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SUPERIOR COURT  
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IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5	ATKINS KROLL (SAIPAN), INC.,	)	SMALL CLAIMS CASE NO. 17-0382
6	Plaintiff,	)	
7	v.	)	FINDINGS AND JUDGMENT
8	PRIMO FERRERA, JR.,	)	
9	Defendant.	)	

I. INTRODUCTION

**THIS MATTER** came before this Court for a small claims bench trial on February 20, 2018 at 1:30 p.m. in Courtroom 223A. Plaintiff Atkins Kroll (Saipan), Inc. appeared through attorney Michael White. Defendant Primo Ferrera, Jr. appeared *pro se*.

The case involves a loan agreement for the purchase of a used 2014 Toyota Sienna (hereafter “vehicle”). At the trial, Plaintiff called one witness (the finance director of Atkins Kroll) and entered into evidence seven exhibits. Defendant called one witness (Defendant’s estranged wife, Lorena Java<sup>1</sup>) and entered no exhibits.

After reviewing the testimonies, evidence, and considering the relevant law, this Court makes the following findings and judgment.

II. FINDINGS OF FACT

This Court finds the following facts by a preponderance of the evidence:

1. On October 1, 2015, Plaintiff and Defendant (and his wife) entered into a contract for a \$27,000 vehicle loan. Ex. 1.

<sup>1</sup> Defendant’s wife also co-signed the loan, but without explanation was not included as a party to the present action.

- 1 2. After the loan was executed, Plaintiff assigned the loan to First Hawaiian Bank.
- 2 3. First Hawaiian Bank then collected monthly payments from Defendant and his wife.
- 3 4. Defendant and his wife failed to make payments in March, April, and May of 2017.
- 4 5. On May 17, 2017, First Hawaiian repossessed the vehicle from Defendant.
- 5 6. Plaintiff then bought back the loan from First Hawaiian Bank. *See* Ex. 2.
- 6 7. The vehicle was prepared for resale, wherein Plaintiff incurred additional costs. *See* Ex. 5.
- 7 8. On May 24, 2017, First Hawaiian Bank ostensibly prepared notice letters to Defendant and
- 8 his wife informing them of the default, repossession of the vehicle, and potential sale of the
- 9 vehicle. Exs. 2, 6.
- 10 9. No testimony or direct evidence establishes that these notice letters were mailed or received
- 11 by Defendant or his wife.
- 12 10. On July 20, 2017, Plaintiff resold the vehicle for \$23,894.00. Ex. 4.
- 13 11. Defendant and his wife testified that they never received written notice letter of default,
- 14 repossession or proposed sale of the collateral property.

### 15 III. LEGAL STANDARD

16 The statutes controlling the sale of collateral property in the CNMI is the Uniform  
17 Commercial Code found in 5 CMC §§ 1101-10104 and provides, in pertinent part, that:

18 Unless collateral is perishable or threatens to decline speedily in value or is of a  
19 type customarily sold on a recognized market, reasonable notification of the time  
20 and place of any public sale or reasonable notification of the time after which  
21 any private sale or other intended disposition is to be made shall be sent by the  
secured party to the debtor, if he has not signed after default a statement  
renouncing or modifying his right to notification of sale. In the case of consumer  
goods no other notification need be sent. . . .

22 5 CMC § 9504(3) (emphasis added). Under the Code, every aspect of the disposition of collateral  
23 “including the method, manner, time, place and terms must be commercially reasonable.” 5 CMC §  
24 9504(3).

1 **IV. DISCUSSION**

2 Both parties agree that Defendant defaulted on the loan by failing to make payments in  
3 March, April, and May of 2017 and that the vehicle was repossessed and re-sold. As such, Plaintiff  
4 seeks a deficiency judgment against Defendant in the amount of \$3,675.02 plus prejudgment  
5 interest, court costs, and reasonable attorneys' fees. Defendant argues however that proper notice  
6 was not given as required under 5 CMC § 9504(3) to alert him of, and provide him time to  
7 participate in the resale of the vehicle.

8 *A. Proof of Reasonable Notice*

9 The controlling issue in this matter concerns disposition of the collateral and Plaintiff's  
10 effort to establish that reasonable notification of the proposed sale of the collateral property was  
11 given to Defendant to permit this Court to award a deficiency judgment.

12 During trial Plaintiff provided poor quality copies of self-titled "certified" letters which  
13 were allegedly sent from First Hawaiian Bank to Defendant (and to his wife). The allegedly-sent  
14 letters explain what actions Defendant would need to take to recover the vehicle and gave notice of  
15 the time and place of the sale of the repossessed vehicle.

16 However, Plaintiff did not provide any documentary or testimonial evidence that these  
17 letters were in fact actually mailed to Defendant or his estranged wife. Nor did Plaintiff provide the  
18 return receipt of the certified mail which would have shown when, where, and by whom the letters  
19 were received. Instead, Plaintiff's counsel simply represented as an officer of the Court that the  
20 letters were mailed by his client and that therefore the statutory notice requirement had been  
21 satisfied.

22 As an initial matter, Counsel's oral representation during the trial that the letters had been  
23 mailed is problematic because as the CNMI Supreme Court recently instructed, and as this Court  
24 reiterates, "[a]lthough an attorney is an officer of the court and has a duty of candor to the court, the

1 trial court's truth-seeking function is best served when the factfinder relies on evidence introduced  
2 under oath". *Inos v. Inos*, 2015 MP 5 ¶ 10 (citations omitted). In more direct terms, "arguments and  
3 statements made by lawyers are not evidence." *Id.* (quoting *Commonwealth v. Cepeda*, 2009 MP 15  
4 ¶ 17).

5 In contrast to counsel's representation, Defendant and his estranged wife both presented  
6 persuasive rebuttal testimonial evidence that no notices were received by Defendant or his wife. In  
7 this respect, this Court notes that the letter addressed to the Defendant used a Post Office Box  
8 number for which after his separation from his wife the Defendant no longer had access. Further,  
9 the addressed letter to the Defendant's wife simply lists "Chalan Piao" as the physical location to  
10 which the letter was mailed and it was left unclear to the Court exactly how such a delivery to Ms.  
11 Java within the village of Chalan Piao would occur.

12 In any respect, as Plaintiff failed to provide evidence or show compliance with 5 CMC §  
13 9504(3)'s reasonable notification requirement and also failed to present any other evidence to rebut  
14 Defendant's testimonial evidence (or that the Defendant waived any right to notice of the sale), this  
15 Court resolves the factual dispute in favor of Defendant. To be absolutely clear, this Court clarifies  
16 that sending a letter is not necessarily always sufficient reasonable notice, but is only one factor to  
17 consider in the circumstances of the case. *See* Richard C. Tinney, Annotation, *Sufficiency of*  
18 *secured party's notification of sale or other intended disposition of collateral under UCC § 9-*  
19 *504(3)*, 11 A.L.R. 4th 241, 2a (LEXIS) (database updated 2018) (stating courts generally look to all  
20 circumstances of the case to determine sufficiency of notice). This Court notes that filing proof of  
21 personal service would obviously show superior compliance with reasonable notification  
22 requirement.<sup>2</sup>

23 \_\_\_\_\_  
24 <sup>2</sup> In other words, even if proof of mailing proper notice had been supplied to this Court, Plaintiff's claim for a  
deficiency judgment may still have potentially been barred as the notice letter was dated after the vehicle had already  
been repossessed and seven working days before the date of the proposed sale. *See Triple J Motors v. Sanchez*, 2007

1           *B. Necessity of Reasonable Notice*

2           Moreover, as highlighted in *Bank of Hawaii v. Teregeyo*, 3 CR 876 (NMI Super. Ct. 1989),  
3 CNMI courts have long held that it is not too burdensome for creditors, like Plaintiff, to fully  
4 comply with the reasonable notification requirements by satisfactorily establishing to a court that a  
5 written letter to debtors containing all the necessary information had actually been received and/or  
6 mailed (properly addressed and postage paid) to the person against whom a deficiency judgment  
7 was sought. *Id.* at 880. The reasonable notification requirement is important because debtors, like  
8 Defendant, “may be severely hampered in defending against any subsequent deficiency action”  
9 when actual notice is not provided. *Economic Dev. v. Arriola*, 2 CR 212, 217 (Dist. Ct. App. Div.  
10 1985).

11           Additionally, another reason why courts should require compliance with the reasonable  
12 notification requirements is because a secured creditor may “lack the incentive to obtain the highest  
13 possible price” for the property due to the continued availability of a deficiency judgment. *Bank of*  
14 *Hawaii*, 3 CR at 880. And finally, without establishing proper notice – which places an extremely  
15 minimal burden on the creditor – the debtor might be precluded from attempting to alert potential  
16 buyers to participate in the sale to ensure that the property is sold at a competitive price. *Id.*

17           For all these reasons, deficiency judgments are typically barred without proof of compliance  
18 with the reasonable notification requirements. See *Triple J Motors v. Sanchez*, 2007 MP 23 ¶ 24  
19 (citing *Economic Dev.*, 2 CR at 219); *Bank of Hawaii*, 3 CR at 879 (applying 5 CMC § 9504(3)).<sup>3</sup>

20 \_\_\_\_\_  
21 MP 23. However, whether those steps fail or satisfy the reasonable notification requirements are separate issues not  
22 pertinent to the resolution of this case instant matter as at a minimum there was no proof that the certified letters to the  
23 Defendant or his wife were actually sent.

22 <sup>3</sup> The CNMI stance on the importance of strict compliance with the notice requirements is not unique, as recently  
23 explained in *States Resources Corp. v. Gregory*, 339 S.W.3d 591 (Mo. App. S.D. 2011):

23           “The purpose of statutory notice is to apprise a debtor of the details of a sale so that the debtor may  
24 take whatever action he deems necessary to protect his interest.” *Chrysler Capital Corp. v. Cotlar*, 762  
S.W.2d 859, 861 (Mo.App. E.D. 1989). Proper notice provides the debtor the opportunity to: (1)  
discharge the debt and reclaim the collateral, (2) find another purchaser, or (3) verify that the sale is

1 *C. Effect of Plaintiff's Failure to Provide Proof of Reasonable Notice*

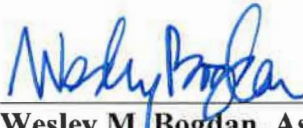
2 Accordingly—because Plaintiff did not provide any evidence or actual proof of compliance  
3 with the reasonable notice requirements—this Court finds that the deficiency judgment is barred.  
4 Further, as the deficiency judgment is barred, prejudgment interest on this amount cannot be  
5 granted and as Plaintiff has not prevailed in this action, court costs and reasonable attorneys' fees  
6 cannot be awarded to Plaintiff. *See* 7 CMC § 3208 (providing that court costs may be recoverable  
7 by the prevailing party).

8 **V. CONCLUSION**

9 Based on the matters adduced in Court and for good cause shown, this Court hereby  
10 **DENIES** Plaintiff's request for deficiency judgment, prejudgment interest, court costs, and  
11 attorneys' fees.

12 The Court **FINDS JUDGMENT** in favor of the defendant, Primo Ferrera, Jr.

13 **SO ORDERED** this 10<sup>th</sup> day of April 2018.

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16 \_\_\_\_\_

17 **Wesley M. Bogdan, Associate Judge**

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19 \_\_\_\_\_  
20 conducted in a commercially reasonable manner. *Mancuso v. Long Beach Acceptance Corp.*, 254  
S.W.3d 88, 95 (Mo.App. W.D. 2008).

21 "The right to a deficiency judgment accrues only when there is *strict compliance* with statutory  
22 requirements." *Chrysler Capital Corp.*, 762 S.W.2d at 861. Any doubt as to whether there has been  
compliance is to be resolved in favor of the debtor. *Mancuso*, 254 S.W.3d at 92. A creditor's failure to  
give proper notice, waives the creditor's entitlement to pursue a deficiency judgment. *Chrysler Capital  
Corp.*, 762 S.W.2d at 861.

23 *Id.* at 596 (footnote omitted) (emphasis added).

24 *See also* Gary D. Spivey, Annotation, *U.C.C.: failure of secured creditor to give required notice of disposition of  
collateral as bar to deficiency judgment*, 59 A.L.R. 3d 401, 3 (LEXIS) (database updated 2018) (listing numerous cases  
in which failure to give notice barred a deficiency judgment).