IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2006

EVA M. SUDHOFF,

Appellant,

v. Case No. 5D05-3137

FEDERAL NATIONAL MORTGAGE ASSOCIATION, ET AL.,

Appellee.

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Opinion filed July 28, 2006.

Non Final Appeal from the Circuit Court for Osceola County, R. James Stroker, Judge.

Nicholas Weilhammer of The Sketchley Law Firm, P.A., Tallahassee, for Appellant.

Susan Minor of Shapiro & Fishman, LLP, Boca Raton, for Appellee.

THOMPSON, J.

Eva Marie Sudhoff ("Eva Marie") appeals from the trial court's order denying her motions to intervene and set aside judicial sale of her marital home. She argues that the judgment of foreclosure was void because she was not a party to the suit and never received notice. The Federal National Mortgage Association ("Fannie Mae") responds that her motions were untimely and that she was not a necessary party to the suit

because she did not sign the note and did not live in the home when Fannie Mae filed its complaint. We reverse and remand.

The mortgage defined "borrower" as "JOHN J. SUDHOFF ["John"], A Married Man, joined by his wife EVA MARIE SUDHOFF." The document provided that, under a separate note, "Borrower" promised to pay $162,585, all principal and interest due under the note. It also discussed Borrower's right to redemption. Under uniform covenants, Borrower could reinstate after acceleration under certain conditions. A non-uniform covenant provided that, before acceleration could occur, Lender must provide notice and at least 30 days' grace to cure default. The agreement prohibited either party from pursuing judicial action against the other unless the complaining party provided notice and a reasonable period to take corrective action.

The mortgage was signed by John and Eva Marie on 30 April 2001. That day, they also signed a planned unit development rider and mortgage insurance rider. However, the note was signed by John only, and the warranty deed listed as grantee "John J. Sudhoff, a married man."

On 17 August 2001, both spouses and the mortgagee executed a Note and Mortgage Modification Agreement. This agreement defined “mortgagor” as “John J. Sudhoff, A Married Man, joined by his wife Eva Marie Sudhoff.” In the agreement, the parties agreed to modify the terms of the note and mortgage to recognize that the note's principal balance was $162,585, secured by the mortgage on their marital home.

Fannie Mae filed its complaint to foreclose a mortgage in January 2005. Eva Marie was not named a party; rather, Fannie Mae named John; JP Morgan Chase Bank; unknown parties in possession #1 and #2; and "all unknown parties claiming by,

through, under and against the above named defendant(s) …, whether said unknown parties may claim an interest as spouses, heirs, devisees, grantees, or other claimants." In the complaint, Fannie Mae acknowledged that John and Eva Marie had executed the mortgage together.

In February 2005, Fannie Mae submitted an affidavit of diligent search, stating that personal service had been unsuccessful and that, after inquiries to the postal service, mortgage service records, Florida telephone directories, and neighbors, it could not find John. It alleged "a diligent search … was made to discover the residence and whereabouts of the Defendant(s) … and of the Defendant(s) spouse, if any," but the record reflects no attempt to locate or serve Eva Marie.

Fannie Mae moved for summary judgment in March 2005. The court granted summary judgment, awarded fees and costs, and ordered a sale of the property. The judgment, with fees and costs, totaled $169,003.37. The property was bought at public sale on 8 July 2005 for $173,475.34. The certificate of sale was filed on 8 July 2005, and a certificate of title was filed on 19 July 2005.

On 2 August 2005, Eva Marie requested party status, filed a notice of lis pendens, moved to intervene, moved to vacate judgment of foreclosure, and moved to set aside the foreclosure sale. She alleged she should have been a party because the litigation purported to sell her marital home. She alleged the property was marital property, but that she had moved out in August 2004. She and John were estranged, but she had left her forwarding address with the postal service. Their dissolution proceeding was pending in Duval County. She had not conveyed her legal interest in the property to anyone.

Fannie Mae argued that her objection was untimely because it did not occur within ten days of the certificate of sale's filing. Also, it objected that she did not have standing to object because she was not a party. Fannie Mae attached affidavits from a process server that stated the property was vacant, the power was off, and the grass was overgrown on both occasions the server attempted personal service.[1] On 9 August 2005, the court denied Eva Sudhoff's motions with prejudice and dissolved the lis pendens. We conclude that the court abused its discretion, and reverse.

Fannie Mae argues that Eva Marie was neither a necessary nor proper party to the foreclosure proceeding. Eva Marie contends her interest in her marital property was extinguished without due process and that she remains vulnerable to a deficiency judgment on the second mortgage she and John executed.

Fannie Mae's failure to join Eva Marie rendered the judgment of foreclosure void because it deprived her of her equity of redemption. The right of redemption is the mortgagor's valued and protected equitable right to reclaim her estate in foreclosed property. Deluxe Motel, Inc. v. Patel, 770 So. 2d 283, 284 (Fla. 5th DCA 2000); Saidi v. Wasko, 687 So. 2d 10, 11 (Fla. 5th DCA 1996); Action Realty & Invs., Inc. v. Grandison, 31 Fla. L. Weekly D786 (Fla. 4th DCA Mar. 15, 2006); Indian River Farms v. YBF Partners, 777 So. 2d 1096, 1099 (Fla. 4th DCA 2001). This equity of redemption is an estate in land. Deluxe Motel, Inc., 770 So. 2d at 284; Saidi, 687 So. 2d at 12; Indian River Farms, 777 So. 2d at 1099; John Stepp, Inc. v. First Fed. Sav. & Loan Ass'n of Miami, 379 So. 2d 384, 386 (Fla. 4th DCA 1980). "[T]he right of redemption is an incident of all mortgages and cannot be extinguished except by due process of law."

[1] Fannie Mae attempted personal service only twice over the course of four days.

Indian River Farms, 777 So. 2d at 1099; John Stepp, Inc., 379 So. 2d at 386; see also VOSR Indus., Inc. v. Martin Properties, Inc., 919 So. 2d 554, 556 (Fla. 4th DCA 2005) (noting that "[t]he right of redemption is an innate feature of every mortgage"). The trial court incorrectly allowed Fannie Mae to foreclose upon the Sudhoffs' property, depriving one of the mortgagors of her equity of redemption. See Maniscalco v. Hollywood Fed. Sav. & Loan Ass'n, 397 So. 2d 453, 455 (Fla. 4th DCA 1981) (reversing with direction to vacate default and final judgment and to set aside the sale). Eva Marie was a necessary party to the proceeding that purported to extinguish her right.

Fannie Mae claims "[t]he law is well established that a mortgagor who does not hold an ownership interest in the property … is neither a necessary nor proper party to a foreclosure suit, unless a deficiency decree is sought." The cases it cites do not stand for this proposition. Rather, they hold that mortgagors who "have conveyed all their rights and interests in and to the mortgaged property to other parties … [are not] necessary … parties to a suit to foreclose unless a deficiency decree is sought." Dennis v. Ivey, 134 Fla. 181, 185 (Fla. 1938); see also South Palm Beach Invs., Inc. v. Regatta Trading Ltd., 789 So. 2d 396 (Fla. 4th DCA 2001) (affirming where appellants "had previously conveyed all their rights and interests in the property to the owner"); Mitchell v. Fed. Nat'l Mortgage Ass'n, 763 So. 2d 358, 358-59 (Fla. 4th DCA 1998) (affirming where appellant had conveyed by warranty deed his rights and interests in the property to his daughter); 55 Am. Jur. 2d Mortgages § 1268 (2005) (stating that a mortgagor is not a necessary party to foreclosure if she no longer retains the equity of redemption); 4-37 Powell on Real Property § 37.37 (noting "[t]he parties defendant must include all persons owning the whole or a part of the equity of redemption[, including] … the

original mortgagor, if he has not transferred his complete interest by a recorded conveyance"). Here, Fannie Mae did not allege that Eva Marie had assigned her right to redemption, and the record indicates she has not.[2] We conclude that Eva Marie was a necessary party.

Because she was a necessary party to the foreclosure, and her equity of redemption was extinguished without due process, the court abused its discretion by denying her motions to set aside the sale and vacate judgment of foreclosure. To set aside a foreclosure sale, "[t]he general rule is … that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result." Arlt v. Buchanan, 190 So. 2d 575, 577 (Fla. 1966), quoted in Ingorvaia v. Horton, 816 So. 2d 1256, 1257 (Fla. 2d DCA 2002); see also Grandison, 31 Fla. L. Weekly D786.

However, the issue here is not the adequacy of the bid price; rather, the central issue concerns the irregularity of the foreclosure and sale, and lack of notice to Eva Marie.[3] The supreme court has held:

> On the question of gross inadequacy of consideration, surprise, accident, or mistake imposed on complainant, and

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[2] The right of redemption is assignable. See, e.g., VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th DCA 2005).

[3] Eva Marie's allegation that her home was sold for $70,000 below market value, even if true, does not present a bid price courts have considered to be grossly inadequate. See, e.g., Action Realty & Invs., Inc. v. Grandison, 31 Fla. L. Weekly D786 (Fla. 4th DCA Mar. 15, 2006).

> irregularity in the conduct of the sale, this court is committed to the doctrine that a judicial sale may on a proper showing made, be vacated and set aside on any or all of these grounds.

Moran-Alleen Co. v. Brown, 123 So. 561, 561 (Fla. 1929). The Second District defended the viability of this rule: "to hold that a trial court may not vacate a foreclosure sale absent a grossly inadequate bid price would deprive the courts of their equitable powers and their duty to protect and preserve the integrity of the judicial sale process." Ingorvaia, 816 So. 2d at 1258-59 (discussing cases applying Brown and concluding that the trial court did not abuse its discretion by setting aside a judicial sale despite no allegation of an inadequate bid price). We agree. Here, Eva Marie was deprived of notice of the foreclosure and sale. Cf. Grandison, 31 Fla. L. Weekly D786 (distinguishing Ingorvaia because the mortgagor in Grandison had notice of the sale and no due process concerns were raised by the judgment and sale).

The trial court's decision whether to set aside a foreclosure sale may only be reversed if the court grossly abused its discretion. E.g., Ingorvaia, 816 So. 2d at 1259. Its entry of judgment of foreclosure when a mortgagor had not been joined, absent evidence she previously conveyed her interest, was such an abuse. The judgment of foreclosure was void, and Eva Marie's prompt motion to vacate the judgment and set aside the sale should have been granted.

Accordingly, we REVERSE and REMAND for further proceedings in accordance with this opinion.

GRIFFIN and ORFINGER, JJ., concur.