

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CITIFINANCIAL MORTGAGE COM-)
PANY, f/k/a ASSOCIATES HOME) C.A. No. 02L-02-011 JTV
EQUITY SERVICES, successor by reason)
of merger with AVCO FINANCIAL SER-)
VICES OF DOVER, INC.,)
)
Plaintiff,)
)
v.)
)
THOMAS B. EDGE and)
TAMMY L. EDGE,)
)
Defendants.)

Submitted: July 11, 2003
Decided: November 12, 2003

Janet Z. Charlton, Esq. Young, Conaway, Stargatt & Taylor, Wilmington, Delaware.
Attorney for Plaintiff.

Dominic J. Balascio, Esq., Hudson, Jones, Jaywork & Fisher, Dover, Delaware.
Attorney for Defendants.

Upon Consideration of Plaintiff's
Motion to Correct Bid & Return at Sheriff's Sale
GRANTED

Upon Consideration of Defendant's
Motion to Compel Payment of a Surplus
DENIED.

VAUGHN, Resident Judge

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OPINION

This is a mortgage foreclosure proceeding filed by Citifinancial Mortgage Company (“Citifinancial”) against Thomas B. and Tammy L. Edge. The property involved is located in the Town of Frederica, Kent County. On or about March 12, 2002, default judgment was taken against the defendants in the amount of \$36,691.92. A Sheriff’s sale was scheduled for September 5, 2002. After taking into account costs related to the sale, the total amount needed to pay the debt in full and all costs was \$40,533.03. Because of an error in bidding instructions, however, counsel for the plaintiff bid \$55,800, the only bid cast at the sale. The sale was duly confirmed, thereby creating, at least on paper, a surplus of approximately \$15,000 to go to the debtors.

An appraisal of the property ordered by the Citifinancial showed the property as having an estimated value of less than \$17,500. After paying the Sheriff the costs of the sale only and obtaining a Sheriff’s deed, the plaintiff sold the property for \$15,000, thereby taking a loss on the mortgage of approximately \$26,000. The defendants demanded that the plaintiff pay them the above-mentioned surplus and have now filed a motion seeking that amount plus attorney’s fees, punitive damages, costs and interest. The plaintiff has filed a motion asking the Court to allow it to correct its bid price to \$40,533.03, the amount it contends it would have bid but for the bidding error.

In order to avoid the obvious injustice which would result if the plaintiff were required to pay any amount to the defendants, the plaintiff’s motion will be granted and the defendants’ motion will be denied.

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STANDARD OF REVIEW

The grant of either motion will terminate the litigation in this Court. Therefore, a summary judgment standard is appropriate under which neither motion should be granted unless there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law.

THE FACTS

In addition to the facts set forth above, the relevant facts are as follows. The figure of \$55,800 was given to plaintiff's counsel by an employee of Citifinancial. As mentioned, the mortgage balance plus costs was \$40,533.03. Since it is not rational for a mortgagee to bid more than a maximum of its mortgage balance plus sale costs, I infer, as alleged by the plaintiff, that the instruction to bid \$55,800 was simply a mistake which went unrealized by both counsel and the employee who communicated the bid instructions, and that the amount which counsel would have bid but for the error would not have exceeded \$40,533.03.

By operation of Superior Court Civil Rule 69(d), the sale was confirmed as a matter of course without objection on the Friday following the first Monday of the following month, which was October 11, 2002. Counsel for plaintiff has represented that she discovered the error in the bid price on October 16, 2002, the date on which she prepared the deed for the Sheriff's signature. She has also represented that she immediately called the Sheriff's office about the error and was told, in substance, not to worry about it. Since these representations are not disputed by the defendants in their responding papers, I accept the representations as fact. They are also consistent with the Sheriff's custom of not requiring a foreclosing mortgagee which bids in a

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property to pay more than the Sheriff's costs. Those costs were \$4,391.37.

The defendants, through counsel, put the plaintiff on notice by letter dated November 6, 2002 that they expected to be paid the excess of the bid price over the mortgage balance and sale costs.

The deed, containing the figure of \$55,800 as the sale price, was tendered by the plaintiff to the Sheriff with a check for \$4,391.37. The deed was signed by the Sheriff on November 13, 2002 and recorded soon thereafter.

At the request of Citifinancial, Ed Hammond, a real estate broker in Dover, appraised the property. His appraisal is dated October 2, 2002. His estimation of value was a suggested list price of \$17,500 and a probable sale price of \$12,500. The property was sold by Citifinancial on November 15, 2002 for, as mentioned, \$15,000. The defendants have offered no competing appraisal or other evidence of value. The plaintiff has submitted photographs of the building on the property which clearly show it to be in need of significant repair. The property was not the defendants' residence. I find that the fair market value of the property is approximately \$15,000.

The defendants allege that a competitive bidder was also present at the Sheriff's sale, Clifton W. Simpler, who was prepared to bid but did not because the plaintiff cast its bid of \$55,800. An affidavit signed by Mr. Simpler has been filed with the defendants' motion. The affidavit states that Mr. Simpler was present at the sale, was a ready, willing and able buyer prepared to pay for the property, and had knowledge of the mortgage balance and the costs of sale. He also states that "[t]he bid of \$55,800 by the representative of Citifinancial caused me not to cast my own bid, which resulted in Citifinancial being the highest bidder." The affidavit, however,

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seems carefully worded to avoid saying that Mr. Simpler was willing to bid more than Citifinancial. It would only be if someone bid more than \$40,533.03 that any excess would be created to go to the defendants. Given that the value of the property was more in the range of \$15,000, I find that the defendants have not established that Mr. Simper was willing to bid a sufficient amount to create net proceeds available for them.

DISCUSSION

In support of their position that the plaintiff should be held to its \$55,800 bid, the defendants rely upon the principle that once a Sheriff's sale is confirmed, it cannot be inquired into or its validity controverted. They cite the following provision from *2 Wolley on Delaware Practice* § 1107 (1906):

Confirmation. When land is sold under a *vend. exp.* or other appropriate execution process and there are no objections made to the sale, the sale is confirmed at the return term of the writ, as a matter of course, without any act or decree of the court; and a sale so confirmed is final in its character and effect, and cannot afterwards be inquired into, nor can its validity be controverted collaterally. By the rules of the court, applications to set aside sheriffs' sales must be made on or before the first Thursday of the term to which the writs are returned, and all sales not objected to on or before the first Thursday, are on the first Friday, confirmed as a matter of course. (footnotes omitted)

Since the sale was duly confirmed without objection on October 11, 2002, the defendants contend, the terms of sale, including the \$55,800 sale price, are final. They also contend that the plaintiff proceeded with the preparation, signing and

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recording of the Sheriff's deed after plaintiff's counsel was aware that a bidding error had been made. They also contend that the error was a unilateral error on the plaintiff's part. For all of these reasons, they contend, the bid price of \$55,800 should stand and they are entitled to the amount over and above the mortgage balance and costs.

In *Deibler v. Atlantic Properties Group, Inc.*,¹ the Delaware Supreme Court observed that Judge Wolley's statement regarding the effect of confirmation continues to be good law.² It has long been recognized that objections to a Sheriff's sale are waived if not asserted prior to confirmation.³ There is a strong judicial interest in the finality of a confirmed Sheriff's sale. However, the rule that a confirmed sale may not be inquired into is not absolute. As the Supreme Court also observed in *Deibler*, objections to confirmation of a sale are waived if not filed before the confirmation date, "unless the court finds lack of notice or other basis to relieve the party of the consequences of unexcused delay."⁴

The Superior Court has broad, equitable power to control judicial sales to protect parties from injustice.⁵ While no case has been brought to the Court's attention in which a Sheriff's sale was set aside or its terms altered after confirmation,

¹ 652 A.2d 553 (Del. 1995).

² The timing of confirmation has been modified because of the abolition of terms of court.

³ *Swiggett v. Kollock*, 3 Houst. 326, 332 (Del. Super. 1866).

⁴ *Deibler*, 652 A.2d at 556.

⁵ *Burge v. Fidelity Bond and Mortgage Company*, 648 A.2d 414 (Del. 1994).

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I have no doubt that the Court's power to control judicial sales includes the power to grant relief after confirmation where necessary to avoid injustice because of mistake or other just cause, especially when the rights of innocent third parties are unaffected.⁶

In this case, neither party is asking the Court to set aside the sale. The plaintiff is asking that it be allowed to amend its bid price to \$40,533.03 to correct a mistake. It was not realized until after the confirmation date had passed that a bidding error had occurred. It may have been preferable for the plaintiff to have moved to correct the error before submitting the deed to the Sheriff for signing. However, it is understandable that the plaintiff wished to have a Sheriff's deed recorded promptly so that it could proceed with sale of the property on November 15.

A substantial amount of the mortgage balance remains unpaid. The relief which the defendants request would give them an unjustified windfall and increase the loss which the plaintiff has already sustained. To avoid injustice, the plaintiff's request that it be allowed to amend its bid price to \$40,533.03, that the Sheriff's return be amended to reflect that bid price, and that the Sheriff sign a corrective deed to Citifinancial reflecting that amount, should be granted.

The defendants also request that the plaintiff's motion be denied on the grounds that the plaintiff has failed to join an indispensable party, namely, the new record owner of the property. This contention is without merit since the new record owner is completely unaffected by the parties' motions or the relief which the Court now grants. The plaintiff, as a matter of courtesy, should notify the new record owner

⁶ 47 Am. Jur. 2d Judicial Sales § 354; Superior Court Civil Rule 60.

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that a corrective deed from the Sheriff to Citifinancial is being recorded with an explanation as to the reason why.

The defendants also request that plaintiff's counsel be disqualified under Rule 3.7 of the Delaware Lawyers' Rules of Professional Conduct on the grounds that counsel is a likely and necessary witness. However, there is no dispute regarding counsel's representations. I see no need for counsel to be called as a witness and no cause for disqualification.

The plaintiff's motion to correct its bid and the Sheriff's return is ***granted***. The defendants' motion to compel payment of a surplus is ***denied***.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary
cc: Order Distribution
File