IN THE SUPREME COURT OF GUAM

BANK OF GUAM
Plaintiff-Appellee/ Cross-Appellant

vs.

DANIEL R. DEL PRIORE
Defendant-Appellant/ Cross-Appellee

OPINION

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Supreme Court Case No.: CVA99-043
Superior Court No.: CV1022-98

Appeal from the Superior Court of Guam
Argued and submitted on October 25, 2000
Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, JR., Associate Justice, and RICHARD H. BENSON, Designated Justice.

CRUZ, C.J.:

[1] Bank of Guam filed an action in the Superior Court of Guam for judicial foreclosure of a security interest given by Daniel R. Del Priore (hereinafter "Del Priore") to secure a ship mortgage. Subsequent to filing the action, Bank of Guam repossessed the collateral and sold it at public sale. Because the foreclosure sale did not yield proceeds sufficient to satisfy the outstanding debt, the Superior Court awarded Bank of Guam a deficiency judgment. On appeal, Del Priore argues that Bank of Guam's failure to plead and prove the notice requirement of 13 GCA § 9504(3) bars recovery of a deficiency. We agree and therefore vacate the deficiency judgment.

[2] Bank of Guam filed a Counter-Appeal, arguing that the trial court erred in awarding attorney fees less than the amount it requested without providing reasons for its reduction. Because we vacate the deficiency judgment, we hold that Bank of Guam is not entitled to attorney fees.

I.

[3] In January of 1990, Del Priore and his wife purchased a boat, the Sunflower (hereinafter "vessel"), through the Bank of the Orient and brought the vessel to Guam. On March 26, 1990, the Del Priores executed and delivered a First Preferred Mortgage to the Bank of the Orient to secure the payment of the promissory note executed on June 20, 1990. The note was a promise to pay to the Bank of the Orient an amount of $228,750.00 in monthly installments. Bank of Guam (hereinafter "Bank") obtained ownership of the financial documents pertaining to this transaction.

[4] In accordance with the provisions of the promissory note, the Del Priores, as debtors, were required to maintain hull and liability insurance for the vessel. The Del Priores obtained insurance from Cassidy's Insurance with policy limits of $400,000.00 for physical damage and $1,000,000.00 for liability for a total annual premium amount of $25,012.00. The policy period began on March of each year. The Del Priores fell into arrears in their insurance payments. Pursuant to the Mortgage Agreement, the Bank renewed the policy on June 13, 1997, after receiving notice of cancellation from Cassidy's. The total amount of insurance premiums the Bank paid on behalf of the Del Priores prior to foreclosure was $39,019.00.

[5] The last payment on the note was made on or about August 29, 1997. On that date, the amount of outstanding indebtedness was $80,000.00. On April 8, 1998, in reaction to the default, the Bank filed a Complaint in the Superior Court of Guam to "Foreclose Security Interest and for Damages" (CV1022-98). Del Priore filed an Answer and Counter-Claim on May 28, 1998. On June 23, 1998, during the pendency of the foreclosure action, the Bank took physical possession of the vessel and moved it from the Agat Marina to a new berthing location. The Bank hired security services to protect the vessel while in its possession. On September 21, 1998, the Bank sold the vessel, which was appraised at between $35,000.00 and $38,000.00, at a public foreclosure sale for $75,000.00. After deducting costs of the sale, including insurance costs, security services, moving and appraisal costs, plus interest, the deficiency owed totaled $61,170.54. On March 11, 1999, the trial court issued its Findings of Facts and Conclusions of Law, awarding the Bank the claimed deficiency amount of $61,170.54 plus interest and court costs of $70.00, for a total deficiency amount of $61,240.54. The court issued a Final Judgment on September

9, 1999, awarding the Bank $61,170.54 plus attorney fees of $9,186.08, for a total judgment award of $70,356.62. On August 26, 1999, the trial court issued an Order clarifying that the $9,186.08 for attorney fees was reasonable, and re-affirming the prior grant of fees in the same amount.

[6] Del Priore filed a Notice of Appeal on October 14, 1999. The Bank filed a Notice of Cross-Appeal on October 20, 1999.

II.

[7] This court has jurisdiction over final judgments of the Superior Court pursuant to Title 7 GCA §§ 3107 and 3108 (1994).

III.

A.

[8] The determinative issue in this appeal is what effect, if any, the failure to plead and prove the notice requirement of Title 13 GCA § 9504(3) has on the ability to obtain a deficiency judgment.[1] Because resolution of the issue requires us to interpret relevant provisions of the Uniform Commercial Code of Guam, we conduct a *de novo* review. *See Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 7 (recognizing that issues of statutory interpretation are reviewed *de novo*); *Ada v. Guam Telephone Authority*, 1999 Guam 10, ¶ 10.

[1] Del Priore presents several other issues on appeal. He argues that the Bank's incurrence of costs for insurance, moving, berthing, and security for the vessel prior to and upon repossession were not commercially reasonable. Because the effect of a failure to provide notice is determinative in this case, we find it unnecessary to resolve and thus decline to address these issues. We further note that Del Priore does not take issue with the amount received at the foreclosure sale.

[9] The Uniform Commercial Code of Guam (hereinafter "UCCG") is found in Title 13 of the Guam Code Annotated. Division 9 of the UCCG governs secured transactions.[2] *See* Title 13 GCA § 9101 (1993). As specifically provided for under Division 9, a secured party has a right to sell the collateral upon default, *see* Title 13 GCA § 9504(1) (1993), and, unless otherwise agreed, may claim a deficiency. *See* Title 13 GCA § 9504(2) (1993). Section 9504(3) of the UCCG governs the disposition of collateral upon default and provides:

> Disposition of the collateral may be by public or private proceedings and may be made by one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but ever [sic] aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. *Unless collateral is perishable and threatens to decline speedily in value or is a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which 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. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.

Title 13 GCA § 9504(3) (1993) (emphasis added).

[10] Thus, section 9504(3) imposes two requirements on a secured party when selling the collateral upon default. First, the secured party must dispose of the collateral in a commercially reasonable manner, and second, unless waived by the debtor after default, the secured party must give the debtor reasonable notification of the sale. *See Liberty Nat'l Bank v. Greiner*, 405 N.E.2d 317, 323-24 (Ohio Ct. App.

[2] Division 9 is Guam's codification of Article 9 of the Uniform Commercial Code (hereinafter "UCC"). A secured transaction is any transaction that is intended to create a security interest. *See* Title 13 GCA § 9102 (1993). A security interest is an interest in personal property or fixtures that secures the payment or performance of an obligation. *See* Title 13 GCA § 1201(37) (1993).

1978) (holding that the requirements of commercial reasonableness and notice are two separate requirements that must be independently satisfied); *Ruden v. Citizens Bank and Trust Co.*, 638 A.2d 1225, 1229 (Md. Ct. Spec. App. 1994); *Thong v. My River Home Harbour, Inc.*, 3 S.W.3d 373, 377 (Mo. Ct. App. 1999). The UCCG is silent as to the consequence of a failure to comply with either of these requirements on a secured party's ability to obtain a deficiency judgment. *See Liberty Nat'l Bank*, 405 N.E.2d at 322; *see also Holt v. Peoples Bank*, 814 S.W.2d 568, 570 (Ky. 1991); *Hertz Commercial Leasing Corp. v. Dynatron, Inc.*, 427 A.2d 872, 877 (Conn. Super. Ct. 1980) (interpreting New York's codification of the UCC); *Roanoke Indus. Loan and Thrift Corp. v. Bishop (In Re Bishop)*, 482 F.2d 381, 385 (4th Cir. 1973). Further, case law for this jurisdiction does not provide an answer. As the question is one of first impression for this court, we proceed to announce a rule on the narrow issue of the effect of the failure to comply with the notice requirement of section 9504(3).[3]

[11] There are three lines of authority regarding the effect of a failure to satisfy the notice requirement of UCC 9-504(3), which is mirrored by 13 GCA § 9504(3), on the recovery of a deficiency. The three divergent rules include the rebuttable presumption rule, the set-off rule, and the absolute bar rule. *See Connecticut Bank and Trust Co. v. Incendy*, 540 A.2d 32, 37 (Conn. 1988).

[12] Some jurisdictions have adopted the rebuttable presumption theory. *See e.g. id.* at 38; *Butte County Bank v. Hobley*, 707 P.2d 513 (Idaho Ct. App. 1985); *see also Lindberg v. Williston Indus. Supply Corp.*, 411 N.W.2d 368 (N.D. 1987); *Landmark First Nat'l Bank v. Gepetto's Tale O' the Whale of Fort Lauderdale, Inc.*, 498 So.2d 920 (Fla. 1986). Under this approach, the creditor must

[3] We do not express an opinion as to the separate issue of the effect of non-compliance with the commercial reasonableness requirement of section 9504(3).

show compliance with the notice requirement of 9-504(3). If he fails to meet this burden, a presumption arises that the fair market value of the collateral at the time of repossession was equal to the outstanding debt. *See Butte County*, 707 P.2d at 515 (citation omitted); *Lindberg*, 411 N.W.2d at 374 (citation omitted). This presumption works against the creditor and prevents recovery of a deficiency. A court will award a deficiency judgment if the creditor rebuts the presumption by providing evidence of the fair market value at the time of repossession. *Butte County*, 707 P.2d at 515; *Roanoke Indus. Loan and Thrift Corp.*, 482 F.2d at 385-86; *but cf. Connecticut Bank and Trust Co.*, 540 A.2d at 38-39 (holding that under the rebuttable presumption theory, the creditor must rebut the presumption by showing that he sold the collateral in a commercially reasonable manner). Upon a showing of the fair market value of the collateral, the creditor will be allowed to recover the lesser of: "(a) the difference between the indebtedness and the fair market value of the collateral sold, or (b) the difference between the indebtedness and the actual amount received upon the sale of the collateral." *Lindberg*, 411 N.W.2d at 374 (citation omitted). The creditor cannot rely on the value received upon the sale as evidence of the fair market value, nor may he rely on testimony of his employees regarding their opinions of the fair market value of the collateral. *Id.*

[13] By contrast, a minority of courts has adopted the set-off rule, in which a creditor's failure to give notice does not preclude recovery of a deficiency; however, the amount recoverable in the deficiency judgment is off set by any damages resulting from such failure. *See e.g. Crowder v. Allied Inv. Co.*, 209 N.W.2d 141 (Neb. 1973); *Swanson v. May*, 697 P.2d 1013 (Wash. Ct. App. 1985); *see also Connecticut Bank and Trust Co.*, 540 A.2d at 37. Under this rule, the debtor has the burden to prove damages and must show that he suffered a loss as a result of the creditor's violation of the notice

requirement. *See Connecticut Bank and Trust Co.*, 540 A.2d at 37.

[14] Other courts have rejected the above two approaches and instead adopted the absolute bar rule. *See e.g. Textron Fin. Corp. v. Trailiner Corp.*, 965 S.W.2d 426 (Mo. Ct. App. 1998); *Dependable Ins. Co. v. Landers*, 421 So.2d 175 (Fla. Dist. Ct. App. 1982); *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980); *Maryland Nat'l Bank v. Wathen*, 414 A.2d 1261 (Md. 1980). Under this rule, compliance with the notice requirement is a condition precedent to receiving a deficiency judgment. *Textron Fin. Corp.*, 965 S.W.2d at 429-30. A failure to satisfy this element bars the recovery of a deficiency. *Id.* at 432.

[15] The Bank argues that we should adopt the rule that the failure to plead and prove notice does not completely bar the recovery of a deficiency. The Bank relies on *Washburn v. Union Nat'l Bank and Trust Co.*, 502 N.E.2d 739 (Ill. App. Ct. 1986), for the proposition that the failure to comply with the notice requirement is not fatal to the claim for a deficiency so long as the creditor can show that the sale was commercially reasonable. Essentially, the Bank argues in favor of the rebuttable presumption theory in which the creditor's rights are determined by looking primarily to aspects of the foreclosure sale itself.

[16] In *Washburn*, the creditor liquidated the collateral without notifying the debtor of the sale. The debtor thereafter *sued for damages*, alleging that the bank-creditor wrongfully sold the collateral without affording the debtor prior notice. *Id.* at 741. The bank-creditor made a motion for summary judgment on this claim, which was granted. The debtor appealed. The debtor argued that a sale without notice rendered the sale commercially unreasonable. Relying on Article 9-507(2), the court defined commercial reasonableness as follows:

> If the secured party either sells the collateral in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercial reasonable practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

See id. at 742 (quoting Article 9-507(2)). Upon review of the record, the court held that the creditor followed the usual procedure in arranging the sale, and accepted the highest bid for the collateral. Moreover, the debtor did not allege that the sale yielded a price below fair market value. *Id.* Asserting the rule that "notice is not required where commercial reasonableness is established," the court held that because the sale was conducted in a commercially reasonable manner, the trial court did not err in granting the Bank's motion for summary judgment. *Id.* at 742-43. In other words, under the facts of the case, the debtor was not allowed to recover damages as a result of the creditor's failure to afford notice.

[17] *Washburn*, however, is distinguishable from the instant case. In *Washburn*, the issue was not whether the creditor is allowed to receive a deficiency judgment absent notice, which is the issue presently before this court, but rather, whether the debtor may recover damages as a result of a failure to afford notice. The rule the Bank takes from *Washburn* is the court's holding that "[t]he Commercial Code has consistently been construed to mean that notice is not required where commercial reasonableness is established." *Id.* at 742. This rule must be viewed in light of the posture of the *Washburn* case. Specifically, the rule makes sense when viewing whether the debtor may recover damages for a defect in notice. If there is no showing that the creditor sold the collateral in such a way that the sale price of the collateral was compromised to the debtor's detriment (i.e., sold the collateral in a commercially *unreasonable* manner), then the debtor was not harmed despite the lack of notice, and therefore there are no resulting damages.

[18] Moreover, as evident in *Washburn*, commercial reasonableness is often determined by reference to the foreclosure sale price. *See id.* at 742. If the sale price was less than the fair market value at the time of repossession, the harm to the debtor is measurable, *to wit*, the harm suffered by the debtor equals the difference between the fair market value of the collateral at the time of repossession and the amount received at the foreclosure sale. In the case of a failure to provide notice, the harm is not as easily measurable, and may consist of the preclusion of the debtor's right of redemption. Thus, there is a distinction between a commercially reasonable sale and the notice requirement, and a commercially reasonable sale does not cure the harm caused to the debtor where the creditor fails to provide notice. *Cf. Dependable Ins. Co.*, 421 So.2d at 178 (recognizing that the right to sue for damages under section 9-507 of the UCC is no protection against the foreclosure of the debtor's opportunity to redeem the collateral).

[19] Thus, we reject the Bank's argument that a commercially reasonable foreclosure sale cures the failure to comply with the notice requirement of 13 GCA § 9504(3). Del Priore argues that we should adopt the absolute bar rule in which the notice requirement is a condition precedent to receiving a deficiency and, therefore, a failure to plead and prove notice forecloses the right to a deficiency. We agree. We find that the absolute bar rule comports most with the history of deficiency judgments as well as the policy underlying the notice requirement of section 9504(3).

[20] The absolute bar theory is supported by the history of deficiency judgments. *See Dependable Ins. Co.*, 421 So.2d at 177. Deficiency judgments were unheard of at common law, thus, because the right to a deficiency is purely a creature of statute, strict compliance with the requirements of the statute is required. *See id.; Textron Fin. Corp.*, 965 S.W.2d at 428-29 (citation omitted).

[21] Moreover, strict compliance with the notice requirement is the better rule because of the important functions notice serves in the context of secured transactions. "Notice to the debtor that the collateral is about to be disposed of is so fundamental that no remedy less severe than forfeiture of the deficiency amount would be adequate and this remedy is by no means exclusive." *Holt*, 814 S.W.2d at 570.

[22] At the very least, notice allows the debtor to ensure that the foreclosure sale is commercially reasonable. *See Carter v. Wells Fargo Bank (In Re Carter)*, 511 F.2d 1203, 1204 (9th Cir. 1975). Specifically, notice of the sale provides the debtor the opportunity to participate in the sale, oppose the sale, or to seek out buyers for the collateral. *See Wilmington Trust Co.*, 415 A.2d at 776. Further, notice allows the debtor to oversee the disposition to maximize the possibility that a fair price will be obtained at the sale. *See id.* at 776; *see also Holt*, 814 S.W.2d at 570 (citing *Bailey v. Navstar Fin. Corp.*, 709 S.W.2d 841, 843 (Ky. Ct. App. 1986)).

[23] More importantly, notice allows the debtor the opportunity to redeem the collateral in accordance with 13 GCA § 9506.[4] *See Liberty Nat'l Bank*, 405 N.E.2d at 323; *Maryland Nat'l Bank*, 414 A.2d at 1263 (recognizing that a debtor without notice is effectively prevented from exercising his statutory right to redeem the property under 13 GCA § 9506); *Wilmington Trust Co.*, 415 A.2d at 776 (determining

[4] This section provides:

> At any time before the secured party has disposed of the collateral or entered into a contract for its disposition under Section 9504 or before the obligation has been discharged under 9505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

Title 13 GCA § 9506 (1993).

that one purpose of notice is to give the debtor the opportunity to exercise his redemption rights); *Dependable Ins. Co.*, 421 So.2d at 178. If a creditor fails to give the requisite notice, the debtor is prevented from procuring the money needed to satisfy the debt or to obtaining refinancing prior to the foreclosure sale. *See Maryland Nat'l Bank*, 414 A.2d at 1263. Significantly, unlike in the case of foreclosure of a real property mortgage where the debtor may have a twelve-month statutory right to redeem the property *after* a foreclosure sale conducted pursuant to a private power of sale, *see Paulino v. Biscoe*, 2000 Guam 13, ¶ 22, in the case of foreclosing on a security interest, the debtor's right of redemption may only be exercised *prior to* the foreclosure sale. *See* 13 GCA § 9506. Therefore, a failure to give notice is particularly harmful in the context of secured transactions thus requiring a rule of strict compliance.

[24] Finally, we think the absolute bar rule which mandates strict compliance with the statute is necessary because of the clear need to protect debtors in light of the inequality of bargaining power inherent in many debtor-creditor relationships. *See Wilmington Trust Co.*, 415 A.2d at 780. It is not unfair to hold the creditor to the notice requirements when we balance the relative ease in providing notice in relation to the harm to the debtor where notice is not given. *See Maryland Nat'l Bank*, 414 A.2d at 1264; *see also Wilmington Trust Co.*, 415 A.2d at 780 ("We are unable to see any unfairness in protecting the debtor's rights to the exclusion of those of the creditor when the creditor has been placed in such a high degree of control of the relationship and carries such a small burden in order to gain the advantages of the Statute."); *Dependable Ins. Co.*, 421 So.2d at 178.

[25] Because of the unquantifiable protections notice affords the debtor and the relative ease in giving notice, we hold that a secured creditor must both plead and prove compliance with the notice requirement of 13 GCA § 9504(3).[5] Creditors are given the opportunity, under the statute, to be made whole via a recovery of a deficiency, and thus have less incentive to effectuate the debtor's interest in maximizing the foreclosure sale price, or to give the debtor the opportunity to redeem the collateral or refinance the debt prior to the sale. In light of this disincentive to protect the debtor, the UCC provisions were enacted with the purpose to prevent secret dispositions of the collateral. *See Maryland Nat'l Bank*, 414 A.2d at 1264. Because the only person interested in protecting the debtor is likely to be the debtor himself, allowing a creditor to obtain a deficiency without strictly complying with the notice requirement would fly in the face of the very protection the Code seeks to preserve, that is, the debtor's ability to protect himself. In the absence of legislative intent to the contrary, the need to preserve the protections afforded to the debtor under the UCCG militates against a rule that would permit the recovery of a deficiency in the absence of notice.

[26] The Bank argues that even if compliance with the notice requirement is a condition precedent to recovering a deficiency, a defect in notice must be raised as an affirmative defense, and if not raised, the debtor is deemed to have waived any objection to the defect. We do not agree. The test for whether a defense is affirmative is "whether it controverts an element of a plaintiff's prima facie case or, [instead], raises matters outside the scope of the prima facie case." *Paint Shuttle, Inc. v. Continental Cas. Co.*,

[5] Compliance with the notice requirement may be pleaded specifically or generally by averring that all conditions precedent have been performed or have occurred. *See Twin Bridges Truck City, Inc. v. Halling*, 205 N.W.2d 736, 739 (Iowa 1973); *cf. Greathouse v. Charter Nat'l Bank-Southwest*, 851 S.W.2d 173, 177 (Tex. 1992) (determining that a creditor must plead the commercial reasonableness requirement of 9-504(3)).

733 N.E.2d 513, 524 (Ind. Ct. App. 2000) (citation omitted). A defense that seeks to controvert the establishment of plaintiff's prima facie case is not an affirmative defense. *See Stanke v. State Farm Mut. Auto. Ins. Co.*, 503 N.W.2d 758, 760 (Mich. Ct. App. 1993). Rather, "an affirmative defense includes any defense that seeks to foreclose a plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case." *Kelly-Nevils v. Detroit Receiving Hospital*, 526 N.W.2d 15, 20 (Mich. Ct. App. 1995). We have already determined that the notice requirement of section 9504(3) is a condition precedent to receiving a deficiency judgment. "[W]hen a cause of action requires proof that a statutorily-created condition precedent was met, the party with the obligation to meet the condition must not only plead compliance, but must prove it affirmatively." *Textron Fin. Corp.*, 965 S.W.2d at 429.; *see also Twin Bridges Truck City, Inc. v. Halling*, 205 N.W.2d 736, 738-39 (Iowa 1973). The party with the burden may, in the alternative, plead that the performance of the condition was waived or excused. *See Twin Bridges Truck City, Inc.*, 205 N.W. at 738. Because compliance with the notice requirement is a condition to recovery, it is an element of the creditor's cause of action for a deficiency, and it is therefore not an affirmative defense. *See Textron Fin. Corp.*, 965 S.W.2d at 429; *Twin Bridges Truck City, Inc.*, 205 N.W. at 738; *cf. Cook Composites, Inc. v. Westlake Styrene Corp* ., 15 S.W.3d 124, 137-38 (Tex. App. 2000) (determining that because the commercial reasonableness and pre-sale notice requirements of the Texas version of UCC 2-706 are elements of the seller's prima facie claim for damages, they are not affirmative defenses). Accordingly, the creditor has the burden to plead and prove that notice was given and it is not incumbent on the debtor to raise it as an affirmative defense. *Cf. Cook Composites, Inc.*, 15 S.W.3d at 138 (holding that because the requirements of UCC 2-706 are elements

of the plaintiff's cause of action "[i]t would make no sense to impose the burden on the buyer to prove a negative as an affirmative defense, i.e., to prove the seller's failure to satisfy the elements of section [2-706] . . . .").

[27] The fact remains that Del Priore did not raise the defect at any time in the lower court. As a general rule, we will not review an issue raised for the first time on appeal. *See Dumaliang v. Silan*, 2000 Guam 24, ¶ 12. However, this rule is discretionary and an appellate court may review an issue raised for the first time if the issue is purely one of law. *See id*. at ¶ 12, n. 1. Because the issue presented by Del Priore is purely a question of law, we find that the failure to raise the issue below is not fatal to the appeal.

[28] Based on a review of the record, we find that the lower court erred in awarding the Bank a deficiency judgment. The parties agree that the Bank sold the collateral at a public sale. Therefore, the Bank was required to give "reasonable notice of the time and place of the sale" because the type of collateral, here, a used vessel, does not fall under the exceptions to the notice requirement. 13 GCA § 9504(3). The vessel was not perishable, subject to a speedy decline in value, or "of a type customarily sold in a recognized market".[6] *Id.* Further, there is no indication in the record, and the parties do not assert, that Del Priore waived the notice requirement after default. *See id.* We find that the Bank neither pled nor proved that it complied with the notice requirement of section 9504(3). The Bank did not allege compliance with the notice requirement in its Complaint to Foreclose Security Interest and for Damages

[6] A recognized market is a "stock market or a commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling or competitive bidding are not primary factors in each sale and where the prices paid in actual sales of comparative property are currently available by quotation." *Maryland Nat'l Bank*, 414 A.2d at 1263 (citation omitted) (determining that there is no recognized market for used cars because "the price of the same model used car will vary according to its condition or the whim of the purchaser"); *see also Hertz Commercial Leasing*, 427 A.2d at 876 (determining that goods customarily sold in a recognized market are limited to widely traded stocks and bonds).

filed on April 8, 1998. This failure to allege compliance is not surprising as the complaint requests a *judicial foreclosure*. At the time of filing the complaint, the Bank had not yet exercised its self-help remedy of repossession and sale. The record reveals that the Bank did not amend its pleadings to pray for a deficiency judgment after foreclosure. Accordingly, the Bank failed to plead compliance with the notice requirement. Further, the Bank failed to prove compliance. The Bank provided testimonial evidence at trial that on June 22, 1998, the Bank notified Del Priore of the repossession. *See* Transcript, vol. --, pp. 74-75 (Bench Trial, Feb. 26, 1999). There was also evidence that the Bank heeded Del Priore's request for 30 days to find a buyer for the vessel. *See* Transcript, vol. --, pp. 75-76 (Bench Trial, Feb. 26, 1999). However, this evidence falls short of proving compliance with the requirement that the debtor be notified of the "time and place of any public sale" as required under 13 GCA § 9504(3).

B.

[29] Finally, because the lower court erred in awarding a deficiency judgment, we find that the award of attorney fees to the Bank was improper, rendering moot the Bank's argument on cross-appeal that the trial court erred in arbitrarily reducing the amount of attorney fees the Bank requested.

IV.

[30] We hold that compliance with the notice requirement of 13 GCA § 9504(3) is a condition precedent to receiving a deficiency judgment. The creditor has the burden to show compliance, and a failure to meet this burden bars the creditor from recovering a deficiency. Because the Bank failed to both

plead and prove compliance with the notice requirement, the Bank was precluded from recovering a deficiency and was not entitled to attorney fees. Accordingly, we **VACATE** the judgment entered by the trial court and **REMAND** for proceedings consistent with this opinion.

PETER C. SIGUENZA, JR.
Associate Justice

RICHARD H. BENSON
Designated Justice

BENJAMIN J.F. CRUZ
Chief Justice