

ISAAC MORADI

Plaintiff,

v.

JUGOSLAV GEROSKI, et al.

Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: BERGEN COUNTY

DOCKET No. F-15099-18

OPINION

Argued: April 17, 2020

Decided: June 10, 2020

Appearances: Darrell M. Felsenstein, (Wells, Jaworski & Liebman, LLP, attorneys) for Movants/Third Party Bidder

Michael R. Caruso, (Chiesa Shahinian & Giantomasi PC, attorneys) for Cross-Movant/Junior Lienholder

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Motion to Vacate and Set Aside a Sheriff's Sale, filed on March 11, 2020 by Darrell M. Felsenstein, attorney for Third Party Bidder Svetozar Savreski, Beata M. Savreski, and Ian Enterprises LLC ("Movants"). On March 25, 2020, a Cross-Motion for entry of an Order Confirming the Sheriff's Sale and Opposition to the Motion to Vacate and Set Aside the Sheriff's Sale was filed by Michael R. Caruso, attorney for U.S. Specialty Insurance Company ("USIC"). On April 8, 2020, Movants filed a reply brief to USIC's opposition and opposition to USIC's Cross-Motion. On April 13, 2020, USIC filed a reply brief to Movants' opposition to the Cross-Motion. The Court heard oral argument on April 17, 2020.

BACKGROUND

On January 31, 2020, Svetozar Savreski (“Mr. Savreski”) was the highest bidder at the Bergen County Sheriff’s Sale of 46 Grove Street, Elmwood Park, New Jersey 07407 (the “Property”). Subsequently, Mr. Savreski assigned the bid to IAN Enterprises LLC. IAN Enterprises LLC is an entity with the sole member being Beata M. Savreski (“Ms. Savreski”), Mr. Savreski’s wife.

On January 31, 2020, at the Sheriff’s Sale, Mr. Savreski paid the sum of \$100,000.00 to the Bergen County Sheriff as a deposit; on February 27, 2020, Mr. Savreski paid the remaining balance of \$281,000.00 to the Bergen County Sheriff for the Property.

On March 2, 2020, Mr. Savreski was allegedly informed for the first time upon meeting with Defendant Jugoslav Geroski (“Defendant”) that the Property, which contains a dry-cleaning business, had environmental contamination.

To date, the Bergen County Sheriff has not delivered the deed to the Property to Movants.

LEGAL STANDARD

The court has the power to vacate a foreclosure sale based on considerations of equity and justice. See Crane v. Bielski, 15 N.J. 342 (1954). The court has power to set aside a sale when there is an independent ground for equitable relief, such as fraud, accident, surprise, irregularity in the sale, and the like, making confirmation inequitable and unjust to one or more of the parties. Id. This discretion is exercised sparingly, and a sale so conducted shall be vacated only when necessary to correct a plain injustice.

In a Sheriff’s Sale, the foreclosed property is struck off to the highest bidder “based upon his promise to pay and the making of the required deposit as security for compliance.” Investors & Lenders v. Finnegan, 249 N.J. Super. 586, 592 (Ch. Div. 1991) (citing Froehlich v. Walden, 66

N.J. Super. 390 (Ch. Div. 1961). If the bidder refuses to make the deposit or complete the sale, he is in breach of contract and is liable for money damages. Id. The measure of damages is the deficiency between the bid at the second sale (which the sheriff must re-advertise after the highest bidder defaults on the first sale) and the bid at the first sale, plus the costs of the first including the sheriff's fees for that sale. Id.

Our highest court has recognized that “public policy ordains that the power to set aside judicial sales based upon competitive bidding should be sparingly exercised. The integrity of the process, designed as it is to secure the highest and best price in cash then obtainable for the property, demands that a sale so conducted shall be vacated only when necessary to correct a plain injustice.” Karel v. Davis, 122 N.J. Eq. 526, 529 (E. & A. 1937).

Pursuant to N.J.S.A. 2A:61-16:

any purchaser of real estate at any public sale, held by any officer or person mentioned in [N.J.S.A.] 2A:61-1 ... shall be entitled to be relieved from his bid if, before delivery of the deed, he shall satisfy the court by whose authority such sale was made of the existence of any substantial defect in or cloud upon the title of the real estate sold, which would render such title unmarketable, or of the existence of any lien or encumbrance thereon, unless a reasonable description of the estate or interest to be sold, and of the defects in title and liens or encumbrances thereon, with the approximate amount of such liens and encumbrances, if any, be inserted in the notices and advertisements required by law, and in the conditions of sale; but, if the court shall direct any lien or encumbrance not described, and which is due and payable, to be paid out of the proceeds of sale, the purchaser shall not then be relieved by reason of such lien or encumbrance.

ANALYSIS

Movants argue that the Sheriff's Sale should be vacated and set aside because of the purported environmental contamination found on the property. It is also alleged that the meeting with Defendant was the first-time Movants heard of the environmental contamination, and that this information came as a surprise to them.

In support of the notion that the Property is in fact contaminated, Movants provide a Phase II Limited Subsurface Investigation Report and Vapor Intrusion Assessment (the “Report and Assessment”), which was prepared by EFI Global, Inc. (“EFI”). See Exhibit D. In addition, Movants provide a Proposal for the Soil and Groundwater Delineation (the “Proposal”), which was also prepared by EFI. The Proposal is designed for additional testing and drilling on or around the Property in order to discern whether any contamination has extended beyond the Property.

Movants also note that they contacted Atlantic Environmental Solution for a price quote for remediation of the contamination on the Property and that their estimate for remediation fell between \$200,000.00 and \$500,000.00. Thus, they assert that to not vacate the Sheriff’s Sale would amount to potentially hundreds of thousands of additional dollars in fixing the environmental contamination and would also result in “plain injustice” and inequity.

Moreover, Movants highlight two main reasons why the Motion to Vacate and Set Aside the Sheriff Sale should be granted. First, they have satisfied each prong in the Crowe v. DeGoia test and thus the Court should grant a temporary restraining order and subsequently a preliminary injunction in their favor. Second, pursuant to N.J.S.A. 2A:61-16, they are entitled to be relieved of the bid.

In support of the notion that a Crowe analysis is satisfied, Movants contend that irreparable harm will occur if they are responsible for the remediation of the environmental contamination. In addition, they argue that the law is well settled that when undisclosed substantial defects and clouds exist on title, and extreme injustice would result if the sale is confirmed, then a high bidder is entitled to set aside that bid. Moreover, they claim that they are likely to succeed on the merits of their application due to the extensive nature of the environmental contamination, the unknown breadth of and costs of the contamination, and the impact that the contamination would have on

their use and enjoyment of the Property. Lastly, Movants argue that both Plaintiff and Defendants in this action “were in a position to know about the existence and extent of the environmental contamination,” and thus they stand to suffer irreparable hardship if the Sheriff’s Sale is not vacated.

Movants’ second argument contends that under N.J.S.A. 2A:61-16 they are entitled to be relieved of their bid because when title is considered unmarketable or encumbered, and no notice is given regarding the encumbrances, then a bidder is entitled to relief from that bid. See also Oakley v. Shaw, 69 A. 462 (Ch. 1908). Moreover, if it is “inequitable and unjust to hold the purchaser to the sale because of fraud, accident, surprise, mistake, or other irregularities in the conduct of a sale,” then a purchaser at judicial sale may be relieved from his or her bid. Karel v. Davis, 122 N.J. Eq. 526 (1937).

Movants also point to the text of N.J.S.A. 2A:61-16 in that it is required that a “reasonable description” of a defect or cloud on title be provided along with an approximate amount of the stated liens and encumbrances. Moreover, “cloud on title” not only is an unclear term, but it is a term that also looks to the “magnitude of the threat to the plaintiff’s title and use of the property.” PHH Mortgage Corp. v. Alleyne, 2016 WL 3502420 at *2 (App. Div. 2016) (quoting Suser v. Wachovia Mortg., FSB, 433 N.J. Super. 317, 326 (App. Div. 2013)). As such, they argue that the environmental contamination on the Property: (1) was never described in any notices or advertisements provided by the Bergen County Sheriff’s Office; (2) created a cloud on title that makes the Property unmarketable; and (3) served as a substantial defect with an estimated cost of remediation between \$200,000.00 and \$500,000.00.

Thus, due to the environmental contamination, it being purportedly unknown at the time of Movants’ bid, and it also being undiscoverable through any standard methods of diligence—

given that a title search, survey, and physical inspection would not have uncovered the contamination—the Sheriff’s Sale should be set aside.

USIC, a junior lienholder-mortgagee in this foreclosure action, contends that (1) the Sheriff’s Sale should be confirmed because Movants’ bid on the property was the highest price and thus would have the greatest benefit on all of the parties and junior lienholders including USIC; (2) the doctrine of caveat emptor (i.e. “buyer beware”) applies to this sale because the environmental conditions of the property do not impact its title or its marketability of title; and (3) should the Court grant Movants’ Motion, then they should be barred from bidding at any re-sale and should be liable for any deficiency in price between the first sale and re-sale.

As to USIC’s first argument, USIC contends that Movants fail to satisfy their burden to set aside and vacate a Sheriff’s Sale because they have not shown any plain injustice for the Court to correct and the \$381,000.00 purchase price would benefit all parties.

Second, USIC argues that environmental conditions do not impair title to the property and thus N.J.S.A. 2A:61-16, which relieves a purchaser from a bid, is inapplicable. In furtherance of this notion, USIC contends that the Alleyne case found that a purchaser’s fee interest or ownership must be limited in order for a cloud on title to exist. PHH Mortgage Corp. v. Alleyne, 2016 WL 3502420 at *3 (App. Div. 2016) (affirming the Chancery Division’s holding that the discovery of a tenant on a property does not constitute cloud on title under N.J.S.A. 2A:61-16, such that notice is required and there is an independent duty for the potential bidder to inspect for tenants on the property). USIC further points to case law where alleged encumbrances on a purchased property, such as the post-sale discovery of vandalism upon inspection or structural defects, were deemed to not cloud title and thus no relief from the bid was granted under N.J.S.A. 2A:61-16. Midfirst

Bank v. Graves, 399 N.J. Super. 228, 230-32 (Ch. Div. 2007); Federal National Mortgage Association (Fannie Mae) v. Cleaves, 2018 WL 6494368 (N.J. Super. Ct. App. Div. 2018).

USIC also argues that Movants' own mistake should not be grounds for vacating the Sheriff's Sale. First Tr. Nat'l Ass'n v. Merola, 319 N.J. Super. 44, 49 (App. Div. 1999) (holding "a judicial sale is not ordinarily vacated on the ground of mistake flowing from [a moving party's] own culpable negligence"); Summit Bank v. Thiel, 325 N.J. Super. 532, 538 (App. Div. 1998) (finding that despite a purchaser's mistake, the purchaser was still bound to the sale because of the doctrine of caveat emptor).

Thus, USIC argues that there is no New Jersey case law finding environmental contamination to apply to N.J.S.A. 2A:61-16 to set aside a Sheriff's Sale, and that the Court should not consider environmental contamination to fall within the purview of this statute. In addition, USIC contends it is clear that the historical and current use of the Property is as a dry-cleaning business, and that it is common knowledge that dry-cleaning businesses create environmental contamination. Thus, USIC concludes that Movants were either not surprised by the contamination or were culpably negligent in failing to exercise due diligence to discover the contamination before bidding on the Property.

Lastly, USIC points out that a quick search of online records of the Property through the New Jersey Department of Environmental Protection website shows the environmental conditions and active site remediation. See Caruso Cert., Ex. C.

Thus, USIC argues that the Motion to Vacate and Set Aside the Sheriff's Sale should be denied, and the Court should grant USIC's Cross-Motion to Confirm the Sheriff Sale.

Movants argue in response that this is a matter of plain injustice if the Sheriff's Sale is confirmed. Karel, 122 N.J. Eq. at 545. Moreover, they distinguish this case from the Alleyne and

Graves cases by highlighting that the defect here is a far greater concern and potential injustice than either a discovered tenant on a property or vandalism to trivial components of a property.

Furthermore, Movants contend that the “as is” notion embedded in judicial sales does not allow USIC to hide behind the fact that no one disclosed the nature and condition of the Property to them; thus, they argue that “as is” refers to defects in a property that are visible, and not to defects that are known to a seller, not readily apparent, and undisclosed to the potential buyer. Weintraub v. Krobatsch, 64 N.J. 445, 454 (1974).

As to the notion that they failed to exercise due diligence to discover the defects, Movants further emphasize that there were no physical indicators to them regarding the condition of the property and that there is a reasonable expectation for this type of defect to be disclosed prior to bidding on a property. In addition, they again point to the Report and Assessment that was conducted on the Property and the fact that a prior sale of the Property fell through.

Lastly, Movants argue that environmental contamination is in fact a defect that should be considered an encumbrance on the Property. In support of this, Movants highlight Minez v. Kromocolor, Inc., which found that an encumbrance is “to be any right to or interest in an estate to the diminution of its value or anything that impairs the use and transfer of, or burdens the title to, such estate.” Minez v. Kromocolor, Inc., 125 N.J. Eq. 439, 440, 7 A.2d. 404, 405 (1937). Thus, Movants argue that because environmental contamination impacts the use, development, and marketability of a property, and can lead to defending against future actions and proceedings, the Property should be deemed encumbered and they should be relieved from their bid.

Setting aside and vacating a judicial sale based upon competitive bidding is relief that a court utilizes sparingly and only to correct a plain injustice. Karel, 122 N.J. Eq. at 529. Ultimately,

given the facts at hand, although unfavorable to Movants, these facts do not amount to a plain injustice that would warrant vacating the Sheriff's Sale.

Here, the Sheriff's Sale should not be vacated, and Movants are bound by the doctrine of caveat emptor. Movants point to the fact that the "as is" nature of properties purchased at judicial sale only applies to readily apparent defects and not defects known to the seller and unknown to the buyer. Additionally, Movants argue that even if the "as is" nature of properties purchased at judicial sales stands, here, no one disclosed the nature of the contaminated property to Movants and due diligence would not, and did not, show the condition of the Property. The Court finds to the contrary. As aforementioned, USIC demonstrated that a quick search of the New Jersey Department of Environmental Protection website shows contamination on the Property. Moreover, the historical and current use of the Property as a dry-cleaning business even further emphasizes that the property was demonstrably contaminated, or at the very least would cause one looking to purchase the Property to pause and conduct additional research before purchasing. Thus, not only was the defect of the Property readily apparent given its prior and current use, but also it is clear that Movants did not exercise a sufficient level of due diligence prior to purchasing the Property, otherwise the contamination would have subsequently been revealed to them.

In addition, pursuant to N.J.S.A. 2A:61-16, in order for a purchaser of real estate to be relieved from a bid at a public sale, the purchaser must demonstrate a substantial defect or cloud upon the title of the real estate that was sold. Moreover, the purchaser must show that the title has become unmarketable or the existence of a lien or encumbrance on the title. Here, the contamination on the Property does not constitute an encumbrance upon the title. In contrast, Movants argue that the contamination should be considered an encumbrance because of the broad definition of an encumbrance outlined in Minez. However, in Minez, there was an express

covenant that title to the property be delivered free and clear of any encumbrances. Whereas here, no such covenant exists, rather, there is the doctrine of caveat emptor, in which the purchaser must take the property “as is.” Moreover, the court in Minez further emphasizes that the doctrine of caveat emptor applies when the contract for the purchase of the property lacks a covenant to deliver the property free and clear of encumbrances, as is the case here.

Additionally, there is no case law or statute in New Jersey that defines environmental contamination as an encumbrance. Similarly, New Jersey case law has found that the post-sale discovery of vandalism on a property, for example, does not constitute cloud on title.

Given the potential additional costs to the other parties and the loss of a sale at the highest price, vacating the Sheriff’s Sale would undoubtedly be prejudicial to USIC, especially when considering that this environmental contamination was readily discoverable. Here, given the evident usage of the Property in a manner that is environmentally contaminating, coupled with the readily available information showing contamination on the Property that Movants could have found with due diligence, the environmental contamination does not constitute a cloud or encumbrance upon title. Thus, the confirmation of the Sheriff’s Sale would not rise to the level of a plain injustice necessary for vacating the purchase of the Property.

For the foregoing reasons, Movants’ Motion to Vacate and Set Aside the Sheriff’s Sale is denied and USIC’s Cross-Motion to Confirm the Sheriff’s Sale is granted. An order accompanies this decision.