Outside Counsel

Bidding a Nominal Sum At a Foreclosure Sale?

By **Bruce J. Bergman**

Can a lender safely bid a nominal sum at a foreclosure sale? Sure.

But first a foreclosing party might ask why the question needs to be asked, and then why the answer is so tersely affirmative.

One practical response to the first inquiry relates to taxes. In New York City, the transfer tax (paid by the foreclosing party unless the burden for that has been shifted by the judgment and the terms of sale) falls to the grantor—officially the referee, but as a practical matter, the foreclosing plaintiff.

In New York City that tax is based upon the amount bid, unlike the New York State component of the tax which is founded upon the amount of the mortgage, or the value of the property if less. Accordingly, it should be immediately apparent that the lower the bid price, the less is the tax for which the plaintiff will be liable.

There is then the broader issue of bidding a sum equal to or greater than the value of the property serving to eliminate the ability to pursue a deficiency judgment. To be sure, numbers in the nominal sum range will bear no practical relationship to the value of any property, but still maintaining the numbers away from any confusion supports a more orderly bidding process.

Those points noted, examining case law on the subject of a lender's nominal bid leads to an off-handed practice observation, and then an examination of more technical legal aspects.

As a practical matter, it is widely recognized that lenders can and do bid nominal sums at their foreclosure sales; therefore the issue not so often raised. (It is broached from time to time though.) This concept is tacitly acknowledged by a recent case [*Bank of New York Mellon Trust Co., N.A.* v. *Gambino*, 212 A.D.3d 756, 183 N.Y.S.3d 438 (2d Dept. 2023)].

There, the foreclosing plaintiff was the successful bidder for the oft-used nominal sum of $500 when it was owed almost $1,000,000. After the sale, a non-party objected by motion on the ground that his bid of $200,000 was not accepted by the referee. The supposedly aggrieved bidder did not even bother to protest the nominal nature of the bid—nor did the court comment upon it.

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The court denied the motion on the grounds that there simply was no proof offered to demonstrate that the $200,000 sum had been bid. This suggests that nominal sum bidding is just a generally accepted proposition.

On the more formal legal basis as mentioned, there is a principle that a very low price bid at a foreclosure sale is capable of being so deficient that it shocks the conscience of the court. In that event, the sale can be overturned. But this does not apply to the plaintiff bidding at its own foreclosure sale.

In a case where the lender purchased the mortgage premises for $1000, even though the premises were valued at $600,000, the price was held not to be inadequate because an indebtedness of $585,000 was extinguished by the foreclosure. [*Guardian Fed. Sav. & Loan Ass'n of New York City* v. *Horse-Hawk Holding Corp.*, 72 A.D.2d 737, 421 N.Y.S.2d 244 (2d Dept. 1979)].

Similarly, a $1,000 nominal bid was ruled not to be a basis to assault a foreclosure sale because the law deems the bid of a mortgagee who does not pursue a deficiency judgment to be the equivalent of the balance due upon the mortgage together with expenses of the sale. [*Champion Mortg. Co., Inc.* v. *Capalbi*, 232 A.D.2d 339, 648 N.Y.S.2d 606 (1st Dept. 1996), *citing Polish Nat'l Alliance* v. *White Eagle Hall Co.*, 98 A.D.2d 400, 407-408, 470 N.Y.S.2d 642. *See also Provident Sav. Bank, F.A.* v. *Bordes*, 244 A.D.2d 470, 664 N.Y.S.2d 103 (2d Dept. 1997)].

The same holding resulted in a case where a lender bid a nominal $150 on property worth up to $260,000. The court found no inadequacy of price because the consequence of the bid was to give the borrower full credit for the balance due on the mortgage debt, together with the expenses of the sale. [*Polish Nat'l Alliance* v. *White Eagle Hall Co.*, 98 A.D.2d 400, 407-408, 470 N.Y.S.2d 642 (2d Dept. 1983)].

Yet other factors considered when shocking inadequacy is rejected are the indebtedness due plaintiff as of the sale and the existence of senior mortgages for which the bidder at the sale would become liable. [*Chiao* v. *Poon*, 128 A.D.3d 879, 11 N.Y.S.3d 87 (2d Dept. 2015)].

So, while the opening response to the question posed in the title of this excursion was pointedly terse, it does suffice.

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