Michigan Law Review

Volume 36 | Issue 8

1938

MORTGAGES - FORECLOSURE SALE - POSSIBILITY OF SETTING ASIDE SALE BECAUSE OF PROBABLE HIGHER BID

James W. Mehaffy
University of Michigan Law School

MORTGAGES — FORECLOSURE SALE — POSSIBILITY OF SETTING ASIDE SALE BECAUSE OF PROBABLE HIGHER BID — A trust deed secured a loan of $85,000. The mortgage was foreclosed, the trustee authorized to bid at the sale, and an upset price of $12,500 fixed. A stranger made a higher bid than the trustee, and the property was sold to him for $40,100. The trustee now seeks a resale, offering evidence to show that the property could bring $50,000 to $60,000 if the trustee bought it, remodeled the building, and had time to find a suitable purchaser. There was no question of a deficiency decree. *Held*, that the lower court erred in refusing to confirm the original sale. *A. J. Straus Paying Agency, Inc. v. Jensen*, (Wis. 1938) 277 N. W. 105.

It is universally agreed in this country that mere inadequacy of the bid is

not enough to justify setting aside the foreclosure sale.[1] This rule, however, is qualified by the fact that inadequacy of price plus some element of fraud, mistake, or surprise is considered grounds for setting aside the sale.[2] Also, gross inadequacy alone has been taken to be evidence of fraud,[3] and if the inadequacy is so great as to shock the conscience, this alone has been deemed sufficient to order a resale.[4] In connection with inadequacy less than this, courts have seized upon comparatively small points in order to set aside a sale they feel to be unjust.[5] The assurance that a higher price will be obtained upon the resale has been thought by some courts a factor to be considered in the problem,[6] although

[1] Griswold v. Borden, 146 Wis. 35, 130 N. W. 952 (1911); Hill v. Hoover, 5 Wis. 354 (1856); Nitro-Phosphate Syndicate, Ltd. v. Johnson, 100 Va. 774, 42 S. E. 995 (1902); State Realty & Mortgage Co. v. Villaume, 121 App. Div. 793, 106 N. Y. S. 698 (1907); Housman v. Wright, 50 App. Div. 606, 64 N. Y. S. 71 (1900); Wetzler v. Schaumann, 24 N. J. Eq. 60 (1873); Hughes v. Riggs, 84 Md. 502, 36 A. 269 (1897); McDonnell v. De Soto Sav. Assn., 175 Mo. 250, 75 S. W. 438 (1903); Windes v. Russell, 150 Ala. 625, 43 So. 788 (1907); Doyle v. Maxwell, 155 Ark. 477, 244 S. W. 732 (1922); Connick v. Hill, 127 Cal. 162, 59 P. 832 (1899); Moeller v. Miller, 315 Ill. 454, 146 N. E. 449 (1925); Springer v. Law, 185 Ill. 542, 57 N. E. 435 (1900); Evans Marble Co. of Baltimore v. Abrams, 131 Md. 204, 101 A. 964 (1917); Ruff v. Guaranty Title & Trust Co., 99 Fla. 197, 126 So. 383 (1930); Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496 (1931); Lemere v. White, 122 Neb. 676, 241 N. W. 105 (1932); Cocke v. Southland Life Ins. Co., (Tex. Civ. App. 1934) 75 S. W. (2d) 194.

[2] Clement v. Ireland, 138 N. C. 136, 50 S. E. 570 (1905); Beliles v. Federal Land Bank of Louisville, 216 Ky. 145, 287 S. W. 537 (1926); Rose v. Bray, 172 Ark. 686, 270 S. W. 601 (1927); Weil v. Laube, 134 Misc. 454, 235 N. Y. S. 14 (1929); Moeller v. Miller, 315 Ill. 454, 146 N. E. 449 (1925); State Realty & Mortgage Co. v. Villaume, 121 App. Div. 606, 106 N. Y. S. 698 (1907); Veit v. Meyer, 105 Wis. 530, 81 N. W. 653 (1905).

[3] Hanan v. Threadgill, (D. C. Fla. 1924) 296 F. 569; Moeller v. Miller, 315 Ill. 454, 146 N. E. 449 (1925); Nelsen v. Doll, 124 Neb. 523, 247 N. W. 44 (1933); 3 JONES, MORTGAGES, 8th ed., § 2108 (1928).

[4] Lefever v. Kline, 295 Pa. 22, 143 A. 488 (1928); Michigan Trust Co. v. Code, 264 Mich. 258, 249 N. W. 844 (1933); State ex rel. Commrs. of Land Office v. Harrower, 167 Okla. 269, 29 P. (2d) 123 (1934); Straus v. Anderson, 283 Ill. App. 342 (1936); Bechtel v. Rocke, 288 Ill. App. 229, 5 N. E. (2d) 872 (1937).

[5] Dewey v. Linscott, 20 Kan. 684 (1878); Demaray v. Little, 19 Mich. 244 (1869); Rowan v. Congdon, 53 N. J. Eq. 385, 33 A. 404 (1895); Lefever v. Kline, 274 Pa. 22, 143 A. 488 (1928); Iron & Glass Dallas Sav. Bank v. Wigman, 264 Pa. 146, 107 A. 661 (1919); Bauer v. Wade, 170 Ark. 1020, 282 S. W. 359 (1926); Federal Land Bank of Spokane v. Curts, 45 Idaho 414, 262 P. 877 (1928); Eastwood v. Kanawha Savings & Loan Co., 109 W. Va. 26, 152 S. E. 778 (1930); Federal Land Bank of St. Louis v. Ballentine, 186 Ark. 141, 52 S. W. (2d) 965 (1932).

[6] John Paul Lumber Co. v. Neumeister, 106 Wis. 243, 82 N. W. 144 (1900); Veit v. Meyer, 105 Wis. 530, 81 N. W. 653 (1905); Dewey v. Linscott, 20 Kan. 684 (1878); Wolfert v. Milford Sav. Bank, 5 Kan. App. 222, 47 P. 175 (1896); Demaray v. Little, 19 Mich. 244 (1869); Rowan v. Congdon, 53 N. J. Eq. 385, 33 A. 404 (1895); New Jersey Nat. Bank v. Savemore Realty Co., 107 N. J. Eq. 478, 153 A. 480 (1931); Moeller v. Miller, 315 Ill. 454, 146 N. E. 449 (1925); Lefever v. Kline, 294 Pa. 22, 143 A. 488 (1928); State ex rel. Commrs. of Land Office v. Harrower, 167 Okla. 269, 29 P. (2d) 123 (1934).

no case has been found in this country in which the court ordered a resale solely on this ground.[7] In England, the practice at one time was to reopen the biddings upon the receipt of an advance bid of ten per cent or more over the prior bid; [8] and although today there appears to be no such arbitrary standard,[9] the bidding may be reopened if there is a substantial advance bid.[10] The increased use in this country of an upset price set by the court might seem, to some extent, to make improper setting aside a sale; [11] likewise, the English practice of the "reserve bid" [12] and the device of statutory appraisal provided for in some states [13] would have the same effect. The recent financial depression has led to increased consideration of the hard-pressed mortgagor, and this has partially taken the form of an increased willingness on the part of the courts to use their discretion in refusing to confirm a sale.[14] The entire question would seem to be one of balancing the equities, a problem into which many factors may enter. Generally speaking, it would seem that the policy of upholding judicial sales in order to encourage bidding should outweigh the desire to help a party who believes a resale will bring a higher price and who will be benefited thereby.[15]

[7] See Fidelity Trust Co. v. Mobile Street Ry., (C. C. Ala. 1893) 54 F. 26; Harris v. Gunnell, 10 Ky. L. 419, 9 S. W. 376 (1888).

[8] Anonymous, 1 Ves. Jr. 453, 30 Eng. Rep. 434 (1792); Anonymous, 2 Ves. Jr. 487, 30 Eng. Rep. 738 (1794); Upton v. Lord Ferrers, 4 Ves. 700, 31 Eng. Rep. 362 (1799); Andrews v. Emerson, 7 Ves. 420, 32 Eng. Rep. 170 (1802).

[9] In Andrews v. Emerson, 7 Ves. 420, 32 Eng. Rep. 170 (1802), Lord Eldon said: "That rule of ten per cent was not a wise rule to establish. The consequences are, you never get more. I remember a time when no such rule prevailed, and I desire it to be observed that in the future there shall be no such rule."

[10] 1 SUGDEN, VENDORS, 14th ed., 163 (1873); Scott v. Nesbit, 3 Bro. C. C. 475, 29 Eng. Rep. 651 (1792); Hodges v. Jones, 2 Fow. Pra. 318; Preston v. Barker, 16 Ves. 140, 33 Eng. Rep. 937 (1809).

[11] 85 A. L. R. 1480 (1933); 89 A. L. R. 1087 (1934).

[12] 2 DANIELL, CHANCERY PLEADING AND PRACTICE, 5th Am. ed., 1268, 1271 (1879); COOOLEY, MORTGAGES, 19th ed., 753, 1073, 1133 (1927).

[13] 42 C. J. 187 (1927); Pan American Bank v. Tallulah Cotton Oil Co., 150 La. 511, 90 So. 779 (1922); Hart v. Beardsley, 67 Neb. 145, 93 N. W. 423 (1903); Pearson v. Badger Lumber Co., 2 Neb. (Unof.) 251, 96 N. W. 493 (1902).

[14] Suring St. Bank v. Giese, 210 Wis. 489, 246 N. W. 556, 85 A. L. R. 1477 at 1480 (1933); Chemical Bank & Trust Co. v. Adam Schumann Associates, 150 Misc. 221, 268 N. Y. S. 674 (1934). Cf. Washington Mut. Sav. Bank v. Horn, 186 Wash. 75, 56 P. (2d) 995 (1936).

[15] ". . . we conclude that mere inadequacy of price, unless so great as to shock the conscience, will not justify the reopening of biddings. This rule seems to rest upon the plain necessity that it is in the interest of suitors that it shall be understood that some stability is to be given to the public sale of property by a master in equity, and that the report of sale will neither be set aside upon trivial circumstances, nor because it shall appear that the bidder has obtained a fair bargain and a reasonable profit. When it once comes to be understood that chancery sales will not be set aside upon a mere showing of inadequacy of price, and that the highest bidder at such sales may reasonably calculate that his purchase will be confirmed, unless, in addition to mere inadequacy, there shall also appear circumstances making it inequitable that he shall have the advantage of his bargain, we may hope tht such will be attended by all intending purchasers, and such

In the principal case, however, the only elements favoring a setting aside of the sale were the trustee's assertion that he could bid more at the next sale because of the possibility of remodeling the building and securing a purchaser willing to pay a higher price, and the suggestion that a fair price had not been received.[16] In view of the fact that the first sale was fairly conducted with one trustee present, that the bidding was competitive and resulted in a bid several times the upset price, that no deficiency judgment was involved, and that there was no suggestion of fraud or mistake, in addition to the fact that a majority of the bondholders favored confirmation of the sale,[17] there would seem to be no question as to the correctness of the decision.

James W. Mehaffy

real competition will be brought about as will result in sales at the fair value of the property. On the other hand, it is not expedient that the court shall lose all control over such sales." Magann v. Segal, (C. C. A. 6th, 1899) 92 F. 252 at 259.

[16] (Wis. 1938) 277 N. W. 105 at 106.

[17] $30,100 in interest of bondholders favored confirmation, $11,200 approved confirmation, and $14,200 expressed no opinion. (Wis. 1938) 277 N. W. 105 at 107.