2011 IL App (1st) 103036-U

SECOND DIVISION
DECEMBER 27, 2011

No. 1-10-3036

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KOENIG & STREY GMAC REAL ESTATE, Plaintiff, v. RENAISSANT 1000 SOUTH MICHIGAN I, LP, an Illinois limited partnership; RENAISSANT 1000 SOUTH MICHIGAN, LLC, an Illinois limited liability company; FIRST AMERICAN BANK; DESTEFANO AND PARTNERS, LTD., an Illinois corporation; TRAINOR GLASS COMPANY, an Illinois corporation; CURTAIN WALL & DESIGN CONSULTING, Incorporated, a Texas corporation; and UNKNOWN OWNERS, HEIRS, LEGATEES AND NON-RECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Cook County.
FIRST AMERICAN BANK, an Illinois banking corporation, Plaintiff-Appellant, v. RENAISSANT 1000 SOUTH MICHIGAN LLC, an Illinois limited liability company; RENAISSANT 1000 SOUTH MICHIGAN I, LP, an Illinois limited partnership; WARREN	)	Cons. Nos. 07 CH 27475 08 CH 16304

BARR; JAMES CARROLL; JOHN BORKOWSKI; EDWARD BORKOWSKI; RICHARD BORKOWSKI; CONTRACTORS LIEN SERVICES, DESTAFANO AND PARTNERS, LTD, an Illinois corporation; TRAINOR GLASS COMPANY, an Illinois corporation; CURTAIN WALL & DESIGN CONSULTING, Incorporated; KOENIG & STREY GMAC REAL ESTATE; TISHMAN CONSTRUCTION CORPORATION OF ILLINOIS; CHICAGO TITLE LAND AND TRUST COMPANY, as Trustee under Trust Number 1106328; 1000 SOUTH MICHIGAN AVENUE, LLC; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS,	)	Honorable Robert J. Quinn, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶1 *Held*: The circuit court abused its discretion in refusing to confirm the July 27, 2010 foreclosure sale where the totality of the circumstances did not support the circuit court's finding that the sale price was unconscionable.

¶2 This appeal arises from the August 26, 2010 order entered by the circuit court of Cook County, which denied a "motion to confirm second foreclosure sale" filed by the plaintiff-appellant, First American Bank (First American). On appeal, First American argues that the circuit court abused its discretion by declining to approve the July 27, 2010 foreclosure sale for a property located at 1000 South Michigan Avenue in Chicago, Illinois.[1] For the following reasons, we reverse the judgment of the circuit court of Cook County and remand the matter with directions to approve the July 27, 2010 foreclosure sale.

[1]This property is described in the record on appeal as both "1000 South Michigan Avenue" and "920 South Michigan Avenue."

¶3 BACKGROUND

¶4 In 2005, business entities Renaissant 1000 South Michigan, LLC, and Renaissant 1000 South Michigan I, L.P. (collectively, Renaissant), purchased commercial real property located at 1000 South Michigan Avenue in Chicago (the property) for $28,800,000. The property was a vacant lot to be used for proposed high-rise residential units. In connection with Renaissant's purchase of the property, First American made two loans to Renaissant in the total principal amount of $22,450,000, which was secured by a mortgage lien and security interest in the property. In December 2005, individuals Warren Barr (Barr), James Carroll (Carroll), John Borkowski, Edward Borkowski and Richard Borkowski (collectively, the Borkowskis), entered into a guaranty agreement with First American, by which they agreed to be jointly and severally liable as personal guarantors of Renaissant for the mortgage at issue. However, the guaranty agreement limited the personal guarantors' liability to $7,000,000, plus other interests, fees and expenses.

¶5 In September 2007, Koenig & Strey GMAC Real Estate (Koenig & Strey) filed a "complaint for foreclosure of real estate broker's lien and other relief" against Renaissant, First American, and other entities and individuals (the Koenig & Strey complaint).[2] The Koenig & Strey complaint asserted breach of a marketing agreement by Renaissant, and requested that a judgment of foreclosure of a real estate broker's lien be granted as a result of Renaissant's failure to pay commissions to Koenig & Strey pursuant to the marketing agreement.

[2]The Koenig & Strey complaint named Renaissant; First American; Destefano and Partners, Ltd.; Trainor Glass Company; Curtain Wall & Design Consulting, Inc.; and "Unknown Owners, Heirs Legatees and Non-Record Claimants," as defendants. None of the issues presented in the Koenig & Strey complaint are before us on appeal.

¶6 On March 31, 2008, First American's loans to Renaissant matured and became due, which Renaissant failed to pay. On May 2, 2008, First American filed a separate cause of action to foreclose the mortgage lien and security interest in the property against Renaissant (mortgage foreclosure action). The complaint also named individually as defendants the Borkowskis, Barr and Carroll, by virtue of their roles as personal guarantors of the mortgage.[3] Count I of the complaint alleged Renaissant's default on the loans owed to First American, and requested the following relief: (1) a judgment on the amount owed pursuant to the loan agreements; (2) a judgment foreclosure and sale; (3) a judgment for deficiency in the amount owed, "to the extent the sale of [the property] results in such deficiency, and to the extent permitted under the [loan agreements]; and (4) other just and equitable relief. Count II of the complaint asserted liability against Barr, Carroll and the Borkowskis, as personal guarantors of Renaissant, for the payments due under the mortgage loans. First American further requested that the circuit court enter "[a] judgment on the [g]uaranty in the amount to be determined at trial." Subsequently, the causes of action filed by Koenig & Strey and First American were consolidated.

¶7 On January 26, 2009, the circuit court entered a judgment of foreclosure and sale (judgment of foreclosure) for an amount of $22,681,907.05, and ordered a foreclosure sale of the property by the Sheriff of Cook County in the form of a public auction.

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[3]The complaint filed by First American also named Contractors Lien Services, Inc.; Destafano and Partners, Ltd.; Trainor Glass Company; Curtain Wall & Design Consulting, Inc.; Koenig & Strey; Tishman Construction Corporation of Illinois; Chicago Title Land and Trust Company, as trustee under Trust Number 1106328; 1000 South Michigan Avenue, LLC; "Unknown Owners"; and "Non-Record Claimants," as defendants who "hold interests in the Mortgaged Premises that are junior to that of First American."

¶8 On March 17, 2009, a public auction was conducted by the Sheriff of Cook County during which the property was offered for sale (first foreclosure sale). First American was the sole–thus, highest–bidder for the property at the first foreclosure sale, by offering a $12 million credit bid for the property.

¶9 On April 22, 2009, First American filed a motion to confirm the first foreclosure sale, requesting the circuit court to confirm the sale of the property to First American and to direct the Sheriff of Cook County to execute and deliver the property's title deed to First American. On May 20, 2009, the Borkowskis filed an objection to First American's motion to confirm the first foreclosure sale, arguing that the property had an appraisal value of more than $33 million, and that a confirmation of First American's bid of $12 million would be unconscionable. On June 5, 2009, the circuit court entered an order stating that an evidentiary hearing was necessary to determine the value of the property as of the date of the first foreclosure sale.

¶10 On January 29, 2010 and February 10, 2010, an evidentiary hearing was held "solely for the purpose of determining the value of the [property]." At the hearing, professional commercial real estate appraisers, Brian Flanagan (Flanagan) and Mitchell Perlow (Perlow), offered conflicting testimony regarding the value of the property. Flanagan, who was retained by the Borkowskis, testified that the value of the property as of the date of the March 17, 2009 first foreclosure sale was $24,600,000. However, Perlow, who was retained by First American, opined that the value of the property at the time of the first foreclosure sale was $16,250,000. Following the hearing, the parties submitted written closing remarks to the circuit court in support of their positions.

¶11 In a written order dated March 2, 2010, the circuit court found that Flanagan's testimony was

entitled to "substantially greater weight" than Perlow's testimony because Flanagan had personally prepared the appraisal report that provided an evidentiary basis for his testimony, while Perlow had not. The circuit court further noted that Perlow admitted that he "did not choose any of the comparables provided in [First American's] appraisal, was not familiar with transactions of the comparables, and could not provide any insight into how the appraisal arrived at its conclusions." The circuit court also explained that the person who prepared Perlow's appraisal report was not available for questioning. The circuit court noted that the parties agreed that land located at 830 South Michigan Avenue, which was sold in November 2008 for $17,550,000, was the most comparable real estate to the property at issue. The circuit court then found that the property's "floor area ratio" (FAR) was the best way to determine value of the property. Based on the square footage and the sale price of the land located at 830 South Michigan Avenue, the circuit court determined an FAR value of $35.10, which, when applied to the allowable building area of 615,000 square feet in the property at issue, yielded an overall market value of $21,586,500. Accordingly, the circuit court held that the $12 million sale price at the first foreclosure sale was "unconscionable and cannot be approved."

¶12 On May 3, 2010, the parties engaged in discussions before the circuit court concerning the use of a marketing process to attract more potential buyers for the property, and the possibility of the circuit court in setting a predetermined bid price which it would approve for the next foreclosure sale. On May 13, 2010[4] and May 14, 2010, a hearing was held during which the circuit court

[4]It does not appear that the transcript of the May 13, 2010 proceedings was made available to this court in the record on appeal.

approved a proposed professional auction marketing plan submitted by Rick Levin (Levin) of Rick Levin & Associates, Inc., and selected Levin as the sales officer for the next foreclosure sale. The circuit court further set an "upset price" of $16.5 million, a bid price at or above which the circuit court guaranteed its confirmation of the foreclosure sale of the property. However, the circuit court noted that it would also consider approving any bids lower than $16.5 million because "[First American], if they want to can credit bid [$16.5 million] if they wish." The parties then engaged in the following exchange with the circuit court:

> "[MR. SNOW - counsel for First American]: [L]et's say [First American] agreed to bid [$16.5 million] *** and [Levin] brings in [$14 million] and we said that's fine with us, we will agree to live with [$16.5 million] vis-a-vis the guarantors. *** In that case, we would have to come [to court].
>
> [MR. WEISS - counsel for First American]: At [$16.5 million].
>
> [MR. LEVIN - sales officer]: [The court] would have to see him at [$16.5 million]. I would tell the buyer his 14 is possible if the Judge and all the parties here –
>
> [THE COURT]: They could accept that, but they would be, in essence, giving up their rights to that two and a half million –
>
> [MR. SNOW]: Yes.
>
> [THE COURT]: – as far as their cause of action on the

guaranty."

[MR. SNOW]: If we were unwilling to do that – [l]et's say we made a decision we would like to talk to you about the process and who came in. We're open to do that as long as it's our burden to show you that the process couldn't have yielded [$16.5 million].

[MR. HRABAK - counsel for the Borkowskis]: No. I don't think that's the purpose of an upset price. It think the [c]ourt is establishing –

[THE COURT]: What I'm saying is that's something we can address. We can address that. I'm not closing either my courtroom doors or any argument by counsel."

¶13 On May 17, 2010, the circuit court entered a supplemental order which supplemented the terms of the January 26, 2009 judgment of foreclosure. The supplemental order provided, *inter alia*, that Levin would serve as the sales officer of a second foreclosure sale of the property, that the notice of the sale shall be advertised and published in several media sources, and that First American shall pay Levin up to $85,000 in advertising and marketing costs. Paragraph W of the supplemental order provided that "[a]n upset price is established whereby a cash bid or credit bid by First American equal to or in excess of $16,500,000 will be deemed reasonable and not violative of 735 ILCS §5/15-1508(b)." On June 16, 2010, the circuit court entered a corrected supplemental order to "correct a typographical error" in the May 17, 2010 supplemental order.

¶14 On July 27, 2010, a second foreclosure auction sale for the property (second foreclosure sale)

was held, which was conducted in accordance with the sale procedures set forth in the June 16, 2010 corrected supplemental order. The second foreclosure sale had a total of three bidders interested in the property–including two cash bidders and First American as the credit bidder. First American, by offering a credit bid of $11.3 million, was the winning bidder at the second foreclosure sale.

¶15 On August 5, 2010, First American filed a motion to confirm the second foreclosure sale. A report of sale prepared by Levin was attached to the motion to confirm the second foreclosure sale. On that same day, August 5, 2010, an auction marketing report prepared by Levin was also filed with the circuit court. On August 12, 2010, a hearing was held during which Levin testified to the extent of the marketing efforts that he made prior to the second foreclosure sale, including advertising the property at issue on a local, national and international level. Levin testified that he spent approximately $91,000 to advertise the property–$85,000 of which was paid by First American and $6000 was paid by Levin's company. He further noted that in the course of marketing the property, potential buyers raised their concerns to him about the lack of vehicular accessibility to the property.

¶16 On August 23, 2010, the Borkowskis filed an objection to First American's motion to confirm the second foreclosure sale, arguing that the sale should be confirmed "only at the upset price of $16,500,000," and that First American should be required "to credit against the judgment amount the difference between the highest auction bid and the upset price." On August 24, 2010, First American filed a reply to the Borkowskis' objection, asserting that a credit bid of $11.3 million should be approved under the totality of the circumstances.

¶17 On August 26, 2010, a hearing on the motion to confirm the second foreclosure sale was held during which First American stated that it would honor its previous credit bid of $12 million, rather

than $11.3 million, for the purposes of determining the personal guarantors' obligation under the guaranty agreement. After hearing the parties' arguments, the circuit court, in denying the motion to confirm the second foreclosure sale, remarked:

> "I never guaranteed anything. I did not really give anything that is an upset price. So at that time I think it was pretty clear there was no upset price because I said I would approve a sale at or above [$16.5 million]; but really today is what I'm going to approve as far as an upset price. Okay. And I think although the [$16.5 million] that I set as a standard whereby at auction a successful bidder would know that I would approve that, it was adequate then and I think it is pretty much adequate now at this point in time.
>
> So I will set a true upset price today after the sale. Obviously 12 million is not going to be adequate. I found it to be grossly inadequate and I still do. However, I will find that a price that's being set today as an upset price, which I am allowed to do via the [*Levy*] case, will be [$16.5 million]."

The circuit court then noted that it would only approve a $16.5 credit bid, and allowed First American the opportunity to make such a bid. However, First American declined to increase its credit bid to $16.5 million, after which the circuit court denied the motion to confirm the second foreclosure sale.

¶18 On September 13, 2010, the circuit court, over the Borkowskis' objection, entered an order

finding that there is "no just reason for delaying appeal" of the August 26, 2010 order under Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006)). On October 8, 2010, First American filed a notice of appeal before this court.

¶19 ANALYSIS

¶20 The sole issue on appeal before us is whether the circuit court abused its discretion in denying First American's motion to confirm the second foreclosure sale. As a preliminary matter, we determine the threshold issue of jurisdiction. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542, 949 N.E.2d 723, 727 (2011) (a reviewing court has an independent duty to consider its jurisdiction over the issues and to dismiss the appeal where jurisdiction is lacking).

¶21 The Borkowskis[5] argue that this court lacks jurisdiction over this appeal because the August 26, 2010 order denying First American's motion to confirm the second foreclosure sale was not a final and appealable judgment under Rule 304(a). They argue that a foreclosure sale is not considered "final" until the circuit court enters an order approving the sale. They further contend that no final judgment was entered because "a material controverted issue concerning the requested deficiency judgment remains to be determined" with regard to count I of the complaint.

¶22 First American argues to the contrary that this court has proper jurisdiction to decide the merits of this appeal because the express Rule 304(a) language entered by the circuit court rendered the August 26, 2010 order denying the motion to confirm the second foreclosure sale final and appealable. Specifically, First American contends that "there is nowhere for the parties to go from

[5]The Borkowskis are the only named defendants who contest the circuit court's August 26, 2010 order on appeal.

here without a determination from this [c]ourt as to whether the sale should be confirmed."

¶23 Rule 304(a) provides in relevant part that "[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the [circuit] court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006). "A [circuit] court's order is a final judgment when it determines the litigation on its merits or disposes of the rights of the parties' entire controversy, or some definite part thereof." *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill. App. 3d 293, 296, 645 N.E.2d 1038, 1042 (1995). Generally, a judgment of foreclosure is not final and appealable because it "does not dispose of all the issues between the parties and it does not terminate the litigation." *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 260, 890 N.E.2d 592, 599 (2008). Thus, unless the circuit court makes a finding pursuant to Rule 304(a) that there is no just reason to delay enforcement or appeal of the mortgage foreclosure judgment, a judgment ordering the foreclosure of a mortgage is not final and appealable until the circuit court enters an order approving the sale and directing the distribution. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56, 535 N.E.2d 818, 824 (1989); *Fankhauser*, 383 Ill. App. 3d at 260, 890 N.E.2d at 599.

¶24 In the instant case, on January 26, 2009, a judgment of foreclosure was entered by the circuit court for an amount of $22,681,907.05, which also ordered a foreclosure sale of the property by public auction. On March 2, 2010, the circuit court denied the motion to confirm the first foreclosure sale. Thereafter, on May 17, 2010, the circuit court entered a supplemental order which supplemented the sale procedures of the January 26, 2009 judgment of foreclosure. On June 16,

2010, the circuit court entered a corrected supplemental order to "correct a typographical error" in the May 17, 2010 supplemental order. On July 27, 2010, a second foreclosure sale of the property was held. On August 26, 2010, the circuit court denied the motion to confirm the second foreclosure sale. Although the circuit court did not approve the second foreclosure sale, the January 26, 2009 judgment of foreclosure was made final and appealable when the circuit court made its September 13, 2010 finding pursuant to Rule 304(a) that there is no just reason to delay appeal of the August 26, 2010 order. Because the August 26, 2010 order denying the motion to confirm the second foreclosure sale stemmed from the January 26, 2009 judgment of foreclosure, the inclusion of the Rule 304(a) language effectively made the August 26, 2010 order final and appealable. Moreover, issues concerning any deficiency judgment against the Borkowskis and other personal guarantors are distinct from the determination of whether a foreclosure sale should be confirmed. Thus, we reject the Borkowskis' contention that this court lacks jurisdiction on the basis that the issues pertaining to the potential deficiency judgment remain to be determined. Therefore, we have proper jurisdiction over this appeal.

¶25 Turning to the merits of the appeal, we determine whether the circuit court abused its discretion in denying the motion to confirm the second foreclosure sale. In adjudicating this matter on appeal, we may review the circuit court's March 2, 2010 order denying the motion to confirm the *first* foreclosure sale on the basis that the first foreclosure sale was "unconscionable" because we may review all interlocutory orders that constitute a "procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." See generally *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023, 911 N.E.2d 541, 547 (2009) (an appeal from a final judgment draws

into issue all previous interlocutory orders that produced the final judgment).

¶26 First American argues that the circuit court's August 26, 2010 order denying the confirmation of the second foreclosure sale was an abuse of the court's discretion because the $11.3 million[6] sale price at the second foreclosure sale was not unconscionable. Specifically, First American contends that the true market value of the property was what a willing buyer offered to pay at the July 2010 second foreclosure sale after Levin's extensive marketing efforts, rather than the theoretical value determined by the court in March 2010. It further contends that inadequacy of the sale price alone was not a sufficient basis to deny confirmation of the second foreclosure sale, that a sale price at a foreclosure sale need not match the value of the property, and that the $11.3 million sale price at the second foreclosure sale was not unconscionable when compared to the theoretical value of the property of $21,586,500.

¶27 The Borkowskis counter that the circuit court did not abuse its discretion in disapproving the second foreclosure sale because the sale price failed to meet or exceed the predetermined upset price. They contend that the circuit court properly conducted an evidentiary hearing to determine the value of the property and reasonably exercised its discretion in setting an upset price. They assert that First American failed to seek review of the circuit court's determination of the $16.5 million upset price,

[6]First American, in making its arguments, repeatedly refers to $12 million, rather than $11.3 million, as the second foreclosure sale price which the circuit court declined to approve. Presumably, First American uses the $12 million figure because it represented to the circuit court at the August 26, 2010 hearing that it would honor its original credit bid of $12 million for the purposes of determining the personal guarantors' obligation under the guaranty agreement. However, for clarity, we use the $11.3 million figure for the sale price of the *second* foreclosure sale and the $12 million figure for the sale price of the *first* foreclosure sale.

and that First American understood that "if the upset price was not realized through the auction process, then, in order to get confirmation of the second [foreclosure] sale, First American could credit bid $16.5 million or agree to apply $16.5 million to the calculation of any deficiency." Further, the Borkowskis maintain that the highest bid at a foreclosure sale should not be the value of the property, and that the $11.3 million sale price at the second foreclosure sale was unconscionable.

¶28 Confirmation of foreclosure sales is governed by section 15-1508(b) of the Illinois Mortgage Foreclosure Law, which provides in relevant 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 [s]ection 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(b) (West 2010).

A circuit court's decision to confirm or reject a judicial sale under section 15-1508 will not be disturbed absent an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 179, 890 N.E.2d 934, 937 (2008). An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court. *Lakefront Plumbing and Heating, Inc. v. Pappas*, 356 Ill. App. 3d 343, 350, 826 N.E.2d 464, 469 (2005). However, a trial court must exercise its discretion within

the bounds of the law. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002).

¶29 Illinois courts have held that circuit courts have the discretion to disapprove a judicial foreclosure sale " 'where the amount bid is so grossly inadequate that it shocks the conscience of a court of equity.' " *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 113, 618 N.E.2d 418, 425 (1993), citing *Levy v. Broadway-Carmen Building Corp.*, 366 Ill. 279, 288, 8 N.E.2d 671, 676 (1937). While a circuit court may decline to confirm a foreclosure sale if the terms of the sale are unconscionable, "the foreclosure price need not match the actual or estimated value of the property." *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 8, 861 N.E.2d 1075, 1082 (2006). Mere inadequacy of price is not a sufficient reason to disturb a foreclosure sale absent evidence of mistake, fraud, or violation of duty by the officers conducting the sale. *Holtzman*, 248 Ill. App. 3d at 113-14, 618 N.E.2d at 425; *Illinois Federal Savings & Loan Ass'n v. Doering*, 162 Ill. App. 3d 768, 771-72, 516 N.E.2d 609, 611-12 (1987). "This rule is premised on the policy which provides stability and permanency to judicial sales, and on the well-established acknowledgment that property does not bring its full value at forced sales and that the price depends on many circumstances for which the debtor must expect to suffer a loss." *Holtzman*, 248 Ill. App. 3d at 114, 618 N.E.2d at 425.

¶30 In the instant case, both parties acknowledge that neither statutory nor common law provide any bright-line rules as to when a particular foreclosure sale price is so grossly inadequate as to shock the court's conscience. Rather, whether a foreclosure sale of property should be approved is determined on a case by case basis. See *Levy*, 366 Ill. at 292, 8 N.E.2d at 677 ("[e]ach case must be based upon its own facts" in determining whether gross inadequacy exists in refusing to confirm a foreclosure sale); see generally *World Savings & Loan Ass'n v. Amerus Bank*, 317 Ill. App. 3d 772,

779, 740 N.E.2d 466, 473 (2000) ("circumstances surrounding [the foreclosure sale] did not give rise to irregularities which would have required the trial court to set it aside").

¶31 We conclude that the totality of the circumstances in the case at bar does not support the circuit court's decision to disapprove the second foreclosure sale. On March 17, 2009, a first foreclosure sale was held during which First American offered a $12 million credit bid for the property as the sole bidder at the public auction. In January and February 2010, the circuit court, as a result of the parties' dispute regarding the appraised value of the property, held an evidentiary hearing to retroactively determine the value of the property *as of the date of the first foreclosure sale*. Based on our review of the record, we find that the circuit court properly examined the credibility of the two professional appraisers who provided conflicting testimony regarding the value of the property, and calculated the property's value to be $21,586,500 *as of the time of the first foreclosure sale* by using a FAR value which was derived from a comparable property. Following the circuit court's refusal to confirm the first foreclosure sale, the parties engaged in discussions with the court concerning alternative sale processes which could attract more potential buyers for the property. The circuit court found that it "had doubts that the vehicle used [a public auction conducted by the Sheriff of Cook County], although it's not contrary to Illinois law, was not sufficient for this type of property." Thereafter, the circuit court approved a proposed professional auction marketing plan prepared by Levin. However, the record shows that despite Levin's $91,000 marketing effort, which the circuit court found was conducted in a "very adequate fashion," only three bidders, including First American, participated in the second foreclosure sale of the property. The July 27, 2010 second foreclosure sale, which was held 16 months after the first foreclosure sale and after extensive

marketing efforts were conducted, generated approximately the same winning bid price as that garnered at the first foreclosure sale.

¶32 At the August 26, 2010 hearing on the motion to confirm the second foreclosure sale, the circuit court, in declining to approve the *second* foreclosure sale, held that the $11.3 million foreclosure sale price was "grossly inadequate"–thus, unconscionable–because it had already found in its prior March 2, 2010 order denying the motion to confirm the *first* foreclosure sale that a $12 million sale price was unconscionable. Specifically, the circuit court stated that "I found [$12 million] to be grossly inadequate and I still do." The circuit court further explained that the predetermined bid price of $16.5 million which it set during the May 14, 2010 hearing was not really an "upset price," but that it would "set a true upset price [of $16.5 million] today after the [second foreclosure] sale."

¶33 We find that under the particular circumstances of the instant case, the circuit court erred in refusing to confirm the *second* foreclosure sale by essentially rubber stamping its previous March 2, 2010 order refusing to confirm the *first* foreclosure sale. In denying approval of the second foreclosure sale, the circuit court stated that "I found [$12 million] to be grossly inadequate and I still do." There is no indication that the circuit court properly considered other pertinent factors, such as the extensive marketing efforts employed by Levin, the low bidder turnout despite such marketing efforts, the economic condition of the real estate market, and the remoteness in time of the appraisal valuation of the property. Here, the $21,586,500 value of the property as of the time of the first foreclosure sale, which was determined retroactively by the circuit court in March 2010, seems to have been less probative of the property's true market value than the actual winning bid price elicited

at the second foreclosure sale. See *Holtzman*, 248 Ill. App. 3d at 114, 618 N.E.2d at 425 (appraisal value of a property had less probative value than the bid price because it was more remote in time); see generally *Advanced Systems, Inc. v. Johnson*, 126 Ill. 2d 484, 498, 535 N.E.2d 797, 803 (1989) ("[t]he best indication of the fair cash value of the property is the actual sales price obtained rather than an appraisal of its worth"). We find that the $11.3 million winning bid price offered at the second foreclosure sale was determinative of what a willing buyer would pay for the property at issue, at that point in time and in that market. There was substantial worldwide marketing efforts in an attempt to attract potential buyers and to produce the maximum bid price possible under the circumstances. The record revealed no other viable buyer for the property, despite the fact that there was extensive marketing to promote the property. The parties did everything that the court required them to do. Although the Borkowskis argue that the "ability to object to the confirmation of a [foreclosure] sale would be a complete nullity" if the sale price was determinative of a property's value, we note that our finding today is applicable only to *this* particular property under the facts and circumstances presented in this case.

¶34 We note that much of the Borkowskis' argument on appeal centers on the circuit court's discretion to set an "upset price," arguing that the circuit court did not abuse its discretion in disapproving the second foreclosure sale because the sale price fell below the predetermined "upset price" of $16.5 million. We find the Borkowskis' argument to be too narrow given the facts of this case.

¶35 An "upset price" is a minimum reserved price which the circuit court has the discretion to set in advance of a foreclosure sale *below which* a foreclosure sale would not be approved. *People*

v. Schwartz, 397 Ill. 279, 284, 73 N.E.2d 279, 282 (1947); *Levy*, 366 Ill. at 290, 8 N.E.2d at 676. In the instant case, the parties dispute whether the circuit court's predetermined price of $16.5 million was an "upset price." We acknowledge that it is unclear in the record as to whether the $16.5 million predetermined price was an "upset price" within the meaning of *Schwartz* and *Levy* prior to the second foreclosure sale. However, we need not resolve these inconsistencies in the record or determine whether the circuit court's predetermined price of $16.5 million could be characterized as an "upset price." The relevant inquiry is not whether the circuit court had discretion to set an "upset price," or whether the $16.5 million figure was an "upset price" below which no sale price could be confirmed. Rather, the relevant inquiry is whether the circuit court, under the totality of the circumstances, should have confirmed the second foreclosure sale despite the failure of the sale price to reach $16.5 million. We find *Levy* instructive and conclude that under the facts and circumstances of this case, the circuit court should have confirmed the second foreclosure sale.

¶36 In *Levy*, a mortgaged property was purchased in 1926 for $135,000, but sold to the highest bidder for $50,000 at a 1933 foreclosure sale. *Levy*, 366 Ill. at 280-81, 8 N.E.2d at 672-73. The mortgagor filed objections to the report of sale following the foreclosure sale, claiming that the sale price was inadequate and asking the court to establish the value of the property and "credit that value on the amount found due" to the mortgagee. *Id.* at 281, 8 N.E.2d at 673. Both parties submitted affidavits pertaining to the value of the property. *Id.* The mortgagee submitted a value of $40,000 to $50,000 for the property, while the mortgagor submitted a value of $77,400 to $80,000 for the property. *Id.* The chancery court then denied confirmation of the foreclosure sale, and ordered a resale of the property at an upset price of $71,508.45. *Id.* at 282, 8 N.E.2d at 673. The appellate

court affirmed the chancery court's order. *Id.* In reversing the chancery court's decision, our supreme court held that mere inadequacy of price, which does not rise to the level of such gross inadequacy as to shock the court's conscience, is not sufficient reason to disapprove a foreclosure sale. *Id.* at 288, 8 N.E.2d at 676. The *Levy* court stated that a bid offer is grossly inadequate where its acceptance amounts to fraud, and found that no gross inadequacy existed in the sale price of $50,000 for the property as would warrant disapproval of the foreclosure sale. *Id.* at 289, 292, 8 N.E.2d at 676-77. The *Levy* court then reasoned that even assuming that $50,000 was an inadequate amount, "the fact that there was a depressed market for real estate would not [be] a sufficient circumstance, coupled with the supposed inadequacy in the bid, to warrant *** disapproving the [foreclosure sale]." *Id.* at 292, 8 N.E.2d at 678. It noted that the power of a court to disapprove a foreclosure sale for gross inadequacy of a bid price "exists independent of an economic depression." *Id.* The *Levy* court then held that the chancery court abused its discretion in refusing to approve the foreclosure sale at $50,000, and directed that the foreclosure sale be approved at that amount. *Id.*

¶37 Applying the *Levy* principles to this case, we find nothing in the record showing such gross inadequacy of the $11.3 million sale price as to amount to fraud. The cases cited by the Borkowskis, in support of their argument that $11.3 million was unconscionable, are distinguishable from the facts of the instant case where they do not pertain to the denial of confirmation of a foreclosure sale nor do they bear any resemblance to the facts or circumstances of the case at bar. See *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 686 N.E.2d 1202 (1997) (reviewing court reversed the circuit court's refusal to vacate its order confirming the foreclosure sale, finding that the mortgagors' opinion of the value of the parcels of land and their meritorious defense that they never intended for both

parcels of land to be pledged as security for the mortgage were sufficient to remand the matter for a hearing in accordance with the provisions of section 15-1508); *Holtzman*,248 Ill. App. 3d 105, 618 N.E.2d 418 (reviewing court reversed the circuit court's order confirming a foreclosure sale and remanded the matter for an evidentiary hearing where the mortgagors sufficiently alleged inadequacy of the sale price and at least one potential buyer was available to purchase the property at prices which would have fully satisfied the mortgage obligation for some of the apartment units at issue). As discussed, factors such as the extensive marketing efforts conducted prior to the second foreclosure sale, as acknowledged by the court, the low bidder turnout at the second foreclosure sale despite the marketing efforts, the economic condition of the real estate market, and the remoteness in time of the appraisal valuation of the property, continue to discount any notion that the $11.3 million sale price could shock the conscience so as to justify disapproval of the second foreclosure sale. Even assuming that the original $21,586,500 appraised value of the property was the most probative of the property's true market value at the time of that appraisal, given the circumstances discussed and the passage of time, we do not find the $11.3 million sale price to be so grossly inadequate as to shock the conscience. We note that it was more than 50% of the original appraised value of the property and close to 70% of the circuit court's later predetermined price of $16.5 million. Thus, we find no reason of record, beyond a mere inadequacy of price, to support the outcome reached by the circuit court. See *World Savings & Loan Ass'n*, 317 Ill. App. 3d at 780, 740 N.E.2d at 474 (mere inadequacy of price is not a sufficient reason to disturb a foreclosure sale absent evidence of mistake, fraud, or violation of duty by the officers conducting the sale); *Holtzman*, 248 Ill. App. 3d at 113-14, 618 N.E.2d at 425 (same); *Doering*, 162 Ill. App. 3d at 771-72, 516 N.E.2d

at 611-12 (same). We hold that, based on the totality of the facts, circumstances, and established case law, the circuit court abused its discretion in refusing to approve the second foreclosure sale.

¶38 Accordingly, we reverse the judgment of the circuit court of Cook County and remand the matter to the circuit court with directions to approve the second foreclosure sale. See, *e.g.*, *Levy*, 366 Ill. at 292, 8 N.E.2d at 678 (directing lower court to approve the foreclosure sale below the upset price). In light of our holding, we need not address First American's remaining arguments concerning whether the circuit court had set a deficiency judgment independent of the sale price and whether a third foreclosure sale would be futile.

¶39 Reversed and remanded with directions.