

CF HY LLC v Hudson Yards LLC
2013 NY Slip Op 34118(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 601579/2008
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SHIRLEY WERNER KORNREICH
J.S.C**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CF HY LLC,

Index No: 601579/2008

Plaintiff,

DECISION & ORDER

-against-

HUDSON YARDS LLC, BARUCH SINGER, MOSHE
ROSNER; MOSHE JUNGER; THE CRIMINAL COURT
OF THE CITY OF NEW YORK, THE CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD,
MANHATTEN COLLISION #7092246, STEVE'S
DETAILING, KING DAVID AUTO REPAIR, XJR AUTO
SERVICE, INC., ADS/KJR AUTO SERVICE, INC.,
WESTSIDE FOOD GROUP CORP, MOHAMMED
ELBRODY, MOHAMMED ELBRODY ADS COLLISION
INC., JACOB BOHBOT, JOSEPH ABUTEL, and
FORTRESS PARTNERS FUND LP,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

I. Introduction

The court assumes familiarity with the procedural history and factual background of this case, which has been set forth in numerous previous decisions. In short, this is a 2008 foreclosure action. All that is left to adjudicate is the deficiency judgment of defendant Baruch Singer. Pursuant to this court's order dated July 26, 2012 (the July 2012 Order), the only evidence needed to determine the deficiency judgment is the fair market value of the subject property (adjoining lots located at 451-545 West 37th Street and 540-548 West 38th Street,

between 10th and 11th Avenues in Manhattan) (the Property) as of September 7, 2011, the date of the foreclosure sale. A hearing was held before me on numerous days between December 18, 2012 and July 2, 2013.¹ The parties submitted post-hearing briefs on August 26, 2013 (Dkt. 486 & 487).

II. *Legal Standard*

Pursuant to RPAPL § 1371, in a deficiency judgment proceeding, the court must determine the property's fair market value as of the date of the foreclosure sale. *Flushing Sav. Bank, FSB v Bitar*, 106 AD3d 690 (2d Dept 2013), citing *BTC Mortg. Investors Trust 1997-SI v Altamont Farms Inc.*, 284 AD2d 849 (3d Dept 2001); see also *TD Bank, N.A. v Talia Properties, Inc.*, 110 AD3d 1057 (2d Dept 2013). “[T]he trial court enjoys broad discretion in that it can reject expert testimony and arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court.” *BTC Mortg.*, 284 AD2d at 850, quoting *ARC Machining & Plating Inc. v Dimmick*, 238 Ad2d 849, 850 (3d Dept 1997). It is well settled that the purchase price is the best evidence of a property's fair market value. See *Plaza Hotel Assocs. v Wellington Assocs., Inc.*, 37 NY2d 273, 277 (1975) (“the purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the ‘highest rank’ to determine the true value of the property at that time”); *MTA v Washed Aggregate Resources, Inc.*, 102 Ad3d 787, 790 (2d Dept 2013).

¹ The hearing began on December 18, 2012 and continued on the following dates in 2013: January 8, February 6, February 8, May 30, May 31, June 11, June 12, June 14, June 26, June 27, and July 2.

III. Discussion

To begin, the court disregards Singer's testimony as to the property's value. Singer is not an expert because he has no qualifications to opine on the value of the Property. Singer also failed to introduce any credible evidence that the sale of the Property was not a valid arm's length transaction. Moreover, the court does not find Singer to be a credible witness, especially because of his lack of candor in responding to the majority of the questions. His self-serving testimony on countless tangential issues and his baseless accusations of malfeasance, therefore, are disregarded.

Turning now to the relevant testimony, plaintiff called two experts: Robert A. Knakal and Richard Marchitelli. Both are highly qualified professionals, and the court finds their testimony credible.

Knakal is the Chairman and founding partner of Massey Knakal (M-K). On September 7, 2011, immediately after the foreclosure sale, plaintiff retained M-K to market the Property. M-K marketed the Property for 9 months to over 40,000 potential buyers, including 5,500 real estate brokers. The original asking price was \$29.95 million. M-K received 36 serious inquiries, 13 of which submitted offers, ranging from \$13 million to \$26.5 million. The Property was ultimately sold for \$26.5 million in September 2012.

As discussed at length in the July 2012 Order, plaintiff retained Cushman & Wakefield, Inc. to prepare a report (the C&W Report) on the fair market value of the Property before the foreclosure sale. Marchitelli prepared the C&W Report, which was issued on September 6, 2011, the day before the foreclosure sale. The C&W Report concluded that the fair market value of the property was \$26 million. The details of the C&W Report and the basis for the court's

finding that it is comprehensive, persuasive, and accurate are set forth in the July 2012 Order.

At the time the court issued the July 2012 Order, there were three consistent data points strongly supporting the conclusion that the fair market value of the Property was \$26 million – the offers to purchase the Property, the C&W Report, and the actual sale price – all of which demonstrated that no reasonable finder of fact could conclude that the market for the property as of September 7, 2011 was materially higher than \$26 million. Marchitelli's professionalism and the analytical precision with which he testified further bolsters his credibility and reassures the court that his analysis is sound.

The work of Singer's experts, however, was lacking. Singer's original expert report (the Leitner Report), which was produced to challenge the Referee's Report of Sale, is highly problematic. The Leitner Report concluded that the Property was worth \$53 million, more than twice the C&W Report's valuation. The July 2012 Order sets forth the ways in which the Leitner Report is "fundamentally flawed." The court, nonetheless, ordered a fair market hearing based on Singer's contention that it would be reversible error not to do so and his allegations, which ultimately proved baseless, that the sale of the property was not arm's length.

The hearing, among other things, was ordered to allow this court to make findings of fact to resolve disputes between the C&W Report and the Leitner Report. But, when it came time for the hearing, Singer abandoned the Leitner Report. Instead, in October 2012, Singer produced a new report (the Landauer Report), co-authored by Robert Von Ancken, who testified on Singer's behalf.

Though Von Ancken's credentials appear pristine on paper and he seems to be generally qualified to appraise Manhattan real estate, his report and testimony are rife with methodological

flaws, logical contradictions, and sundry shoddiness. In short, in expeditiously serving as Singer's eleventh hour surprise, replacement expert, Von Ancken failed to educate himself on some of the most basic facts about the Property. Such oversight calls Von Ancken's entire analysis into question. For instance, Von Ancken never visited the property and was unaware of the mean nature of the surrounding area (which includes horse stables emitting the stench of manure, strip clubs, and auto repair shops). This might explain why the Landauer Report and Von Ancken's testimony are rife with inaccurate descriptions of the Property and the neighborhood and do not discount the value of the Property accordingly. To wit, at the hearing, Von Ancken could not accurately identify the Property on a map.

Moreover, as with the Leitner Report, Von Ancken's methodology is highly flawed. He improperly accounts for DIBs (incorrectly incorporating them into the purchase price and then double counting their value by also incorporating the buyer's potential to purchase bonus FAR), erroneously relies on incorrect zoning (e.g., overstating residential capacity), grossly misinterprets market conditions, and badly makes use of comparables. His testimonial defense of his analysis is unsatisfactory. Von Ancken's fair market value opinion of \$50 million flies in the face of all evidence contemporaneous with the September 7, 2011 sale. For these reasons, the court disregards the Landauer Report and Von Ancken's testimony.

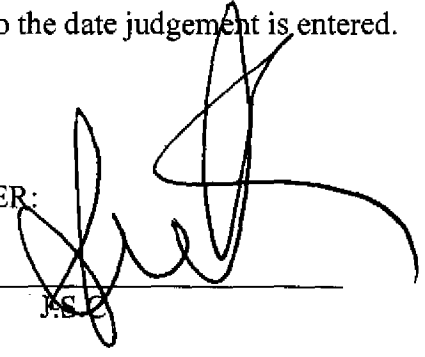
Finally, aside from the superiority of plaintiff's expert, the court concludes that the sale price is the best indication of the Property's fair market value. As discussed earlier, the best evidence of fair market value is the market itself. Since there is no credible evidence that the market has been distorted and the sale price is substantiated by plaintiff's sound, comprehensive appraisal, the court is not persuaded by Singer's unconvincing report concluding otherwise.

Therefore, the total judgment against Singer is as follows: \$47,769,544.36, as calculated in the Referee's Report of Sale dated December 12, 2011, plus \$10,000 in Referee's fees, minus the \$26 million fair market value – totaling \$21,779,544.36, plus 9% statutory interest from December 12, 2011 to the date judgment is entered. Accordingly, it is

ORDERED and ADJUDGED that the fair market value of the subject property as of September 7, 2011 is \$26 million, and the Clerk is directed to enter judgement in favor of plaintiff CF HY LLC and against defendant Baruch Singer in the amount of \$21,779,544.36 plus statutory interest of 9% from December 12, 2011 to the date judgement is entered.

Dated: December 4, 2013

ENTER:



J.S.E.