

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-017833

06/06/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

NATIONAL BANK OF KANSAS CITY

LANCE R BROBERG

v.

GOODYEAR NORTH L L C, et al.

THOMAS E LITTLER

SEAN K MCELENNEY

UNDER ADVISEMENT RULING

This matter is under advisement following a fair market value trial. The court makes the following findings and conclusions.

1. The stipulated facts in the pretrial statement are adopted and incorporated by reference.
2. This case involves two properties on which were deeds of trust securing promissory notes.
3. One property consists of approximately 103 acres near Van Buren Street and Bullard Avenue in Goodyear, Arizona. The parties call this property "Goodyear North."
4. The other consists of approximately 99 acres near Yuma Road and Bullard Avenue in Goodyear, Arizona. The parties call this property "Goodyear South."
5. After a default, Plaintiff National Bank of Kansas City ("NBKC") conducted trustee's sales on the two properties.

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6. The trustee's sale on Goodyear North occurred on June 30, 2011.
7. The trustee's sale on Goodyear South occurred on May 17, 2011.
8. NBKC (or its affiliates) was the successful bidder at the trustee's sale.
9. The amount owing on each property as of the trustee's sale exceeded the sale price.
10. NBKC sued Defendants to recover the deficiency.
11. Defendants exercised their right to a judicial determination of fair market value.

12. The standard for determining "fair market value," as set forth in A.R.S. § 33-814(A), is as follows: "[F]air 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."

13. Each side presented a well-supported appraisal of the properties. NBKC's expert, Mr. Glover, valued the properties at \$1.00 per square foot. Defendants' expert, Mr. Turner, valued the properties at \$1.40 per square foot.

14. The market for land in the West Valley in 2011 was difficult for sellers. Demand was low, prices had come down significantly from the highs of the mid-2000's, and there were relatively few sales.

15. Both parties' experts used the "sales comparison approach" to appraise the properties. Per that approach, each expert found comparable sales of other property, made adjustments to those sales to make them more comparable, and then evaluated and weighed the price-per-foot for the comparable sales to reach a price-per-foot for Goodyear North and Goodyear South.

16. This approach to valuation requires a substantial exercise of subjective judgment on the part of the appraiser. An expert's selection of comparable properties, the adjustments the expert makes, and the weighing of adjusted comparable sales prices to determine a price-per-foot value for these properties all require an expert to make judgments based on his or her experience, training, market research and discussions with people in the real estate industry.

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17. This exercise is especially difficult in a market where, as here, there are relatively few sales of comparable property.

18. The court finds that Mr. Glover's appraisal is more credible than Mr. Turner's for several reasons.

19. First, Mr. Glover's determination that the properties' highest and best use is "a speculative holding with potential for commerce (commercial/industrial) development" is credible. This is not much different from what Mr. Turner opined, although he did not use the word "speculative." The most likely buyer for this kind of property in mid-2011 would be someone looking to hold for future sale or development.

20. Second, Mr. Glover more credibly assessed how soft the demand for this kind of property was in mid-2011.

21. In particular, the following statement is credible: "[T]here is a general anticipation for a large number of foreclosed commercial properties that will likely be brought to the market in the next year or so and the increased supply will likely keep price levels low and potentially drive them down further."

22. Third, and most significantly, evidence extrinsic to the appraisals supports Mr. Glover's valuation. The court uses the term "extrinsic" here not in the parole evidence sense of the word, but to refer to evidence of value independent of the appraisal. The court admitted and the parties devoted a substantial amount of time to this evidence, which the court admitted because it is relevant to assist the court in assessing the credibility of the appraisals. Especially where the appraisals involve the subjective judgments of experts, it is relevant and helpful to measure those judgments against other, independent indicators of value.

23. One item of such evidence consisted of correspondence and "letters of intent" to Defendants before the trustee's sale, and their negotiations with third parties interested in the properties before the trustee's sale.

24. This evidence, while of some relevance, is not very persuasive. Despite extensive marketing efforts, Defendants did not receive any firm offer to purchase the properties for a discernible price. Expressions of interest or conditional offers say more about the potential buyer's negotiation posture than they do about the properties' fair market value.

25. Another category of evidence consisted of estimates of value NBKC obtained from brokers Cassidy/Turley and Lee & Associates. These estimates are of limited value because they were generated for purposes of persuading NBKC to use the brokers' services.

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26. Another item of evidence consisted of a “Consulting Report” generated by Zimmer and Associates. Although that report uses the term “true liquidation price,” its description of that term as involving a sale in 12 months or less is consistent with both Mr. Glover’s and Mr. Turner’s use of the term “fair market value.”

27. The Zimmer and Associates report determined the value to be \$1.00 per square foot, which is consistent with Mr. Glover’s appraisal. Although the Zimmer and Associates report is not itself an appraisal, its independence from Mr. Glover’s appraisal lends credence to it.

28. Both Defendants’ representatives testified regarding the value of their properties. These estimates were completely subjective and so the court does not give them much weight.

29. Nate Nathan, a broker who worked for both Defendants and Plaintiff in marketing the property, also testified regarding the properties’ value. Mr. Nathan’s testimony was somewhat more credible than Defendants’ estimates, since Mr. Nathan does not have a vested interest in the result of this matter.

30. The wide variation in estimates of the value of these properties illustrates just how variable the market for this kind of property was in mid-2011.

31. The final item of “extrinsic” evidence the court has considered is the ultimate sale of the properties to Seldin Real Estate, Inc. for \$1.05 per square foot. This arm’s length transaction in October 2011 is strong evidence of the properties’ value in May and June 2011, and strongly supports Mr. Glover’s appraisal.

32. The Seldin sale was not a below market transaction to allow the properties to be quickly disposed. Rather, NBKC (and institutions affiliated with it) were motivated to obtain the best price for the properties within a reasonable period of time.

33. Defendants have not shown that continuing to market the properties in late 2011 and 2012 would have generated a better offer than was received from Seldin.

34. Moreover, the Seldin sale was a competitive sale because there were two buyers seriously interested in it. It is therefore an even better indicator of the fair market value than a sale involving simply a negotiation between two parties.

35. The court has considered and weighed all the evidence presented. Some of the evidence supports Mr. Turner’s appraisal and some of it supports Mr. Glover’s appraisal. But on

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balance, Mr. Glover's appraisal is closer to the property's fair market value as defined in A.R.S. § 33-814 than Mr. Turner's.

36. In light of the Seldin sale, however, the court will not adopt Mr. Glover's appraised value of \$1.00 per square foot. Rather, an upward adjustment is required. The properties were not worth less in May and June 2011 than they were in October 2011.

37. The court finds the fair market value of the Goodyear North and Goodyear South properties as of the dates of their trustee's sales to be \$1.05 per square foot.

No order is presently required based on these findings. So that this matter may be brought to resolution,

IT IS ORDERED that any responses to the pending motions for summary judgment be filed on or before **July 15, 2013**.

IT IS FURTHER ORDERED that any replies be filed on or before **August 9, 2013**, after which the court will decide whether to set oral argument.

FILED: Exhibit Worksheet

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.