Nominal Sale Bid—The Court Stumbles (Partly)

By **Bruce J. Bergman**

It has been previously discussed in these pages that the nominal bid of a foreclosing plaintiff at a mortgage foreclosure sale is valid, not objectionable and, short of combination with other factors such as fraud or collusion, unassailable. [See "Bidding a Nominal Sum at a Foreclosure Sale, NYLJ, June 13, 2023, at 4, col. 2, reviewing *Bank of New York Mellon Trust Co., N.A.* v. *Gambino*, 202 A.D.3d 756 (2d Dept. 2023).]

While that should be absolutely clear, a not uncommon problem with adjudicating foreclosure actions is the relationship among the myriad, sometimes arcane concepts which can clash with what would otherwise seemingly be an elementary or isolated point.

Here, some of the issues which can—and do—intersect include the axiom that a very low bid price at a sale can be shocking to the conscious of the court, thus objectionable, and the delineation of sums to be credited to a borrower when computing a deficiency judgment. In short, bidding dictates may cross paths with pursuit of a deficiency judgment. This concern arises from a recent case, *Wilmington Savings Fund Society FSB v. Oppitz*, 218 A.D.3d 1104, 193 N.Y.S.3d 437 (3d Dept. 2023). There, the result of the ruling was correct, but part of the explanation for it was not, which portends future miscues.

In this case, $300,000 was due upon the mortgage in foreclosure. At the auction sale, the foreclosing plaintiff's $100 bid was the successful sum and it was struck down for that amount. This is not unusual. There are any number of benign circumstances which elicit little of no bidding at foreclosure sales, leaving the foreclosing plaintiff as the lone successful bidder—and at a minimal amount. That was the message of the previously mentioned New York Law Journal article.

The disparity between the bid amount and the sum due is often, and was in the cited case obvious, but was of no consequence because a foreclosing plaintiff's bid is deemed the equivalent of the mortgage balance.

Further in the ruling under consideration, the defaulting mortgagor claimed to be aggrieved and attacked the sale on the ground that the bid price was inadequate. The trial court properly denied the motion; nothing new there.

On appeal, the Third Department correctly held that mere inadequacy of price does not establish sufficient grounds to vacate a sale, a long-accepted precept. Moreover, the court stated that in the absence of fraud, collusion or other irregularity, the foreclosure sale would not be set aside unless the inadequacy of price is so great that it shocks the conscience of the court—another well accepted postulate (although it seems that no foreclosure sale has ever been set aside *solely* founded upon inadequacy of bid).

The court particularly noted that the mortgagor did not allege any such fraud, collusion or other irregularity, but confined its assault to the adequacy of the sale price alone.

In that regard, the court observed that the sales price might initially appear to be inadequate. But, it held as well that "where the successful bid for a sum less than the amount due is made by a mortgagee *who seeks no deficiency judgment*, the law deems the bid to be equivalent of the mortgage balance plus the sale expenses." (Italics added)

Finding that the plaintiff had indeed not sought a deficiency judgment, the court ruled the denial to vacate the sale to be correct and so affirmed.

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In the instance of a very low bid being the solitary basis for challenge, because the plaintiff's nominal bid is as a matter of law considered to be the equivalent of the full sum due, any discussion should end there. Nonetheless the court added the additional factor of a deficiency not being pursued. Such addition would advise that if the foreclosing plaintiff *did* seek a deficiency judgment, the pursuit would expose the nominal bid (here $100) to attack, with possible vacatur of the sale resulting. But it is not so and it is not something to consider.

This necessitates a nutshell mention of the deficiency standards pursuant to the controlling RPAPL §1371. There presented (and as supported by a plethora of case law) is the rule that in computing a deficiency the property owner is a afforded the benefit of the higher of the value of the property on the date of the sale or the amount bid. That is to say, the deficiency formula takes the amount due pursuant to the judgment of foreclosure and sale and subtracts from that the greater of the value of the two categories recited.

The resultant sum (if any) is the quantum of the deficiency. Therefore, and as applicable to the recent case being reviewed, the statutory formula in calculating the deficiency would discard the nominal bid and compute only the actual value of the property. Hence, if the value of the property were, for example, $280,000, then the deficiency would be $20,000 because RPAPL §1371 requires that such be the equation. The calculation cannot be $300,000 less $100.

Therefore, that a plaintiff bids a nominal sum has no affect upon pursuit of and assessment of a deficiency; RPAPL §1371 attends to that. Adding to judicial determination upholding a plaintiff's nominal bid on condition of a plaintiff electing not to seek a deficiency errs.

This court understandably cited a chain of prior cases as the source for such language. If the prior cases were incorrect regarding this aspect, citing them anew does not render them correct. Perhaps most compelling, the continuing citation of this inaccurate and unsupportable "principle" will only serve to foster disarray when a nominal bidding plaintiff does in actuality move for a deficiency. Courts may wish to take a fresh look at this heretofore unnoticed aberration.

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