

85-LW-3278 (10th)

Huntington National Bank, Plaintiff-Appellee

v.

Ewing Lumber Company, Inc. et al., Defendants-Appellants, Xenia Company et al., Defendants-Appellees.

No. 83AP-793 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on March 12, 1985.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. PORTER, WRIGHT, MORRIS & ARNOLD, MR. CHARLES M. COBBE and MR. CRAIG D. BARCLAY, for plaintiff-appellee.

MR. JOHN H. LEWIS, for defendants-appellants.

MESSRS. ZONAK & POULOS, and MR. JOHN G. POULOS, for defendant-appellee, Xenia Company.

MR. HARRY HOFHEIMER, for defendant-appellee, Diamond Savings and Loan Co.

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. PHILLIP M. WALTHER, for defendant-appellee, Treasurer of Franklin County, Ohio.

OPINION

STRAUSBAUGH, J.

Defendants, Ewing Lumber Company, Inc., Charles W. Ewing and Charlotte A. Ewing, appeal from the judgments rendered by the Franklin County Common Pleas Court on June 21, 1983 and July 25, 1983 in favor of plaintiff, Huntington National Bank. Defendants raise the following four assignments of error:

"1. The Trial Court erred in its interpretation of U.C.C. Section of the Ohio Revised Code 1309.50(B) (U.C.C. 90507(2)) [sic] by excluding opinion testimony by the defendant's expert regarding procedure which would maximize the recovery of the assets, fair market value of the assets, and whether a market existed for sale of the assets as a unit, and erred in its interpretation of §1309.47(C) and §1309.50(B) by refusing defendants' request to charge no. 2.

"2. The Trial Court erred by directing a verdict on defendants' count 3 of the counterclaim.

"3. The Trial Court erred by finding plaintiff Huntington National Bank the real party of interest.

"4. The Trial Court erred in dismissing count two of the counterclaim of Ewing Lumber Company, Inc."

The record reveals that, on June 21, 1977 in exchange for a loan of \$200,000, Ewing Lumber Company delivered a promissory note to plaintiff for the same amount along with a security agreement granting plaintiff a security interest in defendants' "inventory, accounts, accounts receivable, contract rights, chattel paper, notes, drafts, acceptances, general intangibles, other forms of obligations and receivables, equipment, supplies, fixtures and all other tangible and intangible personal property." In addition, Charles W. Ewing and Charlotte A. Ewing executed and delivered a guaranty to plaintiff through the U.S. Small Business Administration (SBA). As collateral for the guaranty, defendants delivered a guaranty mortgage deed to plaintiff on certain real property. Plaintiff argued at trial that as of October 1, 1979 an arrearage developed on the loan and, in March 1980, demand was made by plaintiff for payment in full. The parties are in dispute

as to the negotiations which followed during the months of April through July 1980 as attempts were made to correct the default. Defendants alleged at trial that an agreement was reached between defendants and an agent of plaintiff whereby payment of the principal would be delayed and a schedule would be established for paying off accumulated interest. However, on July 23, 1980, Kenneth Maxwell Green, an officer of plaintiff, notified defendant by letter of plaintiff's rejection of defendants' proposal for repayment of the past-due loan and that the account would be turned over to the SBA for further consideration. On August 1, 1980, Green and an officer of the SBA arrived at the premises of Ewing Lumber Company and demanded possession of the collateral securing the loan. Charles Ewing, however, refused to turn over the property. On the same day, plaintiff filed this action in the Franklin County Common Pleas Court.

In its original complaint, plaintiff alleged that defendant failed to repay the principal and interest in accordance with the terms of the promissory note and that defendant refused to surrender or deliver possession of the inventory granted to plaintiff as collateral on the note. Plaintiff sought recovery from defendant in the amount of \$197,487.99 together with interest at the rate of \$70.14 per diem from August 1, 1980 and for an order directing replevin of the said collateral. On August 8, 1980, pursuant to plaintiff's affidavit in replevin, a hearing was held to determine if plaintiff was entitled to possession of the inventory. On August 11, 1980, the trial court issued a writ of replevin to the Franklin County Sheriff directing him to seize the inventory and deliver it to plaintiff. The court also ordered plaintiff to post a \$5,000 bond as protection for the interests of defendants. On August 15, 1980, pursuant to the replevin order, the Fairfield County Sheriff arrived at the Ewing Lumber Company accompanied by a representative of plaintiff to take possession of the inventory. The premises were locked and plaintiff was allowed to keep possession of the keys. A public auction for sale of the collateral was then conducted on September 9 and 10, 1980, at the direction of plaintiff. Total proceeds of the sale were listed at \$74,526.65.

Plaintiff subsequently amended its complaint to include a claim for the sale of defendants' real property given as collateral for the SBA guaranty and that the proceeds be applied to payment of plaintiff's claim according to the priority of its lien. The amount sought on the note was reduced to \$146,247.78 together with interest at the rate of \$60.10 per diem from September 22, 1980. In response to plaintiff's complaint, defendants argued that the SBA, and not plaintiff, was the real party in interest in connection with the note and that no money was owed because defendants' collateral was sold pursuant to an unlawfully executed replevin order without inventory or appraisal and in a manner which was commercially unreasonable. Defendant, Ewing Lumber Company, also filed a counterclaim against plaintiff alleging that an agent of plaintiff made numerous false representations to defendants about further extensions of credit for working capital with knowledge of their falsity and for the purpose of inducing defendant to liquidate some of its obligations to plaintiff which were not guaranteed by the SBA, which defendants relied upon and as a result of that reliance suffered the loss and destruction of its entire business; that, in connection with the repossession and sale of its assets pursuant to the security agreement, plaintiff willfully caused waste and loss of the assets; and that plaintiff entrapped defendant through bad faith representations about extension of time for payment of arrearages with no actual opportunity given to cure the default by procuring other funds, all in violation of the U.C.C. requirements of good faith in the performance and enforcement of secured transactions. As a result of plaintiff's alleged improper actions, defendant asked \$150,000 in compensatory damages and \$1,000,000 in punitive damages for each of the three counts of its counterclaim. Defendants, Charles W. Ewing and Charlotte A. Ewing, also filed a counterclaim alleging that plaintiff made false representations about extensions of credit to Ewing Lumber Company and induced them to sell to defendant, Xenia Company, pursuant to a land contract, the real estate described in the amended complaint. Defendants claimed they were damaged in the amount of \$100,000 and demanded in addition to the \$100,000 as compensatory damages \$1,000,000 as punitive damages.

On September 13, 1982, defendants filed a motion to vacate the replevin order of August 11, 1980 along with a motion to dismiss plaintiff's claim or limit it to ten percent of the original claim. However, on September 21, 1980, the trial court overruled both motions indicating also that there was no just reason for delay. Defendant immediately appealed the trial court's judgment to this court in case No. 82AP-785, and in a decision rendered on April 5, 1983, it was ruled that the trial court's denial of defendants' motion to dismiss and its refusal to limit plaintiff's action did not constitute a final appealable order. As for defendants' motion to vacate the replevin order, this court concluded that:

"*** The issues, however, involving the replevin order are moot because it was executed as a result of the sale of the seized property. The only remaining issue is the amount of credit to be given, due to the replevin sale, which has yet to be decided by the trial court. Furthermore, any question of damages for an alleged unconstitutional replevin is a separate matter which can also still be decided by the trial court."

The case was brought to trial before a jury on April 11, 1983, during which the trial court refused to allow one of defendants' witnesses, Thomas Jacoby, to testify as to his opinion as an expert on the best procedure to maximize the

recovery of value of the assets by sale, the market value of the assets, and whether there would be a market for the assets as a unit as opposed to selling them separately. The jury returned a verdict in favor of plaintiff, awarding the total principal and interest due, based upon a flat nine and one-half percent interest rate. In its final judgment entry, the trial court calculated the amount owed as principal at \$106,841.14, together with interest thereon in the amount of \$28,434.12 as of April 18, 1983 and at the rate of \$28.19 per diem thereafter. The trial court also directed a verdict in favor of plaintiff on each of defendant's counterclaims and ordered that the mortgage deed executed and delivered to plaintiff pursuant to the SBA guaranty be foreclosed and that said real property be sold by the Franklin County Sheriff as upon execution. Defendants filed a motion for new trial, which was overruled by the trial court on July 25, 1983, and defendants thereafter filed this appeal.

The first part of defendants' first assignment of error alleges that the trial court erred in excluding the testimony of Thomas Jacoby, a CPA, of his opinion of the procedure used by plaintiff to sell the assets of Ewing Lumber Company, the fair market value of the assets, and whether a market existed for a sale of the assets as a unit. Defendants contend that the trial court erroneously construed R.C. 1309.50 and 1309.47 in excluding such evidence. Plaintiff responds by arguing that Jacoby's testimony was properly excluded because the record clearly showed he was unfamiliar with the specific property in question as required by Evid. R. 705. Furthermore, as to the method of sale used by plaintiff to dispose of the collateral, Jacoby's proffered testimony consisted of conclusions of law and not statements of fact as to what must be considered in determining if the sale was commercially reasonable.

R.C. 1309.47(C) states, in pertinent part:

"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. ***"

R.C. 1309.50(B) provides:

"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. ***"

While proof of an alternative method of sale alone is insufficient to establish that the sale was not commercially reasonable, such evidence is not specifically prohibited under R.C. 1309.50(B) for purposes of challenging the method and terms of the sale. As noted above, R.C. 1309.47(C) requires that the methods and terms of the sale must be commercially reasonable. An alternative method of disposition such as through the sale of the inventory as a unit or in conjunction with the equipment as an ongoing business when considered with other evidence of the unreasonably low price acquired at the auction sale could allow a reasonable person to conclude that the public sale of the inventory and equipment was not commercially reasonable. See Peoples Acceptance Corp v. Van Epps (1978), 60 Ohio App. 2d 100; California Airmotive Corp v. C. W. Jones (C.A.6, 1969), 415 F. 2d 554. For instance, evidence was presented of a gross discrepancy between the disposal price at the auction and the reported original costs of the collateral in the business records of Ewing Lumber as of July 31, 1980. With respect to the defense of commercial reasonableness in the disposition of collateral, a secured party does not have absolute discretion in choosing the method of sale. United States v. Willis (C.A.6, 1979), 593 F. 2d 247. If the choice of a public sale of each item of collateral was unreasonable, it matters little that this unreasonable choice was executed in a reasonable fashion. Id.

In regard to Jacoby's testimony, if a proper foundation had been laid for his expert opinions, the trial court would have erred if it rejected his testimony under R.C. 1309.50(B) as to the best methods of sale available to maximize the recovery, the integrity of plaintiff's appraisal before the sale and the potential for selling the inventory as a unit. However, no proper foundation was provided. Moreover, in light of his apparent lack of personal knowledge of the specific condition and quality of the inventory, the trial court did not abuse its discretion in refusing to allow him to testify as to the fair market value of the assets. See Evid. R. 702. Upon retrial, if a proper foundation can be laid for his opinions, for the reasons hereafter expressed, the opinions will be admissible.

In support of its claim that Jacoby's testimony to the reasonableness of the bank's appraisal and sale would constitute conclusions of law not statements of fact, plaintiff specifically cites the testimony proffered by defense counsel after the objections to Jacoby's testimony were sustained. That statement appears in the record as follows:

"Mr. Lewis: The defendant indicates, that had these questions been allowed, that they would disclose that, in determining whether a commercial reasonable sale was conducted, there had to be consideration of whether or not it should be sold at a private or public sale. And if the public sale was allowed, and goes forward without any consideration of alternate methods of disposition of the collateral as the record shows, under the cases this is indicative that the collateral has not been disposed of in a commercially reasonable manner." (T. 301-302.)

The ultimate issue for the trier of facts centers around the commercial reasonableness of the public sale of the collateral. Evid. R. 704 specifically allows an expert to testify as to the ultimate issue of fact. Therefore, Jacoby's testimony would not have constituted a conclusion of law but merely would have been an opinion as to the ultimate issue of fact in the case, that being whether the public sale of the collateral was commercially reasonable.

As for the second part of defendants' first assignment of error, the defendants specifically requested that the following instruction be given to the jury concerning the issue of the commercial reasonableness of the sale.

"The bank does not have absolute discretion as to the choice of the method of sale. That is, whether sold by public auction or sold to a private party. In determining whether the bank's choice of public sale was reasonable, you may consider the care shown by the bank in making its choice. You should consider whether the decision maker or makers had sufficient knowledge and information about the assets including whether an appraisal of value was made by people with special knowledge of lumber and building materials before the method of sale was chosen. You may also consider whether the bank examined the market for sale in a reasonable manner prior to the sale. In other words, even if you find that the auction was a commercially reasonable auction, that does not mean the sale of the assets was a commercially reasonable sale.

"United States v. Willis, 593 F. 2nd 247, 14 00 3rd 443 (CA6 1978).***"

Whether a failure of the trial court to give a requested jury instruction is reversible error depends not only upon the accuracy of the requested instruction, but also upon the effect of the charge given. Hall v. Anheuser Busch Brewery, Inc. (Aug. 3, 1983), No. 82AP-489, unreported (1983 Opinions 2067); Railway Company v. Schneider (1888), 45 Ohio St. 678. Upon a review of the instructions given and of defendants' requested instruction number two, no significant deviation appears between the two that would be prejudicial to the substantial rights of the defendants or mislead the jury. Accordingly, defendants' first assignment of error is overruled.

Defendants' second assignment of error deals with the alleged error by the trial court in directing a verdict in favor of plaintiff on count three of defendants' counterclaim for entrapment and breach of plaintiff's duty of good faith and for its refusal to give a requested jury instruction on the issue of abuse of process.

Ewing Lumber Company, Inc. alleged in the third count of its counterclaim that plaintiff entrapped it through bad faith representations about extensions of time for payments of arrearages as part of a deliberate decision to destroy the business of Ewing Lumber Company and gave it no reasonable opportunity to cure its default by procuring other funds, all in violation of the U.C.C. and its requirement of good faith in the performance and enforcement of secure transactions.

Under Civ. R. 50(A) it is well recognized that when considering a motion for a directed verdict the trial court must construe the evidence most strongly in favor of the party against whom the motion is brought, and after doing so, only if the court can find that reasonable minds could come to but one conclusion and that conclusion is adverse to such party, may the motion be sustained. Storther v. Hutchinson (1981), 67 Ohio St. 2d 282.

In Ohio, when dealing with commercial transactions there is a fundamental requirement of good faith under R.C. 1301.09 in the performance and enforcement of all agreements and duties. Here, the allegations of plaintiff's bad faith center around negotiations between representatives from plaintiff and the Ewings and attempts made to remedy defendant's default on the promissory note without having to take possession of the collateral. Charles Ewing, president

of Ewing Lumber Company and its only stockholder, testified that a proposal was made to plaintiff and accepted by one of its agents, Mr. Gary Lewis, to settle defendant's delinquent account; but that for no apparent reason plaintiff later reversed its decision and rejected the proposal and with no further discussions or opportunity given to defendants to correct the problem proceeded to enforce the security agreement and take possession of defendant's entire inventory, totally shutting down his business. A reasonable person construing such evidence in favor of defendant could not be precluded from concluding that plaintiff acted in bad faith when negotiating with defendant on its delinquent note. The issue, therefore, should have been submitted to the jury for consideration.

In the second part of the second assignment of error, defendants contend that the trial court erred by refusing to give request instruction number three concerning the issue of abuse of process in regard to the unlawful execution of the replevin order of August 11, 1980. Defendants' instruction number three reads as follows:

"There is evidence that Huntington National Bank obtained a court order for possession of the business assets of Ewing Lumber Co. Inc. and that the Sheriff served this order on the Ewings. The law then requires the Sheriff to inventory and appraise the assets without turning them over to the bank until the bank has posted a bond as security to protect the Ewings from harm. Also the law requires that the Ewings have 5 days opportunity to post a redelivery bond allowing them to retain possession and use of the assets in question until the court resolves the dispute. There is evidence that the Sheriff returned to inventory and appraise but that the bank failed to keep the appointment. The Sheriff did not inventory, appraise, or set bond nor did Huntington National Bank post the required bond.

"If you find that the bank continued its actions over the verbal protests of the Ewings then you must find that the bank did not obtain peaceful possession and that their actions were the same as any ordinary trespasser.

"The authority for this instruction is:

"Ohio Revised Code] 2337.11, 2737.06, 2737.14, 1919.07, and 2737.09; Morris v. First National Bank, 21 O.S. 2d 25 (1970)."

In support of its refusal to give the requested charge, the trial court ruled that defendants should have attacked the validity of the replevin action in the prior proceedings, therefore the actions taken by plaintiff in regard to the replevin order of August 11, 1980 were not at issue in this case. It is defendants' contention that plaintiff failed to comply with R.C. Chapter 2737 when enforcing the order of replevin and converted the temporary possession granted by the sheriff when the lumberyard was initially locked into permanent possession and sold the assets without conducting a proper inventory and valuation of the property or posting the required bond.

Plaintiff contends that our previous decision of April 5, 1983 precluded any consideration of the replevin order and, therefore, the trial court was correct in refusing to give the request and instruction. However, upon a review of our opinion of April 5, 1983, we find that, while any attempt to regain possession of the collateral by attacking the validity of the replevin order is now moot, the issue still remains as to the amount of credit to be given as a result of the replevin sale. Therefore, any issue as to the lawful execution of the replevin order as revised in the original pleadings and its effects upon the amount of credit allowed from a later sale could still be considered.

At this time, however, it is important to note that it was improper to label defendants' claim of unlawful enforcement of the replevin order as an abuse of process. Abuse of process exists not when the issuance of process was wrongly procured, but that having been issued it was intentionally misused to accomplish a result not commanded by it or lawfully obtainable under it. W.D.G., Inc. v. Mutual Manufacture & Supply Co. (Nov. 4, 1976), No. 76AP-366, unreported (1976 Opinions 3808). Here, there is no allegation that the replevin order was used to accomplish something other than the possession and sale of the collateral, a purpose for which it may lawfully be issued. The allegations arise from a challenge as to the method in which the order was executed pursuant to R.C. Chapter 2737. Therefore, the issue of the lawful execution of the replevin order should have been submitted to the jury as it directly related to the sale of the collateral and the credit given for the items sold. Defendants' second assignment of error is sustained.

Defendants' third assignment of error challenges the ruling of the trial court finding plaintiff to be the real party in interest. Defendants argue that plaintiff was fully compensated for the balance due on the note by the SBA and that since the SBA was eligible to assert a claim against the Ewings under R.C. 1303.69(B) as a transferee, plaintiff was no

longer the real party in interest.

R.C. 1303.30 provides that the holder of an instrument has the right to enforce payment in his own name subject to the provisions of R.C. 1303.69 dealing with payment or satisfaction. Here, the evidence clearly establishes that plaintiff was the holder of the promissory note and has maintained that status throughout the action without relinquishing control over the note. Although the SBA may have compensated plaintiff under the guaranty, there has been no transfer of the note as mentioned under R.C. 1303.69(B). Therefore, as holder of the note plaintiff still remains the real party in interest. Defendants' third assignment of error is therefore overruled.

Defendants' fourth and final assignment of error deals with the trial court's dismissal of the second count of the Ewing Lumber Company counterclaim. Defendants' counterclaim contends that plaintiff willfully caused the deterioration of several assets of the lumber company through the repossession and sale. Specifically, defendant notes the destruction of a valuable tax loss carry forward and the loss and destruction of accounts receivable.

The alleged destruction and loss of both items is directly linked to the central issue of the commercial reasonableness of the sale. Both the accounts receivable and the loss carry over are covered under the broad description of collateral found in the security agreement and as quoted earlier in this opinion. The "general intangibles" as mentioned in the description could reasonably be interpreted to include the tax loss carry forward and, as noted by defendants in their brief, under certain circumstances that item is transferable. As such, its alleged destruction as a result of plaintiff's conduct and sale was a question of fact to be determined by the jury in deciding if the sale of the collateral was commercially reasonable under the circumstances and if plaintiff breached its duty of good faith to defendant by allowing such assets to deteriorate.

As for the accounts receivable, these items also were included in the security agreement and a factual issue was raised as to whether plaintiff's failure to attempt to sell the accounts receivable or collect on them irreparably diminished defendants' ability to later enforce them. The issue of waste of the accounts receivable is linked directly to the amount recovered through the sale and the amount now sought as a deficiency. In light of Green's testimony that the accounts were not even considered or discussed in regard to the sale, the issue should have been presented to the jury in regard to its effect upon the commercial reasonableness of the sale and plaintiff's duty of good faith in dealing with defendants. Accordingly, defendants' fourth assignment of error is sustained.

Defendants' first and third assignments of error are overruled, the second and fourth assignments of error are sustained, and the judgment of the trial court is reversed and remanded with instructions to conduct a new trial in accordance with law and this opinion.

Judgment reversed and remanded with instructions.

MCCORMAC and MOYER, JJ., concur.