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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001019-MR

U.S. BANK NATIONAL ASSOCIATION (AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION), AS TRUSTEE, IN TRUST FOR THE REGISTERED HOLDERS OF BANC OF AMERICA MERRILL LYNCH COMMERCIAL MORTGAGE INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES 2007-1 — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 17-CI-01000

COURTYARDS UNIVERSITY OF KENTUCKY, LLC; AND IB NEW VENTURES, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: U.S. Bank National Association (USBNA)[1] appeals from a Fayette Circuit Court judgment[2] confirming the judicial sale of property following a mortgage foreclosure.

On March 17, 2017, USBNA initiated a foreclosure action on a student housing complex located in Lexington. USBNA held a mortgage loan on the property of $16.875 million. The circuit court appointed a receiver and on March 7, 2018, it entered an order foreclosing on the property. The order set an initial date of April 9, 2018, for the judicial sale of the property by the Master Commissioner.

As provided under the terms of the foreclosure order, USBNA canceled the date and moved the Master Commissioner to reschedule the sale, tendering a proposed order to be filled in with the new date. The Master Commissioner rescheduled the sale to June 11, 2018. USBNA's law firm received

[1] The full name of the appellant is U.S. Bank National Association (as successor-in-interest to Bank of America, N.A., successor by merger to LaSalle Bank National Association), as Trustee, in trust for the registered holders of Banc of America Merrill Lynch Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates 2007-1.

[2] The judgment refers collectively to the following: The order confirming the amended report of sale, payment and distribution of proceeds and delivery of deed; the interlocutory order denying USBNA's motion for relief from order and objection to Master Commissioner's report of sale and USBNA's objection to Master Commissioner's amended report of sale; and the interlocutory oral order denying USBNA's motion to alter, amend, or vacate on June 29, 2018.

the order indicating the new date and placed the order in a file, but inadvertently failed to notify USBNA's counsel or to send the order to USBNA.

The upcoming sale was publicly noticed and duly advertised. It was well-attended with standing room only. The Master Commissioner opened the bidding on the property at $9.666 million, two-thirds of the appraised value of $14.5 million. A representative of IB New Ventures, LLC, bid the full amount. As there were no other bids on the property, IB New Ventures was declared the highest bidder and the auction closed.

Approximately one hour later, USBNA learned of the sale and immediately contacted the Master Commissioner's office in an unsuccessful attempt to stop the bid from being accepted. USBNA thereafter filed a motion for relief and objections to the Master Commissioner's report of sale and an affidavit from its counsel explaining the clerical error and how USBNA could not possibly have known of the sale. Following a hearing, the circuit court denied the motion for relief and objections. IB New Ventures filed a motion to confirm the amended report of sale and to cause delivery of the deed. USBNA objected and the circuit court held another hearing at which it orally granted IB New Ventures' motion to confirm. The circuit court entered an order confirming the amended report of sale, payment and distribution of proceeds, and delivery of deed. The deed was transferred to IB New Ventures. USBNA posted a supersedeas bond but because

the deed had already been transferred it ultimately acquiesced to the bond being released by the circuit court. This appeal by USBNA followed.

USBNA argues the circuit court abused its discretion in failing to set aside the judicial sale because the sale price of $9.666 million was grossly inadequate and USBNA was unfairly surprised by the sale. It contends the Master Commissioner and circuit court unfairly prioritized the purported rights of a mere bidder over USBNA, the secured creditor.

"Whatever the value of the property, it has long been the rule in this jurisdiction that mere inadequacy of price is an insufficient ground for setting aside a judicial sale." *Sterling Grace Mun. Securities Corp. v. Central Bank & Trust Co.*, 926 S.W.2d 670, 673 (Ky. App. 1995), *as modified on denial of reh'g* (Mar. 1, 1996) (citations omitted). "For an inadequate price to require reversal for a new sale, the amount brought in the original sale must be so grossly inadequate as to 'shock the conscience' of the circuit court or raise the presumption of fraud." *Id*. (citation omitted). On the other hand, "where the inadequacy is accompanied by circumstances, though only slight and insufficient in themselves, which tend to cause it, or where it is attended by apparent unfairness or impropriety or oppression on the part of those connected with the sale, the sale ought to be and will be set aside." *Gross v. Gross*, 350 S.W.2d 470, 471 (Ky. 1961) (citation omitted).

The reluctance to overturn judicial sales furthers the salutary policy of engendering and maintaining confidence in the stability of such sales. *Id*. "If a judicial sale is to be set aside upon slight grounds and a resale ordered upon a promise of an increase in the purchase price, judicial sales would become so unstable as practically to put a premium upon the bad faith of bidders, and take from the purchaser his right under the law of having a reasonably speedy determination of his case." *Jones v. Deposit & People's Bank*, 180 Ky. 395, 202 S.W. 907, 910 (1918).

The circuit court's decision to confirm or vacate a judicial sale is reviewed for an abuse of discretion. *Lerner v. Mortgage Electronic Registration Systems, Inc.*, 423 S.W.3d 772, 773 (Ky. App. 2014). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). A sale "ought not to be lightly disapproved where it was conducted in a fair and regular manner, and confirmation ought not to be refused except for substantial reasons."
Gross, 350 S.W.2d at 471.

USBNA argues that the sale price of the property was grossly inadequate. The Master Commissioner appraised the property at a value of $14.5 million. The successful bid by IB New Ventures was for two-thirds of that

amount: $9.666 million, a difference of almost $5 million below the appraised value. USBNA argues that the price inadequacy is further highlighted when the sale price is compared to the value of the loan the property collateralized: $16.875 million or over $7 million more than the sale price.

In rejecting USBNA's argument that the sale price was grossly inadequate, the circuit court noted that the price met the threshold of the appraisal price formula established in Kentucky Revised Statute (KRS) 426.530(1). That statutory provision provides for a right of redemption "[i]f real property sold in pursuance of a judgment or order of a court, other than an execution, does not bring two-thirds ($^{2}/_{3}$) of its appraised value[.]" As to the difference between the sale and appraisal price of almost $5 million and the difference between the sale price and loan amount of over $7 million, the circuit court acknowledged that "we're talking about millions," but stated that "to a poor man or a poor woman that has a $75,000 home, 30 percent is . . . just as important to them as it is to US Bank . . . the percentage, I think is more appropriate to look at than the actual raw numbers." We agree with the circuit court's reasoning, which is fully consonant with our case law.

In *Sizemore v. Bennett*, 408 S.W.2d 449 (Ky. 1966), for example, the appellate court affirmed the trial court's setting aside of a judicial sale when the property at issue was appraised at $35,200 and the sale price by the Master

Commissioner was less than half, $11,915. This low sale price was accompanied by numerous errors in the notice and advertising of the sale, as well as affidavits from the plaintiffs that they were actually misinformed as to the true sale date. *Id.* at 452. In *Lerner, supra*, the appellate court affirmed the trial court's finding that a sale price of approximately ten percent of the appraised value of the property shocked the conscience. *Lerner*, 423 S.W.3d at 774. When viewed in light of KRS 426.530(1) and the facts of these other cases, the sale price of $9.666 million simply cannot be deemed grossly inadequate.

A sale price which is not low enough to shock the conscience may still be grounds for vacating a judicial sale if other circumstances are present which cast doubt on the fairness of the process. "[T]here must be either fraud or misconduct in some one connected with the sale, unfairness of the officer who conducts the sale, some surprise or misapprehension on the part of those interested, or some irregularity in the proceedings, or other circumstances attending, conducing to show unfairness." *Smith v. Holowell*, 201 Ky. 271, 256 S.W. 408, 409 (1923). USBNA argues that the error of counsel in failing to forward the order setting the new sale date constituted sufficient "surprise or misapprehension" to warrant setting aside the sale. USBNA contends it is unjust that all its efforts in the foreclosure proceedings to protect its rights as the holder of a $16.875 million loan were destroyed by an unexpected and accidental clerical error.

The circuit court rejected this argument, finding that the process was fair and complied with all the rules, stating: "The Master Commissioner has done everything he was supposed to do with this sale. . . . I have to protect the integrity of the process."

The circuit court's conclusion comports with our case law, which holds that errors in notice and other irregularities can be grounds for setting aside a sale if the fault lies with the Master Commissioner rather than one of the parties. In *Sterling Grace*, *supra*, the sale was not set aside because there was no evidence the Master Commissioner failed to provide notice, advertise, or conduct the sale in any way which deviated from the correct procedure. *Sterling Grace,* 926 S.W.2d at 673. In *Sizemore*, *supra,* on the other hand, it was undisputed that the leading newspaper for publishing judicial sale notices in the county advertised an incorrect sale date in two of three issues; that all three issues omitted two lots described in the judgment and order of sale; that in all three issues of that newspaper another lot, not contained in the judgment and order of sale, was listed to be sold; and that another paper which was directed to publish three notices of the sale, inserted only two. Under these circumstances, the appellate court affirmed the trial court's holding that these many errors in advertising, coupled with a finding that the sale price was inadequate, were sufficient to establish sufficient prejudice to set aside the sale. *Sizemore,* 408 S.W.2d at 452. In *Kissell Co. v. Chadwick*, 737 S.W.2d

710 (Ky. App. 1987), the appellant argued there was "misapprehension or irregularity" in the proceedings to justify setting aside the sale because he did not receive special notice of the sale date as promised by the Master Commissioner's office. This Court rejected the argument, stating "[t]he Master Commissioner filed his report to the court, and it included his statement that the sale was conducted after proper advertisement, and appellant does not dispute this. Therefore, we do not consider appellant's counsel not receiving special notice of the sale date as even close to sufficient reason for setting aside the sale[.]" *Id.* at 711.

In the case before us, any confusion about the date of the sale, which was properly advertised and conducted by the Master Commissioner, was attributable solely to USBNA and its attorneys, who were on notice that a change of date was forthcoming as they had initiated it. This error, attributable solely to USBNA's counsel, coupled with the sale price of the property, simply do not constitute grounds for overturning a properly-conducted judicial sale that complied with all legal notice requirements. The circuit court did not abuse its discretion in refusing to do so.

Finally, IB New Ventures argues that it should be awarded costs and attorneys' fees pursuant to Kentucky Rule of Civil Procedure (CR) 73.02(4), which provides: "If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent."

An appeal is considered frivolous "if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith." *Angel v. Harlan County Bd. of Educ.*, 14 S.W.3d 559, 562 (Ky. App. 2000) (quoting CR 73.02(4)). An argument is lacking in merit if it is one no reasonable attorney could assert. *Leasor v. Redmon*, 734 S.W.2d 462, 464 (Ky. 1987). CR 73.02(4) sanctions were deemed appropriate after an attorney who had conceded before the trial court that the county fiscal court was shielded by sovereign immunity proceeded to name the fiscal court as a party in the appeal, thereby forcing it to incur legal expenses to defend itself. *Angel*, 14 S.W.3d at 562. The situation before us is not so clear-cut. The determination to set aside a judicial sale is not an unambiguous question of law; it is a highly fact-specific determination and is left to the sound discretion of the trial court. USBNA's arguments are fact-based and not so unreasonable that sanctions are warranted.

For the foregoing reasons, the Fayette Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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