

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010160

03/26/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

MUTUAL OF OMAHA BANK

MARY GRACE MCNEAR

v.

QUEEN CREEK PROFESSIONAL VILLAGE
DEVELOPMENT L C, et al.

DALE S ZEITLIN

UNDER ADVISEMENT RULING

The Court took under advisement the matter of the Trial to the Bench regarding the fair market value of the property which is the subject matter of this case.

Neither party has specifically requested prior to trial, findings of fact and conclusions of law pursuant to Rule 52, ARCP. Nevertheless, the Court makes the findings below in aid of the ultimate decision on the matter of fair market value as that term is defined under A.R.S. § 33-814.A.

The Court has also received Defendant's Motion to Strike Plaintiff's Closing Argument and the Response thereto. The Court specifically ordered the arguments to be filed simultaneously by January 25, 2012. Plaintiff did not file her written closing until January 31, 2012. Defendant argues that the argument should be stricken as the Plaintiff has had the benefit of his argument while he has not had the benefit of hers. Alternatively Defendant argues he should be allowed to file a rebuttal brief. The Court finds that a rebuttal brief is not necessary or warranted as the evidence is not difficult to synthesize. Nevertheless, the record fails to state any good cause why the brief was filed late. Plaintiff argues that it attempted to obtain a stipulation from counsel to an extension. No one obtained any prior relief from the Court's Order to simultaneously file the arguments.

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IT IS ORDERED the Motion to Strike is granted. The Court will rule based on its own notes and recollection of the evidence and Defendant's closing argument.

Under § 33-814.A., any deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the Court, less the fair market value of the trust property on the date of the sale as determined by the Court or the sale price at the trustee's sale, whichever is higher. The fair market value shall be determined by the Court at a priority hearing upon such evidence as the Court may allow. The Court shall issue an order crediting the amount due on the judgment with the greater of the sales price or the fair market value of the real property.

Fair market value means the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress.

The issue in this case is for the Court to reconcile the evidence wherein the Plaintiff offers evidence that the fair market value is \$95 per square foot while the Defendant offers evidence that the value is \$170 per square foot.

At the time of the Trustee's Sale the amount owed by the Defendant to the Plaintiff was \$1,220,104.39, an amount stipulated to by the parties.

The parties note that the Deed of Trust covered four separate properties located in a single office condominium complex in the southwest valley town of Queen Creek. The Plaintiff's expert adjusted the value of the properties downward, that is, giving it a lesser value, under a bulk sale analysis. The Defendant did not adjust the value downward based on a bulk sales analysis. The Plaintiff reasoned that the adjustment was required by the Uniform Standards of Professional Appraisal Practice, Standard 1-4(e). That standard states that when analyzing an assemblage of various estates or component parts of a property an appraiser must analyze the effect on value if any of the assemblage. The Court is not convinced by the testimony of the Plaintiff's expert that it is appropriate to analyze the value of the subject properties in bulk.

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As noted during the testimony, the lender is not in the business of owning property. It lends money for others to buy, develop and sell property. While it may be in the interest of a lender to sell properties of these types in bulk to get them off the lender's books it is not necessarily reflective of the fair market value of the various properties. In this regard the Court finds the Defendant's expert testimony compelling. He noted that the highest and best use of the properties in question is not as a single unit; rather each unit would be sold separately to separate investors and because of that within a relatively shorter period of time than selling the units in bulk. The Court believes the bulk sale analysis and resulting diminution in valuation is not reasonable under the circumstances.

The Court has also reviewed the evidence regarding the comparable sales. It is noted right away that the parties dispute whether properties in close proximity to a hospital would bring a higher value than those, like the property at bar, which are not close to a hospital. The record contains certain statements which are technically hearsay that some doctors testified that the proximity to a hospital was not an issue for them. Whether or not a particular doctor felt location made a difference, it is common knowledge that "location" is always a factor in valuing any property. It would strain credulity to believe that proximity to a hospital for certain doctors, such as surgeons, is desirable and bring greater value. The Court is not convinced that the comparables in close proximity to the hospital should not be an adjusted because the subject properties are not in close proximity to a hospital. The Court also notes that some of the properties included in the Plaintiff's comparables appear to be distressed. That is, the motivation of the seller is high enough to unreasonably depress the fair market value. The Court is not convinced the adjustment for those properties accurately reflects the true value of the properties.

Based on the matter presented, taking into account the credibility of the witnesses and the interests of the parties, the Court finds the fair market value of the subject properties to be based on the value asserted by the Defendant adjusted downward ten percent (10%) for proximity to the hospital and further adjusted downward by eight percent (8%) due to market conditions existing at the time of the sale. The Court believes Plaintiff's bulk sale adjustment is not appropriate. The resulting value is \$140.36 per square foot as of the date of the sale. The total value of the properties is \$1,222,254.80. The sale price was \$685,000.00. The amount owed was \$1,220,104.39. Accordingly, any deficiency judgment against the Defendant is credited with the greater of the sales price or, as in this case, \$1,222,254.80, the fair market value. The result is there is no deficiency judgment.

This under advisement ruling is all in accordance with the formal written Order signed by the Court on March 26, 2012 and filed (entered) by the Clerk on March 27, 2012.

FILED: Exhibit Worksheet

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ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.