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NO. 4-10-0693 Order Filed 3/8/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

BRICKYARD BANK,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
VICTOR HOROWITZ, a/k/a AVIGDOR)	No. 09CH141
HOROWITZ; AHUVA HOROWITZ; INMAN)	
PLAZA, INC.; and CHAMPAIGN)	Honorable
PLAZA, LLC,)	Charles McRae Leonhard,
Defendants-Appellants.)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and McCullough concurred in
the judgment.

ORDER

Held: Because defendants' (1) motion to adjourn confirmation hearing was based on supposition and (2) claim that the plaintiff failed to present sufficient evidence in support of its motion to confirm judicial sale was meritless, the circuit court did not abuse its discretion by entering an order confirming the sale of property defendants mortgaged to secure a real-estate loan from plaintiff.

In August 2010, the circuit court entered an order, confirming the judicial sale of property that defendants, Victor Horowitz, also known as Avigdor Horowitz; Ahuva Horowitz; Inman Plaza, Inc.; and Champaign Plaza, LLC (debtors), mortgaged to secure a real-estate loan from plaintiff, Brickyard Bank (Brickyard). Debtors appeal, arguing that the court abused its discretion by confirming the judicial sale of the mortgaged property. We disagree and affirm.

I. BACKGROUND

A. The Events Preceding the Circuit Court's Order Confirming Sale

In September 2004, Brickyard provided a real estate loan to debtors, who executed a promissory note in the amount of \$2.3 million that was secured, in part, by a mortgage on property debtors owned. In May 2006, the parties modified the terms of that loan, which resulted in the debtors executing a promissory note in the amount of \$2.5 million. In addition, the Horowitzes, in their respective personal capacities, each signed a separate commercial guaranty, indemnifying Inman Plaza, Inc., and Champaign Plaza, LLC. In October 2008, debtors defaulted on their promissory note.

In March 2009, Brickyard filed a complaint for foreclosure and other relief pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 through 15-1706 (West 2008)). Specifically, Brickyard requested that the circuit court (1) foreclose on the debtors' mortgaged property (count I) and (2) enter judgment against (a) Inman Plaza, Inc., and Champaign Plaza, LLC. (count II), and (b) the Horowitzes (count III), in the amount of \$2.5 million.

In October 2009, Brickyard filed a "motion for default judgment and/or summary judgment." In particular, Brickyard alleged that it was entitled to (1) a default judgment because

debtors had failed to file a responsive pleading to its foreclosure complaint or (2) summary judgment because no issue of material fact existed with regard to its complaint. Following a November 2009 hearing on Brickyard's motion, the circuit court granted debtors leave to file an answer to Brickyard's foreclosure complaint.

In December 2009, debtors filed (1) an answer to count I of Brickyard's complaint and (2) a motion to dismiss counts II and III. At a separate hearing conducted later that month, the circuit court granted Brickyard's motion for appointment as mortgagee in possession, which allowed Brickyard to take possession of the mortgaged property. Following the court's subsequent denial of debtors' motion to dismiss counts II and III, debtors filed their answers to those counts.

At a February 2010 hearing, the circuit court (1) granted summary judgment in favor of Brickyard and against debtors on count I and (2) deferred judgment on counts II and III. With regard to count I, the court's March 1, 2010, written judgment of foreclosure (1) awarded a \$2.8 million judgment against debtors, which included late fees and interest; (2) ordered the judicial sale of the mortgaged property in accordance with the applicable provisions of the Foreclosure Law; and (3) ordered the filing of a report that specified the sale proceeds realized from the judicial sale and the disposition thereof.

Following a hearing held on the same day that the court issued its order as to count I, the court entered a docket entry granting summary judgment in favor of Brickyard and against debtors on counts II and III of Brickyard's foreclosure complaint.

B. The Events Surrounding the Confirmation of Sale

1. *The Circuit Court's Judgment as to Debtors' Motion To Adjourn Confirmation Hearing*

In April 2010, Brickyard served notice on debtors, informing them that the judicial sale of the mortgaged property would take place on May 28, 2010. On June 9, 2010, Brickyard filed a motion to confirm sale, which it mailed to debtors that same day. Appended to that motion was a report of sheriff's sale that was signed by the Champaign County sheriff and deputy sheriff, stating that on May 28, 2010, the mortgaged property was sold to the highest bidder, Brickyard, for \$1 million. On June 24, 2010, Brickyard informed debtors that the circuit court had-- on that same day--entered a docket entry, scheduling Brickyard's motion to confirm sale for a July 29, 2010, hearing.

On July 27, 2010, debtors filed a motion to adjourn confirmation hearing, arguing that because Brickyard had not provided them with an appraisal of the mortgaged property until two weeks before the July 29, 2010, confirmation hearing, they required a 60-day delay to conduct an independent appraisal of the mortgaged property.

At the July 29, 2010, hearing, the circuit court first considered debtors' motion to adjourn, in which their counsel made the following argument:

"The property was sold for a million dollars. [Debtors] don't know whether that's unconscionable or not. [Debtors] suspect[] that it is, but without further investigation and an opportunity to depose the appraisers with some insight from our own appraisers as to whether they did a good job or not[,] it would be difficult to make that *** determination so [debtors would] like an opportunity to *** develop the record."

Brickyard objected, arguing that debtors had ample opportunity to acquire an independent appraisal because on June 24, 2010, Brickyard informed debtors that the circuit court scheduled a July 29, 2010, confirmation hearing. Debtors responded by renewing their claim that because they had just received Brickyard's appraisal on the mortgaged property two weeks earlier, they required additional time to review that appraisal and perform their own appraisal. The following exchange then took place between the court and debtors' counsel.

"THE COURT: *** [I]t struck the court as significant first that this Judgment of

Foreclosure was entered in *** March of 2010. The *** sale was scheduled for May 28. *** [I]t is odd that your clients don't [know] what their own property was worth and second that they didn't articulate these concerns in the month preceding July 24 so it just doesn't seem *** that your position is exactly bristling with diligence on the part of your clients.

[DEBTORS' COUNSEL]: *** [M]y understanding is *** that my clients believe the property is worth [about \$]2.5 million or more, and we reached an agreement. *** We repeatedly asked [Brickyard] for their appraisal before the hearing *** all the way up to three days beforehand and then immediately afterwards asked for it and then asked for it again and we only got [Brickyard's] report[,] basically in breach of an agreement[,] two weeks ago so we were diligent in that [debtors] wanted to see what [Brickyard was] saying the assessment was[,] which if that had been given to us in *** May[,] then maybe we would have had an opportunity.

[Debtors did not] know what [Brickyard's] appraisal report said. If it said [\$]2.5 million or more, maybe we wouldn't have needed to do an appraisal. *** But [debtors] didn't know what [Brickyard's] number was. *** [Brickyard's] appraisal amount came in at a million. [Brickyard] bid a million so [debtors were] asking for what that number was for *** a long time and [Brickyard was] in breach of that agreement because they had it for a[]while. They had it before the sale and they didn't share it with [debtors] even though that's what [debtors] had agreed upon so [debtors] relied to some degree on the provision of this report. ***

* * *

THE COURT: What is the basis of [the debtors] purported belief that the premises are worth two to two and a half times what [Brickyard's] appraisal was?

[DEBTORS' COUNSEL]: I don't know. I know *** that's what [debtors] conveyed. [The court] had mentioned that it's surpris-

ing that [debtors do not] know the value.
That's the value that's been given to me. I
don't know the entire basis of that value.
*** I didn't *** depose [debtors] on that
issue. It was enough to say there's a prob-
lem here.

* * *

THE COURT: *** [E]ven assuming that
there was an agreement that the appraisal be
tendered[,] the record *** establishes that
it was at last produced; and [even] if there
were [an] arguable or colorable claim ***
that the amount of the sale was unconsciona-
ble or the appraisal process or the bidding
process was imbued with fraud or collusion
***, the Court would perhaps be well justi-
fied in adjourning this hearing but [debt-
ors'] claim here is simply rooted in specula-
tion and it's at least mildly redolent of
simply being interposed for the purposes of
delay. There is no objective basis on this
record, on which the Court could even sur-
mise, much less conclude, that there [is] any
basis for contesting the amount of the sale

or not confirming it so the verified Motion to Adjourn the Confirmation Hearing is respectfully denied."

(Immediately after the court ruled on debtors' motion to adjourn, debtors' counsel stated that it was not speculation that debtors believed the mortgaged property was worth \$2.5 million because Brickyard would not have loaned debtors that amount if Brickyard did not believe the property was worth at least that much.)

2. The Circuit Court's Judgment as to Brickyard's Motion To Confirm Sale

Thereafter, the circuit court considered the parties' arguments regarding Brickyard's motion to confirm sale. In response to debtors' request, Brickyard tendered a "certificate of sale" that the Champaign County sheriff and deputy sheriff signed, again stating--as they did in the report of sheriff's sale--that on May 28, 2010, the mortgaged property was sold to the highest bidder, Brickyard, for \$1 million.

Thereafter, debtors objected to Brickyard's motion to confirm sale, arguing that (1) Brickyard had failed to provide sufficient evidence to show that the winning bid of \$1 million was not unconscionable and (2) because the report of sheriff's sale and certificate of sale were not verified or notarized, those documents constituted inadmissible hearsay. After considering the evidence and argument presented, the circuit court later entered a written order (1) confirming sale and (2) order-

ing that debtors receive a credit of \$1 million in partial satisfaction of the judgments previously entered against them.

This appeal followed.

II. THE CIRCUIT COURT'S ORDER CONFIRMING SALE

Debtors argue that the circuit court abused its discretion by confirming the judicial sale of the mortgaged property. Specifically, debtors contend that (1) the court's judgment deprived them of the opportunity to determine whether the judicial sales price of \$1 million was unconscionable and (2) Brickyard failed to provide sufficient evidence to support its motion to confirm sale. In their brief to this court, debtors also argued that the court erred by granting summary judgment in Brickyard's favor as to count III of Brickyard's foreclosure complaint, but later abandoned that argument in their reply brief. We address debtors' contentions in turn.

A. The Applicable Statute and Standard of Review

Section 15-1508 of the Foreclosure Law, entitled "Report of Sale and Confirmation of Sale," provides, in pertinent part, as follows:

"(a) Report. The person conducting the sale shall promptly make a report to the court, which report shall include a copy of all receipts and, if any, certificate of sale.

(b) Hearing. 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(a), (b) (West 2008).

Section 15-1508(b) of the Foreclosure Law confers broad discretion on circuit courts in approving or disapproving judicial sales that a reviewing court will not disturb absent an abuse of that discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178, 890 N.E.2d 934, 937 (2008).

B. Debtors' Motion To Adjourn Confirmation Hearing

We note that in their brief to this court, debtors assert that by filing their motion to adjourn confirmation hearing, they did not seek to prevent the confirmation hearing from occurring pursuant to section 15-1508(b) of the Foreclosure

Law. Instead, debtors claim that their adjournment motion "sought merely the opportunity to postpone the [judicial] sale so they might conduct an appraisal and determine the veracity of the appraisal conducted by [Brickyard], and ultimately, whether the foreclosure sale price was unconscionable."

In this regard, debtors posit that (1) the circuit court's denial of their request for a 60-day delay to verify Brickyard's appraisal was "patently unfair" and (2) "under the facts of this case, it was simply impossible" for the court to find that an evidentiary hearing on the issue of unconscionability was not warranted. We disagree.

Debtors base their claim regarding the circuit court's "unfair" dismissal of their motion to adjourn confirmation sale on the premise that because their loan amount for the mortgaged property was \$2.5 million--150% more than Brickyard's winning bid of \$1 million--a question of material fact existed regarding the unconscionability of the judicial sale, which warranted an evidentiary hearing. However, the mere disparity between the debtors' loan amount and Brickyard's purchase price, absent additional irregularities, does not present a sufficient basis to delay the confirmation of a judicial sale. See *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 263, 890 N.E.2d 592, 602 (2008) ("Illinois courts have generally held that mere inadequacy of price is not a sufficient reason to disturb a

judicial sale unless there were some other irregularities"). With regard to those other irregularities, debtors' claim that they could not conduct an appraisal of the mortgaged property in a timely manner because of Brickyard's refusal to provide them its appraisal is equally unpersuasive.

In this case, the record shows the following: (1) on March 1, 2010, the circuit court entered (a) a \$2.8 million judgment against debtors and (b) a docket entry granting summary judgment in favor of Brickyard and against borrower as to counts II and III; (2) in April 2010, debtors were aware that a judicial sale of the mortgaged property would take place on May 28, 2010; (3) shortly after June 9, 2010, debtors were informed by mail that (a) the judicial sale of the mortgage property occurred as scheduled and (b) Brickyard provided the winning bid of \$1 million; and (4) on June 24, 2010, Brickyard informed debtors that the court had scheduled a July 29, 2010, hearing to consider Brickyard's motion to confirm sale.

Based on the aforementioned history of this case, shortly after June 9, 2010--approximately 50 days before the July 29, 2010, hearing on Brickyard's motion to confirm sale--debtors were aware that the \$2.8 million judgment entered against them would be credited by no more than \$1 million, which was Brickyard's winning bid at the May 2010 judicial sale of the mortgaged property at issue. More importantly, in accordance

with debtors' stated intent to ultimately determine whether the judicial sale was unconscionable, debtors had all the pertinent information required 50 days before the confirmation hearing to obtain a comparison appraisal of the mortgaged property to ascertain whether Brickyard's \$1 million winning bid was appropriate. Thus, we reject debtors' contention that the circuit court's dismissal of its motion to adjourn confirmation hearing deprived them of the opportunity to determine whether the judicial sales price of \$1 million was unconscionable.

C. Debtors' Sufficiency of the Evidence Claim

Debtors also argue that Brickyard failed to provide sufficient evidence to support their motion to confirm sale. Specifically, debtors' contend that because Brickyard did not present pertinent testimony or proffer "affidavits or sworn to documentation," it failed to present any evidence that the judicial sale had even occurred much less was appropriately conducted. We disagree.

We first note that debtors do not cite--nor has our research uncovered--any competent authority that requires a movant to present testimony or proffer verified affidavits in support of a motion to confirm a judicial sale. Indeed, our review of section 15-1508 of the Foreclosure Law, which governs confirmations of judicial sales, requires the movant to, at a minimum, proffer (1) a report of sale that includes a copy of all

pertinent receipts and (2) a certificate of sale, if any. 735 ILCS 5/15-1508(a) (West 2008). Thus, we reject debtors' contention in this regard.

In addition, based on the record before us, we also reject debtors' contention that Brickyard failed to provide any evidence in support of its motion to confirm sale. In this case, the pertinent evidence presented to the circuit court consisted of the following: (1) a report of sale and certificate of sale each signed by the Champaign County sheriff and his deputy attesting to the pertinent details of the judicial sale pursuant to section 15-1508(a) of the Foreclosure Law and (2) debtors' acknowledgment that the \$1 million judicial sales price was consistent with Brickyard's \$1 million appraisal of the mortgaged property.

Accordingly, we reject debtors' argument that the circuit court abused its discretion by confirming the judicial sale of the mortgaged property at issue.

III. CONCLUSION

For the reasons stated, we affirm the circuit court's judgment.

Affirmed.