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COURT OF APPEALS

STATE OF NEW YORK

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FLUSHING SAVINGS BANK, FSB,

Appellant,

-against-

No. 84

BITAR,

Respondent.

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Judicial Institute  
84 North Broadway  
White Plains, New York 10603  
April 30, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 84, Flushing Savings  
2 Bank.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. KRETZING: Two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, go  
7 ahead.

8 MS. KRETZING: May it please the court I'm  
9 Laurel Kretzing representing Flushing Savings Bank.  
10 The courts below erred in failing to find a market  
11 value for the property and dismissing the - - -

12 CHIEF JUDGE LIPPMAN: What did - - - what  
13 did you do, counsel, though? What did the bank do -  
14 - -

15 MS. KRETZING: The bank - - -

16 CHIEF JUDGE LIPPMAN: - - - in terms of  
17 establishing that value?

18 MS. KRETZING: The bank timely moved for  
19 deficiency judgment motion pursuant 30 - - - 1371.2  
20 and submitted an affidavit on personal knowledge of a  
21 licensed real estate appraisal.

22 CHIEF JUDGE LIPPMAN: The licensed - - -  
23 the - - - the - - - that affidavit was not too  
24 detailed in nature, to say the least, right?

25 MS. KRETZING: It was not too detailed,

1 Your Honor, but it was detailed enough. It was made  
2 on personal knowledge. He's - - -

3 JUDGE RIVERA: But - - - but if a judge  
4 wanted to assess this, what - - - what would the  
5 judge be looking at? Because all it says is  
6 reviewing comparable sales, examination of the  
7 neighborhood, market and general economic trends,  
8 comparable rentals, et cetera, et cetera, but there's  
9 no attachments. There's nothing to say the years  
10 that were actually reviewed. What - - - what would  
11 the judge have to be able to assess it?

12 MS. KRETZING: If the judge wanted to look  
13 into the affidavit further, if he wanted to evaluate  
14 how the expert arrived at the opinion, the judge,  
15 under the statute, is entitled to direct that proof  
16 be brought to her.

17 JUDGE RIVERA: Why isn't that your burden  
18 to provide that information?

19 MS. KRETZING: It is my burden to  
20 ultimately provide it. The - - - the statute says  
21 "upon affidavit or such other proof as the court  
22 shall direct".

23 JUDGE READ: So you're saying if the aff -  
24 - - if the judge thinks the affidavit is inadequate  
25 he has an obligation to have a hearing or to do

1 something else to come up with the value?

2 MS. KRETZING: That's correct, because the  
3 statute imposes - - -

4 JUDGE READ: But you have to prove the  
5 value to the judge.

6 MS. KRETZING: Ultimately, of course, I  
7 have to prove the value. But the question here is  
8 the judge, based on the papers that we submitted,  
9 apparently determined that she could not determine  
10 market value.

11 JUDGE RIVERA: Well, you got a burden of  
12 production and a burden of persuasion.

13 MS. KRETZING: That - - -

14 JUDGE RIVERA: I - - - I appreciate your  
15 comment about the burden of persuasion. I'm still  
16 not sure how you think you've met your burden of  
17 production by simply saying - - - having your expert  
18 say well, I looked at a bunch of things, and I - - -  
19 I think this is the market value without giving the  
20 judge something by which to assess this.

21 MS. KRETZING: Well, as the case law has  
22 developed over the years, this kind of affidavit has  
23 been found over and over and over again to be  
24 sufficient.

25 JUDGE PIGOTT: Yeah. And it might - - - it

1           might need changing. A - - - a - - - a lot of the -  
2           - - a lot of cases where there's a foreclosure, you,  
3           the bank, bid it in for the value of your mortgage  
4           and everybody goes home. And what that means is that  
5           the - - - that you ran the risk when you loaned the  
6           money to the homeowner that the home was going to be  
7           of a value that you're willing to - - - to - - - to  
8           loan. So they put their down payment in. You give  
9           them a loan for what you think is the fair market  
10          value.

11                       Now, for some reason these values change  
12          and you say, well, we want our money back plus. And  
13          - - - and - - - and so all of a sudden, now, these  
14          appraisers are kind of important. And I think the  
15          point that Judge Rivera's getting at is shouldn't - -  
16          - shouldn't we be really, really sure that - - - that  
17          this is a valid amount considering the fact that  
18          you're not only taking the house but you're taking  
19          more money beyond that.

20                       MS. KRETZING: Well, I just want to point  
21          out that this is not a house. It's a commercial  
22          property. But the appraiser swore in his affidavit  
23          that he went to the property, that he looked at it  
24          inside and out. He described his twenty-two years of  
25          experience. He said he was familiar with the values

1 in Kings County.

2 CHIEF JUDGE LIPPMAN: Yeah. But doesn't  
3 there have to be something offered that buttresses  
4 what, by any standard, is a relatively spare  
5 affidavit? Doesn't - - - if you're not going to do  
6 it, doesn't the judge do it? Somebody has to provide  
7 some protection here as to the value of this  
8 property.

9 MS. KRETZING: That's precisely the point,  
10 Judge. The judge should direct what it is - - -

11 CHIEF JUDGE LIPPMAN: So the judge didn't,  
12 and what you did is okay, and that's the end of the  
13 story?

14 MS. KRETZING: It's - - - similar  
15 affidavits on an unopposed application for deficiency  
16 judgment have routinely been found by the courts to  
17 be sufficient. But if - - -

18 JUDGE ABDUS-SALAAM: Counsel, why do you  
19 say it was unopposed? I thought there was some  
20 opposition in the Supreme Court.

21 MS. KRETZING: No. Mr. Bitar never opposed  
22 either the foreclosure sale or the deficiency  
23 judgment so that there was no - - - there was no  
24 opposing affidavit and thus the court didn't, I  
25 guess, get into the nitty-gritty of what the issues

1           were.

2                   JUDGE FAHEY: Well, but - - -

3                   JUDGE RIVERA: So - - -

4                   JUDGE FAHEY: I'm sorry. Go - - - go

5           ahead. Finish your point.

6                   JUDGE RIVERA: Let - - - let me - - - let -

7           - - let me ask - - - let me ask you this, counsel.

8           So let - - - let's say we - - - we agree with your

9           position. The judge gets this. Let's say the judge

10          says, you know what, Court of Appeals tells me this

11          is all they have to do. I'm looking at it. I'm not

12          persuaded it's 475. I'm persuaded it's 300,000.

13          What's your recourse on that?

14                   MS. KRETZING: Had the judge - - -

15                   JUDGE RIVERA: If you say it's purely

16          discretionary for the judge, the judge looks at it

17          and says, okay, this is enough, I don't think it's

18          475; I think it's 300.

19                   MS. KRETZING: My recourse, of course,

20          would be to appeal.

21                   JUDGE RIVERA: And - - - and what will that

22          Appellate Court be looking at?

23                   MS. KRETZING: The - - - the Appellate

24          Court would look exactly at what the record was.

25                   JUDGE RIVERA: And that would be this piece

1 of paper?

2 MS. KRETZING: That's correct.

3 JUDGE RIVERA: And - - - and what will  
4 happen after that?

5 MS. KRETZING: The Appellate - - -

6 JUDGE RIVERA: The court will say the judge  
7 didn't have a basis by which to decide 300,000,  
8 because there's nothing here.

9 MS. KRETZING: The - - -

10 JUDGE RIVERA: Aren't we back to your  
11 burden of production?

12 MS. KRETZING: I think we're back to the  
13 burden of production which, according to the statute,  
14 is supplemented by whatever the judge directs me to  
15 put before the court in order for the court to  
16 determine the reasonable market value because that's  
17 what the court, by statute, is directed to determine.  
18 This is a - - - a - - -

19 JUDGE RIVERA: Don't you think the court  
20 has to have something to work with other than this?

21 MS. KRETZING: I think that the affidavit  
22 that was submitted was sufficient. Could we - - -

23 JUDGE STEIN: What - - - what if - - - what  
24 if the court didn't think so and asked for more  
25 information and that information still didn't satisfy

1 the court that it was sufficient? Or - - - or - - -  
2 or no further information was provided or - - - or  
3 whatever. How many times does the court have to go  
4 back until - - - and how many chances does the - - -  
5 the - - - the bank get before it's okay for the court  
6 to say I agree or I don't agree?

7 MS. KRETZING: I think that once the court  
8 directs you. For instance, if the court in this case  
9 had directed us to come back to court with this  
10 appraisal and have a hearing, if at that hearing the  
11 court was not persuaded that the value of the  
12 property was 475 and the court then set the 300,000-  
13 dollar value, that would be - - -

14 JUDGE STEIN: So - - - so now in - - - in  
15 each of these cases if - - - if the bank is routinely  
16 giving a conclusory affidavit, so in every case, now,  
17 the - - - the court has to order a hearing, so now in  
18 all of these fore - - - def - - - deficiency judgment  
19 there's always going to be a hearing, is - - - is - -  
20 - do you see a problem with that?

21 MS. KRETZING: I - - - I don't see a  
22 problem with that because the - - - the converse of  
23 that is if the court finds the affidavit that's  
24 sufficient, there is no hearing. If, on the other  
25 hand, the court in its discretion needs more, then

1 the court - - -

2 CHIEF JUDGE LIPPMAN: So - - - so if the  
3 court - - -

4 MS. KRETZING: - - - will have the hearing.

5 CHIEF JUDGE LIPPMAN: If the court doesn't  
6 ask for more, then your affidavit, whether it's  
7 sufficient or insufficient, is sufficient in your  
8 mind?

9 MS. KRETZING: As long as the court finds  
10 market value.

11 JUDGE RIVERA: Well, I think your point is  
12 that this kind of bare bones affidavit without  
13 providing any of the underlying information that  
14 really is the - - - the database by which this expert  
15 comes to this conclusion satisfies the burden of  
16 production.

17 The burden of persuasion, however, you're  
18 saying that requires the hearing. If the judge  
19 really thinks, well, I - - - I see how you got to the  
20 475. I don't know how a judge would say that, but  
21 let's assume for one moment that's really what you're  
22 arguing. But I - - - I need more to - - - to - - -  
23 to confirm for myself that, indeed, this 475 is a  
24 fair market value or that some other number is not  
25 the more appropriate fair market value. That always

1 demands, getting back to Judge Stein's point, a  
2 hearing.

3 MS. KRETZING: It may - - -

4 JUDGE FAHEY: Well, is - - - isn't - - - is  
5 - - -

6 JUDGE RIVERA: I don't know. Why would you  
7 put yourself in that position? I - - - why would you  
8 not provide the information that substantiates the  
9 475 and avoid the hearing?

10 MS. KRETZING: Well, the - - - I don't  
11 think it's that simple. The statute says as such  
12 other information as the judge might direct.

13 JUDGE RIVERA: Right, right. Yes. Let me  
14 just - - -

15 MS. KRETZING: If the judge directs the - -  
16 -

17 JUDGE RIVERA: - - - interrupt you on that.  
18 As - - - "shall determine upon an affidavit or  
19 otherwise as it shall direct." The "otherwise" seems  
20 to suggest there's got to be something to - - - to  
21 begin with.

22 MS. KRETZING: Yes.

23 JUDGE RIVERA: There's nothing to begin  
24 with here to assess the 475, which is what you  
25 promoted as the fair market value.

1 MS. KRETZING: Well, it's the opinion of  
2 the real estate appraiser after his personal  
3 inspection and based on his knowledge. But - - -

4 JUDGE RIVERA: No, no, no. Based on his  
5 knowledge but based on paragraph 4. It's not only,  
6 well, I looked at it and based on my twenty-two years  
7 I - - - I - - - this looks to me like it's worth 475.  
8 It's that I've looked at it. I've inspected it.  
9 I've reviewed it. I've looked at sales. I examined  
10 the neighborhood. I mean there's a whole - - - I - -  
11 - I'm not suggesting that if there was more this  
12 might not be in satisfaction on your burden of  
13 persuasion. It just strikes me that it's conclusory  
14 and doesn't give the judge anything to work with.  
15 And I'm quite surprised that you would not be  
16 concerned that this would not give the judge  
17 something to work with.

18 MS. KRETZING: I think the affidavit, based  
19 on his personal knowledge, based on his database,  
20 provides sufficient information for the judge. If  
21 the judge does not believe that to be true and needs  
22 more information, the judge will specify what  
23 information the judge wants to hear. It could be the  
24 submission of an appraisal or it could be a hearing.

25 JUDGE RIVERA: Or it could be everything

1 listed in - - - in number 4.

2 MS. KRETZING: Yes, correct.

3 JUDGE RIVERA: Your last paragraph. Say  
4 give me everything.

5 MS. KRETZING: That - - - that would be  
6 included in an appraisal.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MS. KRETZING: Thank you.

9 CHIEF JUDGE LIPPMAN: You'll have rebuttal.  
10 Counsel.

11 MR. SHAWHAN: May it please the court Mark  
12 Shawhan for the Attorney General as amicus. The  
13 burden in the deficiency judgment is on the bank.

14 CHIEF JUDGE LIPPMAN: Does the judge have a  
15 burden here?

16 MR. SHAWHAN: The judge - - - the judge  
17 does not have a burden. The judge has a  
18 responsibility to - - -

19 CHIEF JUDGE LIPPMAN: What's the judge's  
20 responsibility?

21 MR. SHAWHAN: To ensure that the bank  
22 cannot obtain a deficiency judgment without first - -  
23 -

24 CHIEF JUDGE LIPPMAN: What about setting  
25 the - - - the value? Doesn't the judge have a

1 responsibility to set a value or to - - - or to  
2 request more information to allow that value to be  
3 determined?

4 MR. SHAWHAN: The judge's responsibility is  
5 to - - - is to determine if the - - - the bank has  
6 shown that the market value is less than the size of  
7 the mortgage debt. If the bank meets its initial  
8 burden of production, it might be the case, depending  
9 on the proceeding.

10 CHIEF JUDGE LIPPMAN: Say the bank doesn't  
11 meet its initial burden. What does the judge do  
12 then?

13 MR. SHAWHAN: If the bank fails to meet its  
14 initial burden of production in - - - in a situation  
15 where the affidavit is as bare bones and boilerplate  
16 as it was in this case, the proper course is to deny  
17 the motion.

18 JUDGE FAHEY: You know, the Second  
19 Department just - - - just had a case - - - I think  
20 it was about seven months after this one, Eastern  
21 Savings Bank. Are you familiar with that?

22 MR. SHAWHAN: Yes.

23 JUDGE FAHEY: All right. Why don't you  
24 address that?

25 MR. SHAWHAN: Yes.

1 JUDGE FAHEY: Because there they sent it  
2 back for further proceedings. I'm a little unclear  
3 if they sent it back for an actual hearing, but they  
4 seem to send it back for further proceedings to give  
5 them a chance to offer proof and proper form.

6 MR. SHAWHAN: Ordinarily in - - - if the  
7 bank puts forward some evidence - - -

8 JUDGE FAHEY: Um-hum.

9 MR. SHAWHAN: - - - which was the case in  
10 Brown, which I believe is the case you're referring  
11 to, then it is a matter of the court's discretion.  
12 And the - - - and - - - and it - - - pardon me. It  
13 is always a matter of the court's discretion as to  
14 how to respond in this sort of situation. Where  
15 there is some evidence, in some cases it's an  
16 appropriate - - -

17 JUDGE FAHEY: Yeah. The problem - - - the  
18 problem with your department is - - - with your  
19 argument, I think, is - - - is that they have a right  
20 to something. They may not have a right to an  
21 inflated deficiency judgment but they have a right to  
22 something. Your argument says they have a right to  
23 nothing, and - - - and that doesn't seem to be a very  
24 fair argument.

25 MR. SHAWHAN: They only have a right to a

1           deficiency judgment - - -

2                   JUDGE PIGOTT:  Yeah.  But this judge - - -  
3           this judge denied reargument and renewal.

4                   JUDGE FAHEY:  Yeah.

5                   JUDGE PIGOTT:  So they're - - - they're - -  
6           - they're sitting here saying this judgment is - - -  
7           we - - - you know, we're not entitled to a judgment  
8           so we'll - - - we'll submit more stuff.  You don't -  
9           - - no, you won't.  So where do you go from there?  I  
10          mean, as Judge Fahey's suggesting, they're owed the  
11          money that they've lent.  Fair market value is a  
12          debatable - - - but, you know, 125,000 dollars seemed  
13          to be the fair market value at the auction, so - - -

14                   MR. SHAWHAN:  Well, the statute - - -

15                   JUDGE RIVERA:  Well, are - - - are they  
16          owed the money or an opportunity to establish that  
17          they're owed money?

18                   MR. SHAWHAN:  That's correct, Your Honor,  
19          that they - - - they have the oppor - - -

20                   CHIEF JUDGE LIPPMAN:  Yeah.  But where is  
21          that balance here?  Where do they have the  
22          opportunity?

23                   MR. SHAWHAN:  They had the opportunity when  
24          they filed a motion and came forward with evidence.  
25          If the - - -

1 CHIEF JUDGE LIPPMAN: Doesn't there have to  
2 be a balance in protecting the interests here?

3 MR. SHAWHAN: Yes. And - - -

4 CHIEF JUDGE LIPPMAN: So where's the  
5 balance in your position?

6 MR. SHAWHAN: The balance in our position  
7 is that the bank has to come forward with something  
8 to meet its initial burden of production.

9 CHIEF JUDGE LIPPMAN: If they do a  
10 conclusory affidavit, the judge - - - it's over with,  
11 finished and the judge just says dismissed?

12 MR. SHAWHAN: If they put forward an  
13 affidavit as bare bones as this affidavit in which,  
14 as Supreme Court said, the only things in this  
15 affidavit that were specific to this property were  
16 the address and the number.

17 CHIEF JUDGE LIPPMAN: But - - - but then,  
18 again, doesn't the judge have a - - - a duty to say  
19 to them give me - - - give me something more so that  
20 we can make a determination here as to what you're  
21 entitled to?

22 MR. SHAWHAN: No, Your Honor. If - - -

23 CHIEF JUDGE LIPPMAN: In other words,  
24 everyone's interests are protected.

25 MR. SHAWHAN: The - - - it is the

1 litigant's initial responsibility to give the court  
2 enough to work with so that it can assess what - - -

3 CHIEF JUDGE LIPPMAN: There's no case law  
4 that says that the judge has a responsibility?

5 MR. SHAWHAN: The - - - the judge's  
6 responsibility is to oversee the proceeding and to  
7 hold the bank to its burden so that the - - -

8 JUDGE ABDUS-SALAAM: Doesn't the statute  
9 say that the judge shall determine the fair market  
10 value?

11 MR. SHAWHAN: Yes. It - - - it does. But  
12 when - - - when the statute was - - -

13 JUDGE ABDUS-SALAAM: So does - - - does the  
14 - - - does the judge have discretion to say there's  
15 no market value?

16 MR. SHAWHAN: What the judge is determining  
17 in that case is that the - - - the market value is  
18 deemed to be the - - - equal to the size of the  
19 mortgage debt. If you look at the history of this  
20 statute when it was enacted, when Governor Lehman  
21 proposed this during the Depression, he said the fair  
22 market val - - - the deficiency judgment should be  
23 the difference between fair market value and the - -  
24 - the debt. And if the - - - the burden is on the  
25 bank to prove that, and if they don't prove it the

1 presumption is that the two are the same and there's  
2 no deficiency judgment.

3 And the - - - the point is that this is a  
4 statute that's intended to protect the interests of  
5 homeowners and property owners. The bank can collect  
6 the deficiency judgment if it can establish that  
7 there is a - - - a basis for relief, that there is a  
8 gap between the fair market value and the size of the  
9 mortgage debt. But it - - - the court cannot  
10 determine whether the bank has met that burden or  
11 could reasonably meet that burden if they get nothing  
12 to go on. The - - - the - - - the - - - the court is  
13 not - - -

14 JUDGE RIVERA: Well, the question is given  
15 that the statute imposes on the judge or - - - or  
16 makes clear that the judge has to est - - - find fair  
17 and reasonable market value, can the judge just  
18 initially say, you know, this - - - this is not good  
19 enough and it's dismissed rather than saying bring me  
20 something else? That's really the question at hand.  
21 I understand your point when I was asking your  
22 opponent about the burden of production. So if the  
23 judge says, okay, you didn't meet it, you've got to  
24 give me something, because I've got to come up with a  
25 number.

1 MR. SHAWHAN: The statute was not intended  
2 to require the court to go back to the litigant, no  
3 matter what the litigant came forward with. If the -  
4 - - the - - - the litigant - - -

5 JUDGE READ: So if they - - - they - - - if  
6 they just - - - if they don't make a - - - a showing  
7 initially the judge thinks is adequate they're out of  
8 luck?

9 MR. SHAWHAN: Yes. Be - - -

10 CHIEF JUDGE LIPPMAN: Isn't there a  
11 fairness issue here?

12 MR. SHAWHAN: Yes.

13 CHIEF JUDGE LIPPMAN: I'm mean, not  
14 everyone is - - - is worrying about the wellbeing of  
15 our banks. But don't you think that there is a basic  
16 fairness here and the court is the one who's supposed  
17 to provide that fairness. And rather than just say,  
18 gee, out of luck, goodbye, let's - - - let's have  
19 something that is consistent with the judicial role  
20 in this proceeding by statute.

21 MR. SHAWHAN: It - - - it - - -

22 CHIEF JUDGE LIPPMAN: And - - - and by  
23 principles of equity and fairness.

24 MR. SHAWHAN: The rule that - - - that we  
25 have discussed is a fair rule for the bank.

1 CHIEF JUDGE LIPPMAN: What's your rule?  
2 What's your rule? They don't - - - it's not - - -  
3 your rule is if the affidavit is insuffic - - -  
4 insufficient or conclusory, end of proceeding, bank  
5 is out of business. The judge should dismiss?

6 MR. SHAWHAN: If the affidavit is as bare  
7 bones and boilerplate as this affidavit, then yes.  
8 The - - -

9 CHIEF JUDGE LIPPMAN: That's the rule you  
10 want us to - - - to put into place?

11 MR. SHAWHAN: Yes.

12 JUDGE PIGOTT: Where does that leave your  
13 client?

14 MR. SHAWHAN: We are here as amicus. We're  
15 not - - -

16 JUDGE PIGOTT: I know. But you're  
17 representing these people and aren't they then going  
18 to be sitting there with an unsecured debt of 800 - -  
19 - judgment of 800,000 dollars?

20 MR. SHAWHAN: Well, we - - - we are - - -  
21 rather than this particular case speaking to the more  
22 general question of how - - -

23 JUDGE PIGOTT: I understand that. But what  
24 I'm suggesting to you that in any case where - - -  
25 you're saying if the judge has to not make a

1 determination, the judgement's there. The - - - the  
2 - - - the bank has its judgment. All right, now it  
3 can take their income. It can take their - - - you  
4 know, anything they own over and above what they get  
5 back from the property. They got 125,000 in this  
6 case. They claim to be owed a - - - a lot more.  
7 They - - - they - - - they, you know, made an  
8 appraisal that the judge doesn't like. But isn't - -  
9 - isn't this client better off with that as opposed  
10 to nothing because that - - - that judgment's going  
11 to sit there?

12 MR. SHAWHAN: The - - - the judgment that  
13 they have obtained is the judgment of foreclosure.  
14 They want to seek an additional judgment for the  
15 300,000 for - - - 300,000 dollars. But they have not  
16 shown any basis that they're entitled to that  
17 judgment. The - - - the - - - in a situation - - -

18 JUDGE PIGOTT: Well, I - - - I - - - I  
19 apologize for interrupting. But what are you going  
20 to do? Are you going to move to vacate the default  
21 judgment, and - - - and what's your grounds? I know  
22 you're the Attorney General. What's the - - - what's  
23 the grounds going to be? You know, that I paid it?  
24 No. You didn't pay it. That's right. And you - - -  
25 so you owe this money plus the appropriate interest

1 and the costs. Why should this be def - - - this def  
2 - - - default be vacated, and you don't have a  
3 reason.

4 MR. SHAWHAN: I'm sorry. I don't think I  
5 understand the question.

6 JUDGE PIGOTT: That's because - - - all  
7 right. Let's pretend you're not the Attorney  
8 General. You've got a client who owns a house and  
9 they don't pay their mortgage. And the bank comes in  
10 and forecloses on it, and the - - - and the house at  
11 the time of the foreclosure is worth 100,000 dollars.  
12 And your - - - your judgment is for 125. As I  
13 indicated before, usually the bank says we'll - - -  
14 we'll - - - we'll bid it in for the amount of our  
15 mortgage and then own the house and we sell it, all  
16 right. If they don't do that, if you say, you know,  
17 we are objecting to that, okay, we have a judgment  
18 for 125,000. Pay us.

19 MR. SHAWHAN: They have - - - the - - - the  
20 whole point of this proceeding is that they cannot  
21 get the additional money over and above what they  
22 have already obtained in the judgment of foreclosure  
23 without establishing that they are entitled to it.  
24 That is the - - - the purpose of this statute is to  
25 ensure that banks cannot obtain deficiency judgments

1 without first putting forward something to show that  
2 they're entitled to that money. And this is a fair -  
3 - -

4 JUDGE RIVERA: So they now proceed that the  
5 foreclosure is treated as sufficient to satisfy the  
6 outstanding debt? Is that what you mean?

7 MR. SHAWHAN: Yes. The - - - the - - - the  
8 - - - the - - - the presumption is that where the - -  
9 - the bank has failed - - - that - - - that the  
10 market value is equal to the size of the outstanding  
11 debt unless the bank establishes otherwise. That's -  
12 - - the burden is on the bank.

13 JUDGE PIGOTT: Where do we find that  
14 presumption?

15 MR. SHAWHAN: The - - - in the - - - the -  
16 - - first, in the fact that the bank is the moving  
17 party. They can only get - - -

18 JUDGE PIGOTT: No, no. Where is - - - is  
19 there a - - - is there a statute, is there a reg, is  
20 there - - - is there a case that says this?

21 MR. SHAWHAN: The enacting history makes  
22 clear that this was what the legislature understood  
23 that the - - - the procedure would be.

24 JUDGE PIGOTT: The legislative history  
25 dictates that if they - - - if they fail on their - -

1 - on their appraisal they - - - the - - - the  
2 judgment is automatically deemed satisfied by a sale  
3 of the house or the property?

4 MR. SHAWHAN: Yes. Because they can only  
5 get an - - - an additional judgment if the - - - the  
6 - - - if the foreclosure sale is, for whatever  
7 reason, well below what everybody takes to be the  
8 reasonable market value, the - - - and the - - - the  
9 bank purchased it - - - purchases it for that little.  
10 The bank is then taking the risk that it cannot show  
11 that it should actually get more money. And this is  
12 a fair rule for the bank, because the information  
13 that we're talking about here is very, very basic.

14 The - - - the - - - there was an appraisal  
15 done in this case. There was no reason for the  
16 appraisal report to have been omitted. New York Law  
17 is very clear that a bare bones boilerplate affidavit  
18 like this has no probative value.

19 JUDGE PIGOTT: That - - - that's - - - that  
20 gets back to the small issue of why the judge would  
21 deny renewal or reargument.

22 MR. SHAWHAN: Bec - - - because the - - -  
23 in a situation where the information is easily in the  
24 hands of the litigant and, for reasons known only to  
25 them they don't provide it - - -

1 JUDGE PIGOTT: They're sloppy.

2 MR. SHAWHAN: Whether or not that's the  
3 case, they - - -

4 JUDGE READ: They didn't think - - - they  
5 didn't think they needed to. They submitted  
6 affidavits like this before and it had worked before.

7 MR. SHAWHAN: The - - - there is abundant  
8 case law for the proposition that conclusory expert  
9 affidavits, on property valuation in particular, are  
10 not of any probative value - - -

11 JUDGE READ: So we're back to they get one  
12 opportunity, that's it. Even if they have all the  
13 backup to support it and they move to renew, the  
14 judge doesn't have to grant that?

15 MR. SHAWHAN: That's correct, because there  
16 - - - there is no reason for them not to have done it  
17 right the first time.

18 JUDGE PIGOTT: But isn't that a windfall?

19 MR. SHAWHAN: No. No, it is not - - - not  
20 a windfall, Your Honor.

21 JUDGE PIGOTT: Wait a minute. You just  
22 said they have proof of what their deficiency  
23 judgment ought to be. They just didn't put it in  
24 front of the court. Therefore, we win.

25 MR. SHAWHAN: If a litigant does not come

1 forward with evidence showing it's entitled to  
2 relief, they cannot recover. And that's whether or -  
3 - -

4 JUDGE PIGOTT: No, you said it. You said  
5 they do have the proof. It's sitting over here in  
6 their pile. They didn't put it up here where the  
7 judge is. And because of that, even though they  
8 could do it tomorrow, the judge said no, you can't,  
9 and we save 400,000 dollars.

10 MR. SHAWHAN: The - - - the - - - the rule  
11 in adversarial litigation is that the party has to  
12 put - - - has to show its entitlement to relief. And  
13 in this case - - -

14 JUDGE ABDUS-SALAAM: So you're likening  
15 this to the summary judgment?

16 MR. SHAWHAN: It - - - it is, in certain  
17 ways, akin to summary judgment. And the - - -

18 JUDGE READ: Can they go back and try  
19 again?

20 MR. SHAWHAN: In - - - in this case what  
21 happened was effectively that they granted summary  
22 judgment against the moving party because the initial  
23 showing was so inadequate.

24 JUDGE READ: Yeah. Sometimes you can move  
25 for summary judgment a second time, though. Can they

1 go back again and put in the backup for the - - - to  
2 the appraisal report?

3 MR. SHAWHAN: No. Because the - - - the  
4 purpose of this statute was designed to force banks  
5 to establish entitlement to relief to ensure - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MR. SHAWHAN: - - - that - - -

8 JUDGE STEIN: There - - - there's a short  
9 time period in which they can move for deficiency  
10 judgment, right? So that - - - that's the problem?  
11 Is that what you're referring to?

12 MR. SHAWHAN: The - - - no, I - - - I was  
13 referring to the fact that the - - - the general  
14 purpose of this statute is to put banks to their  
15 proof. The - - - the - - -

16 JUDGE STEIN: No, no. But the ques - - -  
17 the question as to whether they can move again or - -  
18 -

19 MR. SHAWHAN: That - - - that's corr - - -  
20 that's correct, Your Honor.

21 JUDGE READ: That they're out of time now.

22 JUDGE STEIN: Well, okay.

23 MR. SHAWHAN: Yes. But - - -

24 JUDGE READ: Completely out of time. What  
25 if they weren't out of time?

1 MR. SHAWHAN: Then, presumably, they could  
2 move again. There's nothing in the opinion that  
3 would stay that. And - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
5 you.

6 Counsel, what's the rule that you would  
7 like us to put into effect here?

8 MS. KRETZING: Your Honor, the rule that is  
9 in place is the rule that should govern this case.

10 CHIEF JUDGE LIPPMAN: What is the rule that  
11 is in place?

12 MS. KRETZING: The rule is set forth in the  
13 statute. And it says, "shall show by affidavit or  
14 otherwise as the court shall direct" so that the  
15 court can - - -

16 CHIEF JUDGE LIPPMAN: And - - - and your  
17 rule is that holds regardless of how inadequate and  
18 insufficient the affidavit that you put in as to the  
19 value?

20 MS. KRETZING: The count cont - - -

21 CHIEF JUDGE LIPPMAN: Is that a yes or a  
22 no?

23 MS. KRETZING: Yes. The court controls the  
24 proceeding. This is a motion that has to be - - -

25 CHIEF JUDGE LIPPMAN: So you could put in

1           virtually nothing and then the judge has to take this  
2           in his or her hands and start to - - - to - - -  
3           whether to direct the hearing or more information.  
4           You - - - you have no real initial responsibility?

5                       MS. KRETZING: Well, in - - -

6                       CHIEF JUDGE LIPPMAN: I mean you could - -  
7           - you could literally put in nothing and the judge  
8           would have to do that?

9                       MS. KRETZING: Well, in this case, we put  
10          in an affidavit of a real estate appraiser - - -

11                      CHIEF JUDGE LIPPMAN: Let's assume the  
12          affidavit - - - assume for the sake of argument that  
13          it is totally, completely inadequate. Assume that.  
14          The judge - - - our rule, the rule that you want, is  
15          that the judge then must say no good, give us some  
16          more information or direct a hearing. That's the  
17          rule? That it's essentially if you fail in your  
18          initial burden the judge takes it into his or her  
19          hands and figures out the market value?

20                      MS. KRETZING: That's the statute, Your  
21          Honor. There - - - the - - - the judge has the  
22          obligation, by statute, to determine the market  
23          value. The - - - the legislative history of this  
24          enactment was to be fair to both mortgagors and  
25          mortgagees when they made this permanent.

1                   JUDGE PIGOTT: But you can see - - - you  
2                   can see the concern here, right? I mean this whole  
3                   mortgage scandal or whatever you want to call it  
4                   that's happened over the last ten years has got a lot  
5                   of people with - - - with - - - with mortgages that  
6                   are underwater. They're getting stuck. And if the  
7                   banks are not paying attention and giving a fair  
8                   market value to - - - to reduce some of these  
9                   deficiency judgments, it's - - - it's - - - it's a  
10                  continuing problem.

11                  MS. KRETZING: Right.

12                  JUDGE PIGOTT: So the - - - the courts have  
13                  been very, obviously, cognizant of that, and I think  
14                  that may have been what was going on here. The judge  
15                  was not satisfied that you had proven that the fair  
16                  market value was as you said.

17                  MS. KRETZING: I certainly understand that,  
18                  Your Honor. And then the court has a way to put me  
19                  to my proof by directing me to do it as the court did  
20                  in Eastern Savings Bank.

21                  JUDGE RIVERA: Well, what - - - why - - -  
22                  why not the alternative or a different approach where  
23                  he denies it, dismisses it, but - - - but, unlike  
24                  here, actually grants the motion to reargue and renew  
25                  and really puts you to the test. I'm trying to think

1 of what incentives you to do what the AG has  
2 suggested is the purpose of this statute. I take it  
3 if - - - if you've done this in the past and been  
4 successful, you're not incentivized to do anything  
5 different.

6 MS. KRETZING: Well - - -

7 JUDGE RIVERA: You don't want to put more  
8 resources into this than you have to. You don't want  
9 to spend that money. I - - - I - - - your client  
10 doesn't want to do that. I understand. But what - -  
11 - what will incentivize you to achieve the purpose?  
12 Why - - - why not this alternative that the judge is  
13 unpersuaded, thinks it's really worth 500,000 or  
14 whatever, and you haven't met your burden. But if  
15 you move to reargue and renew and produce the  
16 documents, the judge would consider that.

17 MS. KRETZING: Well, I think the - - - the  
18 two procedures are - - - are pretty much the same.  
19 But it's built into the statute that you don't need  
20 to - - -

21 JUDGE RIVERA: Well, I would think you'd  
22 get a little tired of doing this motions to reargue  
23 and renew.

24 MS. KRETZING: Well, that's true, Your  
25 Honor.

1 JUDGE RIVERA: You might put it in at the  
2 beginning.

3 MS. KRETZING: That's true, Your Honor.  
4 But then the question becomes - - - and if you  
5 compare this case with Eastern Savings Bank, how much  
6 is enough? It's - - - it's going to come down to a  
7 full real estate appraiser - - - appraiser would have  
8 to go in every time, and I don't think that's what  
9 the legislature - - -

10 JUDGE RIVERA: Well, no. Why - - - why  
11 wouldn't it be paragraph 4? I mean you're relying on  
12 paragraph 4. Why not attach - - -

13 MS. KRETZING: Paragraph 4.

14 JUDGE RIVERA: - - - this material?

15 MS. KRETZING: If you attach that material  
16 to paragraph 4 that is a real estate apprais - - -  
17 appraisal. You put your comps in. You put all the -  
18 - - the market data. You put a cap rate in. And  
19 then you have a capitalization of new income  
20 appraisal.

21 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
22 you both.

23 MS. KRETZING: Thank you.

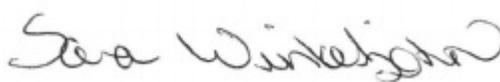
24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Flushing Savings Bank, FSB v. Bitar, No. 84 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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