



*State of New York
Court of Appeals*

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NOTICE TO THE BAR

On April 3, 2014, this Court granted leave to appeal in Flushing Savings Bank, FSB v Bitar. The case is being treated as a normal-coursed appeal (see section 500.12 of this Court's Rules of Practice).

In March 2010, plaintiff commenced this action against the defaulting note obligor and mortgagor, to foreclose a mortgage on certain real property. In June 2010, an order of reference was granted to plaintiff and a referee was appointed to compute the amount due to plaintiff and to conduct the sale of the property. Thereafter, plaintiff was granted a judgment of foreclosure and sale, which provided that should the proceeds of the foreclosure sale be insufficient to pay the amount reported due to plaintiff, that plaintiff may recover the amount of the deficiency from defendant upon a properly made motion for deficiency pursuant to RPAPL 1371.

In August 2011, the property was sold at a public auction to the highest bidder, plaintiff, for \$125,000.00. In September 2011, the referee rendered his report of sale, which determined that at the time of sale, plaintiff was owed \$793,724.75, leaving a deficiency of \$668,724.75.

In October 2011, plaintiff's certified appraiser inspected the property and determined that the fair market value of the property on the date of sale was \$475,000.00. The appraiser prepared a one and a half page affidavit in which he stated that he "made a personal exterior and interior inspection of the [mortgaged] premises" and that he set the value of the property based on this "inspection and after review[] [of] comparable sales, examination of the neighborhood, market and general economic trends, comparable rentals, expense data and subject to the reasonable assumption that there [had] not been substantial changes in occupancy and condition." Plaintiff moved to confirm the report of sale and for leave to enter a deficiency judgment against defendant in the amount of \$318,724.75, which is the alleged amount due pursuant to the judgment minus the fair market value given by the appraiser. Defendant did not oppose plaintiff's motion.

Supreme Court confirmed the referee's report of sale but denied the branch of plaintiff's motion which sought a deficiency judgment. The court held that plaintiff did not establish prima facie proof of fair market value of the property. The court concluded that plaintiff did not submit any appraisal, and instead plaintiff relied on the "appraiser's conclusory four-paragraph affidavit

which [did] not contain any specific information regarding how he reached his fair market value determination."

Plaintiff appealed from that portion of the April 2012 order that denied its motion for permission to enter a deficiency judgment, and the Appellate Division affirmed. The court determined that plaintiff failed to make a prima facie showing of the value of the mortgaged premises. The court noted that, "the appraiser did not describe the subject premises or the results of his inspection and failed to append any of the evidence of comparable sales and market data upon which he relied in arriving at his opinion. Nor did plaintiff submit an actual appraisal report."

The issues presented are (1) whether the courts below properly concluded that the affidavit of plaintiff's appraiser was too conclusory to establish a prima facie showing of the fair market value of the property as of the foreclosure sale date; and (2) assuming that the affidavit was insufficient, whether the courts could deny plaintiff's unopposed application for a deficiency outright, without making any express finding as to the value of the property, without holding a hearing on the value of the property, or without in some way affording plaintiff an opportunity to cure the alleged insufficiency in its proof.

The Court invites amicus to address these issues. Amicus motions must comply with section 500.23 of the Court's Rules of Practice. Particular attention should be paid to section 500.23(a)(2) of the Rules. The text of the Rule is available on the Court's website at:

<http://www.courts.state.ny.us/ctapps/500rules.htm.#Amicus>

Questions may be directed by telephone to the Clerk's Office at (518) 477-7705.