

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2009-015320

11/29/2010

HONORABLE JEANNE GARCIA

CLERK OF THE COURT  
M. Hovorka  
Deputy

NORTHERN TRUST N A

WILLIAM J SIMON

v.

BARNEY F KOGEN, et al.

BRIAN JOSEPH PALMER

**RULING**

The court took Plaintiff's Motion for Summary Judgment under advisement following oral argument. Having considered the briefing, record, relevant legal authority, and arguments, the court grants Plaintiff's Motion for the reasons set forth below.

This is an action to recover the deficiency amount on a promissory note following a trustee's sale. Following default for lack of payment, Plaintiff set a trustee sale for November 19, 2008. Before the sale took place, the entity owned by Defendants filed bankruptcy. The stay was lifted and the trustee sale took place on February 17, 2009. Defendants' entity then filed an adversary proceeding in the Bankruptcy Court, alleging that the credit bid of \$496,706.11 was grossly inadequate given that the property was valued at \$3,400,000. The Bankruptcy Court granted Plaintiff's Summary Judgment on this issue and entered final judgment for Plaintiff. Plaintiff now seeks judgment for liability and damages in the amount of \$1,668,714.46 on the basis that Defendants are bound by the Bankruptcy Court's findings. Defendants oppose summary judgment on the basis that they are entitled to a hearing under A.R.S. §33-814. They also assert that they are entitled to discovery to challenge Plaintiff's appraisal and provide their own appraisal.

Summary judgment is appropriate if the moving party demonstrates that there is no

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genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). This is a case where the facts are not in material dispute and calls for legal conclusions to resolve the Motion. Thus, the key issue is whether Plaintiff is entitled to judgment as a matter of law.

The court agrees with Defendants that the determination of fair market value may not be the same as a determination that the bid is not grossly inadequate pursuant to (*In re Krohn*, 203 Ariz. 205, 52 P.3d 774 (2002)). However, it agrees with Plaintiff that Defendants are barred from litigating the matter in this court because they should have addressed the fair market value in the Bankruptcy proceedings.

Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. (citation omitted) this doctrine binds the same party standing in the same capacity in subsequent litigation on the same cause of action, not only upon facts actually litigated but also upon those points which might have been litigated. (citation omitted)

*Gilbert v. Bd. of Medical Examiners*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987).

Gross inadequacy is generally defined by the sales price being less than 20% of fair market value. *In re Krohn*, 203 Ariz. at 212, 52 P.3d at 781. Thus, fair market value is a necessary part of whether there is gross inadequacy of a bid. Defendants had their opportunity to address the fair market value in the Bankruptcy proceedings. Res judicata prevents them from attempting to do so now. Therefore,

**IT IS ORDERED** granting Plaintiff's Motion for Summary Judgment. Pursuant to A.R.S. §12-341.01, Plaintiff is entitled to an award of attorneys' fees and costs.

**IT IS FURTHER ORDERED** that Plaintiff lodge a form of judgment and file an affidavit of attorneys' fees no later than **December 23, 2010**.

The court also took Defendant's Rule 56(f) Motion under advisement following oral argument. In light of the ruling above,

**IT IS ORDERED** denying Defendant's Rule 56(f) Motion.

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