

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2175
Summary Calendar

WESTERN GULF SAVINGS,

Plaintiff,

RESOLUTION TRUST CORPORATION,
As Conservator for WESTERN GULF SAVINGS,

Plaintiff-Appellee,

v.

CARROLL KELLY, JR., ET AL.,

Defendants,

CARROLL KELLY, JR. and
KELLY JOINT VENTURE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CA H 89 1168)

March 25, 1993

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Resolution Trust Corporation, as receiver for Western
Gulf Savings & Loan Association, received a judgment for over

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

\$1,000,000 on a promissory note executed by appellants W. C. Kelly and Kelly Joint Venture.¹ On appeal, Kelly and Kelly Joint Venture ingeniously assert that the RCC failed in its burden of proof for summary judgment purposes because it did not prove that the personal property collateral was disposed of in a commercially reasonable manner. We disagree with appellants' contention and affirm.

There is no dispute that Kelly and Kelly Joint Venture were obligated on a \$1.5 million promissory note executed to Western Gulf in 1984 and secured by a deed of trust and security agreement covering real and personal property in Brazoria County, Texas. Appellants defaulted under the terms of the note. On May 5, 1987, after the proper demand, notice and posting of notice of public sale as required by law, Western Gulf foreclosed its liens against the real property and, at the foreclosure sale, purchased the property for \$700,000. Western Gulf credited the proceeds of the foreclosure sale to the indebtedness, resulting in a deficiency balance due of \$1,073,677.09. The notice of sale stated Western Gulf's intention to sell both the real and personal property at foreclosure, but the trustee's deed appeared to except from its terms certain personal property that was otherwise covered by the deed of trust and security agreement.²

¹ Other obligors, Theo Kelly and Pat Kelly, settled with RCC in district court and are not before this court on appeal.

² The district court specifically found that "all property securing the indebtedness was sold" at foreclosure. The court did not squarely address appellants' contrary argument, which was sufficiently proved, for summary judgment purposes, by

Western Gulf commenced suit on the deficiency in state court. After Western Gulf became insolvent, federal entities substituted in as plaintiffs, the case was removed to federal courts, and a motion for summary judgment was filed. After a hearing, the district court granted summary judgment in favor of RTC in early 1992 for the sum of \$1,073,677.09 less \$30,000 in credit, together with interest and attorneys fees.

Appellants' argument is premised on the applicability to the foreclosure sale of § 9.505 of the U.C.C., Texas Bus. & Comm. Code Ann. § 9.505 (Vernon 1989), which provides that retention of collateral by a secured creditor constitutes a satisfaction of the debt. They assert that although its notice stated that the foreclosure sale would encompass the personal property subject to Western Gulf's security interest, for reasons unknown, Western Gulf did not actually sell the personalty at foreclosure. As a secured creditor, RTC bears the burden to prove that the personal property was disposed of in a commercially reasonable fashion. Tex. Bus. & Comm. Code § 9.504; Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769 (Tex. 1982); FDIC v. Payne, 973 F.2d 403, 410 (5th Cir. 1992).³ Because Western Gulf neither sold the personal property at foreclosure nor proved for summary judgment purposes that it

reference to foreclosure sale documents themselves. Our discussion assumes arguendo that appellants may have been correct that certain personal property was not included in the foreclosure sale.

³ The precise nature of RTC's burden was most recently described in Greathouse v. Charter Nat. Bank Southeast, _____ S.W.2d _____, 36 Tex. S. Ct. J. 378 (1992 WL 379408) (op. on reh. Dec. 22, 1992).

otherwise disposed of that collateral in a commercially reasonable fashion, retention of the collateral constituted a satisfaction of the debt. According to appellants, RTC's suit for deficiency must therefore fail.

There is a critical distinction between this case and Tanenbaum and Payne, however. As appellants conceded, because Western Gulf had a lien on their real property, Western Gulf was permitted to foreclose on the personalty either under the U.C.C. or the terms of the Texas Property Code. Pursuant to § 9.501(d) of the Texas U.C.C., when a loan is secured by both real and personal property, the secured party may elect to proceed in accordance with its rights and remedies in respect of the real property. Once a secured party makes such an election, the default rules in the U.C.C. no longer apply. Tex. Bus. & Comm. Code § 9.501(d); Van Brunt v. BancTexas Quorum, N.A., 804 S.W.2d 117, 128 (Tex. Civ. App.--Dallas 1989, no writ) (on rehearing). Appellants have voiced no quarrel that the foreclosure proceedings were conducted regularly and on proper notice according to Texas real property law.

Further, under Texas law, before April 1, 1991, Western Gulf was entitled to sue for a deficiency based on the difference between the high bid at the foreclosure sale and the amount of the unpaid indebtedness. Tex. Prop. Code § 51.003; Savers Federal Savings and Loan Association v. Reetz, 888 F.2d 1497 (5th Cir. 1989). Western Gulf did bid in the real property at foreclosure, although it is alleged that RTC, successor to Western Gulf, has

retained the personal property to this day. Because the sale was properly noticed and conducted under Texas real property law, however, appellants' argument seems to be an ingenious attempt to circumvent the rule that inadequacy of consideration was not a defense to a deficiency suit on all foreclosure sales taking place before April 1, 1991. Savers Federal Savings and Loan Association v. Reetz, supra.

Appellants would alternately contend that although the foreclosure sale was initially conducted pursuant to Texas real property law, the apparent exception from the actual sale of certain personal property rendered further acts in regard to that personalty subject to the Texas U.C.C. Not having disposed of the personal property in a commercially reasonable fashion, RTC is deemed to have accepted that personal property in satisfaction of the entire debt. The problem with this two-step characterization of the foreclosure is that it has been specifically rejected by a Texas court of appeals. In Van Brunt, supra, the secured creditor sued for a deficiency after having conducted an allegedly procedurally incorrect U.C.C. foreclosure sale of personal property followed by a nonjudicial real estate foreclosure sale. On rehearing, the Dallas court of appeals discussed the Tanenbaum rule and applicable questions concerning the Texas U.C.C. and concluded that "any defect in BancTexas's foreclosure under the [Texas Business and Commerce] Code has no effect on its rights under the real property mortgage, including its right to seek a deficiency." Van Brunt, 804 S.W.2d at 130.

Appellants assert that Van Brunt misinterpreted Tanenbaum. We disagree, for reasons well stated in Van Brunt. In any event, we are bound under Erie by expositions of Texas law by Texas courts. Van Brunt is not distinguishable, as appellants contend, because a U.C.C. foreclosure sale was attempted in that case. Van Brunt held that notwithstanding the way in which the secured creditor had attempted to dispose of collateral under the U.C.C.--whether by sale or otherwise--it could still proceed under its real property law rights to seek a deficiency judgment.

We agree with RTC that the district court's seat-of-the-pants decision to credit \$10,000 on the deficiency based on an alleged valuation of the real property by counsel for RTC does not affect our analysis. The district court did not have to benefit the appellants in this way.⁴

The judgment of the district court is **AFFIRMED**.

⁴ If the value of the personal property collateral was a disputed fact, as appellants contend, then they could have introduced summary judgment evidence asserting what credit was due. Because Tanenbaum does not apply, RTC's proof of the credit was adequate absent controverting evidence by appellants.