ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

FAIRBANKS CAPITAL CORP.

Plaintiff,

against

CRAIG S. KOZLOWSKI, CAROL H. KOZLOWSKI,

Defendants

DECISION AND ORDER

Index No. 47940

Ronald C. Valentine, Esq.
Referee

Cohen & Roth
William M. Roth, Esq.
Attorneys for Plaintiff

McConville, Considine, Cooman & Morin, P.C.
Michael T. Powers, Esq.
Attorneys for Defendants

A motion has been made by Ronald C. Valentine, as Referee to Sell in the above entitled mortgage foreclosure action, for an order directing the disposition of funds now held by him following the default of Mr. Kozlowski as the successful bidder in the first sale of the subject premises, located at 3012 Quaker Road, Palmyra, New York.

A Judgment of Foreclosure was issued by this Court on June 9, 2003, which foreclosed a mortgage on said premises owned by the Defendants, and appointed Mr. Valentine as the Referee. A sale was conducted on October 5, 2004, at which time the property was sold to the Defendant Craig S. Kozlowski (hereinafter "Defendant") for the sum of $218,488.00. The Defendant deposited the sum of $22,000.00 with the Referee on October 5, 2004, which sum he continues to hold in escrow.

The sale of the premises to Mr. Kozlowski was never completed, as a result of his inability to secure the necessary financing. Therefore, the property was re-advertised for sale, and the Referee sold the property to the Plaintiff on December 15, 2005 for the sum of $500.00. The property was conveyed to JP Mortgage Chase Bank, as Trustee for the Truman Capital Mortgage Loan Trust 2002-1 (to whom the bid had been assigned by the Plaintiff) by Referee's Deed dated December 15, 2005. The Plaintiff has requested that the down payment of $22,000.00 be released to its attorneys. The Defendant has requested that the bid deposit be returned to him.

The Terms of Sale contain the standard language that, in the event that a purchaser fails to comply with any of the conditions of sale, the

premises may be re-sold, and "(the) purchaser will be liable for any deficiency there may be between the sum for which the premises shall be struck down upon the sale and the price for which the premises may be purchased on the resale...." However, the defaulting purchaser's exposure under this provision has traditionally been held to be limited to the amount of the bid deposit. (See, e.g. *Matter of Bertino v. Kalmanash*, 94 AD2d 794 (2nd Dept, 1983)).

The Defendant maintains that, given the "shockingly low" bid of $500.00 made by the Plaintiff at the re-sale, a just quantification of the deficiency between the two sales is impossible to determine. He further argues that, since the time has expired for an application by the Plaintiff to obtain a deficiency judgment under RPAPL §1371, the successful bid must be deemed to be the equivalent of the mortgage balance plus the sale expenses. Therefore, argues the Defendant, there is no deficiency, and the deposit should be refunded to him.

In response, the Plaintiff maintains that the deficiency judgment contemplated by §1371 has no connection with the use of the word "deficiency" in the Terms of Sale. This Court agrees. The deficiency judgment is a statutory creation, which may be sought only by a

mortgagee, and which is calculated pursuant to a formula which is not the same as the calculation of a deficiency after a re-sale. Moreover, as the Plaintiff correctly points out, there is no requirement that a Plaintiff seek a deficiency judgment against a mortgagor as a prerequisite to seeking a deficiency from a defaulting bidder.

The Court is aware that the $500.00 bid of the Plaintiff is in no way indicative of the actual value of the property, and if the Defendant's exposure were not limited to the amount of the deposit, pursuant to decades of judicial opinions, that fact would be a matter of great concern. However, the Referee's Report of Sale indicates that the amount due to the Plaintiff is $328,370.61. Even had the Defendant completed the original transaction in accordance with his own bid of $218,488.00, the deficiency due the Plaintiff would have totaled almost $100,000.00. Therefore, it is clear that the deficiency due to Plaintiff is undisputably substantially in excess of the Defendant's deposit. (See, e.g. *Rakoski v Robert Stein Unique Gorgeous Fashions, Inc.*, 132 Misc2d 953 (Supreme Ct, Suffolk Co. 1986)).

Therefore, the Court finds that the Defendant is liable for the deficiency between the bid at the first sale and the re-sale price, up to the

amount of the Defendant's deposit at the original sale. The Referee is hereby directed to release the deposit of $22,000.00 to the Plaintiff's attorneys, less additional referee fees and disbursements in the total amount of $495.00, which may be retained by the Referee as requested in his affidavit.

This Decision constitutes the Order of the Court.

Dated: September 5, 2006
Lyons, New York

Honorable Dennis M. Kehoe
Acting Supreme Court Justice