IN THE UNITED STATED BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
SHIRLEY E. GODFREY,	)	Case No. 14-bk-565
	)	
Debtor.	)	Chapter 7
	)	
IN RE:	)	
	)	
MORGANTOWN EXCAVATORS, INC	)	Case No. 12-bk-570
	)	
Debtor	)	Chapter 7
_____	)	
	)	
MORGANTOWN EXCAVATORS, INC., and SHIRLEY E. GODFREY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Proc. No. 1:13-ap-24
	)	
THE HUNTINGTON NATIONAL BANK,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION & ORDER

In advance of trial on November 7, 2016, Morgantown Excavators, Inc., and Shirley E. Godfrey (collectively, the "Plaintiffs") filed three motions in limine: (1) to specifically allow evidence on alternative theories of damages under West Virginia Uniform Commercial Code §§ 46-9-625(b) and 46-9-626(a); (2) to prohibit the use of the so-called "forbearance defense" that might be used to exclude certain evidence at trial, and (3) to prohibit Mark Welsh for offering an expert opinion regarding damages.

The Huntington National Bank (the "Defendant") separately filed two motions in limine: (1) to limit the available remedies under the West Virginia's Uniform Commercial Code to the

amounts available under W. Va. Code § 46-9-626(a); and (2) to prohibit evidence at trial regarding the Plaintiffs' attempts to compromise its debt with the Defendant.

For the reasons stated herein, the court will allow the Plaintiffs to present evidence of compensatory damages at trial that might be in excess of the Defendant's eliminated or reduced deficiency claim and will deny the remaining motions in limine.

1. Remedies Under West Virginia's Uniform Commercial Code Arising From a Commercially Unreasonable Disposition in a Non-Consumer Case

The parties' arguments for allowing or limiting evidence on damages arises from a disagreement regarding the extent of available damages under the West Virginia Uniform Commercial Code. In a September 12, 2016 Memorandum Opinion, the court held that the Defendant sold the Plaintiffs' personal property collateral in a commercially unreasonable manner under W. Va. Code §§ 46-9-610(b), 46-9-611(b), and 46-9-612(a).

In the Defendants' view, evidence of damages at trial must be limited to those available under § 46-9-626(a):

> **(a) Applicable rules if amount of deficiency or surplus in issue**. — In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:
>
> . . .
>
> (3) . . . if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:
>
> (A) The proceeds of the collection, enforcement, disposition or acceptance; or
>
> (B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition or acceptance.
>
> (4) For purposes of paragraph (3)(B) of this subsection, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses and attorney's fees unless the secured party proves that the amount is less than that sum.

Id.

Because the amount of the Defendant's deficiency claim is in issue under § 46-9-626(a), the Defendant asserts that the Plaintiffs may "not otherwise recover" general compensatory damages under § 46-9-625(d).

On the other hand, the Plaintiffs agree that § 46-9-626 provides them with a measure of damages, but the Plaintiff also contends that they may be entitled to damages under § 46-9-625(b):

> **(b) Damages for noncompliance.** — Subject to subsection[] . . . (d) . . . of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.
>
> . . .
>
> **(d) Recovery when deficiency eliminated or reduced.** — A debtor whose deficiency is eliminated under section 9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under section 9-626 may not otherwise recover under subsection (b) of this section for noncompliance with the provisions of this part relating to collection, enforcement, disposition or acceptance.

Id.

In the Plaintiffs' view, § 46-9-626 and § 46-9-625 provides for an election of remedies and the damage limitation in § 46-9-625(d) only limits a double recovery. They assert that 46-9-625(b) allows them to prove the entirety of their compensatory damages, which can then be compared to the amount of the reduction or elimination of the Defendant's deficiency under § 46-9-626(a). The Plaintiffs then assert that they may elect the greater of the two damage awards.

As a general rule of interpretation, the remedies provided by the West Virginia Commercial Code "must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in this chapter or by other rule of law." W. Va. Code § 46-1-305. This general rule of interpretation is to "negate the possibility of unduly narrow or technical interpretation of remedial provisions . . . [and] to make it clear that compensatory damages are limited to compensation." *Id.* cmt. 1.

Looking only to the plain language of § 46-9-625(d) is not helpful, as the plain language is subject to different interpretations. For example, following the reduction or elimination of a deficiency, the statute states that a debtor "may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition or acceptance." The term "not otherwise recover" may refer to: (1) a complete limitation to any further recovery apart from eliminating or reducing the deficiency, or (2) a partial limitation to

recovery such that the debtor does not obtain a double recovery by both eliminating or reducing a deficiency judgment and obtaining compensatory damages.[1]

The parties have not provided the court with any published, non-consumer, commercial law case determining whether § 9-626 is an exclusive remedy when a deficiency is in issue, or whether § 9-625(d) allows general damages for a commercial disposition conducted in an unreasonable manner so long as there is no double recovery.

Many commentators on the Uniform Commercial Code mention § 9-625(d) in passing, usually stating that the purpose of § 9-625(d) is to prevent a double recovery in commercial cases as distinguished from consumer cases. *E.g.*, *George Blum et al.*, 68A Am Jur. 2d *Secured Transactions* § 601 (2016) ("[A] debtor or secondary obligor whose deficiency is eliminated or reduced under the foregoing rules may not otherwise recover damages under the remedy provision of Article 9 for noncompliance with the provisions of Part 6 of Article 9 relating to collection, enforcement, disposition, or acceptance. Comment: The provision eliminating the possibility of double recovery or other overcompensation arising out of a reduction or elimination of a deficiency under the other provision, that does not apply to consumer transactions, is silent as to whether a double recovery or other overcompensation is possible in a consumer transaction."); William V. Dorsaneo, *Texas Litigation Guide* § 240.05[7][a] (2016) ("A debtor whose deficiency is eliminated by applying the applicable statutory rules may recover damages for the loss of any surplus. However, double recovery is not permitted. Thus, a debtor or secondary obligor whose deficiency is eliminated or reduced may not otherwise recover damages for noncompliance with the provisions relating to collection, enforcement, disposition, or acceptance."); Brent R. Cohen, *What's in Store for the Wayward Lender: The Consequences of Failing to Comply with Revised Article 9*, 22-2 ABIJ 26 (March 2003) ("[W]here a deficiency has been eliminated or reduced under

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[1] Comment 2 to W. Va. Code § 46-9-626 details the different compensatory damage provisions that may apply to a secured creditor during the course of a collection:

> Consider, for example, a repossession that does not comply with section 9-609 for want of a default. The debtor's remedy is under section 9-625(b). In a proper case, the secured party also may be liable for conversion under non-UCC law. If the secured party thereafter disposed of the collateral, however, it would violate section 9-610 at that time, and this section would apply.

Id.

By analogy, the Defendant in this case would limit damages in Comment 2 to the amount of any reduced or eliminated deficiency. The Plaintiffs would establish damages for conversion and compare that damage award to the amount of the reduced or eliminated deficiency to choose the greater amount.

§ 9-626, the debtor cannot recover additional damages for the failure to comply with the provisions of Part 6 relating to collection, enforcement, disposition or acceptance. This provision is designed to eliminate the possibility of double recovery or other over compensation where reduction or elimination of a deficiency has occurred."); James A. Stukey, *Louisiana's Non-Uniform Variations in U.C.C. Chapter 9*, 62 La. L. Rev. 793, 869 n. 369 (Spring 2002) ("The last sentence of uniform Section 9-625(d) eliminates the possibility of double recovery in connection with a reduction or elimination of a deficiency based on non-compliance with such collection and enforcement provisions. The language is confusing."); Donald J. Rapson, *Symposium: Default and Enforcement of Security Interests Under Revised Article 9*, 74 Chi.-Kent L. Rev. 893, 938-39 (1999) ("Thus, this resolution eliminates the possibility of double recovery or other over-compensation arising out of a reduction or elimination of a deficiency."); *see also* W. Va. Code § 46-9-625 cmt. 3 (2016) ("The last sentence of subsection (d) eliminates the possibility of double recovery or other over-compensation arising out of a reduction or elimination of a deficiency under section 9-626, based on noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance. Assuming no double recovery, a debtor whose deficiency is eliminated under section 9-626 may pursue a claim for a surplus. Because section 9-626 does not apply to consumer transactions, the statute is silent as to whether a double recovery or other over-compensation is possible in a consumer transaction.").

The issue of whether compensatory damages in excess of the amount of a reduced or eliminated deficiency could be allowed in commercial cases was directly analyzed in a 1999 article written by Timothy R. Zinnecker, an associate professor of law at the South Texas College of Law:

> The goal of awarding damages is to restore the aggrieved party to the position it occupied before the secured party breached its statutory duties. The limitation found in subsection (d) attempts to further that goal by eliminating the possibility of double-recovery or over-compensation. Yet, the limitation on recovery may frustrate the goal of restoration if the aggrieved party proves damages in an amount that exceeds that portion of the deficiency reduced or eliminated under revised section 9-626. For example, Creditor fails to send the requisite disposition notice to Debtor. Under local law, Creditor's noncompliance bars recovery of a $2000 deficiency. Debtor can prove actual damages resulting from Creditor's noncompliance. Debtor has improved its position by $2000, less its actual damages. If those damages are not greater than $2000, then a court can deny recovery of actual damages and yet place Debtor in a position no worse (and probably better) than it would have enjoyed if Creditor had sent a disposition notice. If actual damages however, exceed $2000 (for example, $2400), then a court should permit recovery of the amount ($400) by which the damages ($2400) exceed the

> discharged deficiency ($2000). Only by doing so can Debtor be restored it its proper place. To best advance the restoration goal of damage awards, revised section 9-625(d) should be interpreted in a manner that prohibits recovery of actual damages only to the extent that (rather than *if*) the deficiency is reduced or eliminated.

Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II*, 54 Bus. Law. 1737, 1807-08 (1999). *But see*, 4 White, Summers, & Hillman, Uniform Commercial Code § 34-45 (Thompson Reuters 2015) ("The real cases will arise under the second sentence of subsection (d) . . . . It appears that any reduction of a deficiency or denial, however small, eliminates the possibility of actual damages under 9-625(b).").

In this case, as previously determined by the court, the Defendant's actions in selling the Plaintiffs' collateral was accomplished through commercially unreasonable means. The Defendants sold the Plaintiffs' property for $535,000. The amount of the Defendant's outstanding indebtedness and the amount of proceeds that should have been realized from a disposition have yet to be judicially determined. The court previously noted that Mr. Godfrey had personally guaranteed loans to the Defendant in the principal amount of $2,044,571. At trial, it might be possible for the Plaintiffs to establish actual damages in excess of the total amount of any reduced or eliminated deficiency.

In reaching the conclusion that W. Va. Code § 46-9-625(d) does not prohibit the establishment of compensatory damages beyond the amount of the creditor's deficiency, the court is persuaded by four rationales: (1) as general rule of interpretation, the remedies provided by the West Virginia Commercial Code are remedial and must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed; (2) the apparent reason for the damage limitation in § 9-625(d) is to prevent a double recovery for both compensatory damages and a loss or reduction of a deficiency claim in commercial cases; (3) this is the rational result advocated by Professor Zinnecker, in his considered analysis of this exact issue; and (4) the apparent absurdity that could result through a contrary holding, whereby a flawed disposition might knowingly cause substantial compensatory damages that would be unrecoverable due to a small deficiency.

Consequently, the court finds that the Plaintiffs may present evidence at trial regarding the totality of the Plaintiffs alleged compensatory damages under W. Va. Code § 9-625(b). Those

damages, however, are delineated by W.Va. Code §§ 46-9-625(b) and § 46-1-305(a). At trial, the court will expect:

(1) Evidence of the Defendant's deficiency claim and an accounting for the $535,000 in sale proceeds received by the Defendant. The court expects this evidence to be submitted in a joint exhibit agreed-to by the parties in advance of trial.

(2) The Defendant's evidence, if any, under W. Va. Code § 46-9-626(a)(4) regarding the amount of proceeds that would have been realized had it conducted a disposition of the Plaintiffs' personal property in a commercially reasonable manner. This presentation is to be followed by the Plaintiffs' rebuttal, if any, and the Defendant's reply, if any. From this evidence the court expects to determine whether the Defendant's deficiency claim is eliminated or reduced, and if reduced, the exact amount of the reduction. In the alternative, the Plaintiffs may elect to forego any damage determination under § 46-9-626(a) and focus only on compensatory damages under § 46-9-625(b).

(3) The Plaintiffs' evidence on compensatory damages under W. Va. Code § 625(b). If the court has previously made a determination regarding the elimination or reduction of the Defendant's deficiency under § 46-9-626(a), then the Plaintiffs must possess a good faith belief that such compensatory damages under § 46-9-626(a) may be proven in an amount that exceeds amount of the Defendant's reduced or eliminated deficiency. In short, any damages awarded under § 9-625(b) by the court after the Plaintiffs' presentation, Defendant's rebuttal, and Plaintiff's reply, are to be offset by any previous elimination or reduction in the Defendant's deficiency claim pursuant to Professor Zinnecker's analysis.

2. Prohibiting Evidence on the Plaintiffs' Offers to Compromise

The Defendant anticipates that the Plaintiffs will try to offer testimony and exhibits concerning the Plaintiffs' proposals to compromise made in March and April of 2012. In the Defendant's view, these proposals occurred post-default and evidence on the proposals is prohibited under Fed. R. Evid. 402 and 408.

The Plaintiffs assert that such proposals are relevant on the basis that it was attempting to pay the Defendant's loan in full, but could not obtain a payoff amount from the Defendant. In the Plaintiffs' view, such evidence is helps demonstrate that the Defendant's disposition of collateral was commercially unreasonable.

After the Defendant filed its motion in limine, the court issued its September 12, 2016 Memorandum Opinion and Order on summary judgment. That order found the Defendant's disposition of the Plaintiffs' collateral to be commercially unreasonable. Consequently, the Defendant's motion in limine to exclude such evidence at trial under Fed. R. Evid. 402 and 408 is denied without prejudice as being moot.

3. The "Forbearance Period" Defense

The Plaintiffs seek to prevent the Defendant from using a "forbearance period" defense to certain evidence the Plaintiffs intend introduce at trial to show that the Defendant sold collateral in a commercially unreasonably manner.

After the Plaintiffs filed their motion in limine, the court entered its its September 12, 2016 Memorandum Opinion and Order on summary judgment establishing that the Defendant disposed of the Plaintiffs collateral in a commercially unreasonably manner. Consequently, the court will deny the Plaintiffs' motion in limine without prejudice as being moot.

4. Prohibiting the Expert Opinion Testimony of Mark Welch Regarding Damages

The Plaintiffs seek to prohibit Mr. Welch's expert opinion regarding any evidence on damages because he previously stated in deposition testimony that his expert opinion was based on his assessment of liability – not damages.

In response, the Defendant asserts that Mr. Welch was identified as a rebuttal expert to the Plaintiffs' experts, Mr. McGinty and Mr. Gompers. Mr. Welch's reports state that the valuation methodology used by the Plaintiffs' experts is flawed and he provides details of his critique.

It is the Plaintiffs' burden to prove compensatory damages. Mr. Welch's expert opinion is relevant to the amount of those compensatory damages, if any, and his previously submitted reports provide a basis for his anticipated trial testimony.

The court will therefore deny the Plaintiffs' motion in limine to exclude expert opinion testimony of Mr. Welch concerning compensatory damages.

ORDER

For the reasons set forth above, it is

ORDERED that the Defendant's Motion in Limine for Pre-Trial Determination Limiting Remedies Available to the Plaintiffs, filed on July 7, 2016 (Document No. 284), be and hereby is DENIED. It is

FURTHER ORDERED that the Plaintiffs' Motion in Limine to Permit Plaintiffs to Elect UCC Article 9 Remedies at Conclusion of Trial, filed on July 8, 2016 (Document No. 289), be and hereby is GRANTED. It is

FURTHER ORDERED that the Defendant's Motion in Limine to Exclude from Trial Evidence Concerning Proposals by Plaintiff Morgantown Excavators, Inc., to Compromise its Debt to Defendant by Future, Partial or Contingent Payments, filed on July 7, 2016 (Document No. 285), be and hereby is DENIED AS MOOT WITHOUT PREJUDICE. It is

FURTHER ORDERED that the Plaintiffs' Motion on Limine Concerning "Forbearance Period" Defense, filed on July 8, 2016 (Document No. 288), be and hereby is DENIED AS MOOT WITHOUT PREJUDICE. It is

FURTHER ORDERED that Plaintiffs' Motion in Limine to Prohibit Use of Opinion Testimony by Defendant's Expert Mark J. Welch to Support any Argument by Defendant on Damages, filed on July 9, 2016 (Document No. 293), be and hereby is DENIED.