



# In the Missouri Court of Appeals Eastern District

## DIVISION FIVE

FIRST BANK,	)	No. ED95297
	)	
Plaintiff/Respondent,	)	Appeal from the Circuit Court
	)	of St. Louis County
	)	Case Number: 08SL-CC04789
vs.	)	
	)	Honorable John F. Kintz
FISCHER & FRICHTEL, INC.,	)	
	)	
Defendant/Appellant.	)	FILED: August 9, 2011

Before: Gary M. Gaertner, Jr., P.J., Mary K. Hoff, J., and Patricia L. Cohen, J.  
PER CURIAM.

### Introduction

Plaintiff, First Bank, brought an action alleging that defendant, Fischer & Frichtel, Inc., defaulted on a promissory note secured by a deed of trust. Plaintiff purchased the subject property at a foreclosure sale and sought the amount still owed on the note. A jury found in favor of plaintiff and assessed damages and interest. Defendant filed a motion for judgment notwithstanding the verdict, new trial or remittitur. Plaintiff filed a motion for new trial and to amend the judgment. The trial court granted plaintiff's motion and denied defendant's motion. Defendant appeals. The judgment is affirmed. Because the case presents issues of general interest and importance and for the purpose of

reexamining existing law, the case is ordered transferred to the Missouri Supreme Court.  
Rule 83.02.

### Background

Defendant's "business model is to purchase lots in subdivisions, market the lots and their home plans to home buyers, and then construct and sell the homes to the home buyers." Plaintiff loaned defendant \$2,576,000 for the purchase of twenty-one lots in a subdivision in Franklin County, Missouri. On June 30, 2000, defendant executed a promissory note secured by a deed of trust and security agreement. The note called for monthly payments of interest only. The note's maturity date was July 1, 2005. The deed of trust provided for a "Power of Sale" in the event of default.

From 2000 to 2008, defendant sold twelve of the twenty-one lots and made payments toward the principal. During this period, the parties modified the deed of trust several times. The parties also agreed to extend the note's maturity date six times, with the last maturity date being September 1, 2008. The parties were unable to reach an agreement regarding an additional modification of the note and extension of the maturity date. After September 1, 2008, plaintiff made a demand for payment but defendant did not pay the balance due. On November 13, 2008, plaintiff filed a petition seeking judgment against defendant for the remaining amount due on the note plus interest, attorneys' fees, and collection costs. Plaintiff hired a company to conduct a foreclosure sale for the nine remaining lots subject to the deed of trust. The company advertised the sale in a Franklin County newspaper and sent defendant notice of the sale. At the sale, plaintiff submitted the only bid and purchased the lots for \$466,000.

At trial, defendant's president, John Fischer, testified that plaintiff agreed to extend the maturity date six times "on the same terms as the original note." Fischer also stated that in April 2008, plaintiff requested different terms to modify the note; an increase in the interest rate from prime minus one-half to prime plus one-half, \$13,100 in renewal fees, increase of the lot payoff from \$126,000 to \$162,000, and a cash payment of \$283,000 or personal guarantees. Fischer next testified that after he offered a deed in lieu of foreclosure in the summer of 2008, plaintiff offered terms that were "worse;" including an interest rate of prime plus three, a \$283,000 cash payment and personal guarantee for the balance of the loan, and one year interest reserve. Paul LaKamp, a senior vice-president for plaintiff, testified that after crediting the \$466,000 from the foreclosure sale, the balance due on the note was \$667,875.75. The trial court admitted certain evidence regarding the value of the property. Defendant offered instructions for the affirmative defenses of breach of good faith and fair dealing and commercial frustration. The trial court sustained plaintiff's objections to these instructions. The court overruled plaintiff's objections to instructions 7 and 8, regarding damages and a definition of fair market value. The jury found in favor of plaintiff and assessed damages of \$215,875 and \$37,500 for interest. The trial court entered judgment for plaintiff in accordance with the jury's verdict and awarded plaintiff attorneys' fees of \$75,000 and costs.

Both parties filed post-trial motions. Plaintiff filed a motion for new trial and to amend the judgment contending that the trial court erred in submitting instructions 7 and 8 to the jury. Plaintiff argued that these instructions misstated the law and there should be a new trial on the issue of damages. Defendant filed a motion for judgment

notwithstanding the verdict, new trial and remittitur contending that the trial court erred in refusing to submit defendant's instructions on the doctrines of good faith and fair dealing and commercial frustration. Defendant also argued that the jury's calculation of interest was incorrect and unsupported by the evidence. The trial court granted plaintiff's motion and denied defendant's motion. Defendant appeals.

#### Discussion

A trial court "may grant a new trial of any issue upon good cause shown." Rule 78.01. Review of a trial court's ruling on a motion for new trial is for abuse of discretion. Smith v. City of Hannibal, 297 S.W.3d 926, 929 (Mo. App. E.D. 2009). Further, "[a]ppellate courts are more liberal in upholding the grant of new trial than the denial of one." Id.

In its first point on appeal, defendant argues that the trial court erred in granting plaintiff's post-trial motion because there was no error in submitting jury instructions 7 and 8. Defendant argues that the challenged instructions were proper because the measure of damages in a suit on a note following a foreclosure sale is the difference between the fair market value of the property on the date of the foreclosure sale and the amount due on the note.

When reviewing an award of a new trial due to an erroneous instruction, we determine if the instruction was erroneous as a matter of law upon the record presented, not as a matter within the discretion of the trial court. Thurman v. St. Andrews Mgmt. Servs., 268 S.W.3d 434, 441 (Mo. App. E.D. 2008). If the instruction is found erroneous, we then defer to the discretion of the trial court because the trial court has the best opportunity to determine the effect of any error. Id.

Instruction 7 stated, "If you find in favor of Plaintiff, then you must award Plaintiff the balance due Plaintiff on the promissory note on the date of maturity, less the fair market value of the property at the time of the foreclosure sale, plus interest."

Instruction 8 defined "fair market value" as, "the price which the property in question would bring when offered for sale by one willing but not obliged to sell it, and when bought by one willing or desirous to purchase it but who is not compelled to do so."

In Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926, 927 (Mo. 1940), the Missouri Supreme Court considered "an action for the balance due on three promissory notes originally secured by a deed of trust which had been foreclosed." The defendant failed to make the requisite payments or taxes. Id. The plaintiff, owner of the notes, purchased the subject property at a foreclosure sale in 1933. Id. "The principal defense pleaded by defendant was that it was unable to refinance its obligation because of the emergency existing in financial circles growing out of the business depression and, further, that the depression prevented competitive bidding at the sale of the property so that it was not sold at its true value." Id. The trial court dismissed the plaintiff's action and found that "because of the depression it would be inequitable to hold the price received at the foreclosure sale to be conclusive of defendant's liability." Id.

On appeal, the defendant argued "that a court of equity has inherent power, without the aid of a statute, to credit on the mortgage debt the fair value of the premises where the mortgagee has acquired the premises at a foreclosure sale at a grossly inadequate price under depressed economic conditions." Id. The Missouri Supreme Court held that to "invoke the aid of equity there must be fraud, unfair dealing or mistake in the trustee's sale." Id. at 928. "Where the sale is fairly conducted the amount bid must

stand." Id. The court further stated that the Kansas City Court of Appeals had "considered the same argument and has held that so long as the sale stands the sum for which the property was sold was the basis for measuring the deficiency." Id. at 928 (citing Reed v. Inness, 102 S.W.2d 711(Mo. App. 1937)). The court also noted that it had previously held that "misfortune due to the monetary stringency of 1893 could not be made a source of equity jurisdiction" and "that to foreclose during the depression was not a wrongful act." Id. (citations omitted). The court reversed the trial court's judgment "with directions to enter judgment as prayed." Id. at 929.

Defendant acknowledges the holding in Drannek Realty Co., but asks this court to adopt section 8.4 of the Restatement (Third) of Prop.: Mortgages (1997), to stop banks from abusing the foreclosure process and to "protect borrowers at foreclosure sales from windfall-seeking lenders." Section 8.4 states:

Foreclosure: Action for a Deficiency

(a) If the foreclosure sale price is less than the unpaid balance of the mortgage obligation, an action may be brought to recover a deficiency judgment against any person who is personally liable on the mortgage obligation in accordance with the provisions of this section.

(b) Subject to Subsections (c) and (d) of this section, the deficiency judgment is for the amount by which the mortgage obligation exceeds the foreclosure sale price.

(c) Any person against whom such a recovery is sought may request in the proceeding in which the action for a deficiency is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale.

(d) If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

The Restatement "adopts the position of the substantial number of states that, by legislation or judicial decision, afford the deficiency defendant the right to insist that the greater of the fair market value of the real estate or the foreclosure sale price be used in calculating the deficiency." Restatement (Third) of Prop.: Mortgages section 8.4 Comment a (1997). But the law in Missouri is that "[a]s long as the [foreclosure] sale stands, the sum for which the property sold has been held conclusive for the purpose of determining the amount of deficiency." Lindell Trust Co. v. Lieberman, 825 S.W.2d 358, 360 (Mo. App. E.D. 1992)(citing Drannek Realty Co., 139 S.W.2d at 928); see Regional Inv. Co. v. Willis, 572 S.W.2d 191, 192 (Mo. App. 1978)(citing Drannek Realty Co., 139 S.W.2d at 928). The trial court did not err in granting plaintiff's post-trial motion based on the erroneous jury instructions. Defendant's first point is denied.

However, this does not end the analysis. Rule 83.02 sets forth certain requirements, present in this case, for transfer of a case to the Missouri Supreme Court after opinion by this court. The rule states in part that, "[t]ransfer may be ordered because of the general interest or importance of a question involved in the case or for the purposes of reexamining existing law." "Many commentators have observed that the foreclosure process commonly fails to produce the fair market value for foreclosed real estate." Restatement (Third) of Prop.: Mortgages section 8.3 Comment a (1997); see Grant S. Nelson, Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals, 47 Mo. L. Rev., 151 (1982). The U.S. Supreme Court has recognized and discussed the reasons for the difference between the foreclosure sale price and the property's "worth," at the time of the sale. BFP v. Resolution Trust Corp., 511 U.S. 531, 539, 114 S.Ct. 1757, 1762, L.Ed.2d 556 (1994). By legislation or judicial decision, states

have adopted various approaches to address the issue. Restatement (Third) of Prop.: Mortgages section 8.4 REPORTERS' NOTE (1997). For example, some states "flatly prohibit deficiency judgments in certain contexts," while other states have adopted an approach similar or identical to the aforementioned Restatement "fair value" analysis. Id. Several states including Missouri, "continue to adhere to the common-law rule that when a foreclosure sale does not yield at least the amount of the mortgage obligation, the mortgagee is entitled to a deficiency judgment measured by the difference between the foreclosure price and the mortgage obligation." Id. (citing Drannek Realty Co., 139 S.W.2d 926; Lindell Trust Co., 825 S.W.2d 358)(further citations omitted). The traditional common-law view was set forth in Drannek more than seventy years ago and the issue is of continuing importance. Because the case presents issues of general interest and importance and for the purpose of reexamining the law, the case is ordered transferred to the Missouri Supreme Court pursuant to Rule 83.02.

In its second point, defendant argues that plaintiff failed to present sufficient evidence to support the jury's calculation of interest. This issue will not arise in the same context upon retrial. Accordingly, we decline to address defendant's second point.

In its third point, defendant argues that the trial court erred in rejecting its proffered affirmative defense instructions based on the doctrine of good faith and fair dealing. Defendant contends that there was substantial evidence to support an instruction under this doctrine.

Defendant's proffered instruction was a non-MAI instruction. When there is no applicable MAI instruction, a non-MAI instruction may be given if it is simple, brief, impartial, free from argument and does not "submit to the jury or require findings of



detailed evidentiary facts." Rule 70.02(b). A non-MAI instruction must follow the substantive law and be readily understood by a jury. Durley v. Bd. of Police Commissioners, 238 S.W.3d 685, 687 (Mo. App. E.D. 2007).

The two proposed instructions on the duty of good faith and fair dealing stated:

INSTRUCTION NO. \_\_\_\_\_ (AFFIRMATIVE DEFENSE-GOOD FAITH AND FAIR DEALING)

You must find for Defendant if you believe that:

1. The Note conferred upon Plaintiff a discretionary power to fail to renew the note and to initiate foreclosure of the subject property in the event of non-payment; and
2. Plaintiff exercised its discretionary power under the Note in violation of the duty of good faith and fair dealing, as that term is defined in Instruction No. \_\_\_\_ by failing to renew the note on commercially reasonable terms or by purchasing the property at foreclosure for less than fair market value.

INSTRUCTION NO. \_\_\_\_\_ (DEFINITION OF GOOD FAITH AND FAIR DEALING)

"Good faith and fair dealing," as used in these instructions, is a duty imposed on a party to a contract which prohibits it to exercise any discretionary power granted to it in that contract in an opportunistic way, that is, the exploitation of changing economic conditions to ensure gains in excess of those reasonably expected at the time of contracting.

To set aside a foreclosure sale, a mortgagor can invoke the aid of equity only if fraud, unfair dealing or mistake was involved in the trustee's sale. American First Federal, Inc. v. Battlefield Center, L.P., 282 S.W.3d 1, 8 (Mo. App. E.D. 2009). When foreclosing on mortgaged property, the mortgagee is a trustee for the mortgagor and must act in good faith and with absolute fairness in making the sale to protect the mortgagor. Id. at 9. If a mortgagee purchases the property at its own sale at an inadequate price, then the proceedings and circumstances must reveal a substantial irregularity or probable unfairness to justify setting aside the sale. Id. "[I]nadequacy of consideration alone will

not justify setting aside a foreclosure sale that was fairly and lawfully conducted, without fraud or partiality and with full opportunity for competitive bidding." Id. (citation omitted).

Defendant's first proffered instruction sets forth two possible bases for the jury to find plaintiff violated the duty of good faith and fair dealing: "failing to renew the note on commercially reasonable terms or by purchasing the property at foreclosure for less than fair market value." Defendant does not argue that the foreclosure sale was not conducted in accordance with the statutory requirements regarding foreclosure sales. See Sections 443.010-440 *et seq* Cum. Supp. (2007). Further, the record does not reflect sufficient evidence of fraud or partiality to require submitting the instruction.<sup>1</sup> The trial court did not err in rejecting defendant's jury instruction for breach of the duty of good faith and fair dealing. See American First Federal, Inc., 282 S.W.3d at 8-9. Defendant's third point is denied.

In its fourth point, defendant argues that the trial court erred by refusing to submit its non-MAI instruction on the affirmative defense of commercial frustration.

Defendant's instruction stated:

INSTRUCTION NO. \_\_ [AFFIRMATIVE DEFENSE-COMMERCIAL  
FRUSTRATION]

You must find for Defendant if you believe:

1. There was a dramatic downturn in the housing market and availability of credit which particularly affected the [ ] subdivision;
2. That the dramatic downturn was not foreseen by the parties and not

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<sup>1</sup> On appeal, defendant also argues that plaintiff violated the duty of good faith and fair dealing "by arranging the foreclosure sale to avoid any other bidders." But this contention is not referred to in defendant's proffered instruction and is not preserved for appellate review. Rule 70.03; Powderly v. South County Anesthesia Associates, Ltd., 245 S.W.3d 267, 277 (Mo. App. E.D. 2008).

caused by or under the control of either party; and

3. That the downturn destroyed or nearly destroyed the value of the performance or the object or purpose of the Note.

The commercial frustration doctrine arose from demands of the commercial world to excuse performance under contracts in cases of extreme hardship. Adbar, L.C. v. New Beginnings C-Star, 103 S.W.3d 799, 801 (Mo. App. E.D. 2003). Under this doctrine, "if the occurrence of an event, not foreseen by the parties and not caused by or under the control of either party, destroys or nearly destroys the value of the performance or the object or purpose of the contract, then the parties are excused from further performance." Id. But if the event was reasonably foreseeable, then the parties should have provided for its occurrence in the contract. Id. The doctrine is limited in its application to preserve the certainty of contracts. Id. at 802.

In support of the instruction, defendant notes the evidence presented at trial that in the past twenty years, "there had not been a more significant downturn in home sales." Defendant further states that neither party "foresaw the economic recession." But a downturn in the housing market and credit market, even severe, is reasonably foreseeable. The promissory note does not provide for such an occurrence. Defendant's inability to sell the remaining lots does not constitute the extreme hardship contemplated by the doctrine of commercial frustration. Further, the application of the doctrine in the present case is not required to preserve the certainty of contracts. The trial court did not err in failing to give defendant's instruction based on the doctrine of commercial frustration. See Bancorpsouth Bank v. Paramount Properties, L.L.C., 2011 WL 2552776 (Mo. App. E.D. June 28, 2011). Defendant's fourth point is denied.

### Conclusion

The judgment of the trial court is affirmed. The case is ordered transferred to the Missouri Supreme Court because the case presents issues of general interest and importance and for the purpose of reexamining existing law. Rule 83.02.