276 P.3d 838, 2012 WL 1920022 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition
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Court of Appeals of Kansas.
UNITED CENTRAL BANK, Appellant,
v.
Dr. Anwarul SIDDIQUI and Hameeda Siddiqui, Appellees.

No. 105,714.
May 18, 2012.

Appeal from Saline District Court; Rene S. Young, Judge.
Norman R. Kelly and Brendan Burke, of Norton, Wasserman, Jones & Kelly, L.L.C., of Salina, for appellant.

Terry D. Criss, of Hampton & Royce, L.C., of Salina, for appellees.

Before GREENE, C.J., LEBEN and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** United Central Bank (UCB), successor in interest to Mutual Bank, appeals the district court's decision to deny summary judgment against Anwarul Siddiqui on the issue of whether Mutual Bank sold collateral in a commercially reasonable manner. UCB also appeals the district court's decision—made after a bench trial—that the collateral at issue was not sold in a commercially reasonable manner and that UCB was not entitled to a second evidentiary hearing to present evidence regarding the value of the collateral. Finally, UCB argues that the district court should have awarded it attorney fees and costs as provided in the guaranty agreement that Anwarul signed. For the reasons stated below, we affirm the judgment of the district court.

FACTS

Anwarul is a neurologist living and working in Salina, Kansas. His brother, Khairulbashar "Bashar" Siddiqui, was the majority owner and principle officer of Midwest Steel Blanking, Inc. (Midwest), an Illinois corporation involved in the business of buying steel, processing it, and selling it to different fabrication shops. In January 2008, Anwarul, along with Bashar, agreed to personally guarantee two loans ($540,000 and $201,438, respectively) Midwest received from Mutual Bank (located in Harvey, Illinois) to buy a steel blanking machine. In addition to Anwarul's and Bashar's personal guarantees, Mutual Bank took a security interest in the blanking machine.

The purchase price of the blanking machine was $1,050,000. Midwest did not pay $239,488.99 of the $1,050,000 purchase price, however, because of a dispute Midwest had with the manufacturer regarding proper installation of the machine (it weighed 40,000 pounds and was 30 to 40 yards long) and deficient production levels once the machine was up and running in late spring, early summer of 2008.

The maturity date of the loans was extended numerous times—from May 22, 2008, to August 22, 2008; from August 22, 2008, to December 15, 2008; and finally from December 15, 2008, to June 15, 2009. In a document prepared on May 12, 2008, in connection with the May 22 extension, Mutual Bank assigned a gross collateral value of $1,022,000 to the blanking machine.

In January and February 2009, Midwest failed to make loan payments and shortly thereafter defaulted on the loans. Midwest also failed to make rent payments and was evicted from its place of business in Lombard, Illinois (a suburb of Chicago). The blanking machine remained inside the building that Midwest vacated. Because of the size of the machine, Mutual Bank decided to keep the machine in the building until it could sell the machine and recoup some of the money it was owed. Thus, in June 2009, Mutual Bank took over the lease that Midwest had with its landlord, incurring a rental obligation of $713.57 per day.

At around this same time, Mutual Bank hired the Chicago law firm of Boodell & Domanskis to coordinate the sale of the machine. The law firm scheduled a public viewing of the blanking machine at Midwest's former building in Lombard on July 22, 2009, followed by a public auction on July 24, at 11 a.m. at the law firm's office in downtown Chicago. The machine would be sold in its "as is" condition,

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and the winning bidder would be required to pay 25 percent of the sale price on the day of the sale with a certified or cashier's check and pay the remaining balance within 24 hours. Notice of the sale and its terms was sent by overnight mail to Anwarul on July 14, 2009. He received the notice the next day.

***2** Also around this same time, the law firm (via e-mail) contacted about a dozen individuals who it had identified as potential bidders for the machine to advise them of the upcoming sale and its terms. Those e-mails that were included in the record on appeal reflect that nine people were specifically informed that the machine would be available for inspection on July 22 in Lombard. The other people were informed that arrangements could be made to inspect the machine prior to the sale.

In addition to notifying specific people of the sale, the law firm advertised the sale on Craigslist and in both the print and online versions of the Chicago Tribune. The ad on Craigslist ran from July 16 to July 24 (the day of the sale) and informed people of the date and location of the sale and its terms. But the Craigslist ad failed to mention that the machine would be available for an onsite inspection on July 22. Instead, the ad mentioned that arrangements could be made through the law firm to inspect the machine prior to the sale. The ad also identified the location of the blanking machine three times—once as "57 Eisenhower Lane, South" and twice (incorrectly) as "57 Eisenhower *Land,* South" (emphasis added) in Lombard, Illinois.

With regard to the ads placed in the Chicago Tribune (which ran from July 18–24), the print ad identified Mutual Bank as the seller of the blanking machine but failed to mention when or where the sale would take place. The online ad incorrectly stated that the sale was taking place on July 22 at 57 Eisenhower Lane, South in Lombard instead of on July 24 at Boodell & Domanskis' downtown Chicago office. Although both the print and online versions of the ad described the general terms of the sale, neither ad mentioned that the machine could be inspected prior to the sale.

Four to five separate parties attended the onsite inspection on July 22. On the day of the sale, a representative from Mutual Bank and three other individuals—each of whom had been notified of the sale by the law firm-attended the sale. Two of the individuals represented the same party. Although the representative from the bank had the authority to credit bid up to the full amount due on the loan, the representative did not submit any bids. One of the individuals submitted an opening bid of $225,000, resulting in back and forth bidding between that person and the other party represented at the sale. Ultimately, the blanking machine was sold to GSL of Illinois, LLC, for $300,000. The proceeds were applied to the outstanding balance on the loans, resulting in the smaller loan being paid off and the principal balance of the larger loan being reduced to $437,209.57. As of August 3, 2010 (the day of the bench trial taking place in this case), the amount due on this loan (principal balance, interest, and fees) was $558,073.56.

On Friday, July 31, 2009, the Federal Deposit Insurance Corporation took over Mutual Bank. The following Monday, August 3, the bank was reopened as UCB. UCB purchased the commercial instruments previously held by Mutual Bank. On September 14, 2009, UCB filed a petition in Saline County District Court against Anwarul and his wife, Hameeda, seeking to collect the amount still owed on the loan. Anwarul and Hameeda (collectively "the Siddiquis") filed an answer claiming, among other things, that UCB should be barred from receiving a deficiency judgment against them because the sale of the blanking machine was not done in a commercially reasonable manner.

***3** After conducting a case management conference, the district court established February 8, 2010, as the deadline for discovery to be completed and February 19, 2010, as the deadline for filing any dispositive motion. UCB subsequently asked the district court to extend the deadlines, noting that it had not received responses to its discovery requests for more information on the defenses asserted to the suit—specifically, the claim that the sale of the blanking machine was not done in a commercially reasonable manner. The district court granted the motion and extended the above deadlines to April 8 and 19, 2010, respectively.

On April 19, 2010, UCB filed a motion for summary judgment, arguing, among other things, that the uncontroverted facts showed that the sale of the collateral was done in a commercially reasonable manner. In support of this argument, UCB pointed to

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an affidavit and report provided by its expert witness, David Cohen. Cohen, a Chicago attorney who had prior experience conducting 11 Uniform Commercial Code (UCC) sales for banks and individuals, opined that based on the notification given to the Siddiquis regarding the sale, the manner in which the sale was advertised to potential bidders, the location and time of the sale, and the terms of the sale (requiring 25 percent of the winning bid to be paid immediately by cashier's check and the balance to be paid within 24 hours of the sale), the blanking machine was sold in a commercially reasonable manner under Illinois' version of the UCC (the parties agree that the substantive law of Illinois should be applied to this case). UCB maintained that because the Siddiquis could not produce evidence showing otherwise, Cohen's opinion established—as a matter of law—that the blanking machine was sold in a commercially reasonable manner under Illinois law.

In response to UCB's motion for summary judgment, the Siddiquis acknowledged Cohen provided an opinion that the sale of the blanking machine was conducted in a commercially reasonable manner, but they asserted that Cohen's opinion was based on disputed issues of material fact and, thus, was insufficient to establish as a matter of law that the sale was commercially reasonable. Specifically, the Siddiquis noted that (1) the advertisements for the sale were not widely circulated and were made less than 10 days prior to the sale, (2) the blanking machine was sold for less than 30 percent of the value that Mutual Bank had assigned to the property, and (3) Mutual Bank never had the equipment appraised prior to the sale. The Siddiquis argued that under Illinois law, these facts demonstrated that the sale of the blanking machine was not conducted in a commercially reasonable manner.

Ultimately, the district court agreed with the Siddiquis and denied UCB's motion for summary judgment. After the district court conducted a pretrial conference with the parties, it filed an order identifying several issues to be determined at the bench trial, two of which were: (1) Was the sale of the blanking machine performed in a commercially reasonable manner and (2) how much money, if any, was UCB entitled to receive from the Siddiquis?

***4** At the bench trial, Robert Hoholik, a former employee of Mutual Bank and current assistant vice president of special assets (*i.e.,* troubled loans) for UCB, testified about his involvement with selling the blanking machine for Mutual Bank. Hoholik stated that he hired Boodell & Domanskis to conduct the sale of the blanking machine for Mutual Bank and that he showed the blanking machine to four or five parties during the onsite inspection on July 22, 2009. Hoholik also testified that he attended the July 24, 2009, sale of the blanking machine and was authorized to credit bid up to the full amount due on the loan but did not submit any bids. Hoholik said that prior to the sale of the blanking machine, Mutual Bank never had the machine appraised. Hoholik explained that it was not the typical practice to get an item appraised before selling it at a public sale because the bids the item received at the sale would establish the value of the item.

Howard Piggee, III, a lawyer with Boodell & Domanskis, testified about his involvement with selling the blanking machine. Piggee said that Mutual Bank wanted the blanking machine to be sold as soon as could reasonably be accomplished because Mutual Bank was paying rent for the building where the machine was stored. Piggee noted that the longer Mutual Bank continued paying rent, the less money there would be available from the sale proceeds to apply against the loans (by the time the sale took place, Mutual Bank had paid $30,000 in rent). Piggee explained that the law firm chose not to advertise the sale in a steel trade journal because the firm believed it would be cost prohibitive. Piggee was not aware of the law firm receiving any inquiries about the blanking machine from people who had read the ad for the machine in the Chicago Tribune. He said those individuals who ultimately came to the sale had been identified as potential bidders and thus directly informed of the sale by the firm. With regard to how the sale of the blanking machine was conducted and its terms, Piggee said the firm decided to conduct the sale at its downtown Chicago office because that was what commonly was done in Chicago for UCC sales of this nature. He agreed, however, that the majority of prospective buyers for the blanking machine would not be located in downtown Chicago. Piggee also noted that requiring the winning bidder to pay 25 percent of the purchase price on the day of the sale with a certified or cashier's check was a standard condition for a sale of this nature. Finally, Piggee said that he was pleased with the sale of the blanking machine because multiple bids were received during the auction.

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Cohen, UCB's expert witness, testified about the commercial reasonableness of the sale. Cohen reviewed the notice of the sale that was mailed to the Siddiquis on July 14, 2009, and testified that, in his opinion, such notice satisfied the UCC's requirement that notice must be given to debtors and third-party guarantors at least 10 days prior to the sale taking place. Based on his review of the advertisements that Boodell & Domanskis placed on Craigslist and in the online and print versions of the Chicago Tribune, as well as the e-mails that went out to several individuals informing them of the sale, Cohen also testified that, in his opinion, the notice of the sale to potential bidders was reasonable under the UCC. Cohen further testified that the location, time, and terms of the sale (requiring 25 percent of the winning bid to be paid immediately by cashier's check and the balance to be paid within 24 hours of the sale) were consistent with other UCC sales taking place in the Chicago area. Finally, Cohen testified the competitive bidding that took place at the sale was not typical of most UCC sales that he had attended where multiple bidders were not present. When asked why the machine was not appraised prior to the sale for purposes of establishing its value, Cohen explained an appraisal was unnecessary given the ultimate selling price at the forced liquidation sale would establish the fair market value of the machine (*i.e.*, the price a willing buyer would pay a willing seller for the machine). After reviewing all the steps taken by Mutual Bank to sell the blanking machine, Cohen reiterated his opinion that the sale of the blanking machine was conducted in a commercially reasonable manner under the UCC.

***5** On cross-examination, Cohen was asked what the recognized market was for the blanking machine. He responded:

> "The recognized market would be any—again, I'm not an expert in the area. I'm an attorney. But it's a blanking machine, so any manufacturing facility that would have use for a blanking machine as part of their manufacturing process could possibly be interested. I assume, that would be the market."

When asked about whether the sale of the blanking machine should have been advertised in a trade journal, Cohen said the odds of being able to place an ad in such a publication prior to the sale were extremely remote because trade journals typically are published only once a month. With that said, Cohen conceded that more bidders could have been drawn to the sale of the blanking machine if the sale would have been delayed to allow for it to be advertised in a trade journal.

Bashar testified at the bench trial on behalf of the Siddiquis. Over UCB's objection, Bashar testified that although he had no experience selling a blanking machine, he had enough experience in the steel servicing industry to know that the blanking machine could have been sold for at least $900,000. Bashar said that if he was going to buy or sell a used blanking machine, he would have looked to, or placed an advertisement in, a trade journal aimed at steel service centers and businesses involved in metal fabrication. Had he been in the market to buy such a machine, Bashar said that he would not have looked on Craigslist or in the Chicago Tribune for leads. Finally, Bashar said the blanking machine sold by Mutual Bank functioned just fine but did not operate at the rate of speed promised by the manufacturer in the original contract to purchase the machine.

After receiving proposed findings of fact and conclusions of law from the parties, the district court issued an order finding that Hameeda was not personally liable for any amount due to UCB. On appeal, UCB waived any claim it may have had against Hameeda. With regard to whether the sale of the blanking machine was commercially reasonable, the court applied the factors set forth in *Mussetter v.. Lyke*, 10 F.Supp.2d 944, 964 (N.D.Ill.1998) (applying California law), to conclude that it was not. With regard to the manner in which the machine was sold, the court found the sale was insufficiently advertised prior to the sale, which weighed heavily in favor of a conclusion that the sale was not commercially reasonable. With regard to the price for which the machine was sold, the court found UCB failed to come forward with an appraisal or other evidence to demonstrate that it was commercially reasonable to sell the blanking machine for $300,000 when the machine had been assigned a gross collateral value of $1,022,000 by Mutual Bank less than 2 years before the sale.

After issuing its order, the district court conducted a conference call with the parties to determine

whether further proceedings were necessary. Pursuant to the discussion at this conference, the district court ordered the parties to submit briefs on, among other issues, whether UCB was entitled to a second evidentiary hearing in order to rebut the presumption that the value of the blanking machine was equal to the amount owed to UCB. See *Standard Bank & Trust Co. v. Callaghan*, 177 Ill.App.3d 973, 979–82, 532 N.E.2d 1015 (1988) (When a secured creditor fails to conduct a sale of collateral in a commercially reasonable manner, a rebuttable presumption arises that the value of the collateral sold is equal in value to the total indebtedness. To show its entitlement to a deficiency, the creditor must rebut the presumption and prove that the value of the collateral was less than the indebtedness.). Upon receiving the briefs and considering the arguments set forth therein, the district court determined that UCB was not entitled to an evidentiary hearing to present further evidence concerning the value of the blanking machine. In reaching this decision, the court found that although UCB was aware before the bench trial that the Siddiquis were contesting the commercial reasonableness of the sale, UCB failed to submit any evidence regarding the value of the blanking machine at trial and failed to provide a reasonable excuse for not doing so. Furthermore, the district court found that conducting a second evidentiary hearing (which would include reopening discovery as requested by UCB) would result in unfair prejudice to the Siddiquis because they would incur additional legal costs to litigate the matter when evidence concerning the value of the blanking machine could have been presented at the bench trial.

***6** Based on its finding that the sale of the blanking machine was not commercially reasonable and its decision not to allow a second evidentiary hearing to establish the value of the blanking machine, the district court concluded UCB had failed to rebut the presumption that the value of the blanking machine was equal to the amount owed to UCB by Anwarul. Accordingly, the district court denied UCB's request for a deficiency judgment and entered judgment in favor of Anwarul. After the district court denied UCB's motion to alter or amend the judgment, UCB filed a timely notice of appeal.

ANALYSIS

On appeal, UCB claims (1) the district court erred in denying summary judgment with regard to commercial reasonableness of the sale of the blanking machine; (2) the district court erred in finding after the bench trial that the sale of the blanking machine was commercially unreasonable; (3) once it determined the sale of the blanking machine was commercially unreasonable, the district court erred in denying UCB the opportunity to present evidence at a second evidentiary hearing to rebut the presumption that the value of the machine was equal to the total amount owed to UCB by Anwarul; and (4) the district court erred in denying UCB's request for attorney fees and costs. We address each of these claims of error in turn.

1. *The District Court's Decision to Deny Summary Judgment*

a. *The Issue Presented*

UCB argues the district court erred in failing to grant summary judgment in its favor on the issue of whether the sale of the blanking machine was commercially reasonable under Illinois' UCC. In support of this argument, UCB contends that Anwarul failed to come forward with any evidence to dispute Cohen's affidavit and report concluding that the sale of the blanking machine was commercially reasonable. UCB maintains that in the absence of a dispute regarding this material fact, the district court should have held that Cohen's opinion conclusively established the sale was conducted in a commercially reasonable manner.

b. *The Standard of Review*

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Osterhaus v.*

Toth, 291 Kan. 759, 768, 249 P.3d 888 (2011).

c. *The Applicable Law*

***7** As noted above, the parties to this dispute agree that the substantive law of Illinois should be applied to determine whether the blanking machine was sold in a commercially reasonable manner. In Illinois, this determination is normally a question presented to the trier of fact for decision. See *Voutiritsas v. Intercounty Title Co.*, 279 Ill.App.3d 170, 183, 664 N.E.2d 170 (1996); *Willard v. Northwest National Bank*, 137 Ill.App.3d 255, 263, 484 N.E.2d 823 (1985). The secured creditor carries the burden to prove commercial reasonableness. Ill. Comp. Stat. ch. 810 5/9–626(2) (2004) ("If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this Part."); *Boender v. Chicago North Clubhouse Ass'n*, 240 Ill.App.3d 622, 627, 608 N.E.2d 207 (1992). A "secured party is required to exercise due diligence to sell the collateral for the best price obtainable and to have a reasonable regard for the debtor's interest." *Voutiritsas*, 279 Ill.App.3d at 183.

A sale of collateral will be considered commercially reasonable if the disposition was made: "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." Ill. Comp. Stat. ch. 810 5/9–627(b) (2004). UCC Comment 4 to Ill. Comp. Stat. ch. 810 5/9–627 states that "the concept of a 'recognized market'... is quite limited; it applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges." Similarly, UCC Comment 9 to Ill. Comp. Stat. ch. 810 5/9–610 (2004) states: "A market in which prices ... are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions."

Although a sale conducted in a manner provided for in Ill. Comp. Stat. ch. 810 5/9–627(b) will be considered "commercially reasonable," the statute does not establish the exclusive means for conducting a **commercially reasonable sale**. See UCC Comment 3 to Ill. Comp. Stat. ch. 810 5/9–627 ("[N]one of the specific methods of disposition specified in subsection [b] is required or exclusive."); *Pioneer Bank & Trust Co. v. Mitchell*, 126 Ill.App.3d 870, 873–74, 467 N.E.2d 1011 (1984) (construing earlier version of statute and reaching same conclusion). Further guidance for what constitutes a **commercially reasonable sale** is provided in Ill. Comp. Stat. ch. 810 5/9–610(b) (2004), which states:

> "Commercially reasonable disposition. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms."

***8** As recognized in *Mnssetter*, a federal case from the Northern District of Illinois applying California law,

> "[c]ase law has developed a number of factors for the trier of fact to consider in determining whether a secured party has acted in a commercially reasonable manner in disposing of collateral. Those factors include (1) whether the sale was public or private, (2) *the sale price realized*, (3) whether the collateral was sold in bulk or in parcels, (4) the time and place of the sale, (5) whether bids were solicited and received, (6) *whether there was sufficient publicity*, (7) *whether there had been an appraisal*, (8) whether the sale had been judicially approved and (9) whether the secured party purchased the collateral [Citations omitted.]" (Emphasis added.) 10 F.Supp. at 964.

Mussetter adopted these factors from Annot., 7 A.L.R.4th 308 (What is "Commercially Reasonable" Disposition of Collateral Required by UCC § 9–504 [3]) and, thus, the factors are not unique to California but are generally applicable to determining what constitutes a **commercially reasonable sale** under the UCC. *Cf. Westgate State Bank v. Clark*, 231 Kan. 81, 92–95, 642 P.2d 961 (1982) (identifying the following list of similar, nonexclusive factors as being relevant to determining whether a sale of collateral was commercially reasonable under Kansas' UCC: [1] the duty to clean up, fix up, and paint up the collateral; [2] public or private disposition; [3] wholesale or retail disposition; [4] disposition by unit or in

parcels; [5] the duty to publicize the sale; [6] length of time collateral held prior to sale; [7] the duty to give notice of the sale to the debtor and competing secured parties; [8] the actual price received at the sale; and [9] other factors, such as the number of bids received, the method employed in soliciting bids, and the time and place of the sale); see K.S.A.2011 Supp. 84–9–610 through K.S.A.2011 Supp. 84–9–613; K.S.A.2011 Supp. 84–9–626; K.S.A.2011 Supp. 84–9–627.

With regard to the sale price realized for the collateral, Illinois courts have recognized that "price alone does not establish commercial reasonableness" but is a "*key component* in assessing commercial reasonableness." See *Standard Bank & Trust Co.*, 177 Ill.App.3d at 977. "In determining whether price is commercially reasonable, Illinois courts have long recognized that property does not bring its full value at forced sales. [Citation omitted.]" 177 Ill.App.3d at 977. This is similarly recognized in Ill. Comp. Stat. ch. 810 5/9–627(a), which states in part:

> "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner."

***9** Accordingly, Illinois courts have consistently held that "the mere inadequacy of price *in the absence of fraud or mistaken or illegal practice* will not vitiate a sale." (Emphasis added.) See *Volini v. Dubas*, 245 Ill.App.3d 846, 858, 613 N.E.2d 1295 (1993); *Standard Bank & Trust Co.*, 177 Ill.App.3d at 975–78 (finding that sale of collateral was not commercially reasonable because secured party had engaged in a mistaken practice, *i.e.*, relied upon an appraisal of collateral that it knew or ought to have known was too low when it purchased collateral at a judicial sale for $50,000 under collateral's fair market value). Conversely, a failure to properly advertise a public sale, combined with a low price realized at the sale, can be enough to conclude that the sale was not conducted in a commercially reasonable manner. See *Voutiritsas*, 279 Ill.App.3d at 183–84; *Boender*, 240 Ill.App.3d at 628–30 (advertisement for a public sale of collateral should be reasonably directed to potential bidders in order to encourage interest); see also *Westgate State Bank*, 231 Kan. at 93 ("One of the most important elements of commercial reasonableness is the duty to surround the sale with publicity sufficient to attract a 'lively concourse of bidders.' In publicizing a foreclosure sale, the exact time, place, and terms of a public sale should be published."). Furthermore, the *Westgate State Bank* opinion notes that a "number of cases hold that if the collateral is equipment, individual consumer goods, or farm goods, there is a duty to provide prior inspection of the collateral for interested purchasers. Failure to allow prior inspection may influence the court to conclude in a particular case that the sale was not commercially reasonable." 231 Kan. at 93.

d. *Applying the Law to the Facts*

In its motion for summary judgment, UCB relied exclusively on the affidavit and report provided by Cohen to argue that no issue of material fact existed as to whether the sale of the blanking machine was done in a commercially reasonable manner. Cohen, a Chicago attorney who had prior experience conducting 11 UCC sales for banks and individuals, cited to the notification given to the Siddiquis regarding the sale, the manner in which the sale was advertised to potential bidders, and the terms of the sale (requiring 25 percent of the winning bid to be paid immediately by cashier's check and the balance to be paid within 24 hours of the sale), to ultimately conclude that the blanking machine was sold in a commercially reasonable manner under Illinois law.

The conclusion reached by Cohen in his affidavit and report, however, is not supported by the facts presented or grounded in the applicable law. To be considered commercially reasonable pursuant to Ill. Comp. Stat. ch. 810 5/9–627(b), sale of the blanking machine had to have been conducted (1) in the usual manner on any recognized market, (2) at the price current in any recognized market, or (3) otherwise in conformity with reasonable commercial practices among dealers in that type of property. A "recognized market" is one in which there are standard price quotes for property and thus prices are not subject to individual negotiation. UCC Comment 9 to Ill. Comp. Stat. ch. 810 5/9–610. But Cohen does not assert that a recognized market for the sale of pre-owned blanking machines exists or that the sale of the blanking machine here was conducted in conformity with reasonable commercial practices among

dealers in this type of property. See Ill. Comp. Stat. ch. 810 5/9–627(b). Thus, Cohen's affidavit and report cannot be construed to conclusively establish that the blanking machine was sold in a commercially reasonable manner. Instead, we construe his affidavit exactly as submitted: Cohen, as an attorney who regularly conducts UCC sales in Chicago, believes the sale of the blanking machine here was conducted in a manner consistent with how UCC sales are conducted in Chicago, regardless of the type of collateral at issue.

***10** Having determined that Cohen's affidavit and report are insufficient to conclusively establish commercial reasonability, we look to the record on summary judgment to determine whether a genuine issue of material fact exists with regard to this issue. In his response to UCB's memorandum in support of summary judgment, Anwarul alleged that (1) the advertisements for the sale of the blanking machine were not widely circulated and were made less than 10 days prior to the sale, (2) the blanking machine was sold for less than 30 percent of the value that Mutual Bank had assigned to the machine, and (3) Mutual Bank never had the equipment appraised prior to the sale. The first allegation was supported factually by copies of the ads and a statement of undisputed fact set forth in UCB's memorandum in support of summary judgment. The second allegation was supported factually by documents attached to Anwarul's response showing that Mutual Bank had assigned a gross collateral value of $1,022,000 to the blanking machine on May 12, 2008, but sold the machine for $300,000 on July 24, 2009. Although the third allegation was not supported by affirmative evidence because it asserted the absence of a fact, UCB did not dispute the fact that the blanking machine was not appraised prior to the sale.

Based on the statutory and common-law factors set forth above and used by Illinois courts to decide whether property has been sold in a commercially reasonable manner, we find the record on summary judgment readily establishes the existence of a genuine issue of material fact with regard to whether the sale of the blanking machine in this case was conducted in a commercially reasonable manner. See *Pioneer Bank & Trust Co.*, 126 Ill.App.3d at 873–74 (reversing district court's decision granting summary judgment in favor of secured creditor; court found that pleadings and affidavits submitted by parties left several issues of fact unresolved as to commercial reasonableness of sale of repossessed collateral). As such, the district court did not err in denying UCB's motion for summary judgment on the issue of whether the sale of the blanking machine was commercially reasonable.

2. *Sufficiency of the Evidence*

UCB had the burden of proving that the sale was commercially reasonable. See Ill. Comp. Stat. ch. 810 5/9–626(2); *Boender*, 240 Ill.App.3d at 627. Because this case proceeded to a bench trial, the issue of whether the sale of the blanking machine was conducted in a commercially reasonable manner under Illinois' UCC was a question of fact for the district court to decide. See *Standard Bank & Trust Co.*, 177 Ill.App.3d at 978. This court reviews the district court's findings to see if they are supported by substantial competent evidence. Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issue can be reasonably determined. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 836, 127 P.3d 292 (2006). An appellate court views all the evidence in a light most favorable to the prevailing party, and it does not reweigh competing evidence or assess the credibility of witnesses. 280 Kan. at 836–37. This court must accept all evidence and inferences that support or tend to support the district court's findings as true, and this court must disregard all conflicting evidence. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009); see also *Westgate State Bank*, 231 Kan. at 95 (applying a substantial competent evidence standard of review to determine whether the district court erred in finding that the sale of the collateral by the secured party was commercially unreasonable).

***11** Similar to its claim of error on summary judgment, UCB argues that there is insufficient evidence to support the judgment because Anwarul failed to introduce at trial any evidence contradicting Cohen's testimony that the sale was commercially reasonable. Consistent with our finding in the context of summary judgment however, we again find Cohen's testimony insufficient to conclusively establish that the blanking machine was sold in a commercially reasonable manner. Specifically, Cohen's opinion patently ignores the undisputed fact that the blanking machine was not a fungible item that was sold on a recognized market (like a stock exchange)

and was not sold at a price current in a recognized market. Thus, Cohen's testimony fails to establish that the sale was commercially reasonable under subsections (b)(1) or (b)(2) of the Illinois UCC statute. Furthermore, Cohen's testimony did not establish that the blanking machine was sold "in conformity with reasonable commercial practices among *dealers* in the type of property that was subject of the disposition." (Emphasis added.) See Ill. Comp. Stat. ch. 810 5/9–627(b)(3).

Having found Cohen's testimony insufficient to conclusively establish that the blanking machine was sold in a commercially reasonable manner, we move on to review the district court's factual finding of commercial reasonableness to see if it is supported by substantial competent evidence in the record. To that end, the district court evaluated the commercial reasonableness of the sale using the factors identified in *Mussetter*, 10 F.Supp.2d at 964 (whether the sale was public or private; the sale price realized; whether the collateral was sold in bulk or in parcels; the time and place of the sale; whether bids were solicited and received; whether there was sufficient publicity; whether there had been an appraisal; whether the sale had been judicially approved; and whether the secured party purchased the collateral). With regard to factors that weighed in favor of a sale that was commercially reasonable, the court acknowledged that the sale was public, the machine was sold as a single unit, bids were solicited and received, and the secured party did not purchase collateral. With regard to the time and place of the sale, the district court noted that the sale took place on July 24, 2009, at 11 a.m. at Boodell & Domanskis' downtown Chicago office but made no finding as to whether this weighed in favor or against a finding of commercial reasonableness. Similarly, the district court noted that the sale was not judicially approved without determining the significance of this finding. Finally, and as set forth more fully below, the court determined that although it was unable to evaluate the reasonableness of the $300,000 sale price, the evidence readily established that the sale of the blanking machine was insufficiently publicized.

a. *Sale Price*

Illinois courts have noted that "price alone does not establish commercial reasonableness" but is a "*key component* in assessing commercial reasonableness." See *Standard Bank & Trust Co.*, 177 Ill.App.3d at 977. "In determining whether price is commercially reasonable, Illinois courts have long recognized that property does not bring its full value at forced sales. [Citation omitted.]" 177 Ill.App.3d at 977.

***12** The evidence at trial showed that the original purchase price of the blanking machine was $1,050,000. In a document prepared by Mutual Bank on May 12, 2008, in connection with a loan extension, the bank assigned a gross collateral value of $1,022,000 to the blanking machine. Ultimately, the blanking machine was sold for $300,000 on July 24, 2009. In addition to this evidence, Bashar testified that—although he had no experience actually selling a blanking machine—he had enough experience in the steel servicing industry to know that the blanking machine could have been sold for at least $900,000.

Notably, UCB lodged a contemporaneous objection to Basilar's testimony on grounds that Bashar was not competent to give such an opinion. The court overruled UCB's objection. On appeal, UCB asserts the district court abused its discretion in overruling UCB's objection in this regard. Because admissibility of evidence is a procedural issue that does not require application of substantive law, we review the district court's decision to overrule UCB's objection under Kansas law. See *Vanier v. Ponsoldt*, 251 Kan. 88, 102–03, 833 P.2d 949 (1992). To that end, Kansas law has long recognized that an owner of property may competently testify as to the value of his or her property. *City of Wichita v. Sealpak Co.*, 279 Kan. 799, 802, 112 P.3d 125 (2005); *City of Wichita v. Chapman*, 214 Kan. 575, 580, 521 P.2d 589 (1974); *In re Tax Appeal of Lipson*, 44 Kan.App.2d 515, 522, 238 P.3d 757 (2010), *rev. denied* 292 Kan. 965 (2011). Moreover, Bashar testified in conjunction with his opinion that he had previous work experience in the industry in which blanking machines were used. Given these circumstances, we cannot say the district court abused its discretion in allowing Bashar to testify as to the value of the machine. See *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 444, 228 P.3d 1048 (2010) (The admission of expert testimony generally lies within the trial court's sound discretion, and its decision will not be overturned in the absence of an abuse of discretion.); *Horsch v. Terminix Int'l Co.*, 19 Kan.App.2d 134, 141, 865 P.2d 1044 (1993), *rev. denied* 254 Kan. 1007 (1994) ("An opinion based on personal observation and experi-

ence in the marketplace is admissible for such weight as the [factfinder] may choose to give it.").

Notwithstanding its ruling on the admissibility of Bashar's testimony, the district court ultimately found it was unable to evaluate the reasonableness of the $300,000 sale price. Specifically, the court noted that no appraisal was obtained prior to the sale and that there was no evidence, except for Bashar's testimony, presented at trial regarding the machine's value at the time it was sold.

b. *Publicity*

Although the court acknowledged a finding of commercial reasonableness was supported by the fact that the sale was public, that bids were solicited and received, and that the secured party did not purchase the collateral, the court went on to hold that the favorable nature of these factors could be sustained only upon a further finding that the sale was sufficiently publicized. See *Westgate State Bank*, 231 Kan. at 93 ("One of the most important elements of commercial reasonableness is the duty to surround the sale with publicity sufficient to attract a 'lively concourse of bidders." '). The court ultimately found that the sale was not sufficiently publicized. Substantial evidence supports this finding.

***13** As a preliminary matter, Boodell & Domanskis sent e-mails less than 10 days before the July 24 sale to about a dozen individuals identified as potential bidders, notifying them of the sale and its terms. Additionally, the law firm—again, less than 10 days before the sale—advertised the sale on Craigslist and in the print and online versions of the Chicago Tribune. The ad on Craigslist informed readers of the date and location of the sale and its terms, but the print ad in the Chicago Tribune failed to mention when or where the sale would be taking place, and the online ad incorrectly stated that the sale was taking place on July 22 at 57 Eisenhower Lane, South in Lombard instead of on July 24 at Boodell & Domanskis' downtown Chicago office. See *Westgate State Bank*, 231 Kan. at 93 ("In publicizing a foreclosure sale, the exact time, place, and terms of a public sale should be published."). Regardless of whether the ads were timely or accurate, Bashar, the only person to testify at trial who had experience in the steel servicing industry, said that if he was going to sell or buy a used blanking machine, he would have placed an advertisement in or reviewed the ads contained in a trade journal aimed at steel service centers and businesses involved in metal fabrication. Notably, Bashar said that he would not look on Craigslist or in the Chicago Tribune to buy a blanking machine.

On July 22, 2 days before the sale, Mutual Bank allowed anyone who was interested to inspect the blanking machine at Midwest's former place of business in Lombard, Illinois. As the *Westgate* court recognized, "[a] number of cases hold that if the collateral is equipment ... there is a duty to provide prior inspection of the collateral for interested purchasers. Failure to allow prior inspection may influence the court to conclude in a particular case that the sale was not commercially reasonable." *Westgate*, 231 Kan. at 93. The record shows that few people, however, were notified of the July 22 onsite inspection. The e-mails contained in the record show that only nine people were specifically informed that the machine would be available for inspection on July 22. Others receiving e-mails were told that arrangements to inspect the machine prior to the sale could be made through the law firm. Similarly, the Craigslist ad failed to mention the July 22 onsite inspection but stated that arrangements could be made to inspect the machine prior to the sale. The Craigslist ad, however, identified the location of the blanking machine three times—once as "57 Eisenhower Lane, South" and twice (incorrectly) as "57 Eisenhower *Land*, South" (emphasis added) in Lombard, Illinois. The ads placed in the print and online versions of the Chicago Tribune failed to even mention that the machine could be inspected prior to the sale.

Ultimately, only four to five individuals came to inspect the machine on July 22, and only two separate parties placed bids at the July 24 sale. The individuals who came to the sale had been directly informed of the sale by the law firm. Piggee, an attorney with Boodell & Domanskis, stated that he was not aware of the law firm receiving any inquiries about the blanking machine from people who had read the ad for the machine in the Chicago Tribune. Finally, when Cohen was asked on cross-examination whether the sale of the blanking machine should have been advertised in a trade journal, Cohen said that the odds were extremely remote of being able to place an ad within such a publication prior to the sale because those publications are typically published once a month. Significantly, however, Cohen went on to

concede that more bidders could have been drawn to the sale of the blanking machine if the sale would have been delayed to allow for it to be advertised in a trade journal.

***14** All of this evidence clearly supports the district court's finding that the sale of the blanking machine was insufficiently publicized. The evidence presented at the bench trial also indicated that the $300,000 sale price realized at the sale was low. Although an inadequate price in the absence of fraud or mistaken or illegal practice is not enough to deem the sale commercially unreasonable, see *Volini*, 245 Ill.App.3d at 858, the failure to properly advertise a public sale, combined with a low price realized at the sale, can be enough to conclude that the sale was not conducted in a commercially reasonable manner. See *Voutiritsas*, 279 Ill.App.3d at 183–84; *Boender*, 240 Ill.App.3d at 628–30. In sum, we conclude substantial competent evidence supports the district court's finding that the sale of the blanking machine was not commercially reasonable.

3. *Second Hearing*

When a secured creditor fails to conduct a sale of collateral in a commercially reasonable manner, a rebuttable presumption arises that the value of the collateral sold is equal in value to the total indebtedness. To show it is entitled to a deficiency, the creditor must rebut the presumption and prove that the value of the collateral was less than the indebtedness. Ill. Comp. Stat. ch. 810 5/9–626(3) (2004); *Standard Bank & Trust Co.*, 177 Ill.App.3d at 979–82; *Ford Motor Credit Co. v. Jackson*, 126 Ill.App.3d 124, 128, 466 N.E.2d 1330 (1984). Based on this legal principle, UCB argues that if the district court was correct in finding that the sale of the blanking machine was commercially unreasonable, the court should have allowed it to present evidence at a second hearing to rebut the presumption that the value of the machine was equal to the total amount owed to UCB by Anwarul. We disagree.

The decision to allow a party to reopen a case after having rested is within the sound discretion of the district court and will not be reversed in the absence of a showing of abuse. *Cansler v. Harrington*, 231 Kan. 66, 68, 643 P.2d 110 (1982). An abuse of discretion occurs when the action is arbitrary, fanciful, or unreasonable. *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P .3d 1130 (2009).

After receiving briefs from the parties on the issue, the district court determined that UCB was not entitled to a second evidentiary hearing to present evidence on the value of the blanking machine in order to rebut the presumption that the machine's value was equal to the amount owed to UCB. In reaching this decision, the court noted that one of the issues to be decided at trial was whether the sale of the machine was commercially reasonable. Furthermore, the district court found that conducting a second evidentiary hearing (which would include reopening discovery as requested by UCB) would result in unfair prejudice to Anwarul because he would incur additional legal costs to litigate the matter when evidence concerning the value of the blanking machine could have been presented at the bench trial.

***15** The parties do not dispute that one of the factors used in Illinois to determine commercial reasonableness of a sale is the price received for the collateral at the sale in comparison to its value. See *Mussetter*, 10 F.Supp.2d at 964 (recognizing that the price realized for the collateral at a sale and whether the collateral was appraised before the sale are factors to be considered in determining whether the sale was commercially reasonable); *Standard Bank & Trust Co.*, 177 Ill.App.3d at 977 ("While price alone does not establish commercial reasonableness," price is a "*key component* in assessing commercial reasonableness."); *Westgate State Bank*, 231 Kan. at 95 (recognizing that price received at the sale is a factor for determining whether the sale was commercially reasonable and noting that "[i]t has been suggested that the secured creditor obtain an independent appraisal of the collateral *before* the sale, so that only bids near the appraised value will be considered"). If a central factor to determining commercial reasonableness is the price received for collateral at a sale in comparison to its value, then UCB should have been aware that the evidence of the blanking machine's value—independent of the $300,000 price it received at the sale—was essential to establishing the sale's commercial reasonableness at the bench trial. To that end, we agree with the district court that UCB could have, and should have, presented this type of evidence to the district court in litigating the issue of commercial reasonableness in the first instance. For this reason, we find the district court did not abuse its discretion in denying UCB's request to conduct a second evidentiary hearing in order to introduce evidence of the

machine's value.

4. *Attorney Fees*

Finally, UCB argues that the district court should have awarded it attorney fees and costs as provided by the guaranty agreement that Anwarul signed. Because Anwarul was the prevailing party before the district court and the district court's decision has been affirmed on appeal, UCB is not entitled to attorney fees and costs as provided in the guaranty agreement. See *Stride v. 120 West Madison Bldg. Corp.*, 132 Ill.App.3d 601, 606, 477 N.E.2d 1318 (1985) ("Where allowed by contract, attorney fees may be recovered by a successful litigant.").

Affirmed.

Kan.App.,2012.
United Cent. Bank v. Siddiqui
276 P.3d 838, 2012 WL 1920022 (Kan.App.)

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