STATE OF MICHIGAN

COURT OF APPEALS

NEWTEK SMALL BUSINESS FINANCE, INC.,

Plaintiff-Appellee,

v

GOLF BAN, INC. and JIDASC, INC., d/b/a PEACOCK RIDGE,

Defendants/Cross-Defendants,

and

JAMES RAU, TIMOTHY BARKER and DANE TERRILL,

Defendants/Cross-Defendants-Appellants,

and

ROBERT PAGE and THOMAS SONDAY,

Defendants/Cross-Plaintiffs/Cross-Defendants.

UNPUBLISHED
November 23, 2010

No. 293038
Van Buren Circuit Court
LC No. 05-054003-CH

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Defendants James Rau, Timothy Barker and Dane Terrill appeal as of right the trial court's judgment holding them jointly and severally liable for a $325,196.82 deficiency resulting after a foreclosure sale. We affirm.

Plaintiff loaned approximately $1.33 million to defendants Golf Ban, Inc. (Golf Ban) and JIDASC, Inc. (JIDASC) to purchase and operate a golf course in exchange for a promissory note to plaintiff. To secure the note, Golf Ban granted plaintiff a mortgage in the real property and a security interest in its personal property. JIDASC likewise granted plaintiff a security interest in its personal property. In addition, defendants Rau, Barker and Terrill, along with Robert Page

and Thomas Sonday executed unconditional personal guarantees, agreeing to be responsible individually to pay any and all sums owed to plaintiff for the note.

Golf Ban and JIDASC defaulted on the note, and on April 28, 2006, plaintiff obtained a judgment of foreclosure against Golf Ban. A public auction was held on July 6, 2006, and plaintiff successfully bid $1,422,572.95, which left a deficiency of $123,063.54. Plaintiff subsequently moved for entry of an order confirming sale and deficiency judgment. The defendants objected and argued, in part, that it was not clear whether the foreclosure sale included personal property, that because JIDASC was not identified in the judgment of foreclosure, its personal property, including a liquor license, was not included in the sale, and that the individual guarantors could not be held liable for the deficiency because they were also left out of the judgment of foreclosure. The trial court subsequently granted plaintiff's motion to amend the judgment of foreclosure to include JIDASC.

On February 8, 2007, the trial court denied plaintiff's motion to confirm the sale because it was unclear what was included in the sale, and ordered a resale of the property. It further ordered that because the individual guarantors were not identified in the judgment of foreclosure, pursuant to MCL 600.3150, they could not be held liable for any deficiency, even after the resale. On May 1, 2007, plaintiff appealed the portion of the trial court's order pertaining to the liability of the individual guarantors. While the appeal was pending, a second auction was held on June 28, 2007, and plaintiff successfully bid $1,127,388.65. The trial court subsequently granted plaintiff's motion to confirm the sale and for entry of a deficiency judgment against Golf Ban and JIDASC in the amount of $545,652.20.

On September 25, 2009, this Court released its opinion regarding plaintiff's appeal. *Newtek Small Business Fin, Inc v Golf Ban, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2008 (Docket No. 277747). In that case, this Court held that under MCL 600.3160, "discretionary authority" rests with the trial court to hold individual guarantors, who were not the mortgagor and were not identified in the judgment of foreclosure, liable for the deficiency after the foreclosure sale. *Newtek*, unpub op at 2-3. The panel reversed the portion of the trial court's February 8, 2007, order holding that the individual guarantors could not be held liable. *Newtek*, unpub op at 3. Following the release of *Newtek*, unpub op, on June 29, 2009, the trial court granted plaintiff's motion for entry of a deficiency judgment against Rau, Barker and Terrill, jointly and severally, for $325,196.82.[1] This appeal followed.

On appeal, defendants first argue that this Court's opinion in *Newtek*, unpub op, reversed in its entirety the trial court's February 8, 2007, order denying confirmation of the sale, and implicitly granted plaintiff's earlier motion to confirm the first sale. As such, the deficiency should be calculated using plaintiff's first and higher bid, which would result in a lower judgment against defendants. We disagree. Foreclosures are equitable actions, which this Court generally reviews de novo. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 522; 730 NW2d 481 (2007). We review this unpreserved issue, however, for plain

[1] By the time of the June 29, 2009, order, Page was no longer a defendant, apparently having filed for Chapter 7 bankruptcy. Sonday was also dismissed, having previously settled.

error affecting defendants' substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

The trial court's February 8, 2007, order contained several rulings and orders on distinct matters. It denied plaintiff's motion to confirm the July 6, 2006, sale; ordered a resale; and ruled that the individual guarantors could not be held liable for a deficiency because they were not identified in the judgment of foreclosure. On appeal in *Newtek*, unpub op, plaintiff clearly appealed only the portion of the trial court's order pertaining to the liability of the guarantors. It did not challenge the order denying confirmation of the sale or ordering resale. As noted in *Newtek*, unpub op at 1: "Specifically, plaintiff challenges the trial court's ruling that because the liability of the individual guarantors was not included in the judgment of foreclosure, the guarantors could not be held liable for the deficiency that existed after the foreclosure sale." Based on this narrow issue presented, the panel held that pursuant to MCL 600.3160, "it was not required that the liability of the individual guarantors be included in the judgment of foreclosure in order for the guarantors to be held liable for the deficiency." *Newtek*, unpub op at 3. "We therefore reverse the trial court's order holding that the individual guarantors cannot be held liable for the deficiency." *Id.* Contrary to defendants' argument, this Court's opinion in *Newtek*, unpub op, did not in any way disturb or reverse the remainder of the trial court's February 8, 2007, order denying confirmation of sale. Further, *Newtek*, unpub op, did not implicitly grant plaintiff's first motion to confirm the sale, and the first sale price was not made binding for purposes of calculating the deficiency judgment against defendants. Those issues were never raised before, addressed, or decided by this Court.[2]

Next, defendants argue that plaintiff's second bid on June 28, 2007, was so inadequate as to shock the conscience. We disagree. Because this issue is unpreserved, we review for plain error affecting defendants' substantial rights. *Veltman*, 261 Mich App at 690.

In *Carpenter v Smith*, 147 Mich App 560, 569; 383 NW2d 248 (1985), we stated that a trial "court may exercise its discretion to decline confirmation of a foreclosure sale if the amount bid is so inadequate as to shock the conscience of the court." In that case, we affirmed an order confirming sale where the plaintiff purchased the foreclosed property for $14,200, which was

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[2] To support their argument, defendants also contend that plaintiff's second bid on June 8, 2007, was an attempt by plaintiff to circumvent the trial court's February 8, 2007, order and to obtain a "defacto" deficiency judgment against the individual guarantors. First, regardless of which sale price is used, a deficiency resulted. Second, the trial court clearly ruled that the individual guarantors could not be held liable for a deficiency, and would not be liable after a second resale. Plaintiff appealed that ruling, but the appeal was pending when the second auction was held. Plaintiff thus proceeded to the second auction, operating under the trial court's ruling that it could not hold defendants liable for a deficiency after the second sale. Finally, the record supports that plaintiff followed every court order, including rebidding on the property at the second auction. Nothing suggests that plaintiff's second bid was intended to circumvent the previous order denying confirmation of the sale. Defendants' allegations are unsupported and without merit. We further note that the argument is nevertheless irrelevant to the issue presented, which is whether our decision in *Newtek, unpub op*, implicitly confirmed the first sale and sale price.

$800 less than the "state equalized value." *Id.* at 569. In doing so, we noted that the defendant failed to present any evidence of the value of the foreclosed property, and further noted that a foreclosure sale, which is compelled and of a "forced nature," ostensibly reduces the value of the property at the time of the sale. *Id.* at 570, quoting *United Growth Corp v Kelly Mtg & Investment Co*, 86 Mich App 82, 86; 272 NW2d 340 (1978). In contrast, in *Detroit Trust Co v Hart*, 274 Mich 144, 145-147; 264 NW 321 (1936), the Supreme Court affirmed an order denying confirmation of a sale where the purchaser successfully bid $25,000 for a foreclosed apartment complex with a fair market value of $89,000 and potential for producing income, resulting in an approximately $60,000 deficiency judgment to the defendants.

Here, defendants exaggerate the extent to which plaintiff's second bid was below the first, claiming it was over $400,000 less. In actuality, the difference between the first bid, $1,422,572.95, and the second bid, $1,127,388.65, is $295,184.30. Defendants rely on the fact that the price of the second bid was below the first as per se evidence of an inadequate and shocking bid. Absent any other evidence, we cannot find that plaintiff's second bid was so inadequate as to shock the conscience, and plain error requiring reversal did not occur.

Next, defendants argue that plaintiff intentionally failed to mitigate its damages, thus creating a higher deficiency judgment. However, defendants have waived this issue by not pleading it as an affirmative defense. MCR 2.111(F)(2); *Attorney General ex rel Dept of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). Even if defendants had not waived this issue, they failed to offer any evidence in support of their claim, and therefore, failed to meet the burden to prove a failure to mitigate. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994); see also *Teodorescu v Bushnell, Gage, Reizen & Byington*, 201 Mich App 260, 267; 506 NW2d 275 (1993).

Finally, defendants argue that the trial court misinterpreted *Newtek*, unpub op, and contrary to MCL 600.3160, erroneously believed that it was obligated to grant plaintiff's motion to confirm the second sale. We disagree. We review this unpreserved issue for plain error affecting defendants' substantial rights. *Veltman*, 261 Mich App at 690.

As we explained earlier in this opinion, in *Newtek*, unpub op, we reversed the portion of the trial court's February 8, 2007, order that the individual guarantors could not be held liable because, pursuant to MCL 600.3150, they were not identified in judgment of foreclosure. At a hearing on plaintiff's motion to confirm the second sale, the trial court flatly stated that it disagreed with our holding, but, because defendants failed to lodge an objection to plaintiff's motion, it was "going to have to grant it." Contrary to defendants' argument, this statement does not imply that the trial court misunderstood our holding in *Newtek*, unpub op, or believed it did not have the discretion under MCL 600.3160 to grant plaintiff's motion. Rather, because the trial court clearly read *Newtek*, unpub op, this Court's holding was easily ascertainable, and the trial court was presumed to know the law, *In re Costs & Attorney Fees*, 250 Mich App 89, 105;

645 NW2d 697 (2002), we find that the trial court did not commit plain error requiring reversal when it granted the motion absent objections from defendants.[3]

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

[3] We note that, in their reply brief on appeal, defendants argue in passing in their statement of facts that the foreclosure sale should not have included personal property. However, this argument is not included in defendants' statement of questions presented, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008), and defendants fail to cite authority to support their argument, *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002). Therefore, the argument is abandoned on appeal.