Cite as 2013 Ark. App. 216

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-826

Opinion Delivered April 3, 2013

DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE FOR ARGENT SECURITIES, INC., AND ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-W2
APPELLANT

V.

FINELINE DEVELOPMENT, LLC
APPELLEE

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[CV-2011-3163-7]

HONORABLE JOANNA TAYLOR, JUDGE

REVERSED AND REMANDED

DAVID M. GLOVER, Judge

The issue in this case is whether the trial court erred in refusing to set aside the commissioner's sale after a default decree of foreclosure was entered and the property was purchased for $100 by appellee Fineline Development, LLC (Fineline). We agree that the trial court erred, and we reverse, set aside the order approving and confirming the commissioner's sale, and remand for further proceedings consistent with this opinion.

On November 9, 2011, appellant Deutsche Bank National Trust Company (Deutsche Bank) filed a complaint for foreclosure against Joe and Linda Burba (Burbas) and Arrow Financial Services, Inc. (Arrow), alleging that it was the holder of the promissory note and mortgage executed by the Burbas on December 27, 2005, for Lot 14, Block J of the Elmdale Terrace Subdivision in the city of Springdale, Arkansas; that the principal sum of the mortgage

was $111,150, with interest of 8.250% per annum; that the note was in default, with an unpaid principal balance of $106,045.42 plus interest from March 1, 2011; and that Arrow's interest in the property was secondary to Deutsche Bank's interest. Deutsche Bank prayed that the mortgage be foreclosed and the property sold. The promissory note and mortgage were attached to the foreclosure complaint.

A default decree of foreclosure was entered on January 11, 2012, granting Deutsche Bank in rem judgment against the property in the sum of $106,045.42 plus interest ($5,726.62 until October 26, 2011, plus additional interest on the unpaid principal at 8.250% per annum), $1,500 in attorney fees, and other loan and late charges of $728.57. The decree further provided that if the judgment was not satisfied within ten days from the date of the decree, the property would be sold at a commissioner's sale, with the circuit clerk of Washington County acting as commissioner. The sale was first set for February 29, 2012; however, upon Deutsche Bank's request, that sale was cancelled and rescheduled for April 12, 2012. The property was sold on April 12, 2012, for $100 to Fineline; shortly after the sale, Deutsche Bank attempted to fax a bid of $80,151.73, but the property had already been sold to Fineline. On April 16, 2012, Deutsche Bank filed a motion to set aside the commissioner's sale, alleging that the bid amount should shock the conscience of the court. A copy of this motion was served on Fineline. The commissioner's report of sale was filed on May 7, 2012. Fineline filed a motion to intervene in the action on June 15, 2012.

A hearing was held on Deutsche Bank's motion to set aside the commissioner's sale on July 5, 2012, but prior to hearing Deutsche Bank's motion, the trial court heard arguments on Fineline's motion to intervene and orally granted the motion. The parties then addressed Deutsche Bank's motion to set aside the commissioner's sale. Deutsche Bank placed into evidence copies of three certified documents—an affidavit of debt, the decree of foreclosure, and the Washington County tax assessor's parcel information on the property. The trial court took judicial notice of the decree of foreclosure, and the affidavit of debt (executed on November 30, 2011) indicating that the total debt on the property was $112,500.61. The tax assessor's parcel-information document, denominated as "Washington County Urban Property Record Card," indicated that the property was last appraised in 2010; that at that time, the land appraised for $30,000 and the building appraised for $63,600; and that in 2007, the land had appraised for $30,000, and the building appraised for $91,900. The trial court held that the only evidence presented as to the value of the property in question was the above tax assessor's record, that those valuations were sixteen months prior to the foreclosure action being filed and almost twenty-one months prior to the commissioner's sale, and that there was no testimony presented as to the value of the real property as of April 12, 2012 (the date of the commissioner's sale), or the condition of the property; that Deutsche Bank had failed to put on any proof as to the value of the property on the day of the sale; that the trial court had no valuation by which to evaluate the adequacy of the $100 bid; and therefore, that the bid was determined to be a fair price and did not shock the conscience of the court.

As an initial matter, Fineline asserts that Deutsche Bank did not timely appeal the sale. Fineline states that the trial court entered an order approving and confirming the sale on July 5, 2012, and that Deutsche Bank's notice of appeal was not filed until August 16, 2012, more than thirty days after the entry of the order confirming the sale. However, a motion to set aside a foreclosure sale is a motion directed at setting aside an order of confirmation and therefore qualifies as a posttrial motion, which extends the time for filing a notice of appeal. *Seay v. C.A.R. Transp. Brokerage Co., Inc.*, 366 Ark. 527, 530, 237 S.W.3d 48, 51 (2006) (citing *McAdams v. Auto. Rentals, Inc.*, 319 Ark. 254, 256, 891 S.W.2d 52, 53 (1995), *cert. denied*, 519 U.S. 1013 (1996)). Here, an order approving and confirming the commissioner's sale was filed for record on July 5, 2012, and a commissioner's deed was filed on July 12, 2012. On July 12, 2012, Deutsche Bank filed a motion to reconsider its motion to set aside the commissioner's sale. On July 30, 2012, the trial court entered an order denying Deutsche Bank's motion for reconsideration—within the thirty-day window to rule. On August 16, 2012, the trial court entered another order finding that Deutsche Bank had failed to meet its burden of proof to have the sale set aside and holding that its motion was denied. On August 16, 2012, Deutsche Bank filed its first notice of appeal and filed its second notice of appeal on August 27, 2012, both of which were timely.

In *Campbell v. Campbell*, 20 Ark. App. 170, 171–72, 725 S.W.2d 585, 586–87 (1987) (citations omitted), our court held:

> 1. Judicial sales are not to be treated lightly, and to give them a certain desired stability, the court should not refuse to confirm a sale for mere inadequacy of price.

> 2. When great inadequacy of price is shown, equity will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to confirm the sale. This rule applies even in the absence of fraud or misconduct on the part of the purchaser.
>
> 3. If the inadequacy of price is so great as to shock the conscience of the court, the court will refuse to confirm the sale even in the absence of other circumstances.
>
> 4. In judicial sales the court is the vendor, and in the exercise of sound judicial discretion, it may confirm or refuse to confirm a sale made under its order.
>
> 5. On appeal, in determining whether the [trial court] abused [its] discretion, we do not substitute our decision for that of the trial court but merely review the case to see whether the decision was within the latitude of the decisions that the court could make in a case like the one being reviewed.

In *Looper v. Madison Guaranty Savings & Loan Association*, 292 Ark. 225, 227–28, 729 S.W.2d 156, 157–58 (1987) (citations omitted), decided by our supreme court two months after our court's decision in *Campbell*, it was held:

> A price that "shocks the conscience" of a judge can never be reduced to a mathematical formula. It depends on a variety of circumstances: the value of the property, the circumstances surrounding the sale, the price, the rights of the parties participating in the sale, and the harm that may result if the sale is confirmed, to name a few. Nevertheless, the decision is one for the [trial court] to make, using sound discretion. While no fixed formula exists or can exist for what is a shocking sale price, fixed rules do exist for us to review such a case. First, we are an appellate court; we do not retry cases. We cannot sit as jurors who determine facts in law cases, nor [trial courts]. Factual determinations of [trial courts] must be upheld unless clearly erroneous.
>
> When we examine a discretionary decision made by [the trial court] the question is not what we would have done, but whether, as a matter of law, discretion was abused—was the judgment call arbitrary or groundless?
>
> Other principles also apply when we review a case, sometimes omitted from our opinions, but nonetheless applicable to all our decisions. The appellant, the party losing at the trial level, has the burden of demonstrating error. The evidence on appeal

> and all reasonable inferences from that evidence, and the findings of fact by a judge must be reviewed in a light most favorable to the appellee, the party that won at the trial level.

In *Campbell*, the trial court refused to confirm the sale of a house for $5,000 when the house appeared to have been worth more than $40,000 due to the grossly inadequate price obtained, together with the inadequate notice of sale, even though there was no fraud. Our court affirmed the trial court's refusal to confirm the sale. In *Looper*, the trial court refused to confirm the sale solely because the sale price shocked the conscience of the court, which our supreme court later also affirmed. In that case, a $42,500 piece of property was sold for $1,900—a mere 4.4% of the value.

Deutsche Bank cites the South Carolina cases of *Wells Fargo Bank, NA v. Turner*, 662 S.E.2d 424 (S.C. 2008), and *Investor Savings Bank v. Phelps*, 397 S.E.2d 780 (S.C. 1990), for the proposition that the amount of the foreclosed note and mortgage are evidence of the property's value. We decline to adopt a bright-line rule that the amount of a foreclosed note and mortgage per se establishes a property's value; however, we recognize that, when coupled with other evidence, a foreclosed note and a mortgage may aid in establishing the value of the property.

The trial court was correct that Deutsche Bank presented no testimony as to the value of the property as of April 12, 2012, or the condition of the property on that day. Deutsche Bank could have bolstered its argument to set aside the sale by submitting current pictures of the property, a recent appraisal, or some other type of expert testimony concerning the value

of the property. However, Deutsche Bank did present some evidence of valuation. It presented the January 11, 2012 decree of foreclosure, granting it judgment for the principal balance of $106,045.42, and the November 2011 affidavit of debt, indicating that the total debt on the property was $112,500.61. However, it is the tax assessor's property record that provides the most reliable evidence of the property value. The property record indicates that the structure on the property is a 1460 square-foot house built in 1964 in the Elmdale Terrace Subdivision, and the most recent valuation is the 2010 tax appraisal, showing a decrease in value of the structure on the property from 2007 to 2010 from $91,900 to $63,600. However, on the tax assessor's property record, the value of the raw land remained at $30,000 from 2007 to 2010, which is a significant real-estate-market indicator. Even if the value of the house from the 2010 appraisal is disregarded and even valued at zero due to the lack of proof of the current condition of the house, the $100 price paid by Fineline for the property is merely .33% of the $30,000 value of the raw land. *See Looper*, *supra*. This bid price is woefully inadequate, to the point of being nonexistent, when compared with the consistent property-tax valuation for the raw land established less than two years prior to the foreclosure sale. That a lot in a neighborhood in the city of Springdale, Arkansas, with the above assessed raw-land value was purchased for a mere $100 shocks the conscience of this court. The trial court's refusal to set aside the commissioner's sale was clearly erroneous, and we reverse that decision and remand to the trial court to conduct another commissioner's sale.

Reversed and remanded.

PITTMAN and WOOD, JJ., agree.

Mickel Law Firm, PA, by: *Stephen P. Lowman*, for appellant.

DWSA Law Group, by: *Tim Snively*, for appellee.