

## SYLLABUS

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### **West Pleasant-CPGT, Inc. v. U.S. Home Corporation (A-1-19) (082981)**

**Argued March 3, 2020 -- Decided July 8, 2020**

**LaVECCHIA, J., writing for the Court.**

In this appeal, the Court considers whether a fair market value credit can be sought in the absence of a deficiency action or similar proceeding as a means for a debtor to obtain a money judgment against a creditor.

In 2005, U.S. Home Corporation (U.S. Home) entered into a contract to purchase two contiguous tracts of land, one of which was owned by West Pleasant-CPGT, Inc. (West Pleasant). Under the contract, West Pleasant and the other landowner were to gain certain approvals permitting development of the properties. Pursuant to the contract, U.S. Home paid advances to the landowners totaling over \$1.5 million. As security for the advances, West Pleasant executed a mortgage and note on its property; the other landowner did not.

When a contract dispute arose in 2006, U.S. Home sought the contract’s termination and return of its total advance. U.S. Home prevailed in arbitration and was awarded a judgment in the full amount of the advance, plus interest. The Appellate Division affirmed the judgment in 2009. When the judgment was not satisfied, U.S. Home commenced foreclosure actions against the properties.

The foreclosure proceedings were stayed when West Pleasant and the other property owner filed for bankruptcy. In West Pleasant’s bankruptcy action, U.S. Home moved to dismiss and for relief from the automatic stay. West Pleasant and U.S. Home executed a Consent Order, in which West Pleasant dismissed its bankruptcy proceeding, waived a fair market valuation and its right to object to a sheriff’s sale of its property, and released U.S. Home from any claims in law or equity.

In the bankruptcy action of the owner of the second property, the bankruptcy court accepted the appraisals of U.S. Home’s expert of \$806,000 for the second property and \$412,500 for the West Pleasant property. Because the combined value of the two properties was less than the amount owed to U.S. Home, the court determined there was no equity in the second property and lifted the stay, allowing U.S. Home to proceed with the foreclosures.

U.S. Home obtained a foreclosure judgment against West Pleasant in November 2010. It executed first on the second property, which it purchased for \$100 as the sole bidder at a sheriff's sale. Not long afterward, U.S. Home purchased the West Pleasant property, also for \$100 as the sole bidder at a sheriff's sale.

U.S. Home never proceeded with any deficiency action against either landowner. Nonetheless, the landowners commenced the affirmative litigation that gave rise to this appeal, seeking a declaration that the arbitration award was fully satisfied, as well as compensation "in the amount of the excess fair market value of the properties obtained by defendant[] U.S. Home over the amount of its outstanding judgment." The second property owner then assigned its rights to West Pleasant.

After a trial, the court valued the second property as worth almost \$2.4 million and West Pleasant's property as worth almost \$2 million. The court ordered U.S. Home to pay the fair market value of the West Pleasant property, plus interest, and extinguished the arbitration award on the second property. On appeal, the Appellate Division determined that West Pleasant had waived its right to a fair market valuation on its property but that it was owed a fair market value credit for the second property. Therefore, the Appellate Division remanded the matter to the trial court for recalculation of damages. The Court granted certification. 239 N.J. 82 (2019).

**HELD:** The use of fair market value credit by this debtor to obtain a money judgment against a creditor -- in the absence of a deficiency claim threatened or pursued or any objection being raised at the time of the sheriff's sales -- is inconsistent with sound foreclosure processes and, moreover, inequitable in the circumstances presented.

1. The Court reviews the legislative history of the relevant statutes. In its present form, N.J.S.A. 2A:50-2 provides that, after the foreclosure of a mortgage, if the foreclosure action fails to generate "an amount sufficient to satisfy the debt, interest and costs," the creditor may bring a deficiency action. And N.J.S.A. 2A:50-3 provides that a debtor "may file an answer in the action for deficiency, disputing the amount . . . sued for" (emphasis added), after which the court shall take evidence and determine the fair market value of the property. The Legislature included the fair market value credit as a protection for mortgagors in deficiency actions to use as a shield, not as a sword. The mortgagor is not left without a remedy, however. The mortgagor may object to the sheriff's sale under Rule 4:65-5 and seek a fair market value credit at that time. (pp. 16-20)

2. The statutory scheme is relevant even when, as here, foreclosure follows the deficiency judgment because courts may consider equitable relief in the form of fair market value credit in appropriate circumstances. For example, although the statutory scheme does not apply to judgment creditors, equitable principles grant a court the inherent power to prevent a potential double recovery or windfall to a judgment creditor who profits on the purchase of the property at the foreclosure sale and who also seeks to

obtain satisfaction of his judgment. But equity follows the law; it will not change or unsettle rights that are created and defined by existing legal principles. Thus, the legislative purposes of the fair market value credit under N.J.S.A. 2A:50-3 have informed the Court's equity jurisdiction where the statute would not otherwise apply. Those purposes -- to protect the mortgagor from a large deficiency judgment and liability for more than the difference between the fair market value of the property and the mortgage debt -- are not present here. (pp. 20-22)

3. New Jersey courts that have equitably applied a fair market value credit, where statutorily it otherwise would have not applied, have done so when the creditor is seeking a deficiency judgment. MMU of N.Y., Inc. v. Grieser, 415 N.J. Super. 37 (App. Div. 2010), on which West Pleasant relies, is distinguishable. The creditor's continued pursuit of recovery against the debtor in that case distinguishes Grieser from these circumstances. (pp. 22-23)

4. Here, U.S. Home has not sought a deficiency judgment against West Pleasant or pursued West Pleasant for collection in other ways. U.S. Home conceded at oral argument that it has waived its judgment against West Pleasant. The Court reviews in detail U.S. Home's approach with respect to the foreclosures and concludes that U.S. Home did nothing untoward in proceeding as it did to obtain the two properties. The Court stresses that the sheriff's sales took place months before the instant complaint was filed and without any deficiency claim being pursued by U.S. Home. (pp. 24-26)

5. This remarkable proceeding in which a debtor brought an after-the-fact affirmative claim for fair market value and obtained a money judgment against the creditor is unprecedented and unwarranted. Public policy generally favors finality in the foreclosure process. A debtor has the ability to seek a fair market value credit by objecting to the sheriff's sale. After the time for objecting to the sheriff's sale has passed, unless a deficiency action or other collection activity is pursued, later claims for fair market value credit should not be permitted to generate endless litigation. And prior to filing this affirmative claim, both property owners had the ability to advance a fair market value objection during the sheriff's sales proceedings under Rule 4:65-5, but West Pleasant waived that option in the Consent Order and the other owner failed to object. The Court declines to expand the equitable application of fair market value credit to permit the affirmative relief that was awarded here. (pp. 26-27)

**The judgment of the Appellate Division is REVERSED and the matter is REMANDED for entry of judgment consistent with this opinion.**

**CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in JUSTICE LaVECCHIA's opinion.**

SUPREME COURT OF NEW JERSEY

A-1 September Term 2019

082981

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West Pleasant-CPGT, Inc.,

Plaintiff-Respondent,

v.

U.S. Home Corporation,

d/b/a Lennar Homes,

Defendant-Appellant.

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On certification to the Superior Court,  
Appellate Division.

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Argued  
March 3, 2020

Decided  
July 8, 2020

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Bruce D. Greenberg argued the cause for appellant (Lite DePalma Greenberg, attorneys; Bruce D. Greenberg, on the briefs).

Deborah A. Plaia argued the cause for respondent (Deborah A. Plaia, on the briefs).

Robert M. Washburn argued the cause for amicus curiae New Jersey Builders Association (Flaster Greenberg, attorneys; Robert M. Washburn, of counsel and on the brief).

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JUSTICE LaVECCHIA delivered the opinion of the Court.

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Under current New Jersey statutory law, a creditor who forecloses upon the mortgage of a debtor may bring a deficiency action against that debtor if the foreclosure action does not generate sufficient funds to satisfy the debt, including interest and costs. See N.J.S.A. 2A:50-2. In response, the debtor may seek a fair market value credit, or a determination of the property's value and award of the difference between that value and the debt owed, should that value exceed the debt. See N.J.S.A. 2A:50-3. Here, the Court considers whether a fair market value credit can be sought in the absence of a deficiency action or similar proceeding as a means for a debtor to obtain a money judgment against a creditor.

In this appeal, defendant-petitioner is a creditor that foreclosed on two commercial properties, purchased the properties at sheriff's sales conducted without any objection by the debtors, and never pursued a deficiency action against the sole debtor that came to hold assigned rights encompassing both properties. This creditor seeks review of a money judgment obtained by the plaintiff debtor through a later-in-time action claiming a right to fair market value credit on the properties.

During bankruptcy proceedings, which interrupted and delayed the foreclosure proceedings, the bankruptcy court concluded that the properties' combined appraised value was less than the debt owed to the creditor, dismissed the bankruptcy proceedings, and returned the parties to their state remedies. The resumed foreclosure processes and sheriff's sales concluded, without objection, not long thereafter. Months later, the debtor brought this after-the-fact action seeking a monetary judgment against the creditor for fair market value credit based on newly calculated appraisals of the properties looking back at the time of the sheriff's sales.

Consideration of fair market value credit has a role in preventing windfalls to creditors when a creditor forecloses on property and pursues a deficiency claim. A defensive claim for fair market value credit may be invoked to prevent a creditor from recovering more than the debt permitted. Alternatively, under our court rules, a debtor has the right to object to the sheriff's sale and may affirmatively raise a fair market value credit at that time; this debtor, however, failed to avail itself of that option. The award of an affirmative money judgment against the creditor in the instant circumstances was in error.

Informed by New Jersey's statutory foreclosure process, we conclude that the use of fair market value credit by this debtor to obtain a money

judgment against a creditor -- in the absence of a deficiency claim threatened or pursued or any objection being raised at the time of the sheriff's sales -- is inconsistent with sound foreclosure processes and, moreover, inequitable in the circumstances presented. The most that should have happened, in equity, was the extinguishment of any cognizable deficiency on the creditor's judgment -- a result to which defendant accedes.

We decline to countenance this debtor's affirmative use of fair market value credit to obtain an after-the-fact money judgment against a creditor absent a timely objection to the sheriff's sale, a creditor's claim for deficiency, or some other aspect of ongoing creditor collection activity, which can provide a proper basis for the debtor's invocation of a court's equitable powers. Those circumstances are not present here. The judgment of the Appellate Division is reversed, and the matter is remanded for action consistent with this opinion.

## I.

### A.

We begin with the transactional and litigation background to the civil action from which this appeal arises.

On August 9, 2005, West Pleasant-CPGT, Inc. (West Pleasant), Four G's Land, LLC (Four G), and U.S. Home Corporation (U.S. Home) entered into a contract whereby U.S. Home agreed to purchase two contiguous tracts of land

in Jackson, New Jersey, in exchange for the purchase price of \$8,400,000.

West Pleasant owned one tract (the West Pleasant Property) and Four G owned the other (the Four G Property).

Under the contract, West Pleasant and Four G intended to gain approval for a subdivision plan to develop forty-two residential lots. The contract also required West Pleasant and Four G to provide certain development approvals to U.S. Home. Pursuant to the contract, U.S. Home paid West Pleasant and Four G three advances, totaling \$1,510,000. As security for the advances, West Pleasant executed a mortgage and note on the West Pleasant Property in the amount of \$1,500,000. Four G did not execute a mortgage on the Four G Property.

In August 2006, after a dispute arose over West Pleasant and Four G's satisfaction of their contractual development obligations, U.S. Home sought the contract's termination and return of its \$1,510,000 advance. The parties submitted the dispute to arbitration.

### 1. Arbitration

On December 5, 2007, an arbitration panel returned an award in favor of U.S. Home in the amount of \$1,510,000, plus interest. The panel found that West Pleasant and Four G failed to satisfy their development obligations under the contract and were jointly and severally liable for the advances U.S. Home



had paid. On April 2, 2008, a trial court confirmed the arbitration award, terminated the contract, and ordered West Pleasant and Four G to pay U.S. Home \$1,510,000, plus interest. The Appellate Division affirmed the judgment on March 6, 2009.

When the judgment was not satisfied, U.S. Home commenced foreclosure actions against the properties. The following actions interrupted the progress of the foreclosure proceedings, which were automatically stayed.

## 2. Bankruptcy proceedings

On January 4, 2010, West Pleasant filed for Chapter 11 bankruptcy. Approximately two months later, Four G also filed under Chapter 11 for bankruptcy.

In West Pleasant's bankruptcy action, U.S. Home filed a motion to dismiss and for relief from the automatic stay related to the West Pleasant and Four G Properties. U.S. Home and West Pleasant executed a Consent Order on June 8, 2010 (the Consent Order), which resolved the motion to dismiss and the motion for relief from the automatic stay with respect to the West Pleasant Property. In addition to dismissing West Pleasant's bankruptcy proceeding, West Pleasant waived in the Consent Order a fair market valuation and its right to object to a sheriff's sale of the West Pleasant Property due to the judgment debt owed to U.S. Home. West Pleasant agreed to "forever waive,

release and discharge [U.S. Home] . . . from any and all claims, claims for relief, demands, costs, damages, liabilities, and obligations, in law or in equity,” in relation to the present matter.

In Four G’s bankruptcy action, U.S. Home sought relief from the automatic stay with respect to the Four G Property, on which there was no mortgage. The bankruptcy court conducted an evidentiary hearing on June 4, 2010 to address whether there was any equity in the Four G Property. U.S. Home presented expert testimony regarding the value of both the Four G and West Pleasant Properties. Four G failed to present any expert testimony after its retained expert withdrew due to a conflict of interest.

U.S. Home’s expert, Peter Maher, who appraised the Four G and West Pleasant Properties as of April 2010, testified that the Four G Property had a fair market value of \$806,000 and the West Pleasant Property had a fair market value of \$412,500.

The court issued its decision on June 9, 2010. The court determined Maher to be a highly qualified appraiser and found no reason not to accept his valuation of the Properties. The court concluded that the Four G Property’s value was \$806,000 and the West Pleasant Property’s value was \$412,500. Because the total debt owed -- more than \$1,600,000 -- exceeded the total value of the collateral of \$1,218,500, the court determined that there was no

equity in the Four G Property. Accordingly, the court granted relief from the automatic stay and permitted U.S. Home to “return to state court and exercise all of its rights under the laws of the State of New Jersey.” Thereafter, on September 28, 2010, the court dismissed Four G’s bankruptcy.

### 3. Foreclosure and Sheriff’s Sales

As noted, U.S. Home had filed its foreclosure action against West Pleasant on April 14, 2008. Following West Pleasant’s and U.S. Home’s entry into their Consent Order, U.S. Home completed its foreclosure proceeding against West Pleasant on November 5, 2010, obtaining a foreclosure judgment, plus costs and fees, in the amount of \$1,705,470.90.

U.S. Home executed first on the Four G Property, which was sold at sheriff’s sale on December 7, 2010. U.S. Home was the only bidder and purchased the property for \$100. After the sale, U.S. Home’s deficiency totaled \$1,736,808.87.

On January 25, 2011, the West Pleasant Property was sold at sheriff’s sale. Again, U.S. Home was the only bidder, and it purchased the property for \$100. After that sale, U.S. Home’s deficiency totaled \$1,734,485.40.

U.S. Home never proceeded with any deficiency action against West Pleasant or Four G. Nonetheless, West Pleasant and Four G commenced the affirmative litigation that gave rise to this appeal.

B.

On July 14, 2011, West Pleasant and Four G filed the instant complaint in the Law Division of Superior Court seeking a declaration against U.S. Home that the arbitration award was fully satisfied, as well as compensation “in the amount of the excess fair market value of the properties obtained by defendant[] U.S. Home over the amount of its outstanding judgment.” Four G then assigned its rights to West Pleasant, and West Pleasant, individually and as assignee of Four G, filed a second amended complaint seeking compensatory damages, among other relief, and asserting a claim for abuse of process.

In April 2014, the trial court held that a trial was necessary to determine the value of the Four G Property as of December 7, 2010, the date of the sheriff’s sale for that property. As a result of that proceeding, the court valued the property as worth \$2,398,000 as of December 7, 2010.

Then, in August 2016, the court conducted proceedings to determine the value of the West Pleasant Property as of January 25, 2011, the date of the sheriff’s sale for that property. On December 16, 2016, the trial court issued its decision concerning the West Pleasant Property. The court determined that, as of the date of the sheriff’s sale, the value of the West Pleasant Property was \$1,985,020.

The court also determined that it could not ignore the value that U.S. Home received from the sheriff's sale of the Four G Property. According to the trial court, when U.S. Home successfully levied on the Four G Property -- which, again, it had valued at \$2,398,000 -- U.S. Home "received a value in excess of the outstanding judgment amount."

That determination spurred the court to conclude that the "foreclosure on the West Pleasant parcel was without merit." As a result, West Pleasant was "entitled to a credit for the fair market value of the property [U.S. Home] acquired in excess of the full judgment amount." In a judgment entered on October 19, 2017, the trial court ordered U.S. Home to compensate West Pleasant in the amount of \$2,299,088.23, which represented the trial court's fair market value determination of \$1,985,020 for the West Pleasant Property, plus interest.<sup>1</sup> The court also dismissed West Pleasant's abuse of process claim.

### C.

U.S. Home filed an appeal, and West Pleasant filed a cross-appeal. U.S. Home asserted that the credit to West Pleasant was barred or otherwise

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<sup>1</sup> The trial court awarded West Pleasant a fair market value credit for the Four G Property and extinguished the arbitration award, but did not award a money judgment for the amount that the Four G Property's fair market value exceeded the arbitration award.

precluded. West Pleasant sought a money judgment for the Four G Property and challenged the dismissal of its abuse-of-process claim.

On May 2, 2019, in an unpublished opinion, the Appellate Division affirmed in part and reversed in part. It affirmed the trial court's dismissal of plaintiff's abuse-of-process claim. However, the Appellate Division's analysis of the fair market value credit issue resulted in reversal and remand for further proceedings on that claim.

First, the Appellate Division rejected the argument that the fair market value credit claim was barred because West Pleasant failed to make a motion to set aside the sheriff's sale on the West Pleasant Property under Rule 4:65-5. The Appellate Division agreed with the trial court's view that Rule 4:65-5 "pertains only to objections to the sale of the property, not the value of the property vis-à-vis the amount of the judgment sought to be satisfied."

The court also rejected U.S. Home's argument that "a fair market value credit can be claimed only at a deficiency hearing" and that plaintiff was precluded from bringing an affirmative suit untethered from a deficiency action to obtain such credit. The Appellate Division stated that "[r]elief through equitable principles is especially applicable in this case where [U.S.] Home was both a foreclosing mortgagee on the West Pleasant tract and a judgment creditor of Four G[.]" The court explained that, "by executing on

both tracts, [U.S. Home] realized more than a double recovery when, in satisfaction of its debt of approximately \$1.7 million, it received land valued at over \$4 million.” As the court observed, equity should not aid a creditor that “seeks to protect a windfall by refraining from instituting a deficiency action,” thereby recovering property which is worth far in excess of what it is owed.

The Appellate Division did not credit the argument that by agreeing to the broad language of the Consent Order before the bankruptcy court, West Pleasant “intended to forgo any future claim for fair market value credit.” The Appellate Division held that, although the Consent Order barred West Pleasant from pursuing a fair market value credit claim on the West Pleasant Property, that did not control the analysis for the Four G Property.

Because Four G was not a party to the Consent Order, the Appellate Division separately considered whether “the doctrines of res judicata and collateral estoppel barred West Pleasant from relitigating the value of the Four G[] tract because the Bankruptcy Court had valued it after an evidentiary hearing.” The Appellate Division agreed with West Pleasant’s argument that the issues decided by the bankruptcy court and the trial court were different. Accordingly, the Appellate Division held that preclusion doctrines did not apply, and it refused to apply judicial estoppel.

In sum, the Appellate Division concluded the following: U.S. Home’s purchase of the West Pleasant Property, as appraised by the trial court as of the date of its sheriff’s sale on January 25, 2011, satisfied U.S. Home’s judgment; under the Consent Order, West Pleasant waived any right to seek a fair market value credit on that property; however, as assignee of Four G, West Pleasant was owed a fair market value credit for the Four G Property. Therefore, the Appellate Division remanded the matter to the trial court for further calculations finalizing the monetary judgment to be awarded to West Pleasant for fair market value credit on the Four G Property.<sup>2</sup>

We granted U.S. Home’s petition for certification, 239 N.J. 82 (2019), and amicus curiae status to the New Jersey Builders Association (NJBA).

## II.

### A.

#### 1.

According to U.S. Home, fair market value credits are available only to prevent a “double recovery” or “windfall” that results from the creditor or mortgagee obtaining a property and collecting, or seeking to collect, a money judgment “arising out of the same default that led to the sale of that same

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<sup>2</sup> The Appellate Division directed the trial court to calculate the amount due U.S. Home on the date it acquired the West Pleasant Property.



property.” Therefore, U.S. Home argues that because it did not pursue a deficiency judgment following its acquisition of the properties, no fair market value credit may be awarded.

U.S. Home describes the damages awarded here as unprecedented and unwarranted. Even if a fair market value credit may apply outside of a deficiency action, U.S. Home argues, equity does not support awarding West Pleasant a fair market value credit in light of the Consent Order it signed concerning the West Pleasant Property and, further, because U.S. Home executed on the Four G Property first.

U.S. Home also maintains that the Appellate Division misapplied appropriate preclusion principles by adopting the trial court’s -- rather than the bankruptcy court’s -- valuation of each property. According to U.S. Home, after West Pleasant took assignment of Four G’s rights, West Pleasant should not have been allowed to relitigate the bankruptcy court’s valuation of \$806,000 for the Four G Property in the trial court.

## 2.

The NJBA asserts that the Legislature evidenced in N.J.S.A. 2A:50-3 its intent to limit fair market value credits to deficiency actions and contends that the decision to extend fair market value credits to cases outside of a deficiency

action is inconsistent with that legislative intent, prior Appellate Division decisions, and decisional law and commentary.

According to the NJBA, lenders have relied on previous holdings and, in practice, have elected not to pursue a deficiency action to avoid a fair market value credit. The Appellate Division's holding "undoes the previous predictability upon which lenders had relied," in amicus's view.

Further, if a new collateral action affirmatively seeking fair market value credit is to be available in equity to debtors who do not face a deficiency action, the NJBA asserts that a debtor should not be permitted to use it as a "weapon" to obtain a money judgment against its creditor. It argues that, at most, a court should declare that the debtor's remaining debt on the judgment has been satisfied.

## B.

West Pleasant asserts that fair market value credits are not limited to deficiency actions. Even in the absence of express statutory authorization, it claims that the Appellate Division appropriately invoked its inherent equitable authority to prevent U.S. Home's windfall.

According to West Pleasant, U.S. Home "chose to execute on the Four G[] [P]roperty first rather than foreclose on the West Pleasant [P]roperty," and so it claims that the equities lie in its favor concerning fair market value credit.

U.S. Home's advance was over-collateralized and, as a result, "U.S. Home realized more than a double recovery."

Additionally, West Pleasant, as assignee of Four G's rights, argues that it was not precluded from litigating the value of each property before the trial court because the acts complained of, the theory of recovery, and the material facts alleged before the bankruptcy court and the trial court were not the same. The issue before the trial court was the credit amount for the fair market value determined by the properties' values at the time of the sheriff's sales; in contrast, the issue before the bankruptcy court was U.S. Home's motion for relief from the automatic stay under Four G's bankruptcy petition.

### III.

This dispute centers on the importance of a deficiency action -- or, more precisely, the lack of any deficiency action -- to the award of a fair market value credit. See N.J.S.A. 2A:50-3. To answer that question, we examine the Legislature's purpose in enacting a fair market value credit and whether that purpose is present in this case. We also consider relevant equitable principles.

#### A. Legislative History

Beginning in 1880, a deficiency decree following the foreclosure of a mortgage was prohibited by statute. L. 1880, c. 170; see also Myron C. Weinstein, Law of Mortgages, 30A N.J. Practice Law Series § 39.1 (2d ed.

2019). That same statute, however, permitted the mortgagee to foreclose on the mortgage first and then proceed on the bond for any deficiency to satisfy the debt owed. L. 1880, c. 170. In 1881, the Legislature amended the statute to provide that the mortgagee must, in all cases, foreclose on the mortgage first before proceeding against the bond for a deficiency. L. 1881, c. 147.

It was not until 1933 that the Legislature provided the option for a mortgagor to seek a fair market value credit in a deficiency action. See L. 1933, c. 82. The 1933 amendment stated that

all proceedings to collect said debt shall be, first, to foreclose the said mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency . . . . [T]he obligor or obligors in said bond may file an answer in the suit on said bond disputing the amount of such deficiency, in which event both parties may introduce in evidence at the trial, testimony of the fair market value of the mortgaged premises at the time of the sale under said foreclosure proceedings, and the court, sitting with or without a jury, shall determine the amount of said deficiency by deducting from said debt the amount assessed as the fair market value of said premises . . . .

[L. 1933, c. 82.]

The 1933 amendment was enacted “[i]n an attempt to deal with the problem of large deficiency judgments resulting from the almost total collapse

of the real estate market during the Great Depression.” Weinstein, § 39-1.

During that time, “collapsed economic conditions had destroyed all market for real estate and made it impossible to secure anything beyond a nominal bid at a judicial sale.” 79-83 Thirteenth Ave., Ltd. v. DeMarco, 44 N.J. 525, 534 (1965). A 1935 amendment, which was “held unconstitutional as applied to mortgages which antedated the statute,” Weinstein, § 39-1, further explained that the fair market value credit was a response to a serious public emergency that had resulted in the “abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the State and Nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions,” L. 1935, c. 88.

After multiple changes to the statutory scheme, see Weinstein, § 39-1 (discussing the statutory history), the statutes in their present form provide that after the foreclosure of a mortgage, if the foreclosure action fails to generate “an amount sufficient to satisfy the debt, interest and costs,” the creditor may bring a deficiency action on the bond or note within three months, N.J.S.A. 2A:50-2 to -2.1.

It is in response to the creditor’s initiation of the deficiency action that the debtor

may file an answer in the action for deficiency, disputing the amount of the deficiency sued for. In that

event both parties may introduce evidence as to the fair market value of the mortgaged premises at the time of the sale thereof in the foreclosure action, and the court, with or without a jury, shall determine the amount of such deficiency, by deducting from the debt secured the amount determined as the fair market value of the premises.

[N.J.S.A. 2A:50-3 (emphasis added).]

The history of N.J.S.A. 2A:50-3 supports that the Legislature included the fair market value credit as a protection for mortgagors in deficiency actions to use as a shield, not as a sword. See Michael T. Madison, et al., 2 Law of Real Estate Financing § 12:73 (Dec. 2019). As stated by this Court, N.J.S.A. 2A:50-3 “is indicative of a broad legislative policy that mortgagors should not be personally liable for more than the difference between [the fair market value of the property] and the mortgage debt.” DeMarco, 44 N.J. at 535. Thus, “[a] claim that no personal liability exists, e.g., that the fair market value of the property exceeds the mortgage debt, is a personal defense which is properly asserted in the deficiency action.” Citibank, N.A. v. Errico, 251 N.J. Super. 236, 248 (App. Div. 1991).

### B. Sheriff’s Sale

The mortgagor is not left without a remedy. The mortgagor may object to the sheriff’s sale under Rule 4:65-5 and seek a fair market value credit at that time.

In DeMarco, the Court addressed whether non-statutory equitable relief was available to the debtor at a time when N.J.S.A. 2A:50-3 did not include notes. 44 N.J. at 535. The Court recognized that non-statutory relief was available but limited it to a fair market value credit by objection to the sheriff's sale. Ibid. The Court reasoned that "the evidence can there be promptly presented in a court of equity and especially since the appropriate relief may be the ordering of a resale which could not well be done months or even years later by the law court in the deficiency suit." Ibid.; see also Natovitz v. Bay Head Realty Co., 142 N.J. Eq. 456, 464 (E. & A. 1948) (recognizing that "the mortgagor could have had credit for the fair market value of the mortgage security in the foreclosure proceeding, if it had chosen to exercise the right," but declining to excuse the mortgagor's "failure to make timely application for this relief," which was attributed to the mortgagor's "ignorance or despair").

#### IV.

##### A.

That background is relevant for present purposes, even though certain mortgages are exempt from the "foreclosure first" rule -- the requirement to "first foreclose on a mortgage before seeking entry of judgment on a note." First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 351 (2007);

see N.J.S.A. 2A:50-2.3. Specifically, an exemption exists where “the debt secured is for a business or commercial purpose other than a two-family, three-family or four-family residence in which the owner or his immediate family resides.” N.J.S.A. 2A:50-2.3(a). Thus, creditors are not required to follow the foreclosure-first sequence with respect to commercial property. That exemption, however, does not prevent the debtor from objecting at a sheriff’s sale.

Although commercial mortgages are exempt from the statutorily required order of proceeding -- and although West Pleasant failed to object to the sheriff’s sale -- a court may consider equitable, “analogous nonstatutory relief” in the form of fair market value credit in appropriate circumstances. See DeMarco, 44 N.J. at 534-35.

For example, although the statutory scheme does not apply to judgment creditors, equitable principles grant a court “the inherent power to prevent a potential double recovery or windfall to the judgment creditor who . . . may profit on the purchase of the property at the foreclosure sale (if purchased for less than fair market value), [and] who also seeks to obtain satisfaction of his judgment.” Morsemere Fed. Sav. & Loan Ass’n v. Nicolaou, 206 N.J. Super. 637, 645 (App. Div. 1986); see also Errico, 251 N.J. Super. at 247.



But, “in all cases, equity follows the law.” Berg v. Christie, 225 N.J. 245, 280 (2016). “[E]quity will generally conform to established rules and precedents, and will not change or unsettle rights that are created and defined by existing legal principles.” Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183 (1985).

Thus, the legislative purposes of the fair market value credit under N.J.S.A. 2A:50-3 have informed the Court’s equity jurisdiction where the statute would not otherwise apply. See DeMarco, 44 N.J. at 534-35; see also First Union, 190 N.J. at 351 (looking to statutory scheme when analyzing a commercial loan). Those purposes -- to protect the mortgagor from a large deficiency judgment and liability for more than the difference between the fair market value of the property and the mortgage debt -- are not present here.

New Jersey courts that have equitably applied a fair market value credit, where statutorily it otherwise would have not applied, have done so when the creditor is seeking a deficiency judgment. See Errico, 251 N.J. Super. at 240 (involving a suit for a deficiency judgment following a foreclosure); Morsemere, 206 N.J. Super. at 644 (finding the case was “analogous to that where a deficiency arises on a note or mortgage”); Resolution Tr. Corp. v. Berman Indus., Inc., 271 N.J. Super. 56, 63-64 (Law Div. 1993) (involving a deficiency proceeding); see also Borden v. Cadles of Grassy Meadows II,

LLC, 412 N.J. Super. 567, 584-91 (App. Div. 2010) (canvassing relevant case law). Courts in other states have done likewise. See, e.g., Key Bank of Maine v. Holman, 657 A.2d 775, 776 (Me. 1995) (holding that the mortgagor was not entitled to a fair market value credit where the mortgagee did not seek a deficiency judgment because a fair market value credit applies only where “(1) the mortgagee is the purchaser at the public sale and (2) the mortgagee seeks a deficiency judgment” (emphasis added)).

The Appellate Division’s decision in MMU of N.Y., Inc. v. Grieser, 415 N.J. Super. 37 (App. Div. 2010), on which West Pleasant relies, is distinguishable. The creditor in Grieser had sold the property to a third party without crediting the sale price to the deficiency owed by the debtor; the creditor had also continued to pursue the debtor following the sale of the property by executing on six other properties owned by the debtor. 415 N.J. Super. at 41. In that case, the Appellate Division applied equitable principles and held that the debtor was entitled to a fair market value credit. The creditor’s continued pursuit of recovery against the debtor distinguishes that case from these circumstances.<sup>3</sup>

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<sup>3</sup> To the extent that the Appellate Division here relied on Brunswick Bank & Trust v. Heln Management LLC, 453 N.J. Super. 324 (App. Div. 2018), we find that case of no help to West Pleasant’s position. In that matter, the debtors actively sought to stay foreclosure proceedings being pursued by the

B.

Here, U.S. Home has not sought a deficiency judgment against West Pleasant or pursued West Pleasant for collection in other ways. U.S. Home conceded at oral argument that it has waived its judgment against West Pleasant “because of the passage of time and because of the position that U.S. Home has taken throughout this litigation that they’re not pursuing the deficiency judgment.”<sup>4</sup>

In this action in which West Pleasant seeks equitable relief, the position of U.S. Home must be viewed with clear eyes. After the bankruptcy proceedings ended and the automatic stays were lifted, the foreclosure processes recommenced. The judgment owed U.S. Home remained unpaid. And, U.S. Home now had, in hand, bankruptcy-court-approved appraisals showing that the properties, in combination, did not exceed the amount of the

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creditor on numerous properties, raising in those settings the issue of overcollateralization and a request for credit. 453 N.J. Super. at 328-29. The debtors’ objections to allowing the foreclosure and sheriff’s sales to proceed place those circumstances in contrast to what occurred here. Moreover, even there, the Appellate Division rejected any claim to require a money judgment to debtors if the fair market value of property purchased by the creditor at sheriff’s sale exceeded the shortfall owed on the debt. *Id.* at 333 & n.9.

<sup>4</sup> In explaining its reasons for not pursuing a deficiency judgment, U.S. Home cited a desire to end dealings with litigious adversaries and to not “throw good money after bad.”

unsatisfied judgment. They also had, in hand, the Consent Order with West Pleasant in which West Pleasant waived any claim to fair market value credit on the West Pleasant Property.

There is no fault to be found in U.S. Home's proceeding to the sheriff's sales and obtaining the properties with nominal bids when no one else bid. Nor can fault be found in the decision to go forward by executing first on the Four G Property. It was appraised at the higher amount of \$806,000 and represented the bulk of the combined value of the two properties, the West Pleasant Property having been appraised as having a fair market value of \$412,500. Even in combination, those appraisals did not cover the amount owed on the debt. The sheriff's sales concluded without any objection ever having been raised by either Four G or West Pleasant. In sum, U.S. Home did nothing untoward in proceeding as it did to obtain the Four G and West Pleasant properties.<sup>5</sup>

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<sup>5</sup> The Appellate Division, relying on Brunswick Bank, mistakenly concluded that U.S. Home's purchase of the West Pleasant Property satisfied its judgment. That could not be correct because U.S. Home purchased the West Pleasant Property second-in-time. Under the reasoning of Brunswick Bank -- and if this matter had a deficiency-action setting or like ongoing collection activity on the debt generated by the creditor -- the only issue to be considered following the sale of the Four G Property would be whether U.S. Home could proceed against the West Pleasant Property. However, as the Appellate Division recognized, West Pleasant waived, under the Consent Order, any right to challenge the sheriff's sale or seek a fair market value credit on that property.

All that took place months before the instant complaint was filed and without any deficiency claim being pursued by U.S. Home. This remarkable proceeding in which a debtor brought an after-the-fact affirmative claim for fair market value and obtained a money judgment against the creditor is as unprecedented and unwarranted as it was argued to be. Cf. Evergreen Bank v. D & P Justin's, Inc., 544 N.Y.S.2d 244, 246 (App. Div. 1989) (reversing the portion of a trial court decision that had “mistakenly employed the fair and reasonable market value rule, available as a shield for the protection of the mortgagor under [the relevant New York statute] where the premises are sold for less than market value, as a sword in [a] surplus money proceeding so as to create surplus moneys when none in fact exist” and noting that, “[h]ad [the] defendants felt the sale price of [the parcel] to be inadequate, their remedy was to move to set aside the sale”).

Public policy generally favors finality in the foreclosure process. A debtor has the ability to seek a fair market value credit by objecting to the sheriff's sale. After the time for objecting to the sheriff's sale has passed, unless a deficiency action or other collection activity is pursued, later claims for fair market value credit should not be permitted to generate endless litigation. The amicus cautions that the later and affirmative litigation use of fair market value credit -- to support after-the-fact suits for money damages by

debtors when the foreclosure process has been completed and deficiency actions are not pursued -- would have the untoward consequence of unsettling the stability and predictability of lending and equity markets involved in commercial real estate. Amicus advises that such a step would cause negative repercussions for lenders and borrowers alike.

The instant use of fair market value credit, approved here in the judgment under review, far exceeds the prior equitable applications that furthered the legislative purpose to fair market value credit recognized by the statutory scheme. And prior to filing this affirmative claim, both Four G and West Pleasant had the ability to advance a fair market value objection during the sheriff's sales proceedings under Rule 4:65-5, but West Pleasant waived that option in the Consent Order and Four G failed to object. We decline to expand the equitable application of fair market value credit to permit the affirmative relief that was awarded here.

## V.

The judgment of the Appellate Division is reversed. The matter is remanded for entry of a judgment declaring the debt satisfied, as conceded by U.S. Home, and dismissing the claim for compensatory damages.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON,  
FERNANDEZ-VINA, SOLOMON, and TIMPONE join in JUSTICE  
LaVECCHIA's opinion.