

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-223

NOVEMBER TERM, 2019

Bank of America, N.A.* v. Seamus P.	}	APPEALED FROM:
O’Kelly, Jennifer S. O’Kelly, & Department	}	
of Taxes	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 314-5-15 Wncv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Bank of America, N.A., appeals from an order confirming the sale of a foreclosed property to intervenor Sandra Lockerby following a remand from this Court. See Bank of America, N.A. v. O’Kelly, 2018 VT 71. We affirm.

The property in question was foreclosed by judicial order in December 2015. See id. ¶ 1. Ms. Lockerby was the only person to attend the foreclosure sale and she submitted a bid that was approximately one-third of the bid that the bank intended to enter. The bank sent a representative to the auction, but she could not find the property. The auctioneer purported to enter a bid on the bank’s behalf. The bank subsequently moved to void the sale, arguing that its representative failed to attend due to excusable neglect and that Ms. Lockerby’s bid was commercially unreasonable. After a hearing, the court declined to accept the bank’s bid because its representative had not appeared in person; it confirmed the sale in Ms. Lockerby’s favor.

In its first appeal, the bank argued that the court should have considered the bid submitted on its behalf by the auctioneer rather than requiring an in-person bid and that the court failed to exercise its discretion in deciding whether to confirm the sale. We did not address the first argument, finding it waived. See id. ¶ 7. Even if the bank had preserved this argument, we found it unclear if the auctioneer had in fact submitted a bid on the bank’s behalf. Id. ¶ 9. We nonetheless reversed the court’s decision after concluding that it failed “to weigh the equities implicated by the sale.” Id. ¶ 11. We remanded to allow the court to exercise its discretion, “including consideration of whether the foreclosure sale satisfied statutory requirements and other factors relevant to the integrity and fairness of the sale.” Id. ¶ 16.

The court held an evidentiary hearing on remand and it also considered the evidence from its original hearing. The court again denied the bank’s motion to vacate the sale and it reinstated its confirmation order. The court made numerous findings, including the following. The property at issue is a single-family residence on two acres located in a rural area. The mortgage on the property was guaranteed by the Department of Veterans Affairs. The property was vacant for at least four to five years before the bank initiated foreclosure proceedings and obtained a default judgment in its favor. As previously indicated, the bank arranged for a judicial sale to occur,

initially in August 2016, later adjourned to September 2016, and then postponed until December 2016. Ms. Lockerby attended the auction. She was not allowed to go inside the house to see its condition, but she lived nearby and knew that it had been vacant and unmaintained for almost five years. She also learned that there were problems with the water pipes and mold. Ms. Lockerby knew that if she wanted to bid on the property, she would be accepting the risk of an unknown level of damage to the interior.

On the morning of the auction, the auctioneer received papers electronically from the bank's attorney's office. The packet he received had a different auctioneer's name on it. One of the documents appeared to authorize the different auctioneer to enter a bid of \$120,000 on the bank's behalf. The auctioneer did not know if he personally was being authorized to enter a bid on the bank's behalf or if this would be acceptable to the court. He did not know if a bank representative would be attending the auction.

As indicated above, the bank did hire a representative to attend the sale and enter a bid on its behalf. Although she had the correct address, she could not find the house and never arrived at the sale. The auctioneer and Ms. Lockerby were the only people in attendance at the appointed time. When Ms. Lockerby sought to enter a bid of \$40,000, the auctioneer, knowing of the bank's intended bid, told her that would be insufficient. The auctioneer ultimately accepted Ms. Lockerby's bid and deposit check, but he did not declare a winning bid. He told Ms. Lockerby that her bid would be considered and that she would hear back. The court found that the auctioneer did not actually enter a bid on the bank's behalf at the time of the sale. It found that his comment to Ms. Lockerby indicated that he intended to defer to the bank's counsel about what would happen next.

Following the auction, the bank did not file a report of sale as required by statute. Instead, two months later, it filed the motion to void the foreclosure sale at issue here. The bank did not disclose to the court that Ms. Lockerby had been present at the auction and submitted a bid. After the court learned about Ms. Lockerby, she was notified of the motion and intervened in the proceedings. The bank argued that the sale should be voided and a new sale held because: its representative did not attend through excusable neglect, Ms. Lockerby's bid was only one-third of the bid that the bank intended to enter, and if her bid was accepted it would cause the bank to suffer a forfeiture. Ms. Lockerby asked that the sale to her be confirmed. The court confirmed the sale, leading to the appeal and remand.

On remand, the bank hired an appraiser to appraise the property. The appraisal was done in November 2018 and purported to value the property as of December 2016, the date of the judicial sale. The appraiser valued the property at \$122,000 based on an analysis of sales of other properties in 2016. The appraiser visited the property in November 2018 and went inside, but there was no power. He acknowledged that he did not know the property's condition in December 2016 with respect to the water supply, septic system, or roof. The court found his inspection cursory and insufficient to make credible and reliable market adjustments from other sales to support his valuation. The appraiser did not have knowledge of the functionality of basic systems that might have been important factors for market purchasers. The court noted that the bank had obtained an appraisal in July 2016 but, for unknown reasons, had not submitted it. Based on all of the circumstances, including Ms. Lockerby's credible testimony, the bank's acknowledgment that there had been damage to the property, and the fact that bidders were not allowed to inspect the property, the court found that the bank failed to prove that the value of the property on December 8, 2016, was \$122,000. It could not discern the property's fair market value as of the sale date.

The court also found that the original mortgage loan was guaranteed by the Veterans Administration (VA). There was no evidence presented as to what the actual shortfall might be to the bank once all factors were considered, including any benefits available through the VA guarantee or other accounting or tax ramifications.

Based on these and other findings, the court rejected the bank's arguments that the sale should be voided. As discussed in additional detail below, it found no irregularities in the conduct of the auction up through the time of bidding. It concluded that the failure of the bank's representative to attend the auction was not an irregularity in the sale. It further found that Ms. Lockerby's bid did not produce an unconscionable windfall and it was not otherwise commercially unreasonable. The court evaluated other equitable concerns as well. It found the evidence unclear that the bank would suffer any shortfall from the sale; the bank chose to have a no-frills auction that was not calculated to maximize the sales price; the bank acted unfairly when it initially sought to void the auction by providing no notice of its motion to Ms. Lockerby; it interfered with the auctioneer's responsibility to report to the court what occurred at the judicial sale; and it violated its statutory duty and an obligation of candor by failing to inform the court that a valid bid had been submitted at the auction. The court also considered equitable concerns related to the original mortgage holders, both of whom had defaulted in the foreclosure action. The court noted that the bank's failure to protect the property value and maximize the sales price prejudiced these mortgagors' financial interests as well as the bank's own interests and accordingly reaffirmed its denial of a deficiency claim against the mortgagors.

Finally, the court found that equity strongly favored Ms. Lockerby, who had followed all the rules, investigated the property to the extent possible, and made a bid that had a reasonable basis given the unknown risks involved. The court noted that she had also paid over \$5000 in property taxes to preserve the availability of the property for the bank and herself. Meanwhile, the bank had sought to void the sale in a manner designed to deprive her of notice. The court found that Ms. Lockerby had been treated unfairly by the auctioneer and by the bank and that allowing a second public sale would singularly benefit the bank, which had unclean hands, and unfairly penalize Ms. Lockerby. This would send the wrong message to the public as well. Thus, as reflected above, the court concluded that the equities clearly weighed in favor of denying the bank's request to void the December 2016 sale and confirming the property to Ms. Lockerby. This appeal followed.

On appeal, the bank essentially challenges the trial court's assessment of the weight of the evidence and its evaluation of the credibility of witnesses. It argues that the trial court abused its discretion in finding the sale commercially reasonable and overlooking evidence to the contrary; it "overlooked controlling circumstances relevant to the integrity and fairness of the sale" by finding the bank to blame for its bidder's failure to find the property; it should have found Ms. Lockerby's bid to be nominal and concluded that it contravened equity to award title to a nominal bidder; the court should not have discussed any equities related to the individuals who initially took out the mortgage on the property; and the court should not have found that it mistreated Ms. Lockerby during this process.*

* The bank raises several other arguments that we do not address. It asserts that the question of whether in-person bidding is required is at issue in this appeal. We previously held that this issue was waived and thus we do not address it here. See O'Kelly, 2018 VT 71, ¶ 8 (considering unpreserved bank's assertion that "binding authority did not mandate an in-person bidding requirement, and accordingly that requirement should not factor into, or control, the trial court's confirmation decision"). As we explained in that decision, we were "not directly

“Confirmation of a foreclosure sale is a discretionary judicial action, the purpose of which is to ensure fairness in the foreclosure process.” HSBC Bank USA N.A. v. McAllister, 2018 VT 9, ¶ 7, 206 Vt. 445. In this case, we directed the court to “exercise its discretion in confirming, or not confirming, the sale, including consideration of whether the foreclosure sale satisfied statutory requirements and other factors relevant to the integrity and fairness of the sale.” O’Kelly, 2018 VT 71, ¶ 16. We now review the court’s decision for abuse of discretion. Id. Thus, the bank must show that the court “withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent.” Vt. Nat’l Bank v. Clark, 156 Vt. 143, 145 (1991). The bank fails to make the necessary showing here.

The court followed our instructions on remand and addressed all of the issues that the bank now challenges on appeal. As indicated above, the court found that Ms. Lockerby’s bid did not produce an unconscionable windfall and it was not commercially unreasonable in any other sense. It considered the bank’s argument that Ms. Lockerby’s bid was low in relation to the outstanding debt for which the property was security. It concluded, however, that a bid-to-debt ratio was not the relevant standard in the context of the type of auction that the bank had arranged here. It explained that the auction had not been designed to maximize market exposure and, in any event, bidders were not obligated to tailor their bids to benefit the secured party by mirroring the amount of debt. The court also rejected the bank’s attempt to show that Ms. Lockerby’s bid was low in relation to property value. As set forth above, it was unpersuaded by the bank’s evidence that the property was worth \$122,000 at the time of the auction. Regardless of the reason that the bank did not submit its earlier appraisal, moreover, that appraisal was not before the court. The court also found that any reasonable bidder, who knew that the property had been unoccupied and unmaintained for a protracted period, and who had no ability to check the interior of the house, had to assume there was a risk of actual property damage in addition to deferred maintenance and consider that in formulating a bid. The court also rejected the notion that this was a nominal bid. It found, among other things, that the fact that the bank was willing, after the fact, to make a higher bid, did not show that Ms. Lockerby’s bid was commercially unreasonable or nominal.

The bank simply disagrees with the court’s findings and conclusions. It reiterates arguments that the court considered and rejected. The court did not overlook the bank’s evidence, as the bank asserts; it found that evidence unpersuasive. As indicated above, the court did not confirm the sale to a “nominal” bidder, as the bank asserts, and thus its argument resting on this

confronted with” this issue, “and thus we d[id] not consider whether the presence of an in-person bidder [was] among the factors the trial court should consider in its confirmation decision.” Id. ¶ 15. The bank could not now “preserve” this issue by mentioning it in a motion for reconsideration following our remand, as it suggests. The trial court properly declined to address this issue beyond noting that the auctioneer had not entered a bid on the bank’s behalf. See In re N.E. Materials Grp. LLC, 2016 VT 87, ¶ 7, 202 Vt. 588 (explaining that “[o]n remand, the lower court is bound by the scope of our remand instructions, and may only reopen issues that are within that scope,” and trial court “is bound to follow the specific instructions given by this Court, interpreted in the light of the opinion”). We note, in any event, that the court did not find that an auctioneer cannot submit a bid on the bank’s behalf, as the bank appears to suggest, but rather that, under the circumstances of this case, he did not.

We similarly do not address the bank’s assertion that it is entitled to relief from judgment under Vermont Rule of Civil Procedure 60(b)(1) based on excusable neglect. The bank did not file a Rule 60 motion below. Its use of the words “excusable neglect” in connection with its motion to void the foreclosure sale did not preserve a claim under Rule 60(b)(1). It cannot raise this argument for the first time on appeal.

premise fails. The bank found the bid commercially reasonable and determined that the equities supported confirming the sale to Ms. Lockerby. The bank fails to show any abuse of discretion. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments that “amount to nothing more than a disagreement with the court’s reasoning and conclusion” do not make out case for abuse of discretion).

This is equally true with respect to the bank’s remaining arguments. The court found that the failure of the bank’s agent to attend the sale was not an irregularity in the sale, nor was her absence due to excusable neglect. The court explained that the agent simply did not know where the property was, she was not properly equipped to find it, and she did not budget enough time to deal with any difficulties in finding the property. The bank simply urges us to view the evidence differently and reach a contrary conclusion. That is not our function on review. “The trial court identified reasonable grounds for its decision, and as we have often repeated, it is for the trial court, not this Court, to weigh the evidence and assess the credibility of witnesses.” Estate of George v. Vt. League of Cities & Towns, 2010 VT 1, ¶ 36, 187 Vt. 229 (citing Chase v. Bowen, 2008 VT 12, ¶ 15, 183 Vt. 187 and explaining “it is exclusively the province of the trial court to assess the credibility of the witnesses and weigh the persuasiveness of the evidence”).

We similarly find no error in the court’s finding that Ms. Lockerby was mistreated during this process. Again, the court provided reasoned grounds in support of this conclusion and it did not err in so concluding.

Finally, the court did not abuse its discretion in observing that the bank’s failure to protect the value of the property and maximize the sales price prejudiced the financial interests of the original mortgagors as well as the bank’s own financial interests. This observation fits within the court’s consideration of “other factors relevant to the integrity and fairness of the sale.” O’Kelly, 2018 VT 71, ¶ 16. The fact that the bank’s conduct potentially prejudiced the mortgagors’ interests in maximizing the sale price, and the court’s consequent decision to deny the bank a deficiency judgment against the mortgagors, are permissible considerations in considering the equities of confirming the sale. See Id. ¶ 14 (noting that in HSBC Bank, 2018 VT 9, this Court approved consideration of effect of potential deficiency judgment on mortgagors in deciding whether to confirm sale).

We have considered all of the bank’s arguments and find them all without merit. The bank fails to show that the court abused its discretion here.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice