STATE OF VERMONT

SUPERIOR COURT
Orange County

CIVIL DIVISION
Docket No. 101-4-10 Oecv

RBS Citizens NA
Plaintiff

v.

Stephen A. Gardner
Defendant

Decision on Defendant's Motion for Partial Summary Judgment

Plaintiff RBS Citizens Bank seeks a deficiency judgment after repossessing defendant Stephen Gardner's car and selling it at a private sale. In the present motion for partial summary judgment, defendant argues that the bank should be barred from recovering any deficiency judgment because the bank did not provide him with reasonable notice prior to disposition of the vehicle. Defendant also argues that he is entitled to judgment as a matter of law on his counterclaims for damages under the Uniform Commercial Code and Vermont Consumer Fraud Act. For the following reasons, the court concludes that there are genuine issues for trial.

The following facts are established for purposes of summary judgment. Mr. Gardner purchased a car for his own personal use from a now-defunct dealership in White River Junction, Vermont. He made a down payment on the vehicle and entered into a financing agreement for the remaining price. Six months later, he stopped making the monthly payments and voluntarily surrendered the car to the bank.

After repossessing the vehicle, the bank sent two notices to Mr. Gardner. The first notice was sent in January 2009 for the purpose of advising him of the pending disposition of the vehicle. For the most part, the contents of the notice comport with the UCC requirements for notices of disposition, but there are two possible violations. The first is that the letter is not authenticated as required by 9A V.S.A. § 9–611(b) but rather ends as follows:

> Sincerely,
> Asset Disposition-Redemption Specialist
> 480 Jefferson Blvd, RJE110
> Warwick, RI 02886

Another possible violation is that the bank does not appear to identify itself in the notice as the secured lender, as required by 9A V.S.A. § 9–614(1)(A).

The second notice was sent in March 2009 after the private sale. The purpose of this letter was account for the proceeds of the sale and to notify defendant that there was a remaining deficiency of $17,804.01. Mr. Gardner alleges that this notice was improper because it did not credit him for "unused balances" of interest and gap insurance.[1]

Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). The moving party bears the burden of demonstrating that there are no genuine disputes of material fact and that he is entitled to judgment. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e).

Here, the first question is whether the bank is barred from recovering any deficiency judgment because the January 2009 notice of disposition was not authenticated. Under the 2000 revisions to the Uniform Commercial Code, secured lenders may repossess the collateral in the event of default, but before disposing of the same, they must provide the debtor with "reasonable authenticated notice" of the planned disposition. 9A V.S.A. § 9–611(b). An "authenticated notice" means a notice that is either signed or otherwise executed or adopted or processed "with the present intent of the authenticating person to identify the person and adopt or accept a record." *Id.* § 9-102(7). In this case, the parties agree that the January 2009 letter was not signed, and there is no other evidence in the record that the letter was marked in such a way as to be considered "authenticated" within the meaning of the UCC.

The question then becomes whether the lack of authentication renders the notice insufficient as a matter of law. This question is important because "failure to provide reasonable notice of disposition acts as an absolute bar to recovery of a deficiency." *Ford Motor Credit Co. v. Welch*, 2004 VT 94, ¶¶ 12–14, 177 Vt. 563 (mem.); *Federal Fin. Co. v. Papadopoulos*, 168 Vt. 621, 624 (1998) (mem.); *Chittenden Trust Co. v. Andre Noel Sports*, 159 Vt. 387, 392–95 (1992); *Chittenden Trust Co. v. Maryanski*, 138 Vt. 240, 246 (1980).[2]

UCC § 9–614(1) provides that notices of disposition in a consumer-goods transaction must include a number of items including, *inter alia*, a description of the debtor and the secured party, a description of the collateral, and a statement as to how the creditor intends to dispose of the collateral. A consumer notification that lacks any of the required information is insufficient as a matter of law. *Id.* § 9–614, Official Comment.

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[1] A third issue raised by defendant was that the bank failed to prove that it "delivered" the letters to him. All that the UCC requires, however, is proof that the creditor "sent" the notice; "it does not have to be received to be effective." 9C Hawkland UCC Series § 9-611:1 [Rev]; 4 White & Summers, Uniform Commercial Code § 34–12 (6th ed. 2010). In any event, the record appears to contain certified mail receipts signed by Mr. Gardner.

[2] Although the 2001 UCC revisions established a new "rebuttable presumption" rule for calculating deficiencies in commercial transactions, the revisions left the courts free to apply the "established approaches" in consumer transactions. 9A V.S.A. § 9–626(b). As noted in the above-cited cases, the established approach in Vermont is the *Maryanski* absolute-bar rule.

Noticeably absent from the list of legally required information in § 9–614 is the "authentication" requirement of § 9–611(b). The conclusion to be drawn from this is that an unauthenticated notice of disposition is not automatically unreasonable as a matter of law. Rather, a lack of authentication creates a genuine issue for trial as to the reasonableness of the notice. See 4 White & Summers, Uniform Commercial Code § 34–12 (6th ed. 2010) (explaining that the UCC provisions relating to authentication do not "foreclose the possibility that actual notice acquired by means that were not 'authenticated' would still be effective"). In this case, therefore, the fact that the notice was not authenticated does not entitle defendant to judgment as a matter of law, but rather creates a need for a trial to determine whether the notice was commercially reasonable.

A more pressing concern is that the notice of disposition does not appear to identify the secured lender as required by § 9–614(1)(A) and § 9–613(1)(A). As the "safe harbor" form makes clear, lenders are supposed to put the "name and address of [the] secured party." *Id.* § 9–614(3). In this case, the notice of disposition does not include either the name or the address of the secured lender, but rather refers only in generic terms to "the bank" and to "us" and "our." At the end of the letter, moreover, the party writing the letter is identified only as "Asset Disposition-Redemption Specialist" without any indication as to who the "redemption specialist" works for. An address is provided for the asset-redemption specialist, but it is not clear whether that is also the address for the secured lender.

Yet defendant did not establish whether the notice of disposition was the only information included within the January 2009 mailing. Neither his statement of material facts nor his requests for admission established whether the notice that is reproduced in the record was the only information included in the mailing, or whether the bank identified itself as the secured lender through some other means, such as by a cover letter. Plaintiff's responses seem to indicate that the bank identified itself at least on the mailing label; whether additional information was provided is unclear. It must be kept in mind here that no particular form of notice is required so long as the form chosen is commercially reasonable. 9A V.S.A. § 9–614(2). Here, an issue remains for trial as to whether the secured lender identified itself in a commercially reasonable manner in the January 2009 notice.

Because genuine issues remain as to whether the notice of disposition was commercially reasonable, the court does not reach the questions of whether defendant is entitled to damages under the Uniform Commercial Code and the Vermont Consumer Fraud Act. The predicate facts establishing violations of those statutes have not been proven at this time.

The penultimate issue is whether defendant has established as a matter of law that the car dealership committed consumer fraud by misrepresenting the gas mileage and the towing capacity of the vehicle in a manner that induced defendant to purchase the car. The only evidence on this point in the record is a request for admission in which defendant asked plaintiff to admit that (1) plaintiff does not know what the dealership

said about the vehicle and that (2) the dealership "personnel or agents made intentional misrepresentations to defendant concerning material matters of gas mileage and towing capacity which induced defendant to purchase [the] vehicle." Predictably, plaintiff admitted the first point and denied knowledge of the second, which leads to the observation that a request for admission phrased in generalized terms is not a particularly effective method of attempting to prove the existence and content of a misrepresentation.[3] In any event, the fact of a misrepresentation has not been established for purposes of summary judgment, and so it remains an issue for trial.

The final issue is whether defendant has established as a matter of law that plaintiff engaged in a deceptive commercial act by failing to credit his account for "the unused 62 months of interest and gap insurance." Here, the terms and conditions of the gap insurance and interest amortization were not established for purposes of summary judgment, and the propriety of their inclusion in the request for a deficiency judgment remains a question of fact for trial.

ORDER

(1) Defendant Stephen Gardner's Motion for Summary Judgment (MPR #5), filed November 18, 2010, is ***denied***.

(2) Defendant Stephen Gardner's Motion to Exclude Plaintiff's Attachments, filed March 18, 2010, is ***denied***.

(3) By July 15, 2011, the parties shall submit a stipulation for ADR and completion of discovery in which the trial-ready date is no later than January 1, 2012.

Dated at Chelsea, Vermont this 27 day of June, 2011.

Harold E. Eaton, Jr.
Superior Court Judge

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[3] Defendant's separate motion to exclude plaintiff's responses to the requests for admission is denied. A party responding to a request for admission may deny knowledge of the request; there is no requirement that the party respond as if the request was an interrogatory. 8B Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d §§ 2260–61. In any event, requests for admission are meant to refine the issues in the case rather than establish the merits. *Id.* § 2252.