

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BAYVIEW LOAN SERVICING, LLC

Appellee

v.

ALLISON WHITTENBERG

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3577 EDA 2016

Appeal from the Order Entered October 14, 2016
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2013, No. 00698

BEFORE: BOWES, J., SOLANO, J., and PLATT, J.*

MEMORANDUM BY SOLANO, J.:

FILED NOVEMBER 20, 2017

Appellant Allison Whittenberg appeals from the order denying her motion to set aside the sheriff's sale of her home. Appellee Bayview Loan Servicing, LLC, has also filed a motion to quash this appeal. We deny Appellee's motion to quash and affirm the trial court's order denying Whittenberg's motion to set aside the sheriff's sale.

JP Morgan Chase Bank filed this mortgage foreclosure action against Whittenberg on September 5, 2013. The mortgage was originated on January 19, 2006 and secured by property at 1737 Naudain Street in Philadelphia. Trial Ct. Op., 1/20/17, at 1.

On September 6, 2013, the trial court entered a case management order that required Whittenberg to appear at a conciliation conference on December 19, 2013, pursuant to the court's Residential Mortgage

* Retired Senior Judge assigned to the Superior Court.

Foreclosure Diversion Program. On that date, the trial court cancelled the conciliation conference, after having determined that Whittenberg had not been served with the complaint and case management order.

On March 17, 2014, JP Morgan Chase transferred the mortgage to Bayview by an assignment of mortgage recorded in the Office of the Philadelphia Recorder of Deeds. On October 16, 2014, a praecipe for voluntary substitution pursuant to Pa.R.C.P. 2352 was filed by JP Morgan and Bayview.

On November 4, 2014, JP Morgan filed a praecipe to schedule another conciliation conference.¹ Although there is no indication in the certified record that a new case management order was entered, both parties agree that another conciliation conference was scheduled for January 8, 2015. Whittenberg's Brief at 2, 4; Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, at 3 ¶ 8; Bayview's Brief at 4; Pl.'s Resp. to Def.'s Pet. to Set Aside Sheriff's Sale, 9/12/16, at ¶ 8. Whittenberg failed to appear at that conference. On January 8, 2015, the trial court entered an order stating, "[Whittenberg] having failed to appear for the First Conciliation Conference, [Bayview] is free to enter a default judgment against [Whittenberg] to the extent permitted by the applicable rules of Civil Procedure." First Conciliation Conference Listing Order, 1/8/15.

¹ Although the praecipe for voluntary substitution had already been filed, the praecipe to schedule another conciliation conference still listed JP Morgan as the plaintiff and merely stated that it had been filed by the "plaintiff."

The trial court recounted the subsequent procedural history of the case as follows:

Whittenberg never filed an Answer and [Bayview] entered a default judgment on January 12, 2015. On January 27, 2015, [Bayview] entered a Praecipe for Writ of Execution. On April 21, 2015, Whittenberg filed a Motion to Postpone Sheriff's Sale and a Rule before th[e trial c]ourt was issued for April 23, 2015. On April 23, 2015, following the hearing, th[e trial c]ourt docketed an Order granting Whittenberg's Motion to Postpone Sheriff's Sale and further postponing the sale until June 2, 2015.

On September 18, 2015, [Bayview] entered a second Praecipe for Writ of Execution. On October 21, 2015, Whittenberg filed a Petition to Open/Strike Judgment, to which [Bayview] filed its opposition on November 10, 2015. On November 13, 2015, Whittenberg filed a second Motion to Postpone Sheriff's Sale and a Rule before the Hon. Nina Wright Padilla was issued for November 24, 2015. Following the hearing, the Hon. Nina Wright Padilla entered an Order granting Whittenberg's Motion to Postpone Sheriff's Sale and further postponing the sale until December 1, 2015. On December 18, 2015, th[e trial c]ourt denied Whittenberg's Petition to Open/Strike Judgment.

On February 11, 2016, Whittenberg filed a third Motion to Postpone Sheriff's Sale and a Rule before th[e trial c]ourt was issued for February 25, 2016. Following the hearing, th[e trial c]ourt docketed an Order on February 26, 2016 denying Whittenberg's Motion to Postpone Sheriff's Sale, citing the two previous postponements.

Trial Ct. Op., 1/20/17, at 1-2.²

The same day the trial court docketed its order, February 26, 2016, Whittenberg filed a Chapter 13 bankruptcy petition in the Eastern District of Pennsylvania. Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, Ex.

² On March 9, 2016, Whittenberg appealed the trial court's order denying her motion to postpone the sheriff's sale to the Commonwealth Court, which transferred the appeal to this Court (No. 1761 EDA 2016). We quashed Whittenberg's appeal on July 11, 2016.

B, Docket for Bankruptcy Petition Number 16-11265-elf. That petition was dismissed on March 15, 2016. *Id.* In the interim, Whittenberg filed a fourth motion to postpone the sheriff's sale. Following a hearing, Judge Wright Padilla dismissed Whittenberg's motion without prejudice. Trial Ct. Op., 1/20/17, at 2.

On April 4, 2016, after Whittenberg filed a second Chapter 13 bankruptcy in the Eastern District of Pennsylvania, Bayview moved to postpone the sheriff's sale in light of the automatic stay under the Bankruptcy Code. Judge Wright Padilla granted Bayview's motion. Trial Ct. Op., 1/20/17, at 2-3. On April 22, 2016, the Bankruptcy Court dismissed Whittenberg's second bankruptcy petition. Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, Ex. B, Docket for Bankruptcy Petition Number 16-11265-elf. Nevertheless, on May 31, 2016, Bayview filed another motion to postpone the sheriff's sale, stating that "[t]here is pending litigation that must be resolved before the Sheriff can offer the property for Sheriffs Sale." Mot. for Postponement of Sheriff's Sale, 5/31/16, at ¶ 2.³ The trial court granted Bayview's motion on June 2, 2016.

On July 29, 2016, Whittenberg filed her fifth motion to postpone the sheriff's sale. Following a hearing, the trial court docketed an order on August 2, 2016 that denied Whittenberg's motion. On August 2, 2016, the

³ Although Bayview's motion to postpone the sheriff's sale did not specify the "pending litigation," it presumably was referring to the appeal then pending in this Court, which was not quashed until July 11, 2016.

property was sold at a sheriff's sale to a third party purchaser for \$350,000. Trial Ct. Op., 1/20/17, at 3.

On August 22, 2016, Whittenberg filed a petition to set aside the sheriff's sale. In her petition, she acknowledged, "A conciliation conference was schedule for January 8, 2015 and Ms. Whittenberg failed to appear." Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, at 3 ¶ 8 (citation to the record omitted). In a footnote, she added that there was "some dispute as to whether or not Ms. Whittenberg received notice of this conciliation conference." **Id.** at n.1. Nevertheless, at no time did Whittenberg ask the trial court to have the default judgment set aside because she did not receive notice. **See id.** In her brief accompanying her petition, under the heading "Questions Presented," Whittenberg listed one issue:

Should the August 2, 2016 Sheriff's Sale of the property located at 1737 Naudain Street . . . be set aside pursuant to Pa. R. Civ. P. 3132 as the property sold at Sheriff's Sale for significantly less than market value depriving Ms. Whittenberg of significant value in the home, and failing to allow her to pay off the loan entirely when she has the means to do so?

Mem. of Law in Supp. of Def. Allison Whittenberg's Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, at 1-2. On October 14, 2016, the trial court denied Whittenberg's motion. On November 14, 2016, Whittenberg filed this appeal.

During the pendency of this appeal, the party who purchased the property at the sheriff's sale successfully filed an ejectment action against

Whittenberg. On September 29, 2017, Bayview filed a motion with this Court to dismiss Whittenberg's appeal as moot because the third party purchaser now owns the property; Bayview contends that the transfer of possession makes it impossible for this Court to issue an order in favor of Whittenberg that would have any legal force or effect. Whittenberg did not file a response to this motion. In view of our disposition, we do not reach the substance of Bayview's motion and deny it as moot.

Whittenberg now raises the following issues on appeal to this Court:

1. Whether [Whittenberg]'s lack of notice of the first scheduled January 8, 2015 conciliation conference through generation and service of a Case Management Order scheduling the same, thereby causing her failure to appear and termination from the Residential Mortgage Foreclosure Diversion Program, rendered a Sheriff sale defective or otherwise constituted proper cause to set aside the sale.
2. Whether the Sheriff sale price was grossly inadequate given the discount from the appraised value and [Whittenberg]'s lack of notice and opportunity to participate in the conciliation conference as part of the Residential Mortgage Foreclosure Diversion Program, which presented the possibility of retaining all equity, an outcome obtaining a higher and better value than the sale.

Whittenberg's Brief at 2.

We review Whittenberg's issues for an abuse of discretion:

A petition to set aside a sheriff's sale is grounded in equitable principles and is addressed to the sound discretion of the hearing court. The burden of proving circumstances warranting the exercise of the court's equitable powers rests on the petitioner, as does the burden of showing inadequate notice resulting in prejudice, which is on the person who seeks to set aside the sale. When reviewing a trial court's ruling on a petition to set aside a sheriff's sale, we recognize that the court's ruling is a

discretionary one, and it will not be reversed on appeal unless there is a clear abuse of that discretion.

GMAC Mortg. Corp. of PA v. Buchanan, 929 A.2d 1164, 1167 (Pa. Super. 2007) (citations omitted).

Whittenberg first contends that she did not receive notice of the mandatory conciliation conference in January 2015 which led to entry of the default judgment and eventual sheriff's sale. Whittenberg's Brief at 11. Whittenberg argues that because of the lack of notice, the sheriff's sale "was defective." ***Id.*** Whittenberg did not raise this issue in the trial court. Although she stated that there was "some dispute as to whether or not [she] received notice," she did not assert lack of notice as a ground to set aside the sheriff's sale. ***See*** Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, at 3 ¶ 8; Mem. of Law in Supp. of Def. Allison Whittenberg's Pet. to Set Aside the Aug. 2, 2016 Sheriff's Sale, 8/22/16, at 1-2. Because "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal," Pa.R.A.P. 302(a), the issue of improper notice cannot now be raised for the first time and therefore merits no relief.

Next, Whittenberg urges this Court to find that:

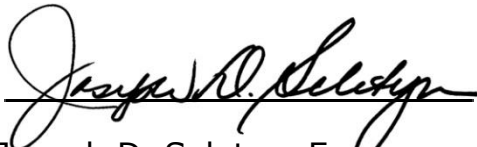
The sheriff sale price was grossly inadequate given the discount from its appraised value and [Whittenberg]'s lack of notice and opportunity to participate in the conciliation conference as part of the residential mortgage foreclosure diversion program, which presented the possibility of retaining all her equity. An equity loss of \$279,587 cannot therefore be reasonably justified.

Whittenberg's Brief at 17. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial

court, we conclude that there is no merit to the second issue Whittenberg has raised on appeal. The trial court opinion properly disposes of the question presented. **See** Trial Ct. Op., 1/20/17, at 4-5 (finding that (1) the record was devoid of any proper cause for the trial court to set aside the sheriff's sale, and (2) the sheriff's sale price was "approximately 55% of the 2015 appraisal and 63% of the estimated \$550,000 market value, which does not rise to the level of gross inadequacy required by the courts of this Commonwealth"). Accordingly, we hold that the final challenge raised by Whittenberg merits no relief and affirm this issue on the basis of the trial court's opinion. The parties are instructed to attach a copy of the trial court's opinion dated January 20, 2017, to all future filings that reference this Court's decision.

Order affirmed. Motion to quash denied.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/20/2017

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JP MORGAN CHASE BANK
Plaintiff-Appellee

v.

ALLISON WHITTENBERG
Defendant-Appellant

SUPERIOR COURT
3577 EDA 2016

COURT OF COMMON PLEAS
CASE NO. 130900698

FILED
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

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OPINION

CARPENTER, J.

JANUARY 20, 2017

Appellant Allison Whittenberg (“Whittenberg”) appeals this Court’s October 14, 2016 Order denying her Motion to Set Aside Sheriff’s Sale. For the reasons that follow, the Superior Court should affirm.

PROCEDURAL HISTORY

On September 5, 2013, Plaintiff-Appellee JP Morgan Chase Bank (“JP Morgan”) filed this mortgage foreclosure action against Whittenberg for a mortgage that was originated on January 19, 2006 and secured by 1737 Naudain Street in the City of Philadelphia. Whittenberg never filed an Answer and JP Morgan entered a default judgment on January 12, 2015. On January 27, 2015, JP Morgan entered a Praecipe for Writ of Execution. On April 21, 2015, Whittenberg filed a Motion to Postpone Sheriff’s Sale and a Rule before this Court was issued for April 23, 2015. On April 23, 2015,



following the hearing, this Court docketed an Order granting Whittenberg's Motion to Postpone Sheriff's Sale and further postponing the sale until June 2, 2015.

On September 18, 2015, JP Morgan entered a second Praecipe for Writ of Execution. On October 21, 2015, Whittenberg filed a Petition to Open/Strike Judgment, to which JP Morgan filed its opposition on November 10, 2015. On November 13, 2015, Whittenberg filed a second Motion to Postpone Sheriff's Sale and a Rule before the Hon. Nina Wright Padilla was issued for November 24, 2015. Following the hearing, the Hon. Nina Wright Padilla entered an Order granting Whittenberg's Motion to Postpone Sheriff's Sale and further postponing the sale until December 1, 2015. On December 18, 2015, this Court denied Whittenberg's Petition to Open/Strike Judgment.

On February 11, 2016, Whittenberg filed a third Motion to Postpone Sheriff's Sale and a Rule before this Court was issued for February 25, 2016. Following the hearing, this Court docketed an Order on February 26, 2016 denying Whittenberg's Motion to Postpone Sheriff's Sale, citing the two previous postponements. On March 9, 2016, Whittenberg filed a Notice of Appeal to the Commonwealth Court.¹

On March 9, 2016, Whittenberg also filed a fourth Motion to Postpone Sheriff's Sale and a Rule before the Hon. Nina Wright Padilla was issued for March 31, 2016. Following the hearing, the Hon. Nina Wright Padilla entered an Order dismissing Whittenberg's Motion to Postpone Sheriff's Sale without prejudice.

On April 4, 2016, JP Morgan filed a Motion to Postpone Sheriff's Sale, due to the automatic stay imposed by 11 USC § 362 as a result Whittenberg filing a bankruptcy

¹ The appeal was transferred to the Superior Court at docket 1761 EDA 2016 and said appeal was quashed on July 11, 2016.

petition. The Hon. Nina Wright Padilla granted the motion on April 4, 2016 and further postponed the sale until June 7, 2016. On May 31, 2016, JP Morgan filed another Motion to Postpone Sheriff's Sale, which this Court granted on June 2, 2016.

On July 29, 2016, Whittenberg filed her fifth Motion to Postpone Sheriff's Sale and a Rule was issued before this Court for August 1, 2016. Following the hearing, this Court docketed an Order on August 2, 2016 denying Whittenberg's Motion to Postpone Sheriff's Sale.

On August 2, 2016, the property was sold at Sheriff's Sale to a third party purchaser. On August 22, 2016, Whittenberg filed a Motion to Set Aside Sheriff's Sale, to which JP Morgan and the third party purchaser filed their respective responses on September 12, 2016. On October 14, 2016, this Court denied the Motion to Set Aside Sheriff's Sale. On November 14, 2016, Whittenberg filed a Notice of Appeal to the Superior Court.

DISCUSSION

Rule 3132 of the Pennsylvania Rules of Civil Procedure provides:

Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.²

The material allegations of the petition generally must be proved by clear evidence.³ The burden of proving circumstances warranting the exercise of the court's equitable powers

² Pa.R.C.P. 3132.

³ *Greater Pittsburgh Bus. Dev. Corp. v. Braunstein*, 568 A.2d 1261, 1263 (Pa. Super. 1989).

is on the petitioner and a reviewing court will not reverse a trial court's decision to set aside a sheriff's sale absent an abuse of discretion.⁴

In the instant matter, Whittenberg averred that the sale should be set aside based upon the circumstances of prior loan modification applications, attempts to secure funding and because the property was sold for an inadequate sales price. This Court disagrees, having found that the record was void of any proper cause for this Court to set aside the Sheriff's Sale. Our Superior Court has long adhered to the principle that "the price obtained at a lawfully conducted sheriff's sale is presumptively the best price obtainable."⁵ The Court has further determined that mere inadequacy of the sale price of a piece of property is not sufficient to set aside a sheriff's sale; rather a showing of gross inadequacy of sales price is required for a court to exercise its discretion in setting aside a sale.⁶ Moreover, "Pennsylvania courts have concluded that a sheriff's sale price is grossly inadequate where sale price was a small percentage—roughly ten percent or less—of the established market value."⁷

Here, the property was sold at Sheriff's sale for \$350,000. Whittenberg argued inadequacy of sales price based upon a 2015 Freddie Mac appraisal of the property for \$629,587 and several Zestimates from Zillow.com of nearby properties for upwards of \$450,000. Whittenberg further estimated that the property could privately sell for over \$550,000. While this Court readily acknowledges the desirability of the neighborhood and various property attributes, this Court was unable to find gross inadequacy of sales

⁴ *Nationstar Mortgage, LLC v. Lark*, 73 A.3d 1265, 1267 (Pa. Super. 2013).

⁵ *Bank of Am., N.A. v. Estate of Hood*, 47 A.3d 1208, 1213 (Pa. Super. 2012) (citing *Blue Ball Nat'l Bank v. Balmer*, 810 A.2d 164, 166–67 (Pa. Super. 2002)).

⁶ *S & T Bank by Dalessio v. Dalessio*, 632 A.2d 566, 569 (Pa. Super. 1993).

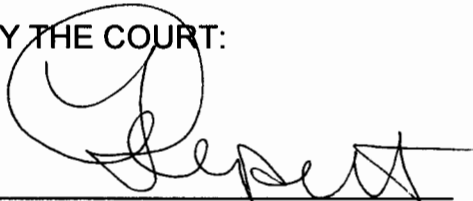
⁷ See *Bank of Am., N.A. v. Estate of Hood*, 47 A.3d 1208, 1212 (Pa. Super. 2012) (citing progeny of cases decided by the Supreme Court of Pennsylvania).

price. The Sheriff's sale garnered a price that was approximately 55% of the 2015 appraisal and 63% of the estimated \$550,000 market value, which does not rise to the level of gross inadequacy required by the courts of this Commonwealth. Accordingly, this Court properly denied Whittenberg's Motion to Set Aside Sheriff's Sale.

CONCLUSION

For the reasons set forth in this Opinion, the Superior Court should affirm this Court's denial of the Motion to Set Aside Sheriff's Sale.

BY THE COURT:



Carpenter, J.