UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6197

UNIVERSAL SAVINGS ASSOCIATION and
RESOLUTION TRUST CORPORATION, as
Receiver for UNIVERSAL FEDERAL
SAVINGS ASSOCIATION,

Plaintiffs-Appellees,

versus

GARY L. MCCONNELL,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-90-2258)

(December 29, 1993)

Before JOHNSON, GARWOOD, and WIENER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Gary L. McConnell (McConnell) appeals a summary judgment entered against him in an action by plaintiffs-appellees Universal Savings Association (Universal) and the Resolution Trust Corporation (RTC) for a deficiency judgment.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding that the summary judgment record contains controverted issues of fact, we reverse and remand.

Facts and Proceedings Below

On May 24, 1985, McConnell executed a promissory note to Universal's predecessor, Universal Savings & Loan Association, in the principal amount of $85,000. The note required only interest payments during its two-year term, with the principal balance due when the note matured on May 24, 1987. The note was secured by 5000 shares of stock in Brazoswood National Bank (Brazoswood Bank), a small bank of which McConnell was a director and shareholder.

Universal sent McConnell a demand letter dated January 27, 1987, informing him that the note was in default due to non-payment and demanding payment in full by February 7, 1987. McConnell did not make any further payments. Despite McConnell's failure to comply with the demand letter, however, Universal took no further action until May 26, 1988, when it sent another demand letter to McConnell. When no payment was forthcoming, Universal filed suit on the note in Texas state district court on June 10, 1988. Though McConnell still did not pay the balance due on the note, Universal did not foreclose on the Brazoswood Bank shares until May 1989, over two years after the note went into default.

Universal notified McConnell of its intent to foreclose upon and sell the Brazoswood Bank shares in a letter dated April 7, 1989. The letter stated that a public sale would take place on May 3, 1989, and invited McConnell to bring any potential purchasers of whom he knew to the attention of a Universal trustee. An agent of Universal also contacted the president of Brazoswood Bank, advising

him of the sale and soliciting the names of potential buyers. Universal also placed notices of the foreclosure sale in the Southwestern Edition of the Wall Street Journal and the Houston Chronicle.

On May 3, 1989, Universal held the foreclosure sale at its offices in Houston, Texas. An attorney representing Universal conducted the sale. Also in attendance were the Universal trustee, the president of Brazoswood Bank, a Brazoswood Bank stockholder named O.D. Kennemore (Kennemore), and a representative of the Federal Deposit Insurance Corporation.

The Universal trustee began the bidding for the stock at $20,000. Kennemore bid $20,500 and the trustee subsequently increased its bid to $20,900, but informed Kennemore that he could have the stock for $21,000. Kennemore bid $21,000 and purchased the shares.

Universal subsequently became insolvent and the RTC was appointed receiver on August 9, 1989, with the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. The RTC intervened in Universal's pending state court action against McConnell and removed the case to federal district court on July 16, 1990. On May 1, 1991, the RTC filed a motion for summary judgment on its deficiency claim. On May 23, 1991, McConnell filed a counter-motion for summary judgment asserting that the RTC was not entitled to recover any deficiency on the note because Universal had not sold the Brazoswood Bank shares in a commercially reasonably manner as required by Texas Business and Commerce Code § 9.504 (West 1991).

After a hearing on September 23, 1991, the district court granted the RTC's motion and denied McConnell's motion on October 15, 1991. McConnell timely appealed the district court's judgment to this Court.

Discussion

Federal Rule Civil of Procedure 56(c) permits summary judgment in favor of a party if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Where the summary judgment movant bears the burden of proof at trial, the summary judgment evidence must affirmatively establish the movant's entitlement to prevail as a matter of law. On appeal, we review a grant of summary judgment *de novo*, resolving all reasonable doubts and drawing all reasonable inferences in favor of the non-moving party. *See FDIC v. Hamilton*, 939 F.2d 1225, 1228 (5th Cir. 1991).

McConnell's central claim before the district court was that the RTC was not entitled to a deficiency judgment against him because Universal did not dispose of the Brazoswood Bank stock in a commercially reasonable manner as required by Texas Business and Commerce Code § 9.504 (West 1991). In *Greathouse v. Charter National Bank-Southwest*, 851 S.W.2d 173 (Tex. 1992), the Texas Supreme Court settled the issue under Texas law of which party in a deficiency action has the burden of pleading and proving the commercial reasonableness of a foreclosure sale by placing the burden of proof on the creditor. *Id*. at 176-177.

Therefore, in order to affirm the summary judgment granted below in favor of Universal, we must be satisfied on the basis of the record that the RTC has conclusively shown commercial reasonableness on the part of Universal in selling the Brazoswood Bank shares. After careful review and consideration of the record, however, we cannot say that the RTC has met its summary judgment burden.

Texas Business and Commerce Code § 9.504(c) states, in relevant 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*." (Emphasis added).

Because Brazoswood Bank was a small, privately-held bank with no public market for its stock, the hallmarks of a commercially reasonable sale of such stock are not generally obvious to the average person. The Texas Court of Appeals stated about the foreclosure sale of a jet aircraft in *Sunjet, Inc. v. Ford Motor Credit Co.*, 703 S.W.2d 285, 289 (Tex. Civ. App. 1985, n.w.h.):

> "In sales of collateral of this nature, the testimony of an expert may be necessary to establish that procedures used complied with practices normally followed in the industry, or that the sale was otherwise commercially reasonable. The normal procedures used in jet aircraft sales are not within the knowledge of the average person. Without expert testimony, neither we nor most other judges would have sufficient knowledge to be able to determine the reasonableness of the methods used in such a sale."

McConnell introduced into the summary judgment record the deposition testimony of Bruce G. Grimes (Grimes), a financial

consultant with approximately thirty years of banking experience. In his testimony, Grimes opined that the sale of the Brazoswood Bank stock by Universal was not commercially reasonable. Grimes cited the following reasons for his opinion: (1) the delay in selling the stock; (2) the failure to advertise the foreclosure sale in a newspaper circulated within the immediate vicinity of Brazoswood Bank (i.e., where its shareholders, the most likely purchasers, were most likely to have seen such a notice); and (3) the failure of Universal to directly approach the shareholders of Brazoswood Bank to try and arrange a private sale.

The RTC, in opposition to Grimes' deposition testimony, submitted the affidavits of (1) the attorney who conducted the foreclosure sale, Nancy Wilson Hargrove (Hargrove), (2) the Universal trustee present at the sale, William D. Cossaboom, Jr., and (3) another Universal officer, Mary Pillion. In their affidavits, each set forth the actions taken in preparation for the foreclosure sale, as heretofore recited in this opinion. Hargrove also expressed her opinion that the sale had been conducted in a commercially reasonable manner and based that opinion on her own experience and on a "no action" letter issued by the Securities and Exchange Commission (SEC).[1]

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[1] We note that Hargrove's reliance on the "no action" letter she cited appears to be misplaced. The SEC is empowered by Congress to interpret and enforce the securities laws of the United States, not state commercial law.

Further, the SEC was not responding to the facts of this case in the "no action" letter relied upon by Hargrove. This is especially obvious in the SEC's comment that in the circumstances before it, a *public* sale was necessary to assure that the sale would be deemed commercially reasonable. In this case, not only is a private sale not precluded by section 9.504, it arguably may

As stated previously, in evaluating the summary judgment evidence, we must resolve all reasonable doubts and draw all reasonable inferences in favor of the non-moving party, McConnell. The testimony of Grimes tends to reflect that he was an expert in the field of transactions in small, closely-held bank stock, and raised substantial questions as to the commercial reasonableness of the foreclosure sale conducted by Universal, which the RTC did not address.

There is no indication, for example, as to whether the current shareholders of Brazoswood Bank represented the best group of potential buyers of the stock. If they were, there is nothing in the record to indicate that putting the notices of sale in the Wall Street Journal and the Houston Chronicle was a reasonable method of attempting to reach those potential buyers.[2] While we are sympathetic to the district court's observation that McConnell did not name anyone who would have paid more for the shares had she known about the foreclosure sale, this fact alone does not conclusively demonstrate the commercial reasonableness of the sale.[3]

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have been preferable (whether or not necessary).

[2] Nor was there any evidence concerning whether either of those newspapers generally circulated in the area where the Brazoswood Bank was located or the like.

[3] We do not mean to suggest that the RTC's position is without merit. As the RTC points out in its brief, McConnell, a director of Brazoswood Bank, and Bill G. Henrichs (Henrichs), the president of Brazoswood Bank, were both notified of the foreclosure sale by Universal and both were asked to contact any potential buyers. Further, based on a listing of prior transactions in Brazoswood Bank stock, McConnell, Henrichs, and Kennemore (the ultimate purchaser of the stock whom Henrichs had

McConnell further claims that the two-year delay[4] from the maturity date of the note to the time of the foreclosure sale establishes the commercial unreasonableness of the sale. The RTC responds that delay is irrelevant to a determination of commercial reasonableness. In making this counter-argument, however, the RTC misreads the applicable statutory sections and accompanying case law.

Texas Business & Commerce Code § 9.507(b) (West 1991) elaborates on commercial reasonableness:

> "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." (Emphasis added).

The language of sections 9.504 and 9.507 is clear and unmistakable. While it is true that an excessive delay may not, *by itself,* be enough to make a foreclosure sale commercially unreasonable, delay is a factor to be considered in the calculus of commercial reasonableness. Section 9.504 expressly states that "*every* aspect of the disposition including the method, manner, *time,* place and terms must be commercially reasonable." *See FDIC v. Blanton*, 918 F.2d 524, 529 (5th Cir. 1990). On this record, we must give some

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brought to the sale) were the purchasers in over two-thirds of the thirty-two most recent sales of Brazoswood Bank stock.

These are good arguments and may justify a directed verdict at trial, once some of the evidentiary holes principally highlighted by Grimes' deposition testimony are addressed on remand. They are not sufficient, however, to sustain a summary judgment on the present record.

[4] If measured from the date of the first notice of default sent by Universal to McConnell, the delay is approximately two years, three months.

credence to Grimes' deposition testimony that, in dealing with the stock of a small, closely-held bank, a two-year delay is too long.

Finally, McConnell argues that the price paid for the shares was too low and that this fact also demonstrates the sale's infirmity. He contends that a commercially reasonable price for the stock would have been at or near the stock's book value.[5] The RTC correctly points out in rebuttal that (1) book value of stock is not necessarily equivalent to fair market value and (2) section 9.504 does not require that collateral be sold at its fair market value (or any particular price), but only requires that the sale and its terms be commercially reasonable.

With respect to the amount of compensation received as a result of a sale of collateral, this Court has found under Texas law that mere inadequacy of consideration alone does not make a foreclosure sale commercially unreasonable so long as the sale was, in all other respects, without procedural infirmity. *See FDIC v. Lanier*, 926 F.2d 462, 467 (5th Cir. 1991). Here, however, we cannot say conclusively that the sale was, in all respects other than price, commercially reasonable. Therefore, as with the element of delay, the price paid for the stock is a "term" of the sale which section 9.504 requires that we incorporate into the commercial reasonableness calculus.

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[5] Affidavits submitted by McConnell establish the book value of the stock as declining from $13.39 per share in May 1986 to $9.13 per share in May 1989. The sale price of the stock at the foreclosure sale was $4.20 per share.

Conclusion

While any one of the points raised by Grimes' deposition testimony and McConnell's arguments may not by itself be sufficient to challenge the commercial reasonableness of the foreclosure sale, in the aggregate they raise a fact issue as to whether too many corners were cut by Universal in disposing of McConnell's collateral. Further, due to some holes in the factual record noted above, we cannot say as a matter of law whether the sale was commercially reasonable or not; we have reasonable doubts, and in such a case summary judgment in favor of either party is not appropriate. *Cf. Patterson v. FDIC*, 918 F.2d 540, 547 (5th Cir. 1990); *United States v. Terrey*, 554 F.2d 685, 693 (5th Cir. 1977).[6] Therefore, the judgment of the district court is

REVERSED AND REMANDED.

[6] However, since *Terrey* Texas law has clarified so that the foreclosing creditor is generally not regarded as a fiduciary or owing a duty of good faith and fair dealing to the debtor. *See FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990).