

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ARMANDO A. GAVIDIA and ANNA B.)
GAVIDIA, a/k/a ANNA GAVIDIA, a/k/a)
ANNA GAVIDA,)
)
Appellants,)
)
v.)
)
SPECIALIZED LOAN SERVICING LLC;)
AMERICAN GENERAL HOME EQUITY,)
INC.; THREE OAKS I MASTER)
ASSOCIATION, INC.; and TIMBER LAKE)
AT THREE OAKS HOMEOWNERS')
ASSOCIATION, INC.,)
)
Appellees,)
)
and)
)
RICHARD DELEKTA,)
)
Intervenor/Appellee.)
_____)

Case No. 2D19-1069

Opinion filed April 24, 2020.

Appeal pursuant to Fla. R. App. P. 9.130
from the Circuit Court for Lee County;
James R. Shenko, Judge.

Steven K. Teuber of Teuber Law, PLLC,
Fort Myers, for Appellants.

Nicole R. Ramirez of eXL Legal, PLLC, St.
Petersburg, for Appellee Specialized Loan
Servicing, LLC.

Brian J. Delekta of Delekta & Delekta,
P.C., Memphis, Michigan, for
Intervenor/Appellee Richard Delekta.

No appearance for remaining Appellees.

SILBERMAN, Judge.

A final judgment of foreclosure was entered in favor of Plaintiff Specialized Loan Servicing LLC (SLS) against Defendants Armando A. Gavidia and Anna B. Gavidia. The Gavidias now appeal an order that denies SLS's motion to vacate the foreclosure sale and certificate of sale and assert that the loan had been reinstated prior to the foreclosure sale. This court granted the motion of Richard Delekta, who is the third-party purchaser of the property, to intervene in this appeal. The Gavidias raise two issues on appeal, and we reject without further discussion the argument in issue one that the trial court erred by not allowing them to exercise their right of redemption. As to issue two, because the trial court did not apply the correct legal standard in denying relief, we reverse the appealed order and remand for further proceedings.

The foreclosure sale in this case was set for January 7, 2019. On the Friday before the sale, on January 4, 2019, Mr. Gavidia filed a pro se motion to cancel the sale. He alleged that payment had been made to reinstate the loan and attached documents reflecting the amount SLS required for reinstatement of \$32,381.46 and reflecting that a wire transfer from Mrs. Gavidia's account in the required amount had been made on January 3, 2019.

SLS also filed a motion to cancel the sale on January 4, 2019. The form motion included the reason for cancellation in the space marked "Other" as "Plaintiff has

received confirmation funds have been received; however, not yet applied. Plaintiff wishes to cancel the sale to provide time to properly review and apply the funds for a possible reinstatement."

Neither motion was heard before the sale occurred on January 7, 2019. SLS filed a timely motion to vacate the foreclosure sale and certificate of sale (motion to vacate) on January 9, 2019, pursuant to section 45.031(5), Florida Statutes (2018), and alleged equitable grounds for relief. Section 45.031(5) provides that "[i]f no objections to sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title." Despite SLS's objection to the sale, the clerk issued the certificate of title on January 18, 2019.¹

A hearing on the motion to vacate was not conducted until February 18, 2019, and our record contains no transcript of the hearing. The notice of hearing indicates that a five-minute hearing was scheduled, and the Gavidias contend that the court did not provide time for an evidentiary hearing. The trial court denied the motion in a boilerplate order.

SLS filed an emergency motion for reconsideration requesting that the court vacate the sale, the certificate of sale, and the certificate of title. In the motion, SLS asserted that the Gavidias would be irreparably harmed by the loss of their home if the sale was not vacated. SLS also asserted that two motions to cancel sale were in the public record and available to prospective purchasers before the sale. SLS asserted that if the sale was vacated that the most the third-party purchaser "stands to

¹SLS's motion to vacate is appropriately considered as an objection to the sale. See Arsali v. Chase Home Fin. LLC, 121 So. 3d 511, 513 (Fla. 2013).

lose is the court registry fee. And the Court can even require that another party to the action pay that fee."

Based on its review of the file and the emergency motion for reconsideration, the trial court denied that motion and explained its reasons for denying the motion to vacate. The trial court found that the pro se motion to cancel the sale "with numerous attached hearsay documents was legally insufficient to cancel the sale." The court added that SLS's motion to cancel the sale was untimely and that it was legally insufficient to cancel the sale because it did not allege that SLS "received sufficient funds and that the loan was reinstated."

The trial court also found that the motion to vacate sale and the emergency motion for reconsideration failed to argue "that there were any irregularities of the sale itself." The court noted that at the hearing on the motion to vacate when the court inquired of counsel, SLS declined to "stipulate to making the 3rd party purchaser completely financially whole (court registry fee, etc.)." Further, SLS did not stipulate to make the purchaser financially whole in its motion for reconsideration.

On appeal, the Gavidias argue that a mistake by SLS's counsel occurred which resulted in the foreclosure sale not being cancelled and that as a result they lost their residence of over seventeen years, despite making the payment to SLS required to reinstate the loan. Neither SLS's motion nor the Gavidias' motion to cancel the sale was ever heard, and SLS filed its motion to vacate sale two days after the sale. Despite this timely objection to the sale, the clerk of court issued the certificate of title.² The

²"The Clerk of the Court lacks authority to issue a certificate of title or a writ of possession when an objection to a foreclosure sale is timely filed." Opportunity Funding I, LLC v. Otetchestvennyj, 909 So. 2d 361, 362 (Fla. 4th DCA 2005).

Gavidias cite to Arsali v. Chase Home Finance LLC, 121 So. 3d 511 (Fla. 2013), to support their argument that equitable grounds exist to justify setting aside the foreclosure sale.

SLS's counsel acknowledged in its motion to vacate sale that its motion to cancel sale was sent directly to the trial court, but "the judicial packet seems to have been mistakenly sent only via Fed Ex and not uploaded directly to the court as an Emergency Motion." The motion to vacate sale also alleged that the Gavidias tendered sufficient funds to SLS to reinstate the loan on or about January 3, 2019. SLS specifically alleged that "the foreclosure sale should be vacated in order to avoid an inequitable result against the Defendant who has reinstated the loan and did not suspect their Property would be sold." In its motion, SLS relied upon Arsali and Moran-Alleen Co. v. Brown, 123 So. 561 (Fla. 1929). SLS argued that it and the Gavidias entered into an agreement in which the Gavidias

could tender funds to reinstate the loan and thereby have the foreclosure sale cancelled and the case dismissed.

Therefore, it was the parties' intentions that the foreclosure sale scheduled for January 7, 2019 be cancelled. Due to a mistake, Plaintiff's motion was not reviewed or ruled upon by the court prior to the foreclosure sale, and the property was sold to a third party purchaser.

SLS further alleged "in the interest of equity" that the foreclosure sale and certificate of sale should be vacated and that Delekta, as third-party purchaser, should be "made whole by returning any proceeds tendered as payment for the Property."

An order on a motion to set aside a foreclosure sale is generally reviewed for an abuse of discretion. See Arsali, 121 So. 3d at 519. But when the trial court does

not apply the correct legal standard, we review that question of law de novo. See id. at 514; Paul v. Wells Fargo Bank, N.A., 68 So. 3d 979, 986 (Fla. 2d DCA 2011).

In Arsali, our supreme court approved the district court's result to the extent that it affirmed the trial court's decision to vacate a foreclosure sale and certificate of sale. Arsali, 121 So. 3d at 512. The supreme court also approved the district court's "decision to the extent it affirme[d] the trial court's order for the return of all monies paid by the third-party purchaser in the ill-fated judicial foreclosure sale of the residential property at issue." Id. The supreme court held that proof of an inadequate bid price is not required to set aside a judicial foreclosure sale. Id. at 520.

The Arsali court determined that "[t]he borrowers alleged and proved adequate equitable grounds for the trial court to set aside the judicial foreclosure sale." Id. at 519-20. The court pointed out that no one alleged "that there was anything unlawful about how the scheduled judicial foreclosure sale was conducted." Id. at 513. Rather, "the dispute surrounded the equities pertaining to the noncancellation of the judicial foreclosure sale and its eventual vacation by the trial court." Id. In Arsali, the plaintiff offered the borrowers the opportunity to reinstate the mortgage, and the borrowers timely sent a cashier's check for the full reinstatement amount. Id. The plaintiff's counsel received the check on May 4, 2011, but failed to arrange for cancellation of the foreclosure sale. The sale occurred on May 9, 2011. The borrowers were unaware that the sale had not been cancelled, and they filed an objection to the sale on May 13, 2011, by filing a motion to vacate the foreclosure sale and the certificate of sale. The trial court conducted a hearing on the motion at which it considered evidence that included a copy of the letter offering reinstatement, the

cashier's check, and mail receipts. Id. The trial court granted the borrower's motion and "ordered the clerk of court to return all funds paid by the third-party purchaser." Id.

The supreme court recognized that "[o]n the question of gross inadequacy of consideration, surprise, accident, or mistake imposed on complainant, and 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.*" Id. at 515 (quoting Brown, 123 So. at 561). The Arsali court reiterated that "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 [equitable] grounds." Id. at 515 (alteration in original) (quoting Brown, 123 So. at 561).

Here, SLS alleged equitable grounds in its motion to vacate that are very similar to the facts of Arsali. And unlike the plaintiff in Arsali, the Gavidias and SLS each filed a motion to cancel the foreclosure sale prior to the sale, but the motions were not heard before the sale. In Arsali, no motion to cancel the sale was even filed before the sale occurred. See id. at 513.

Part of the reason the trial court denied relief here was because there was no allegation of "any irregularities of the sale itself." In doing so, the trial court applied an incorrect legal standard and failed to consider the equitable grounds alleged as Arsali allows. The supreme court in Arsali expressly recognized that no allegations regarding how the "foreclosure sale was conducted" were needed when the issue concerned the equities of allowing a foreclosure sale to stand when the plaintiff and the borrowers had agreed to a reinstatement of the loan prior to the sale. Id. Here, the trial

court failed to follow the correct legal standard and should have allowed a hearing for SLS to prove its allegations that the loan had been reinstated.

Further, the parties to the foreclosure action had agreed to cancel the sale. It is arguable that the failure to cancel the sale was a mistake that was, in fact, related to the foreclosure sale. See Skelton v. Lyons, 157 So. 3d 471, 473 (Fla. 2d DCA 2015) (stating that "the substance of an objection to a foreclosure sale under section 45.031(5) must be directed toward conduct that occurred at, or which related to, the foreclosure sale itself") (quoting IndyMac Fed. Bank FSB v. Hagan, 104 So. 3d 1232, 1236 (Fla. 3d DCA 2012)). Moreover, based on Arsali, an agreement to reinstate a loan prior to the foreclosure sale can provide a sufficient equitable reason to allow a court to vacate a sale.

In addition, the trial court appeared to deny relief on the basis that SLS failed to stipulate to make Delekta "financially whole (court registry fee, etc.)." In Arsali, the supreme court approved the trial court's judgment to the extent that it required the return of all monies that the third-party purchaser paid in the foreclosure sale. 121 So. 3d at 512. Florida courts have the power to provide equitable remedies to litigants when necessary. Id. at 518. Thus, Arsali establishes that the court has authority to direct payment to the third-party purchaser.

SLS requested in its motion to vacate that Delekta be "made whole by returning any proceeds tendered as payment for the Property." In its motion for reconsideration, SLS also acknowledged that the trial court can require another party to the action to pay the court registry fee. Thus, the trial court could have used its

equitable powers to require that the purchase price and court registry fee be returned to Delekta.

In conclusion, because the trial court did not apply the correct legal standard, we reverse the order denying the motion to vacate and remand for reconsideration. On remand, the trial court should consider the equitable grounds alleged, as Arsali allows, with a hearing to allow those equitable grounds to be established.

Reversed and remanded.

KELLY and MORRIS, JJ., Concur.