UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1852
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAC TRANSPORTS, a partnership,
ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(5:91-CV-308-C)

(March 19, 1993)

Before POLITZ, Chief Judge, DAVIS and JONES, Circuit Judges.

POLITZ, Chief Judge:[*]

JAC Transpsorts, a Texas partnership, and individual partners appeal the entry of adverse summary judgment in favor of the Small Business Administration. We affirm.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

On December 10, l985, JAC and its individual partners (hereinafter collectively "JAC" or "makers") executed a $310,000 promissory note payable to First National Bank, secured by certain of JAC's equipment. The note was transferred to the SBA. JAC did not make timely payments and, on November 8, 1988, the SBA served notice of delinquency and demanded payment from each maker. The notice stated that "SBA hereby formally makes demand on you for approximately $10,000, the amount past due." The letter informed that if the arrearage was not cured in ten days, acceleration of the note payments would occur.

Neither JAC nor the individual partners responded. The SBA then advised each maker in writing that payment was accelerated and that the entire balance of the note was due. No payment was forthcoming and the SBA sent notices of public sale. The collateral was sold, resulting in net proceeds of $102,502.09. SBA applied the proceeds to the debt, leaving a deficiency of $221,762.44 in principal, plus $25,271.80 in accrued interest as of February 5, 1990, with daily interest of $71.39 accruing thereafter.

The SBA filed the instant deficiency judgment action and sought summary judgment. The makers likewise sought summary judgment, contending that the sale was not conducted in a commercially reasonable manner because the balance of the note was not lawfully accelerated. The makers focused on ostensible technical shortcomings of the notice of default and notice of

intent to accelerate. The district court entered summary judgment for SBA; the makers timely appealed.

Analysis

The makers maintain that the terms of the note and Texas law require a more specific notice of the amount of past due debt than the SBA provided.[1] The SBA counters that the notice was sufficient despite its approximation of the past due debt. We must briefly examine the Texas debt acceleration mechanism.

Viewing discretionary acceleration as a harsh remedy, Texas law overlays equitable notice requirements on every loan agreement.[2] Before accelerating the note payments, the holder must allow the maker an opportunity to cure any deficiency.

Although presentment[3] ordinarily is not required when a holder seeks satisfaction from the maker,[4] the holder must notify the

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[1] The SBA argues that federal law should control this question. We disagree. Absent some need for uniformity in the administration of a federal program, contract disputes involving the SBA are determined by reference to state law. E.g., **United States v. Kimbell Foods, Inc.**, 440 U.S. 715 (1978).

[2] E.g., **Texas Refrigeration Supply, Inc. v. FDIC**, 953 F.2d 975 (5th Cir. 1992) (citing **International Bank, N.A. v. Morales**, 736 S.W.2d 622 (Tex. 1987); **Kierstead v. City of San Antonio**, 643 S.W.2d 118 (Tex. 1982)).

[3] "Presentment" is a term of art defined in section 3.504 of the Texas Uniform Commerical Code as "a demand for . . . payment upon the maker . . . ." Tex. Bus. & Comm. Code Ann. § 3.504 (Vernon 1968).

[4] Tex. Bus. & Comm. Code Ann. § 3.501 (Vernon 1968).

maker of the arrearage[5] and of the intent to accelerate.[6] Typically, these two steps are accomplished in one notice. This advisory forewarns the maker and permits an opportunity for curing the default.

If the delinquency is not abated, the holder must serve notice of the actual acceleration. The record before us reflects no dispute with respect to the notice of actual acceleration or the period between the notice of intent to accelerate and the notice of actual acceleration, we therefore focus on the adequacy of the presentment and notice of intent to accelerate.

JAC contends that the SBA's use of the word "approximate" in its notice of default renders the presentment and notice of intent to accelerate invalid. This submission disregards the equitable character of the notice requirements and fails to consider the different purposes served by the discrete notices.

We do not perceive Texas precedents as making this aspect of the notice requirement as hypertechnical as JAC suggests. We are mindful that the entire notice structure is an implied contractual right subject to waiver,[7] and that it is firmly based in equity.

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[5] **Ogden v. Gibraltor Sav. Ass'n**, 640 S.W.2d 232 (Tex. 1982).

[6] **Allen Sales & Servicenter, Inc. v. Ryan**, 525 S.W.2d 863 (Tex. 1975).

[7] Such a waiver must clearly, unequivocally, and separately waive each notice requirement. **Shumway v. Horizon Credit Corp.**, 801 S.W.2d 890 (Tex. 1991). In fact, it appears from our review of the record that the note executed by JAC includes such a waiver. We will not address the adequacy of the waiver, however, as it was

The degree of specificity required in each of the three notices varies according to the equities. The Texas Supreme Court has carefully noted that in some circumstances the note-holder is justified in providing no notice whatever.[8]

Texas courts generally have weighed the sufficiency of a notice against the likelihood that its recipient will understand what is required and thus avoid needless harm in the form of a default.[9] A review of the Texas cases reveals a significant distinction between the specificity required of the notice relating to the existence of the default and the notice of intent to accelerate. These notices obviously serve different purposes. The maker can fairly be presumed to possess or acquire knowledge of the amount of the debt and the timeliness of payments.[10] Presentment, accompanied by a good faith calculation of the past due debt, allows the maker an opportunity to confirm or deny the default based on information he either has or fairly can be charged with having. Indeed, it is not certain that the Texas courts would absolutely require the holder to provide specification of the

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not developed below or raised in this court. **FDIC v. Laguarta**, 939 F.2d 1231 (5th Cir. 1991).

[8] **Ryan**, 525 S.W.2d at 866.

[9] **Johnson v. First Southern Prop., Inc.**, 687 S.W.2d 399 (Tex.App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e); **Sumrall v. Navistar Fin. Corp.**, 818 S.W.2d 548 (Tex.App. -- Beaumont 1991, writ denied).

[10] **Sumrall**, 818 S.W.2d at 555-56.

amount of arrearage.[11] Assuming, however, that the holder is obliged to calculate the arrearage, an insufficiency in the calculation, such as the estimation in the instant case, does not inequitably hamper the maker's response.

Notice of intent to accelerate, on the other hand, is a different matter. The maker is not expected to divine the note-holder's state of mind. Absent a clear statement, the maker can only guess whether the holder will exercise the power to accelerate. Thus, equivocation with respect to the holder's intent to accelerate is generally considered unfair.[12] The record reflects a clear statement of intention herein.

In the case at bar we conclude that the notices were adequate and that the foreclosure proceedings were valid. The judgment of the district court is therefore AFFIRMED.

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[11] Chief Justice Nye's thoughtful opinion in **Rosa De Saron Church v. Rodriguez**, 767 S.W.2d 898 (Tex.App. -- Corpus Christi 1989, no writ), underscores the point. In that case, the notice of intent to accelerate did not specify the arrearage. The maker, a church, erroneously tendered an amount less than was actually owed in an effort to forestall sale. The holder refused the tender, accelerated the debt, foreclosed, and sold the property on which the church was located. The court rejected the church's argument that the payee's failure to specify the amount past due rendered its notice ineffective, stressing that the church did not call the payee or his attorneys to determine the amount it owed or make reference to readily available documents. See **Purnell v. Follett**, 555 S.W.2d 761 (Tex.Civ.App. -- Houston [14th Dist.] 1977, no writ) (recognizing a demand for payment as adequate presentment despite failure of letter to specify amount and refusing to recognize purported waiver of right to notice of intent to accelerate).

[12] **Ogden**, 640 S.W.2d at 233.