

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-023591

02/15/2011

HONORABLE EMMET RONAN

CLERK OF THE COURT
M. Postert
Deputy

BUCKEYE RECOVERY ACQUISITION L L C CHRISTOPHER M MCNICHOL

v.

J P, E V B, L L C, et al.

ROBERT D MITCHELL

MINUTE ENTRY

The issue before the Court is whether there is a deficiency under A.R.S. 33-814 after the Trustee Sale at issue, and, if so, what is the total amount of the deficiency. The Court incorporates in its final ruling the parties' stipulations of material fact and law that are set forth in paragraph (2) of their Joint Pretrial Memorandum. The Court has considered the testimony and evidence presented at the evidentiary hearing held on October 18th, November 18th and December 17th. The Court has also considered the arguments of counsel.

Under A.R.S. 33-814, a deficiency is calculated by subtracting either the Plaintiff's credit bid at the Trustee Sale or the fair market value of the property as of the date of the sale (which ever is higher) from the total indebtedness. The definition of "fair market value" is set forth in A.R.S. 33-814(A). Plaintiff acquired the property with a credit bid of \$11,000,000 at the Trustee Sale on July 1, 2008. The total indebtedness at the time of the sale was \$19,363,103.97. The Court must determine the fair market value of the property as of July 1, 2008.

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Plaintiff asks the Court to find that the fair market value as of July 1, 2008 was \$13,375,000 resulting in a deficiency of \$5,988,103.97. Defendant argues that the fair market value of the property as of that date was \$18,840,000 which would create a deficiency of \$523,103.97. Each party presented expert testimony and an appraisal report in support of their respective positions.

Both experts used the Sales Comparison Approach and the Income Approach in arriving at their opinions. Plaintiff's expert gave all the weight in his appraisal to the Sales Comparison Approach because he felt it was the only reliable market value indicator under market conditions as of the effective value date of July 1, 2008. Defendant's expert gave consideration to both approaches but "overall" placed more weight on the Income Capitalization Approach in reaching his opinion. Inherent in all approaches to the attempt to determine the fair market value of real property are numerous assumptions about revenues, absorption, construction costs, holding costs, yield costs, etc. The process becomes even more difficult in a volatile, largely depressed market like we have experienced the past few years. However, the Court believes that Plaintiff's report does not give appropriate weight to the income approach in light of the history and strength of the real estate market in the Phoenix area. Defendant's reconciliation of the Sales and Income Approaches is a more accurate reflection of fair market value than Plaintiff's total reliance on the Sales Approach. The Court also believes that Defendant's Sales Comparison Approach more accurately reflects fair market value than the Sales Comparison Approach used by Plaintiff.

The Court also believes that some value should be attached to the nine (9) model homes. Plaintiff's expert opinion that a new developer would not want to use the models makes some sense. However, there are other options available to a developer other than simply tearing them down. Accordingly the Court feels the 9 model homes do have value to a potential purchaser.

The Court has given consideration to the opinions of both experts in the case. The Court has also considered that Defendant's expert's opinion as to value was revised upward after conversations with Defendant. In reading and evaluating the expert's reports, the Court has also considered the very speculative nature of any fair market value determination and the fact that reasonable minds (particularly experts) can differ about what weight you give to various factors as you go through the process. The Court's determination of fair market value below is its best effort to use its common sense and apply the information in the experts' reports to the crystal ball that is now the Arizona Real Estate Market.

THE COURT FINDS the fair market value as of 7/01/2008 of the nine (9) model homes to be \$750,000.

THE COURT FURTHER FINDS the fair market value as of 7/01/2008 of the 526 finished lots to be \$16,000,000.

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THE COURT FURTHER FINDS the deficiency owed by Defendant to be \$2,613,103.97.

IT IS ORDERED that Plaintiff shall file a proposed form of judgment for the Court's review.

IT IS FURTHER ORDERED that each party shall bear their own attorney's fees and costs in this matter.

FILED: Exhibit Worksheet

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.