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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET NO. F-6748-16

WILMINGTON SAVINGS
FUND SOCIETY, FSB, AS
TRUSTEE OF UPLAND
MORTGAGE LOAN TRUST A,

Plaintiff(s),

v.

GEORGE J. LEWIS, JR.,
INDIVIDUALLY AND AS CO
-EXECUTOR OF THE ESTATE OF
GEORGE J. LEWIS, SCOTT T.
LEWIS, INDIVIDUALLY AND AS CO
-EXECUTOR OF THE ESTATE OF
GEORGE J. LEWIS; NEW JERSEY
PROPERTY LIABILITY INSURANCE
GUARANTY ASSOCIATION; MIDLAND
FUNDING LLC; JPMORGAN CHASE
BANK N.A.; PALISADES SAFETY
AND INSURANCE ASSOCIATION;
SANDRA FEKETA; FRANK WASCO;
STATE OF NEW JERSEY; UNITED
STATES OF AMERICA,

OPINION

Defendant(s).

Decided: May 21, 2019

Sean D. Adams, attorney for plaintiff (Hill Wallack LLP).

BEDRIN MURRAY, J.T.C. (temporarily assigned)

This matter comes before the court by way of plaintiff's motion for an order authorizing pendente lite sale of certain real property, free and clear of liens, claims and encumbrances, pursuant to N.J.S.A. 2A:50-31. No opposition was filed. For the reasons set forth below, plaintiff's motion is denied.

I. Background and Procedural Posture

On or about December 6, 2010, George J. Lewis and Rosemary Lewis ("George" and "Rosemary" individually, and "defendants" when referring to both) executed and delivered to United Mortgage Corp. ("United") a Promissory Note ("note") in the principal amount of \$288,000.00. As security for the note, defendants executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for United, a mortgage in the amount of \$288,000.00 encumbering the property known as 28 Hoover Street, North Arlington, Bergen County, New Jersey ("subject property"). The mortgage was recorded in the Bergen County Clerk's Office on January 7, 2011. A chain of assignments followed, with the most recent taking place on May 18, 2017 to Wilmington Savings Fund Society, FSB, as Trustee of Upland Mortgage Loan Trust A.

Rosemary and George passed away on May 17, 2013 and September 19, 2014, respectively. Their children, George J. Lewis, Jr. and Scott T. Lewis ("George" and "Scott" individually, and the "children" when referring to both), were named as co-executors of George's estate in his Last Will and Testament, which also directed that the subject property be devised to them.

The children defaulted on the loan on March 1, 2015, six months after George's death. On March 8, 2016, plaintiff filed a complaint in foreclosure. On March 29, 2016, Scott filed a Chapter 13 petition in the United States Bankruptcy Court for the District of New Jersey. An order granting plaintiff relief from the automatic stay as to the subject property was entered on

June 28, 2017. On October 27, 2017, default was entered against all defendants.

On April 13, 2018, plaintiff obtained an order substituting plaintiff and appointing a custodial receiver for the property.

On June 22, 2018, the Clerk of the Superior Court of New Jersey ordered plaintiff to file a certification setting forth the status of the matter, including when the matter would proceed to judgment or otherwise be resolved. A second such order followed on December 5, 2018. Rather than proceed to final judgment, plaintiff filed the instant motion seeking to sell the subject property by pendente lite sale, free and clear of liens, claims and encumbrances.

II. Legal Standard

In a foreclosure litigation, sale of mortgaged property generally may take place only after the mortgagee has obtained a judgment of foreclosure and writ of execution directing that the property be sold. See Scott T. Tross, N.J. Foreclosure Law & Practice, § 11-11, at 282 (2018 ed.). However, N.J.S.A. 2A:50-31 provides an exception to the general rule, providing for sale pending foreclosure in certain circumstances.

When, in an action for the foreclosure or satisfaction of a mortgage covering real or personal property, or both, the property mortgaged is of such a character or so situated as to make it liable to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action, the superior court may, before judgment, upon the application of any party to the action, order a sale of the mortgaged property to be made at public or private sale through a receiver, sheriff, or otherwise, as the court may direct. The proceeds of any such sale shall be brought into court, there to remain subject to the same liens and equities of the parties in interest as was the mortgaged property and to be disposed of as the court shall, by order or judgment, direct.

Ibid.

In Horner v. Dey, 61 N.J. Eq. 554, 555 (Ch. 1901), the court denied an application for pendente lite sale, distinguishing ordinary long-term depreciation in property value from a clear and imminent threat certain to depreciate value before the litigation is concluded. The court held that

[T]he statute plainly intends by an immediate sale to prevent an impending depreciation of some extraordinary character which is threatened before . . . a disposition of the property can be effected, such as a dangerous condition of buildings, an abandonment of the premises, or the like. In such cases an immediate disposition of the property would be made, in the expectation of securing now a price which would be unlikely at the end of the litigation.

In Jersey Land Co. v. Goldblatt, 104 N.J. Eq. 425, 426 (E. & A. 1928), the court granted pendente lite relief where the proofs revealed that the subject property, an apartment dwelling, had uninhabitable units, faulty heating and plumbing systems, and rain coming in through the walls. Clearly, the issue turns on a showing that without an immediate sale, the property will face significant depreciation before entry of judgment and sale.

III. Analysis

In support of its application, plaintiff relies on the Certifications of Michael Cohan (“Cohan Cert.”), president of New Vistas Corporation, the court-appointed receiver (“receiver”) for the property, and Sean Adams (“Adams Cert.”), counsel for plaintiff. The Adams Cert. relies largely on the April 13, 2018 order appointing the receiver, wherein among the many enumerated rights is the authority to sell the property pendente lite. It is unclear if plaintiff considers this language as a pre-qualification for such relief without regard to the provisions of the statute. Nevertheless, this court concludes that plaintiff must show that the property meets the criteria for the statutory exception, and the Adams Cert. fails to do so.

The Cohan Cert. submits that as of January 15, 2018, the amount due plaintiff was \$342,582.23, plus interest and costs. In addition, the Cohan Cert. estimates that the market value of the subject property was approximately \$260,000.00 as of August 8, 2017, relying on an appraisal attached to the Certification of Elizabeth A. Ostermann (“Ostermann Cert.”), Vice President of Carrington Mortgage Services, LLC, plaintiff’s servicer.¹ To that end, plaintiff entered into a contract for sale of the property on or about November 28, 2018 for the sum of \$335,000.00 (Cohan Cert., Exh. C).² The certification does not, however, offer any evidence that the property is likely to deteriorate prior to the conclusion of the action.

In sum, the record is bereft of any proof that a pendente lite sale is warranted in this matter. While plaintiff relies on Jersey Land, supra, 104 N.J. Eq. at 426, it demonstrates none of the urgency exhibited in the Jersey Land facts.³ Specifically, there is no allegation that if the sale does not take place, the subject property will face impending, substantial deterioration. Nor is there any suggestion that the property is of such a character or so situated that it will likely decline in value pending the litigation.⁴ In addition, there is no claim that the costs of preserving the property are excessive. Moreover, while counsel states in his letter memorandum that the Cohan Cert. maintains that “the Property has been vacant and abandoned for an extended period of time”, no such statement can be found. The court also notes that plaintiff seeks to sell the property free and clear of all liens, claims and encumbrances, which is in direct contravention of

¹ The Ostermann Cert. is dated March 15, 2018 and was initially offered in support of plaintiff’s prior motion to substitute plaintiff and for the appointment of a rent receiver. It is noted that the appraisal appended to said certification suggests that the property be listed for \$280,000.00 and sold for \$270,000.00. The thirty-day price is difficult to read but appears to be the \$260,000.00 figure cited by plaintiff.

² However, the Cohan Cert. at ¶10 states that “. . . sale of the Property to the Purchasers for \$260,000.00 is in the parties’ best interests.” It is not known if the discrepancy is inadvertent error.

³ Plaintiff also relies on an unpublished opinion in support of its application. Said opinion is not binding on this court; further, the facts differ from those at bar and are not persuasive in the instant matter.

⁴ In fact, the appraisal attached to the Ostermann Cert. states that “[m]arket values remained stable during last 12 months within subject’s market area.”

N.J.S.A. 2A:50-31.

In short, it is evident from an examination of the relevant statutory and case law that pendente lite relief in a foreclosure litigation is an extraordinary remedy, intended to thwart an imminent deterioration or destruction of the property and/or its value. It is not intended as a means of circumventing the ordinary foreclosure process for the sake of expediency.

Given the above facts, the court concludes that plaintiff has not met the standard required for leave to sell the mortgaged property pending determination of the action. For the foregoing reasons, plaintiff's motion for an order permitting pendente lite sale free and clear of liens, claims and encumbrances is denied. An order accompanies this decision.