

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PNC BANK, N.A.,	:	
Plaintiff,		
v.	:	Case No. 3:12-cv-369
GATOR PIQUA PARTNERS, LLLP, <i>et al.</i> ,	:	JUDGE WALTER H. RICE
Defendants.	:	

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION TO BAR DEFENDANT JAMES GOLDSMITH FROM PURCHASING PIQUA PLAZA BELOW REDEMPTION VALUE (DOC. #66); SUSTAINING RECEIVER'S MOTION FOR ORDER APPROVING AND CONFIRMING SALE OF THE REAL PROPERTY KNOWN AS PIQUA PLAZA LOCATED AT 1923-1947 COVINGTON AVENUE, PIQUA, MIAMI COUNTY, OHIO, ESTABLISHING THE TERMS OF SALE, APPOINTING APPRAISERS, APPROVING APPRAISALS, AND OTHERWISE ESTABLISHING THE PROCEDURES FOR CONDUCTING THE SALE (DOC. #73); SUSTAINING PLAINTIFF'S MOTION FOR CONFIRMATION OF RIGHT TO CREDIT BID (DOC. #65); SETTING CONFIRMATION HEARING FOR DECEMBER 20, 2013 AT 9:30 A.M.

This matter is currently before the Court on several pending motions: (1) Plaintiff's Motion to Bar Defendant James Goldsmith from Purchasing Piqua Plaza Below Redemption Value (Doc. #66); (2) Receiver's Motion for Order Approving and Confirming Sale of the Real Property Known as Piqua Plaza Located at 1923-1947 Covington Avenue, Piqua, Miami County, Ohio, Establishing the Terms of Sale, Appointing Appraisers, Approving Appraisals, and Otherwise Establishing the

Procedures for Conducting the Sale (Doc. #73); and (3) Plaintiff's Motion for Confirmation of Right to Credit Bid (Doc. #65).

I. Background and Procedural History

In October of 2007, Gator Piqua Partners, LLLP ("GPP"), borrowed \$2.5 million from PNC Bank to purchase Piqua Plaza, a shopping center located in Piqua, Ohio. James Goldsmith, manager and sole partner of Gator Piqua, LLC, which is the sole general partner of GPP, signed a personal Guaranty on the Promissory Note. After GPP defaulted on the loan, PNC filed suit against GPP and Goldsmith. It sought judgment against GPP in the amount of \$1,695,749.25, plus interest, a decree of foreclosure, an order of sale, and the appointment of a receiver. In addition, pursuant to the terms of the personal Guaranty, PNC sought judgment against Goldsmith in the amount of \$593,512.24 plus interest. Doc. #4.

On November 13, 2012, the Court issued a Consent Judgment in Mortgage Foreclosure. Doc. #11. On November 30, 2012, the Court appointed CBRE, Inc. ("CBRE"), as Receiver. Doc. #14. On June 20, 2013, PNC filed a Motion for Summary Judgment against Goldsmith in connection with the personal Guaranty. Doc. #38. The parties are currently conducting additional discovery in connection with that motion, and have recently agreed to attempt to mediate that particular dispute. Doc. #69.

On August 28, 2013, the Court ordered CBRE to list Piqua Plaza for sale and make every effort to sell it "as is" within 120 days.¹ Doc. #49. Piqua Plaza has a current appraised value of \$550,000. In October of 2013, CBRE learned that Gotham Developers, Inc. ("Gotham"), another corporation controlled, in whole or in part, by Goldsmith, was planning to make an offer of \$440,000 on the property. CBRE gave PNC the opportunity to comment on the offer.

Thereafter, on October 21, 2013, PNC filed a Motion for Confirmation of Right to Credit Bid in response to Gotham's offer. Doc. #65. A "credit bid" allows a secured creditor to bid up to the amount of the mortgage debt without having to pay cash. On October 22, 2013, PNC filed a Motion to Bar Defendant James Goldsmith from Purchasing Piqua Plaza Below Redemption Value. Doc. #66.

On October 31, 2013, CBRE and Gotham entered into a Purchase and Sales Agreement. Ex. A to Doc. #73. On November 5, 2013, CBRE filed a Motion for Order Approving and Confirming Sale of the Real Property Known as Piqua Plaza Located at 1923-1947 Covington Avenue, Piqua, Miami County, Ohio, Establishing the Terms of Sale, Appointing Appraisers, Approving Appraisals, and Otherwise Establishing the Procedures for Conducting the Sale. Doc. #73.

The relevant statute provides that before the Court approves the sale, it must appoint three appraisers, and the purchase price must be at least 2/3 of the appraised value. Before the confirmation hearing, the terms of the sale must be

¹ Dollar General is the sole remaining tenant in the shopping center, and much of the remaining property needs substantial repairs.

published in the newspaper for ten days. Moreover, “[t]he private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.” 28 U.S.C. § 2001(b).

II. Plaintiff’s Motion to Bar Goldsmith from Purchasing Piqua Plaza Below Redemption Value (Doc. #66)

According to Henry W. Davis IV of CBRE, prospective buyers have expressed very little interest in Piqua Plaza. One other offer for \$375,000 contained numerous contingencies. Gotham’s \$440,000 offer is substantially higher and contains no contingencies except clean title and court approval. Davis Decl. ¶¶7-8. It therefore offers the best option for reducing the outstanding debt.

Nevertheless, PNC objects to the sale, arguing that it is inequitable to allow Gotham to purchase the shopping center for a small fraction of what GPP still owes on the loan, when Goldsmith controls both corporations. PNC seeks a court order barring Goldsmith, or any other entity controlled by him, from purchasing the property for a price below the redemption value of \$1,696,749.25.

PNC maintains that, by revoking his Guaranty and allowing the shopping center to fall into foreclosure, Goldsmith waived his right to cure GPP’s default. According to PNC, Goldsmith, as someone claiming “by, through, or under [Gator Piqua],” had “all right, title, lien and equity of redemption” in the property foreclosed. Doc. #11, PageID#326. PNC argues that Goldsmith should not be

permitted to use Gotham to regain title to the property, leaving PNC stuck with the outstanding bad debt. PNC argues that allowing Gotham to purchase this property will encourage deliberate loan defaults, and essentially allow debtors to self-adjust their debt obligations.²

As Defendants point out, however, it is black letter law that corporations are entities separate and distinct from the individuals who control them. *See Agle v. Tracy*, 87 Ohio St.3d 265, 268, 719 N.E.2d 951 (Ohio 1999). Therefore, even though Goldsmith may control Gotham, Gotham is nonetheless a separate legal entity, and must be treated as such. Goldsmith's involvement in GPP's default does not bar Gotham from purchasing Piqua Plaza.³ The Court therefore **OVERRULES Plaintiff's Motion to Bar Defendant James Goldsmith from Purchasing Piqua Plaza Below Redemption Value. Doc. #66.**

Claiming that Plaintiff's motion is spiteful and devoid of any legal precedent, and has "unreasonably and vexatiously" multiplied the proceedings, Defendants have asked the Court to consider awarding attorney's fees under 28 U.S.C.

² PNC cites to similar arguments recently raised by Bank of America in connection with an emergency motion to vacate or modify a previous court order in *Bank of America, N.A. v. Corporex Realty & Investment, LLC*, No. 2:12-cv-0023 (E.D. Ky.), attached as exhibits to Doc. #77. The concern in that case was that an equity sponsor might later seek to convert his equity contribution into a senior lien on the property. As PNC concedes, the parties settled the matter before the court ruled on the motion.

³ Although PNC alleges that Goldsmith's recent deposition testimony raises "concerns" about whether GPP maintained the proper corporate formalities necessary to be considered distinct from Goldsmith, PNC has presented no evidence to that effect. Nor has PNC presented any evidence that Gotham failed to maintain proper corporate formalities.

§ 1927. In the Court's view, Plaintiff's motion does not rise to the level of sanctionable conduct. From a purely equitable standpoint, the motion is not entirely without merit. Nevertheless, there is no justifiable legal basis for barring Goldsmith from purchasing the property, through Gotham, for less than the redemption value.

III. Receiver's Motion for Order Approving and Confirming Sale of the Real Property Known as Piqua Plaza Located at 1923-1947 Covington Avenue, Piqua, Miami County, Ohio, Establishing the Terms of Sale, Appointing Appraisers, Approving Appraisals, and Otherwise Establishing the Procedures for Conducting the Sale (Doc. #73)

Receiver CBRE has moved the Court for an Order: (1) approving and confirming sale of Piqua Plaza to Gotham Developers, Inc.; (2) establishing the terms of sale; (3) appointing appraisers, and approving appraisals; and (4) otherwise establishing the procedures for conducting the sale. Doc. #73.

CBRE notes that Roger D. Thornton of Integra Realty has appraised the value of the property at \$550,000. Ex. B to Doc. #73. Appraisal reviews conducted by Thomas E. Sherick of GEM Real Estate Advisory Group, Ex. C to Doc. #73, and James W. Burt of Beck Consulting, Inc., Ex. D to Doc. #73, confirm Thornton's analysis. As previously noted, there has been little interest in the property, and CBRE has received only two purchase offers. Gotham's offer of \$440,000 is considerably higher than the other offer of \$375,000, and CBRE believes that Gotham's offer is the best available, and should be approved. Davis Decl. ¶¶8-9.

PNC's objections to the proposed sale are set forth in its Motion to Bar Goldsmith from Purchasing Piqua Plaza Below Redemption Value, Doc. #66, and in its Motion for Confirmation of Right to Credit Bid, Doc. #65. For the reasons discussed herein, those objections are not well-taken.

In the Court's view, Gotham's offer is the highest and best available, and it meets the statutory requirement of being at least 2/3 the appraised value.

Accordingly, the Court SUSTAINS CBRE's motion, Doc. #73, and:

- 1) Approves the Purchase Contract for \$440,000, submitted by Gotham Developers, Inc., Ex. A to Doc. #73;
- 2) Appoints Roger D. Thornton, Thomas E. Sherick, and James W. Burt to appraise the Property pursuant to 28 U.S.C. §2001(b);
- 3) Approves the Roger D. Thornton appraisal, Ex. B to Doc. #73;
- 4) Finds that the appraisal reviews of Thomas E. Sherick and James W. Burt, Exs. C and D to Doc. #73, satisfy the statutory requirement of the two additional appraisals, and approves the two appraisal reviews as the second and third appraisals;
- 5) Finds that the minimum purchase price that is subject to confirmation is \$366,667; and
- 6) Authorizes and directs the Receiver to publish the terms of the sale in a newspaper of general circulation in Miami County, Ohio, at least ten days before the confirmation hearing, which is set for Friday, December 20, 2013, at 9:30 a.m. in Courtroom 1 on the Ninth Floor of the United States District Court for the Southern District of Ohio, 200 West Second St., Dayton, Ohio. The publication notice shall include the time, date, and place of the confirmation hearing.

Unless another party makes a bona fide offer, under conditions at least as good as those in the Purchase Contract, which offer guarantees at least a 10% increase over the price in the Purchase Contract, the Court will, at the hearing, confirm the sale and fully authorize the Receiver to perform all acts reasonable and

necessary to complete its obligations under the Purchase Agreement and to close the sale. This will include ordering:

- 1) That the sale be free and clear of liens and that all liens encumbering the Property shall attach to the proceeds of the sale;
- 2) That the Receiver be authorized to execute all conveyance documents and other documents as are reasonable and necessary to close the sale;
- 3) That the Receiver be authorized to amend the Purchase Agreement to the extent that the amendment is not substantial and does not substantially adversely affect the proceeds to be paid to the Plaintiff, unless the Plaintiff consents to such amendment;
- 4) That the sale shall extinguish all of the defendants' redemption rights, including, without limitation, the equity of redemption and the statutory right of redemption.
- 5) That the sale shall be subject to the existing lease to DolGen, Inc.; and
- 6) That net proceeds from the sale, after payment of ordinary closing costs and pro rations and Receiver's fees and expenses, shall be distributed directly to or on behalf of the Plaintiff, to be applied toward its loan balance as it sees fit.

IV. Plaintiff's Motion for Confirmation of Right to Credit Bid (Doc. #64)

PNC seeks confirmation of its right to submit a "credit bid" in response to Gotham's offer, if it so chooses. Doc. #64. As the Supreme Court recently explained:

The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers to be the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan.

Radlax Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2070 n.2

(2012). If the credit bid is the winning bid, the secured creditor will obtain title to the property in exchange for a full or partial cancellation of the debt.

Defendants argue that PNC waived its traditional right to credit bid when it opposed a public foreclosure sale by a special master, and urged the Court to instead appoint a receiver who would market the property through private channels. Defendants also argue that PNC has no right to credit bid *after* a private purchase contract is executed. According to Defendants, under the circumstances presented here, a credit bid cannot be deemed a “bona fide offer” under 28 U.S.C. §2001(b). Defendants point to no authority in support of any of these arguments.

In the Court’s view, it does not matter that PNC seeks confirmation of its right to submit a credit bid at a private sale as opposed to a public auction. In either context, there is a risk that the collateral will be sold at less than the fair market value. Therefore, in order to adequately protect the interests at stake, the secured creditor must be given the opportunity to purchase the collateral for what it believes is a fair market value. *See Radlax*, 132 S. Ct. at 2070 n.2.

The Court also rejects Defendants’ argument that a credit bid, at this stage of the proceedings, would be untimely, and could not constitute a “bona fide offer.” As PNC correctly points out, as long as the statutory window for others to submit bona fide offers remains open, PNC cannot determine how much to credit bid, or even whether to credit bid at all. According to Defendants, PNC is attempting to grant itself an extra-judicial right of first refusal. They argue that, unlike in a public foreclosure sale, if PNC is permitted to credit bid at this late stage of the proceedings, all others will be denied the opportunity to submit higher bids. This concern is unfounded. Bona fide offers for the purchase of Piqua Plaza may

be submitted at any time prior to the conclusion of the December 20, 2013, confirmation hearing. Therefore, if PNC exercises its right to credit bid, others will have ample opportunity to submit higher bids.

For the reasons set forth above, the Court SUSTAINS Plaintiff's Motion for Confirmation of Right to Credit Bid, Doc. #65. PNC may submit a credit bid at any time prior to the conclusion of the confirmation hearing.

Date: December 5, 2013



WALTER H. RICE
UNITED STATES DISTRICT JUDGE