. R.C. 1309.627 provides:

(A) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the

collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(B) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

{¶ 14} In support of its motion for summary judgment, appellee provided documentation showing that appellant received proper notice of the sale and that the collateral was inspected by an independent third party. After the third party inspection was audited for completeness, photos and descriptions of the collateral were placed on appellee's auction site. Appellee also provided photos showing how the collateral appeared on the auction site. When the bidding closed, the bids were reviewed and compared to the estimated fair value of the collateral. Any unacceptable bids were returned to the auction site and the process was repeated.

{¶ 15} The record in this case shows that appellant received proper notice and we agree with the trial court that appellee sufficiently demonstrated that it conducted the sale

in a commercially reasonable manner among its recognized market of dealers and equipment brokers. Appellant's second assignment of error is found not well-taken.

{¶ 16} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
