COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP689 **Cir. Ct. No. 2002CV238**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CIT GROUP EQUIPMENT FINANCING, INC.,

PLAINTIFF-APPELLANT,

V.

FRS FARMS, INC., FREDERICK R. STEWART AND JANELL STEWART,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. CIT Group Equipment Financing appeals a circuit court judgment dismissing CIT's claim for a deficiency judgment against FRS Farms, Frederick Stewart, and Janell Stewart (collectively "FRS Farms," unless

otherwise indicated). FRS Farms defaulted on equipment leases, prompting CIT to file this action, repossess the equipment, and sell it. Following the sales, CIT sought a deficiency judgment for the difference between the amount FRS Farms owed and the proceeds of the sales. At a bench trial, the dispute centered on whether CIT's sales of the equipment met the "commercially reasonable" requirement in the Uniform Commercial Code (U.C.C.), codified in WIS. STAT. ch. 409 (2005-06).[1]

¶2 CIT argues that the circuit court erred in determining that the sales were not commercially reasonable. CIT also asserts that the circuit court erred in concluding that CIT is equitably estopped from obtaining a deficiency judgment. FRS Farms argues that the election-of-remedies doctrine provides an alternative ground for upholding the circuit court's decision to deny a deficiency judgment.

¶3 We affirm the circuit court's finding that the sales were not commercially reasonable. We agree with CIT, however, that the circuit court erred in denying CIT a deficiency judgment on grounds of equitable estoppel. We reject FRS Farms' election-of-remedies argument. We conclude, therefore, that CIT is entitled to a deficiency judgment in an amount to be determined on remand. We affirm in part, reverse in part, and remand for the circuit court to determine the proper amount of the deficiency judgment.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Background

¶4 FRS Farms leased meat processing equipment from a company called Amplicon Financial.[2] FRS Farms executed a lease in August 2000 for a bone crusher, and a separate lease in October 2000 for a "chubmaker" system. The leases identify the bone crusher and the chubmaker system as each having a price of $450,000.

¶5 Amplicon sold its rights in the leases to CIT. FRS Farms defaulted on the leases when it stopped making lease payments in July 2001.

¶6 CIT sued FRS Farms, seeking replevin and damages. In September 2002, CIT obtained a replevin order under WIS. STAT. ch. 810, the general replevin statutes, requiring that the equipment be delivered to CIT. CIT sold the components of the chubmaker system in October 2002 and March 2003 for a total of $183,000; it sold the bone crusher in late 2004 for $14,000. The sales proceeds thus totaled $197,000, several hundred thousand dollars less than the price of the equipment as shown on the leases.

¶7 After a bench trial, the circuit court concluded that CIT's sales of the equipment were not commercially reasonable. The court agreed with FRS Farms, however, that CIT should be equitably estopped from obtaining a deficiency judgment. It is unclear whether the court also agreed with FRS Farms' election-of-remedies argument. The circuit court dismissed CIT's claim for a deficiency judgment. CIT appeals.

[2] Frederick and Janell Stewart personally guaranteed the leases.

Discussion

A. Commercial Reasonableness Of The Sales

¶8 CIT argues that the circuit court erred in concluding that the sales of the equipment were not commercially reasonable. We disagree.[3]

1. Commercially Reasonable: General Standards

¶9 "The Uniform Commercial Code, as adopted by Wisconsin, requires that disposition of collateral by a secured party after default must be commercially reasonable." ***Appleton State Bank v. Van Dyke Ford, Inc.***, 90 Wis. 2d 200, 204, 279 N.W.2d 443 (1979). The relevant standard is set forth in WIS. STAT. § 409.610, Wisconsin's version of U.C.C. § 9-610. Section 409.610 provides, in pertinent part:

> (2) COMMERCIALLY REASONABLE DISPOSITION. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.

¶10 Further guidance on the meaning of "commercially reasonable" is contained in WIS. STAT. § 409.627, Wisconsin's version of U.C.C. § 9-627:[4]

> (2) DISPOSITIONS THAT ARE COMMERCIALLY REASONABLE. A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (a) In the usual manner on any recognized market;

[3] We note that some of CIT's arguments in the equitable estoppel portion of its briefs are more aptly directed at whether the sales were commercially reasonable. Thus, we address those arguments when discussing commercial reasonableness.

[4] The provisions cited are part of U.C.C. Revised Article 9, "Secured Transactions."

> (b) At the price current in any recognized market at the time of the disposition; or
>
> (c) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

¶11 FRS Farms argues that the standard in paragraph (c) applies here, and CIT does not disagree. Neither party suggests that either paragraph (a) or (b) applies, apparently because there is no "recognized market" for the equipment. *See* U.C.C. § 9-627, cmt. 4, 3 U.L.A. 568, at 569 (2002) (explaining that "the concept of a 'recognized market'" in these paragraphs is limited and "applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges"). Accordingly, the question for the circuit court was whether CIT sold the equipment "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."

2. Commercially Reasonable: Burden Of Proof

¶12 Under WIS. STAT. § 409.626(1)(b), the party disposing of collateral has the burden to show that the sale was commercially reasonable. *See also* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 451 n.16, 405 N.W.2d 354 (Ct. App. 1987) ("A secured party must establish that every aspect of the sale of secured property was commercially reasonable."). Thus, CIT had the burden of proof at trial.

3. Commercially Reasonable: Standard Of Review

¶13 The parties spend little time discussing our standard of review. Citing ***Appleton State Bank***, 90 Wis. 2d at 205, CIT tells us that whether a disposition of collateral is "commercially reasonable" is a question of fact. Indeed, ***Appleton State Bank*** states: "In most cases what constitutes a

'commercially reasonable' disposition of collateral will be a fact question dependent on the surrounding facts and circumstances." ***Id.*** We question whether this appellate review standard makes sense in a case where the issue is whether underlying facts meet a statutory standard. However, CIT concedes that we are faced with a question of fact, and ***Appleton State Bank*** seemingly supports that view. Accordingly, we will uphold the circuit court's determination that CIT's sales of the bone crusher and the chubmaker system were not commercially reasonable unless that determination is clearly erroneous. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. Findings of fact are clearly erroneous when they are against the great weight and clear preponderance of the evidence. ***Id.***, ¶12. We affirm findings of fact if the evidence reasonably permits the findings, even though the evidence would also permit a contrary finding. ***Id.***

4. Whether The Circuit Court Erred In Determining That The Sales Were Not Commercially Reasonable

a. Whether The Circuit Court Erroneously Focused On "Proceeds" Instead Of "Procedures"

¶14 CIT argues that the circuit court erroneously placed undue emphasis on the relatively low prices CIT obtained, and failed to focus instead on the procedures CIT used, in disposing of the equipment. We disagree.

¶15 The primary focus of the commercial reasonableness inquiry is the procedures employed, not the amount of the proceeds. ***Appleton State Bank***, 90 Wis. 2d at 208. The proceeds of the sale, however, are relevant. This is made clear in the comments to the Uniform Commercial Code. "While not itself sufficient to establish a violation of [the relevant U.C.C. provisions], a low price suggests that a court should scrutinize carefully all aspects of a disposition to

ensure that each aspect was commercially reasonable." U.C.C. § 9-610, cmt. 10, 3 U.L.A. 515, at 518 (2002); U.C.C. § 9-627, cmt. 2, 3 U.L.A. at 569.

¶16 Here, the circuit court recognized that it was required to focus on the procedures. The court stated at the outset of its decision: "[I]t's not just a matter of price, as brought out by [counsel for CIT]. It's a matter of procedure. And we have to look at the procedure that was used here." The fact that the circuit court expressed concern about the low prices CIT obtained in the sales of the equipment does not show that the court applied an incorrect standard or that it drew unreasonable inferences from those prices.

b. Additional Background Facts And A Summary Of The Circuit Court's Decision

¶17 Before addressing CIT's other specific challenges, we provide additional background information.

¶18 At trial, CIT called one witness, Shawn Mulgrew, a CIT management-level employee involved in the equipment sales. Mulgrew testified that CIT had some experience in dealing with food processing equipment, but admitted that neither he nor his office specialized in such equipment. He also testified that the equipment was "specialty type equipment."

¶19 Mulgrew described the steps that CIT typically follows in selling repossessed property. Apart from his testimony that CIT sometimes hires outside companies to assist in sales, Mulgrew's testimony does not suggest that any of CIT's normal steps take into account the specialty nature of the equipment at issue here. For example, he explained that CIT notified potential buyers via an email

list containing approximately 500 names, but he knew of only one entity on the list that dealt in food processing equipment.

¶20 Mulgrew testified that, in this case, CIT hired two outside companies, Coldiron and Barliant, to assist in the sales. Coldiron specialized in semi-tractor trailers and construction equipment, not food processing equipment. CIT viewed Barliant as a knowledgeable source in the food processing secondary market. Coldiron assisted with the sale of the bone crusher, and Barliant assisted with the sale of the chubmaker system.

¶21 FRS Farms called three witnesses, including Bill Kroupa, the executive vice-president of a company specializing in food processing equipment, and Mark Thomas, senior vice-president of the company that sold the type of bone crusher that FRS Farms leased.

¶22 Kroupa testified that he inspected the chubmaker system, which appeared almost new. His understanding was that it had been used for only 12 to 16 hours. Kroupa estimated its value at $310,500, $127,500 more than the $183,000 CIT obtained.[5]

¶23 Thomas testified that his company was the sole North American distributor for the type of bone crusher leased by FRS Farms, and that his company sold most of the bone crushers in the United States. Thomas said his company deals in the resale of bone crushing systems. Thomas valued the bone

[5] Kroupa admitted that he did not inspect the interior of the chubmaker's heated water tank, a part of the chubmaker that CIT asserts had been damaged. However, the circuit court, acting as fact finder, was not required to credit any evidence indicating a reduced value attributable to this alleged damage.

crusher at $325,000, $311,000 more than the $14,000 CIT obtained. Thomas opined that a price of $14,000 for the bone crusher was "extremely low" and may have resulted from CIT's marketing methods.

¶24 Based on the testimony summarized above and other evidence, the circuit court made a number of underlying findings of fact, including the following:

1. The equipment was unique and specialized.
2. Some of the equipment had hardly been used.
3. There was a comparatively small market for the equipment.
4. The specialized nature of the equipment meant that CIT's reliance on its usual marketing practices, such as the email distribution list, did little to demonstrate that the sales were commercially reasonable.
5. The evidence indicated that no one had seen the equipment other than Frederick Stewart, Kroupa, and representatives of Coldiron and Barliant.
6. The nature of Coldiron's and Barliant's involvement in the sales raised conflict of interest concerns.
7. CIT obtained no formal written appraisals of the equipment.
8. None of the individuals who gave an opinion on the value of the equipment were certified appraisers.
9. CIT did not normally sell equipment of this type, and it should and could have made more of an effort to deal with the specialized market for the equipment.

¶25 These underlying findings led the circuit court to its ultimate finding that the sales of the equipment were not commercially reasonable. We conclude that this ultimate finding is not clearly erroneous. In the following three sections,

we address each of CIT's arguments challenging both the underlying findings and the court's ultimate finding.

c. CIT's "Industry Standards" Arguments

¶26 CIT argues that we must deem the sales commercially reasonable "as a matter of law" because the circuit court found that the procedures CIT used were, in CIT's words, "commercially accepted industry standards." This argument is based on a misinterpretation of the following comment made by the circuit court: "The evidence is that [CIT followed] what they called a usual customary procedure in collecting defaulted property and disposing of the same. And the fact that it is the commercially reasonable procedure for the industry doesn't mean that it necessarily is commercially reasonable." Reading this comment in context, it is clear that the court is saying that CIT may have followed its usual practice but CIT's usual practice was not commercially reasonable under the circumstances.

¶27 In a closely related argument, CIT asserts that the testimony of its sole witness, Mulgrew, established that the sales were commercially reasonable. Specifically, CIT points to Mulgrew's testimony that the steps CIT followed in conducting the sales were "consistent with industry standards" and argues that the record is devoid of evidence rebutting this testimony. However, the circuit court was free to disregard Mulgrew's testimony. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998) (it is the job of fact finders, not appellate courts, "'to review questions as to weight of testimony and credibility of witnesses'" (citation omitted)). Moreover, Mulgrew's testimony reveals that neither Mulgrew nor his office had significant experience dealing with the type of specialty equipment here.

d. Whether The Circuit Court Drew An Erroneous Inference From The Fact That Coldiron And Barliant Purchased The Equipment

¶28 There is no dispute that CIT employed Coldiron and Barliant to assist CIT in selling the equipment. Rather than sell directly to end purchasers, CIT sold the equipment to Coldiron and Barliant. CIT employee Mulgrew testified that the transactions were structured in this manner to simplify the process. Mulgrew explained that, by invoicing Coldiron and Barliant, CIT could avoid having to invoice the ultimate buyer and then issue separate checks to Coldiron and Barliant for their 10% commissions. CIT argues that the circuit court wrongly interpreted this arrangement as suspect and, therefore, as indicating that the sales were not "commercially reasonable." We disagree.

¶29 The circuit court's decision reveals that the court understood that the ultimate purchasers may well have been parties other than Coldiron and Barliant. Still, the court explained that the structure of the transactions "open[ed] the door" for conflicts of interest. The court's concern is amply supported by the record. On cross-examination, Mulgrew admitted that CIT could not verify the identity of any end purchasers and that it was possible Coldiron or Barliant could have turned around and sold the equipment at a higher price. Given the evidence before it, the circuit court drew a reasonable inference that this circumstance supported a finding that the sales were not commercially reasonable.

e. Whether The Circuit Court Erred By Drawing A Negative Inference From The Delay In The Sales Of The Equipment

¶30 As previously indicated, CIT obtained its replevin order in September 2002, but did not immediately sell all of the equipment. In particular, CIT did not sell the bone crusher until late 2004. In rendering its decision, the circuit court said: "And I also, one of the reasons why there was this delay, the

suit was—well, the default was in July of 2001, the suit was commenced about a year later. And the reasons for the delay, and there could be market fluctuations throughout this whole period, is that they had to get a stay of the bankruptcy. But the problem is the stay was not against the owner of the property …, so I think there was what you might term as being laches in delay on moving on this process, and it was perhaps somewhat of an extreme."

¶31 CIT argues that the above comment shows the circuit court inferred that CIT acted improperly in delaying the sale of the bone crusher. According to CIT, the court should not have drawn a negative inference from the delay for a number of reasons, including that the evidence shows it was reasonable to expect that it would take several months to sell the specialty type of equipment here and that FRS Farms caused or contributed to the delay.

¶32 We need not reach the merits of CIT's delay arguments. Instead, we conclude that it is apparent from the circuit court's decision that, regardless whether the court erroneously found that the delay had a detrimental effect on the price CIT obtained for the equipment, the court would still have made the same ultimate finding that the sales were not commercially reasonable, and this ultimate finding would still not be clearly erroneous.

f. Summary And Transition To Remaining Issues

¶33 For the reasons stated above, we reject CIT's argument that the circuit court erred in determining that the sales of the equipment were not commercially reasonable. This conclusion does not, however, resolve all issues on appeal. Even though we have rejected CIT's challenge to the circuit court's commercial reasonableness finding, the court also denied CIT a deficiency judgment based on equitable estoppel, and CIT challenges that decision.

Additionally, FRS Farms argues that the circuit court's denial of a deficiency judgment is supported by the election-of-remedies doctrine. Thus, we turn our attention to those issues.

B. Equitable Estoppel

¶34 CIT contends that the circuit court erred in denying CIT a deficiency judgment on the basis of equitable estoppel. CIT argues that FRS Farms failed to show that the facts here satisfy the elements of equitable estoppel. We agree.[6]

¶35 "The elements for equitable estoppel include (1) an action or non-action that induces (2) reliance by another, either in the form of action or non-action, (3) to his or her detriment." ***Russ v. Russ***, 2007 WI 83, ¶37, __ Wis. 2d __, 734 N.W.2d 874. The party asserting equitable estoppel has the burden to demonstrate that the elements are satisfied. ***Gabriel v. Gabriel***, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973). Here, that party is FRS Farms.

¶36 So far as we can discern, the circuit court applied equitable estoppel based on the same findings that led the court to conclude that the sales were not commercially reasonable. However, nothing in the circuit court's decision or in FRS Farms' argument explains how these findings satisfy the elements of equitable estoppel. Indeed, FRS Farms did not address the elements of equitable estoppel in the circuit court, and FRS Farms fails to address those elements now. Given the incomplete estoppel argument that FRS Farms made in the circuit court

[6] CIT also argues that equitable estoppel does not apply because estoppel principles are displaced in this case by the Uniform Commercial Code provision providing for a deficiency judgment. We need not address that argument.

and now repeats in this court, we conclude that FRS Farms has failed to show that equitable estoppel applies to bar CIT from obtaining a deficiency judgment.

C. Election-Of-Remedies Doctrine

¶37 Generally speaking, the election-of-remedies doctrine provides that a plaintiff is entitled to choose among available remedies so long as the plaintiff is not unjustly enriched, the defendant is not misled, and the result is not otherwise inequitable. *See* ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 807, 519 N.W.2d 674 (Ct. App. 1994). FRS Farms argues that the circuit court's decision denying CIT a deficiency judgment should be upheld under the election-of-remedies doctrine. We are not persuaded.

¶38 We initially observe that it is not apparent that FRS Farms presents a true election-of-remedies argument. FRS Farms labels its argument an election-of-remedies argument, but the underlying question appears to be a matter of statutory construction involving whether provisions in the replevin statutes and in WIS. STAT. ch. 409 conflict or can be harmonized. We choose not to resolve whether FRS Farms' argument is properly characterized as an election-of-remedies argument. Further, for the reasons explained below, we need not resolve FRS Farms' underlying statutory construction argument.

¶39 FRS Farms points out that CIT first obtained an order for pre-judgment replevin under WIS. STAT. ch. 810. FRS Farms explains that CIT then sold the equipment as permitted by WIS. STAT. ch. 409. FRS Farms asserts that, under ch. 810, a plaintiff does not have the right to dispose of collateral until the right of possession is fully adjudicated. FRS Farms points to the procedures outlined in ch. 810, in particular those in WIS. STAT. § 810.06, which provides:

> **Return of property to defendant.** At any time before final judgment the defendant may require the return of the property by executing and delivering to the sheriff a bond, executed by sufficient sureties to the effect that the defendant shall be bound to the sum of the bond for the delivery of the property thereof to the plaintiff, if the delivery be adjudged, and for the payment to the plaintiff of such sum as may be recovered against the defendant.

FRS Farms argues that, once CIT chose to proceed under ch. 810, FRS Farms had the right under § 810.06 to retain possession of the property at any time prior to final judgment. FRS Farms further asserts that CIT deprived FRS Farms of this right by selling the property under ch. 409 and, therefore, that the circuit court was correct when it denied CIT a deficiency judgment.

¶40 FRS Farms' election-of-remedies argument raises more questions than it answers; but, as we understand it, FRS Farms' concern is that CIT was able to cherry-pick provisions in WIS. STAT. ch. 810 and combine those provisions with provisions in the Uniform Commercial Code to CIT's advantage. In FRS Farms' view, provisions in ch. 810 and provisions in WIS. STAT. ch. 409 may conflict, and, when they do, creditors must proceed according to one or the other. FRS Farms is suggesting that it was "inequitable" for CIT to proceed using whichever provisions suited it at the moment and that CIT's approach denied FRS Farms its right to possession.

¶41 The problem with FRS Farms' argument is that FRS Farms does not demonstrate that it had the financial means to meet the statutory possession requirements, that it ever attempted to exercise any statutory rights it might have had to possession, or that it would have sought possession if given the opportunity. Accordingly, we reject FRS Farms' argument, and do not apply the election-of-remedies doctrine to uphold the circuit court.

D. Proper Amount Of Deficiency Judgment

¶42 The record and the briefing of the parties suggest that the parties entered into an agreement regarding the amount of the deficiency judgment if the circuit court found that the sales were not commercially reasonable. However, on appeal the parties dispute whether the amount they agreed to should be adjusted by $75,000. The circuit court did not make a finding as to whether such an adjustment would be appropriate, and none of the findings the circuit court did make permit us to infer a finding on this topic. As explained further below, we conclude that the disagreement over the $75,000 amount hinges on a factual dispute that must be resolved by the circuit court.

¶43 The parties' agreement was based on FRS Farms' asserted values for the equipment. CIT argues that the agreement must be adjusted by $75,000 because the trial testimony established that the value FRS Farms' witness Thomas gave for the bone crusher was overstated by $75,000. More specifically, CIT asserts that the model of bone crusher listed on the lease and invoice demonstrates that Thomas incorrectly valued the bone crusher based on a different model valued at $75,000 more. However, FRS Farms directs us to portions of Thomas's testimony that might support a finding that Thomas, whose company originally sold the bone crusher to FRS Farms, based his valuation on the correct bone crusher model. Specifically, FRS Farms points to evidence suggesting that Thomas referenced documentation of the original sale in order to identify the model that FRS Farms leased by serial number, and that FRS Farms' model was the same as the model on which Thomas based his valuation. Based on the evidence summarized, we cannot resolve the parties' dispute over the $75,000 adjustment without fact finding.

¶44 We need not address whether the parties' agreement binds the court with respect to the deficiency judgment. If that is an issue, it is best addressed by the circuit court. Accordingly, we remand for the circuit court to determine the amount of any deficiency judgment.

Conclusion

¶45 We affirm the portion of the circuit court's judgment determining that the sales were not commercially reasonable, but we reverse the portion of the judgment determining that CIT is equitably estopped from obtaining a deficiency judgment. We remand to the circuit court for further proceedings to determine the proper amount of the deficiency judgment.

¶46 No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.