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Nos. 1-09-2146 & 1-09-2771 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANCO POPULAR NORTH AMERICA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 05 CH 19713 &
)	05 CH 19711
)	
AKINDUNNI O. SONUGA, SONAK)	Honorable Jesse G. Reyes,
ELECTRICAL CONTRACTORS, INC. ET AL.,)	Sheila King Devane and
)	Lewis Michael Nixon,
Defendants-Appellants.)	Judges Presiding.
)	

ORDER

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Murphy and Steele concurred in the judgment.

HELD: The trial court did not err in approving the judicial sale of property that was the subject of a mortgage foreclosure proceeding where the notice of the sale was proper and the sales price was not unconscionably low. In addition, a trial court order approving the sale of a second property and entering a deficiency judgment was not precluded by the doctrines of merger, *res judicata*, or collateral estoppel.

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Defendants Akindunni O. Sonuga, Sonak Electrical Contractors, Inc., and others appeal from orders of the trial court approving the sale of two properties in Chicago, Illinois and entering deficiency judgments in two mortgage foreclosure proceedings filed by plaintiff, Banco Popular North America (Banco). Defendants argue that the circuit court's order approving the sale of one of the properties, located at 18th E. 24th Street (24th Street property), should be reversed because the notice of sale was not proper and the purchase price was unconscionably low, and that the order approving the sale of the other property, located at 3240 W. Foster Avenue (Foster Avenue property) and entering a deficiency judgment in the amount of \$173,463.06, was precluded by the doctrines of merger, *res judicata*, and collateral estoppel. For the reasons set forth below, we affirm the circuit court.

This case arises out of three loans Banco Popular made to Sonuga, which were secured by three mortgages on the Foster Avenue property and the 24th Street property . First, on September 28, 1999, Banco lent Sonuga \$157,500 subject to the terms of a note, which was secured by an unconditional guaranty from Sonak Electrical Contractors, signed by Sonuga, its president, and a mortgage on the Foster Avenue property. On October 30, 2001, Sonuga borrowed an additional \$560,000 from Banco pursuant to a second note, which was also secured by Sonak Electrical Contractors' unconditional guaranty, as well as a mortgage on the 24th Street property, and a second mortgage on the Foster Avenue property. On March 18, 2004, Banco lent Sonuga an additional \$500,000, pursuant to a third note, secured by a second mortgage on the 24th Street property.

In November 2005, after defendants failed to make regular monthly payments pursuant to

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the terms of the notes, Banco filed two separate mortgage foreclosure actions. First, in case number 05 CH 19713, filed on November 16, 2005, Banco sought to foreclose on the 24th Street property pursuant to the mortgages executed on October 30, 2001 and March 18, 2004. On April 2, 2008, Banco presented a motion for summary judgment and judgment of foreclosure, which was scheduled for a hearing on May 14, 2008. On that date, defendants filed a motion to continue, asserting that they had accepted an offer to sell the 24th Street property for \$1,180,000. It appears that motion was denied, because on that date, the circuit court entered a judgment of foreclosure and sale on the 24th Street property, which assessed judgment claims of \$639,604.21 on the October 30, 2001 mortgage and \$631,496.18 on the March 18, 2004 mortgage. The judgment stayed the effectiveness of the judgment until June 11, 2008 but permitted plaintiff to begin publication of the judicial sale on May 28, 2008. Plaintiff published a notice of judicial sale for three weeks (June 9, 16, and 23, 2008) but the notice erroneously stated that the entry of judgment of foreclosure occurred on May 28, 2008, rather than May 14, 2008.

The judicial sale was held on June 30, 2008, and Banco was the highest bidder at \$423,000. On September 12, 2008, plaintiff filed a motion for an order approving sale and for deficiency judgment, stating that the judicial sale resulted in a deficiency balance of \$878,646.72 and seeking a deficiency judgment against defendants in the amount of \$631,496.18, which was the judgment amount entered by the court on the junior mortgage. The motion also noted that the first mortgage loan on which judgment was entered (the October 30, 2001 mortgage) in the amount of \$639,604.32 was cross-collateralized with the Foster Avenue property, which was the subject of a related foreclosure action that was scheduled for a judicial sale on October 8, 2008.

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On October 2, 2008, plaintiff filed a supplemental filing in support of its motion for an order approving sale and for deficiency judgment, which included a real estate appraisal dated October 9, 2007, showing an estimated value for the 24th Street property of \$690,000. On October 6, 2008, plaintiff filed a second supplemental filing with a more recent appraisal, dated October 1, 2008, showing an estimated value for the 24th Street property of \$465,000. On October 14, 2008, defendants filed their response to the motion to approve sale, which included an affidavit from Sonuga stating that in December 2007, he had entered into a contract to sell the 24th Street property for \$1,180,000, and alleging that Banco interfered with that sale by telling the potential buyers that it might sell the property to them for a much lower price. Banco then purchased the property at the judicial sale for only \$423,000, far less than the contract price.

On November 24, 2008, the circuit court entered an order granting defendant possession of the 24th Street property and entering a personal deficiency judgment against Sonuga in the amount of \$631,496.18. On December 24, 2008, defendants filed a motion to reconsider, which the circuit court denied on July 17, 2009. Defendants filed a timely notice of appeal on August 14, 2009.

In the second foreclosure action, also filed on November 16, 2005 (case no. 05 CH 19711) Banco sought to foreclose on the Foster Avenue property pursuant to the mortgages executed on September 28, 1999 and October 30, 2001. Banco filed an amended complaint on June 5, 2006 and defendants filed their answer and affirmative defenses on November 21, 2007. On February 19, 2008, Banco filed a motion for summary judgment and judgment of foreclosure to which defendant filed a response on June 16, 2008. On August 4, 2008, the trial court entered

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a judgment of foreclosure and sale, which assessed a claim of \$161,858.74 on the September 28, 1999 mortgage and \$610,725.18 on the October 30, 2001 mortgage. The court also entered a separate order granting plaintiff's motion for summary judgment and entering the corresponding judgment of foreclosure and stating that:

“C. The Court hereby acknowledged Banco and Defendant's counsel's representations that there are collectively three mortgage loans at issue between this action and Cook County Case No. 05 CH 19713 and that in connection with confirmation of the judicial sale in this matter, Banco is directed to make a full accounting to the Court as to application of the sale proceeds in both matters as part of any motion for entry of a deficiency judgment.

F. The Motion for Judgment against defendant Sonak Electrical Contractors, Inc., based on its guarantees, which are the subject of Counts III and VI of the First Amended Complaint, is entered and continued until confirmation of the judicial sale and following application of the sale proceeds.”

The judicial sale for the Foster Avenue property was held on October 8, 2008, and Banco was the highest bidder at \$205,000. On December 10, 2008, Banco presented its motion for order approving the report of sale and for a deficiency judgment. That motion included an October 7, 2008 appraisal that valued the Foster Avenue property at \$300,000. On September 10, 2009, the circuit court issued its order approving the report of sale and entering a deficiency judgment against defendants in the amount of \$173,463.06. Defendants filed a timely notice of

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appeal on October 9, 2009. The two foreclosure proceedings were consolidated on appeal.

Defendants first argue on appeal that this court should reverse the trial court order in case number 05CH 19713 approving the sale of the 24th Street property because plaintiffs failed to provide proper notice of the sale and the amount of plaintiff's bid was too low. Section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2008)) (Foreclosure Law) confers broad discretion on circuit courts in approving or disapproving judicial sales, and that exercise of discretion will not be disturbed absent an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). Section 15-1508(b) states in pertinent part:

“Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale.” 735 ILCS 5/15-1508 (West 2008).

Here, defendants assert that the notice of the sale of the 24th Street property was not proper because it listed May 28, 2008 as the date on which judgment of foreclosure was entered, when the correct date was May 14, 2008. Defendants argue that because of this error, a third party would be unable to find the judgment of foreclosure and therefore, would likely not bid on the property. Therefore, defendants assert, plaintiff was permitted to submit an unconscionably

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low bid without concern that someone else would submit a higher bid.

Section 15-1507(c) of the Foreclosure Law provides that a notice of sale must include the following: (1) the name, address and telephone number of the person to contact for information regarding the real estate; (2) the common address and other common description (other than legal description), if any, of the real estate; (3) a legal description of the real estate sufficient to identify it with reasonable certainty; (4) a description of improvements on the real estate; (5) the times specified in the judgment, if any, when the real estate may be inspected prior to sale; (6) the time and place of the sale; (7) the terms of the sale; (8) the case title, case number and the court in which the foreclosure was filed; and (9) any other information ordered by the court. 735 ILCS 5/15-1507(c) (West 2008). Further, section 15-1507(c)(1) provides that “an immaterial error in the information shall not invalidate the legal effect of the notice ***.” 735 ILCS 5/15-1507(c) (West 2008).

Section 15-1507(c) does not require that the date that a judgment of foreclosure was entered be included in the notice and the court did not add it as a requirement in its order of foreclosure. Although defendants assert that the error prevented third parties from submitting a bid on the property, the information provided in the notice of sale, which adhered to the statutory requirements, was sufficient for a third party to determine which property was the subject of foreclosure and decide whether or not to submit a bid. Therefore, because the error was immaterial, it did not invalidate the effect of the notice and is not a basis for reversing the trial court order affirming the sale of the 24th Street property..

Defendants also argue that the trial court order approving the sale of the 24th Street

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property should be reversed because one of the terms of the sale, namely the amount bid, was unconscionable, and because Banco attempted to commit fraud in the conduct of the sale. As evidence that the sales price was unconscionably low, defendants point to the fact that the judgment was for \$1,271,100.50 and the defendants had an offer to purchase the property for more than \$1,000,000. Further, defendants assert that in a filing on October 2, 2008, plaintiffs submitted an appraisal valuing the 24th Street property at \$690,000 but only four days later, submitted a revised appraisal from the same firm, stating that the value of the property was only \$465,000. Defendants contend that Banco's bid was a "blatant attempt to commit fraud" by diminishing the sales price in order to maximize the deficiency and carry that deficiency over to the Foster Avenue property. By doing so, defendants assert, Banco was able to gain control over both properties, which had a value in excess of \$1,580,000. We disagree, because we find that Banco's bid was not unconscionable and defendants presented no evidence that Banco committed fraud.

This court delineated the standard for approving a sheriff's sale in *Illini Federal Savings & Loan Association v. Doering*, 162 Ill. App. 3d 768 (1987), stating, in part, as follows:

"It is settled that a court of equity has wide discretion in supervising judicial sales to ensure such sales are conducted according to law and free from fraud which could deprive the equity owner of valuable rights. [Citations.] This discretion is not unlimited, however, and it is a firmly established rule that unless there is evidence of mistake, fraud, or violation of duty by the officer conducting the sale, mere inadequacy of price alone is not sufficient cause for setting aside a judicial sale. [Citations.] It is the policy of the law

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to give stability and permanency to judicial sales [citation] and, since ‘[i]t has long been recognized that property does not bring its full value at forced sales, and that the price depends on many circumstances from which the debtor must expect to suffer a loss’ [citation] it follows that ‘[m]ere inadequacy of price is no reason for upsetting a judicial sale unless there are other irregularities’ [citation].” *Illini Federal*, 162 Ill. 2d 771-72.

Applying the *Illini Federal* standard to this case, we find no abuse of discretion in the trial court’s approval of the sale of the 24th Street property to Banco. The bid by Banco of \$423,000 was only 10% less than the October 2008 appraised value of \$465,000. Defendants contend that the October 2008 appraisal was part of plaintiff’s fraud because it was filed on October 6, 2008, four days after plaintiff presented an appraisal valuing the property at \$690,000. However, although the appraisals were filed within four days of each other, they were conducted one year apart and therefore, could reasonably reflect a decrease in value over time.

Further, defendants have presented no evidence of the value of the 24th Street property to support their argument that Banco’s bid was too low. Defendants do assert that in January 2008, a buyer had agreed to purchase the property for \$1,180,000, and although a copy of the real estate contract did not appear in the record, defendants attached a copy as an exhibit to their reply brief. It is evident, however, that the transaction was never completed and although defendants assert that Banco interfered with this sale by notifying the buyer that it might sell the property to them for a much lower price, defendants present no evidence to that effect. Further, even if we agreed with defendants that the price was lower than what might have been obtained by selling the property, that is not grounds for reversing the trial court’s order, as this court has held that “mere

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inadequacy of price in the absence of fraud or mistaken or illegal practice will not vitiate a sale.”

Standard Bank & Trust Co. v. Callahan, 177 Ill. App. 3d 973, 977 (1988). Here, absent any evidence that Banco attempted to thwart a sale of the property or committed fraud, we find no abuse of the trial court’s discretion in approving the sale for an amount that was close to the appraised value. Therefore, we find no grounds for reversing the trial court’s order as to the judicial sale of the 24th Street property.

Next, defendants contend that the trial court’s order entering a judgment of foreclosure and sale in favor of plaintiffs on the Foster Avenue property should be reversed because it is precluded by the doctrines of merger, *res judicata* and collateral estoppel. The merger doctrine provides that when a judgment based on a contract or instrument is obtained, the instrument becomes entirely merged into the judgment. *Poilevey v. Spivack*, 358 Ill. App. 3d 412, 414 citing *Doerr v. Schmitt*, 375 Ill. 470, 472 (1941). Once the instrument is merged into the judgment, no further action at law or equity can be maintained on the instrument. *Poilevey*, 358 Ill. App. 3d at 414 citing *Doerr*, 375 Ill. App. 3d at 472. Defendants argue that when the trial court entered the judgment of foreclosure and sale on May 14, 2008 as to the 24th Street property, the October 30, 2001 note was merged into that judgment, and therefore, the plaintiff was barred from seeking relief on that note in the Foster Avenue property foreclosure.

Banco argues that the merger doctrine is not absolute and does not apply in this case. Banco asserts that there are several exceptions to the merger doctrine and contends that this court has held that the doctrine “does not prevent a court from looking ‘beyond a judgment to see upon what it is founded to give the judgment its effect.’” *Poilevey*, 386 Ill. App. 3d at 416 quoting

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Meeker v. Gray, 142 Ill. App. 3d 717, 726 (1986). Whether and to what extent merger occurs is a matter of the parties' intent as evidenced by the language of the instruments and surrounding circumstances. *Timothy Christian Schools v. Village of Western Springs*, 285 Ill. App. 3d 949, 953 (1997) citing *Daniels v. Anderson*, 162 Ill.2d 47, 64 (1994). For instance, in *Meeker*, the plaintiff, Meeker, obtained a judgment of confession against defendant, Tommy Payne, and in settlement, Payne agreed in 1971 to convey his 288 acre farm to Meeker for \$65,000. However, Payne refused to honor the settlement and tore up the contract for sale of the farm to Meeker. The parties countersued each other, which resulted in a ruling in favor of Payne. However, this court reversed in March 1973 and ordered the circuit court to render a decree for specific performance in favor of Meeker. While that lawsuit was pending, however, Payne contracted to sell portions of the farm to others and Meeker filed another lawsuit seeking equitable relief. The trial court awarded Meeker lost rental value from the March 1973, date of the specific performance order and on appeal, Meeker argued that his damages should date back to the original settlement agreement with Payne, in 1971. One of the defendants argued that based on the merger doctrine, the 1971 settlement agreement merged with the 1973 judgment. This court disagreed and awarded damages from 1971, stating with regard to the merger doctrine that

“[It] does not mean that the court may not look behind the judgment to see upon what it is founded, to give the judgement its just effect. [*Doerr v. Schmitt*, 375 Ill. 470, 472 (1941).] Here Mr. Meeker proved his entitlement to possession of 288 acres as of March 15, 1971. *** Any judgment which does not compensate him for the loss of that right confers unjust protection on those who wrongly deprived him of his rights.”

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Meeker, 142 Ill. App. 3d at 726.

Similarly, Banco contends it was proper for the trial court to “look behind the judgment to see upon what it is founded” and that because the parties here intended to factor in the shortfall on the sale of the 24th Street property into the order approving sale of the Foster Avenue property, we should not apply the merger doctrine. We agree. Here, the parties knew and the trial courts acknowledged that the three mortgages on the two parcels of land at issue in the two foreclosure cases were connected and that any shortfall from the judicial sale on the 24th Street property would be factored into the calculation of a deficiency on the Foster Avenue property. For instance, Banco notes its motion for order approving sale of the 24th Street property, which was filed prior to the judicial sale of the Foster Avenue property, stated in pertinent part that “the first mortgage loan on which judgment was entered in the amount of \$639,604.32 is cross-collateralized with certain real property [Foster Avenue property] that is the subject of a related foreclosure action *** and is now scheduled for judicial sale on October 8, 2008.” Further, in the Foster Avenue foreclosure case, the court in its August 4, 2008 order stated that “there are collectively three mortgage loans at issue between this action and Cook County Case No. 05 CH 19713 and that in connection with confirmation of the judicial sale in this matter, Banco is directed to make a full accounting to the Court as to the application of the sale proceeds in both matters as part of any motion for entry of a deficiency judgment.” Both the parties and the courts acknowledged that the mortgages were cross-collateralized and that the shortfall on the judicial sale of the 24th Street property could be recouped in the judicial sale of the Foster Avenue property. Therefore, the doctrine of merger did not preclude the trial court’s order approving the

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sale of the Foster Avenue property.

Alternatively, defendants contend that plaintiff's effort to seek relief in the Foster Avenue foreclosure action was barred by the doctrines of *res judicata* and collateral estoppel. In order for the doctrine of *res judicata* to apply the following three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was identity of causes of action; and (3) there was an identity of parties or their privies. *Avery v. Auto-Pro, Inc.*, 313 Ill. App. 3d 747, (2000). Here, defendant contends that there was a final judgment on an identical note between identical parties, and therefore, the trial court erred in entering an order in Banco's favor approving the sale of the Foster Avenue property.

The doctrine of collateral estoppel bars relitigation of an issue that was already decided in a prior case. *In re A.W.*, 231 Ill.2d 92, 99 (2008). The three requirements for the application of collateral estoppel are that:

“(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.” *Gumma v. White*, 216 Ill.2d 23, 38 (2005).

Here, defendants contend that the issue being presented to the court is identical, a final judgment was entered, and the parties were the same, and therefore, the requirements of collateral estoppel were met and also preclude the trial court from entering an order approving the sale of the Foster Avenue property.

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Plaintiff asserts that neither *res judicata* nor collateral estoppel are a basis for reversing the trial court's order approving the sale of the Foster Avenue property. First, with regard to *res judicata*, plaintiff asserts that the order approving report and sale of the 24th Street property was not intended to be a final judgment that would not be impacted by the judicial sale of the Foster Avenue property since it was clear that the October 30, 2001 mortgage was cross-collateralized by the Foster Avenue property. Further, plaintiff asserts that although there was an identify of parties between the two cases, there was not an identity of causes of action because the two cases involved two separate parcels of land.

Similarly, with regard to defendants' collateral estoppel argument, plaintiff contends that there was not an identical issue between the two foreclosure actions because separate properties were involved in each case. We agree. In case number 05 CH 19713, Banco sought to foreclose on the 24th Street property while in case number 05 CH 19711, Banco sought to foreclose on the Foster Avenue property. Although the cases were related, as noted above, because the first mortgage loan in case number 05 CH 19713 (the October 30, 2001 mortgage) \$639,604.32 was cross-collateralized with the Foster Avenue property in case number 05 CH 19711, the cases involved different properties and different primary loans, so there was not an identity of causes of action for *res judicata* purposes or identical issues, for collateral estoppel purposes. Therefore, neither doctrine precluded the trial court from approving the sale of the Foster Avenue property and entering a deficiency judgment.

For the foregoing reasons, we affirm the circuit court.

Affirmed.