

Question 8 – February 2020 – Selected Answer 1

A. The Bank did not not comply with the Texas U.C.C. when it took possession of the painting.

In Texas, a secured party may use "self help" to repossess collateral so long as, during the reclaiming of that collateral, the secured party does not "breach the peace". This means that the secured party cannot use deceptive practices or threats of violence to recover the property. The Secured party must also end their reclamation of the property if, while during the reclamation, the debtor tells the secured party to cease operations. A secured creditor who hires an independent contractor to perform the repossession will be liable for damages regardless of that designation. Texas holds secured parties strictly liable for failure to adhere to these guidelines, and may award the debtor actual damages and, in some cases, punitive damages.

The Bank here hired a contractor, who was physically imposing to reclaim the painting within the Artist's possession. The contractor's intimidating presence along with his decision to waive a gun at the Artist during repossession show a gross breach of the peace. Furthermore, when the Artists asked that the contractor stop repossession, the contractor failed to yield. Because of the contractor's actions, the Bank will be held liable for its noncompliance with the UCC.

B. The Bank did not comply with the Texas UCC in its attempt to sell the Painting.

When a secured party makes a sale of repossessed property it must give notice to the debtor of the sale. Under the Texas UCC notice is presumed valid if it is made at least 10 days before the sale. The secured party must also make a reasonable sale of the property, meaning that it must reasonably advertise the property, sell it in either a private or public sale (based on appropriateness), make the sale at an appropriate time, and if there is a group that would likely purchase the property, make efforts to market to that group.

The Bank complied with few of the above requirements. It gave a notice to the Artist only six days before the sale and, in fact, tried to sell the property on a different day than it gave notice for. The painting is worth quite a bit of money, so private sale was probably reasonable, but the secured party attempted to sell the painting in a public sale that was not advertised for resulting in only two people in attendance. Because of the aforementioned missteps, the attempted sale by the bank was not in compliance.

C. The Artist can 1) have his rightfully tendered payment for the painting honored and reassume possession 2) allow for the Bank to keep the painting but either in partial or full discharge of his debt.

Texas does not allow for a statutory right of redemption after the sale of repossessed property. However before a sale is made, the debtor may pay the full accelerated price of the property under the original security agreement, including any interest, and take repossession of the property.

The property had not yet been sold at the time that the Artist presented the full amount of the debt, including interest and the cost of the Bank's repossession. Because the property was not sold, the Bank should have accepted the payment at that time, and Artists can ask for this remedy. The Bank and the Artist, through agreement can also allow for the bank to keep the painting, but it will need to be in either full or partial satisfaction of the Artist's debt.

Question 8 – February 2020 – Selected Answer 2

(A) No, the bank did not comply with the UCC when repossessing the collateral.

The bank had a valid perfected security interest in the painting. A security interest is enforceable against a debtor when it attaches. A security interest attaches when the debtor has rights in the collateral, there is a security agreement (or creditor possession of the collateral), and the creditor gives value.

Here, the bank gave value as a \$100K loan. There was a valid security agreement, and the debtor had rights in the collateral (ownership and possession. Thus, bank was entitled to enforce the security agreement against the debtor. Additionally, the bank perfected by filing a financing statement.

The security agreement included a definition of default, an acceleration clause, and a right to repossess. Under Article 9, a secured party may repossess the collateral without notice to the debtor upon default. Art. 9 does not define default, but most security agreements define default as failing to comply with the terms of repayment or the terms of the security agreement. Here, artist missed a loan repayment that triggered default under the security agreement. Thus, Bank was entitled to repossess the painting (collateral) without sending notice to the artist of when repossession would occur.

Bank hired a third party reposessor. Under Article 9, this is allowed. However, the repossession must occur without a breach of the peace. There is no one definition of breach of the peace, and courts undergo a fact intensive analysis of each case to determine if the peace was breached.

Here, when collector took the painting off the wall, Artist screamed loudly. This was a breach of the peach based on Texas case law. The breach of the peace does not have be done by the collector. Even the debtor may scream and breach the peace. At that point, the collector was required to abandon the repossession and try again at another time.

The collector did not stop though. He contined to take the painting and waved a gun as he left the Gallery. If the screaming did not breach the peace, then waving the gun surely did. Repossessors in Texas may not use threats or force or deadly weapons to repossess the collateral. This was a breach of the peace, and the bank is liable for the collectors actions.

The bank may argue that the security agreement provided that it could repossess the painting by "any means." This argument will fail because because Texas law does not authorize a breach of the peace and Texas public policy does not authorize a secured party to shift the blame to the collector. A secured party will be liable for the collector's acts.

Due to the breach of the peace, the artist may be entitled to damages. If the artist had been a consumer with consumer goods as collateral, the artist could have recovered actual damages, 10% of the principal and interest payments over the life of the loan, or damages for conversion, and the creditor would have lost the right to seek a deficiency judgment. However, the Artist is not entitled to all of these damages because the collateral was not consumer goods.

Consumer goods are goods held primarily for family or household purposes. Here, the collateral was inventory as it was held for sale or lease. A non-consumer debtor may seek actual damages for the breach of the peace but will not be able to get the 10% of the principal.

(B) No, Bank did not comply with the UCC in the sale at auction.

Once a secured creditor repossesses the collateral, the secured creditor must hold a public or private sale or may keep the collateral in a strict foreclosure. However, if the creditor keeps the collateral in a strict foreclosure, then it may lose the opportunity to seek a deficiency judgment.

All aspects of the notice of sale and the sale itself must be commercially reasonable. The requirements in a repossession and foreclosure of consumer goods are more strict than the requirements in a non-consumer repossession and foreclosure.

Here, the collateral are non-consumer goods. So, bank must simply make sure that all aspects of its notice of sale and the sale were commercially reasonable.

A creditor must send notice to the debtor of the earliest date that the sale will occur, whether the sale will be private or public, where the sale will occur, and at what time. The creditor should also give notice of the ability of the debtor to redeem the property by paying all of the accelerated debt, expenses in repossession, and interest. A commercially reasonable notice depends on the facts, but usually 10 days prior to the sale is commercially reasonable in a non-consumer transaction. Additionally, whether a private or public sale is commercially reasonable depends on the facts, the parties, and the type of collateral involved. (i.e., is this the type of collateral that is usually sold at private events and only to a certain class of buyers).

The creditor should also give notice to the debtor and other creditors with rights in the collateral if it intends to strictly foreclose and keep the collateral in satisfaction of the debt without a sale.

Here, the bank's notice of sale was not commercially reasonable. The bank sent a notice that stated that the private sale would occur on November 5th at the Bank. Bank held the auction on November 3rd. This was before the date stated in the notice. It is not commercially reasonable to give the wrong date in the notice of sale. Additionally, if the bank failed to send out invitation to people who usually buy these types of goods, then the sale would not be commercially reasonable.

Based on the bank's lack of sufficient notice, the property did not sell at the auction. Now, the bank has strictly foreclosed. Due to this violation, there is a presumption

that arises that the painting is worth the amount of the debt. Thus, bank would have to overcome this presumption to recover any more money from the artist.

(C) Artist may sue the bank for specific performance or damages.

The artist had the right to redeem the property by complying with terms of the security agreement. The security agreement contained an acceleration clause. So, at default, all payments would accelerate and become due. Thus, to redeem the property, the debtor would have to pay all past due and all future payments on the property plus interest and the creditors expenses in repossession.

Here, the artist had the right to redeem the property because the bank never sold it to a buyer (or Bona fide purchaser). The bank kept the painting. Thus, when artist tried to tender the past due and full amount of the loan, and the collection costs, and interest, the bank should have allowed the artist to redeem.

Now, the artist may sue for specific performance to get the painting or damages.