

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000044

03/15/2011

HONORABLE JEANNE GARCIA

CLERK OF THE COURT
M. Hovorka
Deputy

PACIFIC WESTERN BANK, et al.

BENJAMIN REEVES

v.

DESERT SUNSHINE L L C, et al.

MICHAEL R SCHEURICH

JOHN S CRAIGER

RULING

The court, having taken the following Motions under advisement following oral argument, having considered subsequent briefing, and having considered the relevant legal authority, now rules on the pending Motions as follows.

I. DEFENDANT'S APPLICATION FOR A DETERMINATION OF FAIR MARKET VALUE

Plaintiff objects to the Application on the basis that Defendants waived their statutory right to a credit for the fair market value by specific language in the parties Agreement.¹ Defendants note that the waiver is limited "to the extent permitted by law or public policy" and asserts that the waiver is not valid because Arizona's public policy is to protect debtors. The court agrees with Defendants that the strong public policy supporting the legislative scheme of protections to debtors outweighs the public policy of enforcing contracts according to their terms. The potential for the creditor to obtain a windfall by purchasing the property at less than market value at foreclosure and then obtain an inflated deficiency from the debtor or guarantor²

¹ "If Lender forecloses . . . the amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price."

² *First Interstate Bank v. Tatum & Bell Ctr. Assocs.*, 170 Ariz. 99, 103, 821 P.2d 1384, 1388 (App. 1991).

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is the same whether the debtor is an individual or a business entity. The Defendants are entitled to a hearing to determine the fair market value as provided in A.R.S. §33-814.

IT IS ORDERED granting Defendants' Application.

Defendants argue that the "sham guaranty" principle, based on California law, should apply to protect Defendant Guarantor, Desert Sunshine, LLC, such that it too is entitled to a fair market value hearing. Plaintiff asserts that Arizona has not adopted this principle and urges this court to refrain from doing so. The court need not and does not rely on this principle to grant Defendants' request for a fair market value hearing.

II. BURDEN OF PROOF

The parties dispute who bears the burden of proof to establish value at the fair market value hearing. The court agrees with Defendants that in the typical fair market value hearing, plaintiff presents its evidence followed by defendant. However, the court cannot ignore the following language found in the deficiency case of *Life Investors Ins. Co. of America v. Horizon Resources Bethany, Ltd*, 182 Ariz. 529, 533, 898 P.2d 478, 482 (App. 1995):

[I]n actuality, Horizon [debtor] had the burden of going forward with the evidence, leaving it to the jury [factfinder] to determine value from all the evidence presented.

Therefore,

IT IS ORDERED that Plaintiff shall proceed first with the disclosure of its expert report as well as with its presentation of evidence at the fair market value hearing.³

III. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff seeks judgment for a deficiency following a trustee's sale of an apartment complex. The court agrees with Defendants that because the parties disputed the value of the property, a material fact, summary judgment is improper. However, some material facts are not disputed.

THE COURT FINDS, pursuant to Rule 56(d), Ariz. R. Civ. P., as follows:

³ This ruling should not be construed as a finding that Defendants delayed its burden and are therefore foreclosed from now providing the appraisal because the issue was fairly debated.

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1. The note and guarantees are valid and enforceable contracts.
2. The Defendants breached those contracts by failing to pay all amounts due and owing.
3. As of the date of the trustee sale, June 21, 2010, \$8,599,170.16 was due and owing under the note.
4. Plaintiff, the successful bidder at the trustee sale, purchased the property for a credit bid of \$3,307,863.00.

IV. DEFENDANTS' APPLICATION FOR RELIEF PURSUANT TO RULE 56(f):

Defendants request an extension of time to obtain an expert's appraisal. Plaintiff objects on the basis that the Defendants have delayed obtaining an appraisal and because Defendants failed to support their request with an affidavit. It is true that Defendants' Application is not accompanied with an affidavit. However, this deficiency, standing alone, is insufficient to defeat the request. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 333, 173 P.2d 1031, 1034 (App. 2008). Moreover, the essential information is provided in the Application for Relief. The court notes that Plaintiff has not challenged the fact that settlement discussions warranted the deferral of retention of experts.

IT IS ORDERED granting Defendants' Application because the court is unable to find that Defendants unreasonably delayed retaining an expert appraiser. Additionally, the court cannot find any prejudice to Plaintiff in allowing Defendants to retain an expert witness to opine on the value of the property.

V. DEFENDANTS' SECOND APPLICATION FOR RELIEF PURSUANT TO RULE 56(f)

On March 11, 2011, Defendants filed a second Application for Relief Pursuant to Rule 56(f). Given the court's ruling above (granting Defendants' first Application without the need to resolve whether the "sham guaranty" applies), it deems the second Application unnecessary. Therefore, Plaintiffs need not file any response.

VI. PLAINTIFF'S MOTION TO STRIKE

Plaintiff seeks an order striking Paragraph 19 of Defendant Sepic's Declaration (relating her opinion of value) as well as the Letter of Intent. An owner may opine on the value of the property owned. *Town of Paradise Valley v. Laughlin* 174 Ariz. 484, 486, 851 P.2d 109, 111 (App. 1992). Therefore,

IT IS ORDERED denying Plaintiff's Motion to Strike the Sepic Declaration.

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With regard to the letter of intent,

IT IS ORDERED staying a ruling pending the receipt of evidence demonstrating that the letter of intent was a bona fide offer. *State v. McDonald*, 88 Ariz. 1, 10, 352 P.2d 343, 349 (1960).

VII. STATUS CONFERENCE

To facilitate the re-setting of the fair market value hearing and to set deadlines for disclosure and discovery,

IT IS ORDERED setting a Telephonic Status Conference for **April 6, 2011 at 11:30 a.m. (time allotted: 15 minutes)** in this Division. Counsel for Plaintiff shall initiate the conference call to this Division at 602-372-0610. **The parties and counsel shall not be permitted to participate in conferences via cell phones or speakerphones.**

NOTE: All court proceedings are recorded by audio method and not by a court reporter. Any party may request the presence of a court reporter by calling this Division five (5) judicial days before the scheduled hearing.

DUE TO JUDICIAL ROTATIONS, EFFECTIVE JUNE 27, 2011, THIS CASE WILL BE ASSIGNED TO THE HONORABLE SALLY S. DUNCAN, 602-506-9042 (LOCATION PENDING).

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.