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FORECLOSURE

Can We Vacate The Sale?

When a foreclosure auction sale is conducted, it would be pleasing to think that it will simply proceed to a closing and thus a conclusion.

While no lender or servicer ever wants the situation to end in this manner, when a borrower is unable or unwilling to reinstate or satisfy a defaulted mortgage, then in most cases the matter must traverse the foreclosure process to a sale.

Sometimes, though, the servicer discovers that some mistake has been made and the question that arises from this is: can we vacate the sale?

Although the answer, of course, will depend upon the circumstances, there are three basic scenarios giving rise to this inquiry. One is where some kind of arrangement for reinstatement or settlement had been arrived at, but through confusion or miscommunication it never led to cancellation of the sale.

Assuming it was the servicer who bid at the sale where both servicer and borrower join together, courts are generally amenable to allowing the borrower to be rescued. Where, however, a third party has bid at the sale, it is far more difficult to cut off the rights of that third party merely because a mistake has been made.

Critical error

A second situation is where either the plaintiff bid or a third party was the successful bidder, but the plaintiff made a critical error (here the borrower has no role).

In either of these later instances, the courts - at least in New York - are quite unfriendly to the notion of vacating the sale. For example, in one, case, a plaintiff erroneously ceased bidding at $43,000, allowing the mortgagor's relative to become the successful bidder at $55,000.

While the relative went to a bank for 20 minutes to obtain the funds (which the referee allowed) the plaintiff's representative at the sale became aware that the correct bidding instructions were to bid from $160,000 to $200,000.

Conceding the mistake to be unfortunate, the court nevertheless ruled that the sale consummated to the successful bidder was legal and it would not be vacated (Crossland Mortgage Corp. v. Frankel, 192 A.D.2d 571, 596 N.Y.S.2d 130 (2d Dept. 1993), citing Guardian Loan Co. v. Early, 47 N.Y.2d 515, 521, 419 N.Y.S.2d 56, 392 N.e.2d 1240).

Mistaken bid

Rejection of an attempt to vacate a sale occurred in another case where the plaintiff's bid

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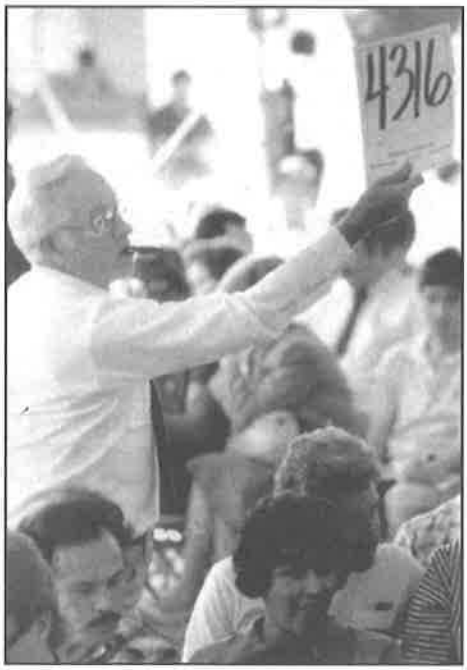
Courts are reluctant to vacate the sale of a foreclosed property at auction.



mistakenly failed to include $18,000 in advances for taxes and insurance.

Combining what was found to be a unilateral mistake with a price differential of only 3%, the court upheld the sale (Jutkowitz v. H & L Attel Realty Corp., N.Y.L.J., Aug. 12, 1994, at 26, col. 3 (Sup. Ct. Nassau Co., Lockman J.)

Although the plaintiff argued other errors which took place (technicalities relating to New York statutes), no prejudice to a substantial right of any of the parties was found, therefore rendering these further miscues to be of no significance (Jutkowitz v. H. & L Attel Realty Corp., N.Y.L.J., Aug. 12, 1994, at 26, col. 3 (Sup. Ct. Nassau Co., Lockman J.), citing Notey v. Darien Constr. Corp., 41 N.Y.2d 1055; R.P.A.PL. §231(6)).

Looking askance

Yet a third circumstance is when the plaintiff takes the property back but realizes that they simply don't want it. It could be that there is no value or that there are major municipal violations or possibly hazardous waste found at the premises. Here too, New York courts at least, look askance at an attempt to abandon the sale.

A conspicuous example (Bank of New York v. Myers, Misc.2d__, 703 N.Y.S.2d 706 (2000)) was a motion made after the sale by the foreclosing plaintiff who had taken back the property, claiming to the court that the matter had been settled.

Unfortunately, the affirmation in support of that motion also contained information to the effect that after the sale the plaintiff discovered the property had significantly diminished in value. This thwarted any hope of even nominal recovery of the mortgage debt through resale of the mortgaged property. Finding that the foreclosing plaintiff's real motive was just to escape from a bad deal, the court denied the motion. The foreclosing plaintiff had also argued that no one would be prejudiced were the sale to be set aside. However, the court disagreed, believing that the local taxing authority would be harmed and that the borrower would likewise suffer if property ownership were thereby reinstated.

In sum, whether a sale can be set aside is assuredly not a pro forma pursuit. Although courts may try to save borrowers, they tend to be less than sympathetic to lenders in a situation like this and certainly are reluctant to affect the rights of third parties who have purchased at these sales.

Care, then, is always in order.

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