

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1128-09T3

NATIONSTAR MORTGAGE, L.L.C.,

Plaintiff-Respondent,

v.

GEORGE B. JONES AND EDITH

R. JONES,

Defendants,

and

NEW JERSEY HOME CONSTRUCTION,
INC.,

Defendant-Appellant.

February 17, 2011

Argued January 11, 2011 – Decided

Before Judges Yannotti and Espinosa.

On appeal from the Superior Court of New Jersey,
Chancery Division, Burlington County, Docket No. F-
7852-08.

Adam D. Greenberg argued the cause for appellant (Honig
& Greenberg, L.L.C., attorneys; Mr. Greenberg, on the
brief).

Michael S. Hanusek argued the cause for respondent (Fein,
Such, Kahn & Shepard, P.C., attorneys; Mr. Hanusek, on
the brief).

PER CURIAM

New Jersey Home Construction, Inc. (NJHC), appeals from an order entered by the trial court on October 9, 2009, setting aside a sheriff's sale at which NJHC acquire title to certain real property in Lumberton Township, Burlington County. For the reasons that follow, we affirm and remand for further proceedings.

Plaintiff Nationstar Mortgage, L.L.C. (Nationstar) commenced this action to foreclose on a mortgage issued to defendants George B. Jones and Edith R. Jones (the Joneses) in the amount of \$348,386.50. The trial court entered a final judgment of foreclosure on April 1, 2009, and thereafter a writ of execution was issued. On July 16, 2009, the sheriff conducted a sale of the property. NJHC was the successful bidder. Its bid was for \$132,300.

On July 23, 2009, plaintiff filed an order to show cause seeking to set aside the sale. In a certification submitted in support of that application, plaintiff's attorney, Michael S. Hanusek (Hanusek), stated the sale had proceeded by mistake. According to Hanusek, the Joneses were "under consideration" for participation in the Home Affordable Modification Program (HAMP), a federal assistance program to prevent foreclosures through loan modifications, promulgated pursuant to section 110 of the Emergency Economic Stabilization Act of 2008. 12 U.S.C.A. § 5201. Hanusek also stated that, under "relevant directives" of the federal Department of Treasury, the foreclosure sale should have been adjourned pending "such evaluation."

Hanusek stated that, because of a "miscommunication" between plaintiff and its foreclosure counsel, the sale was "inadvertently" not adjourned. He said that plaintiff sent an electronic message on the date of the sale requesting a postponement, but the message did not reach counsel in time to adjourn the sale. Hanusek also said that the Joneses were under consideration for participation in the HAMP program but they "did not appear nor take any action to protect their interests" at the sale.

Hanusek additionally stated that there was a clerical error by plaintiff's foreclosure counsel and a miscommunication between counsel and the bid service contractor who attended the sale. Hanusek said that the property had been appraised originally at \$385,000, and its assessed value was \$380,000. According to Hanusek, plaintiff had intended to bid \$431,000 on the property, but due to a clerical error, plaintiff only bid up to \$131,000. Hanusek stated, "[e]ven discounting the above appraised value to the high \$200,000 range, the bid price is still less than [fifty percent] of the [p]roperty's value."

In support of its application, plaintiff also submitted a certification from Gary Maclin (Maclin), who described himself as a "[f]oreclosure [s]pecialist[.]" Maclin stated that, as of April 21, 2004, the appraised value of the property was \$385,000. He further stated that the July 16, 2009, sale proceeded by mistake because the Joneses were under consideration for participation in the HAMP program and they were still being evaluated for that program.

NJHC opposed plaintiff's motion. In a certification filed on July 31, 2009, Donald Pollock, Jr. (Pollock), the principal of NJHC, stated that prior to the sheriff's sale, he had made "substantial efforts" to investigate the property. Pollock attended the sale and bid

over the "upset price[,] " which is the price that plaintiff bid on the property. Pollock submitted the winning bid of \$132,300 and thereafter deposited \$30,000 with the sheriff.

Pollock stated that, until plaintiff filed its order to show cause, he had no knowledge there was any problem with the sale. Pollock asserted that the fact that the Joneses might be eligible for a loan modification was irrelevant. He said that there was no evidence the Joneses had applied for a loan modification. Pollock also said that the Joneses had listed the property for sale at \$249,900, as indicated by a multiple listing service. Pollock stated that, "[o]bviously, [the Joneses] intend to move from the property and have no need for a loan modification."

Pollock additionally stated that he had contacted the realtor to inquire about the value of the property. According to Pollock, the Joneses were seeking to do a "short sale" of the property, and the realtor told him she thought she could "get it done for \$200,000."

Pollock said that, "[a] loan modification is not a short sale." Although Pollock did not make an offer for the property, the realtor sent him a contract for \$200,000 and said the Joneses would require fourteen days to vacate.

Pollock asserted that, "[p]lainly the property is not worth \$385,000 now." He noted that an appraisal from 2004 had no bearing on the value of the property in 2009, "after the financial crisis the country has suffered." He also said that "tax assessments often have little relation to the actual value of a property." Pollock stated that, if a sheriff's sale were set aside "so easily, [his] efforts and expenses would be continuously wasted and for naught."

Michael Merritt (Merritt), a Foreclosure Prevention Manager for plaintiff, submitted a reply certification dated August 5, 2009. Merritt stated that the Joneses had, in fact, applied for a loan modification on July 13, 2009. Merritt also said that, if NJHC had investigated the value of the property, it should have known that the bid price of \$132,300 was "unconscionably less" than the property's current market value.

Merritt also noted that plaintiff had obtained an opinion from a broker that the value of the property was \$325,000 as of July 31, 2009. He stated that the fact that the Joneses had listed the property for a "short sale" did not render their loan modification application "a nullity" or prove that they intended to move from the premises.

The court filed a written opinion dated August 18, 2009, in which it concluded that plaintiff's motion should be denied. The court stated that a sheriff's sale could not be set aside based on plaintiff's unilateral mistakes. The court also stated that there were insufficient equitable grounds upon which to set aside the sale. The court memorialized its opinion in an order dated August 18, 2009.

Thereafter, plaintiff filed a motion for reconsideration of the August 18, 2009 order, which NJHC opposed. The court heard argument on the motion on September 25, 2009, and issued a written opinion dated September 25, 2009, in which it concluded that reconsideration was warranted and the sale should be set aside.

The court found that plaintiff's objection to the sale was timely because it had been filed prior to the actual transfer of the deed, and NJHC had not fully paid the purchase price. The court additionally found that the purchase price of the property "is

most probably inadequate[.]" The court stated that a property assessed at \$380,900 for tax purposes in April 2009 could not be worth nearly \$250,000 less "just a few months later."

The court concluded that, to permit such a sale to be consummated would be "tantamount to permitting a forfeiture and equity abhors a forfeiture." The court also stated that "equity requires taking into consideration the possibility of the [owners] availing themselves of a loan modification through the [HAMP.]"

The court entered an order dated October 9, 2009, granting plaintiff's motion for reconsideration, vacating the order of August 19, 2009, and setting aside the July 16, 2009, sheriff's sale. This appeal followed.

NJHC argues that: 1) a sheriff's sale may not be set aside due to the negligence of a party that was not caused by any third-party; 2) the \$132,300 sale price was not so disproportionate to the value of the property as to warrant setting aside the sale; and 3) NJHC is an innocent party who should not be required to bear the loss occasioned by plaintiff's mistakes.

"[T]he Chancery Division has the authority to set aside a sheriff's sale and order a resale of property." First Trust Nat'l Ass'n, Inc. v. Merola, 319 N.J. Super. 44, 49 (App. Div. 1999) (citing Crane v. Bielski, [15 N.J. 342](#), 359 (1954)). "However, the exercise of this power is discretionary and must be based on considerations of equity and justice." Ibid. (citing Crane, *supra*, 15 N.J. at 359).

The court may set aside a sheriff's sale "by reasons of fraud, accident, surprise, or mistake, irregularities in the conduct of the sale[.]" Ibid. (quoting Karel v. Davis, 122

N.J. Eq. 526, 528 (E. & A. 1937)). Nevertheless, a judicial sale may not be vacated "'on the ground of mistake flowing from [a moving party's] own culpable negligence.'" Ibid. (quoting Karel, supra, 122 N.J. Eq. at 528). Furthermore, "inadequacy of price is not sufficient alone to justify equitable relief." Id. at 50 (citing Crane, supra, 15 N.J. at 348).

In this case, the trial court provided two reasons for setting aside the sheriff's sale. The court found that the bid price was "probably inadequate" because in April 2009, the property had been assessed at \$380,900 for tax purposes. The court based this finding upon a copy of a document called "New Jersey Tax & Assessment Search" that had been furnished by an entity or service called "Data Trace."

We note that NJHC does not dispute the fact that the property had been assessed for tax purposes at \$380,900. Rather, NJHC argues that the better measure of the property's value is the fact that the property had been listed for sale at \$249,900, and the realtor was pursuing a "short sale" of the property for about \$200,000. We are satisfied, however, that the trial court did not err by comparing the bid price with the assessed value of the property for tax purposes.

Here, NJHC did not provide the court with an opinion as to the property's value rendered by a duly qualified appraiser. Although there was some evidence that the Joneses may have been willing to sell the property for an amount less than the appraised value, their willingness to do so could have been due to a variety of considerations. We are satisfied that there is sufficient credible evidence in the record to support the trial court's finding regarding the adequacy of the bid price.

In its decision, the trial court also found that the Joneses had applied for a loan modification under HAMP. The record also supports that finding. Plaintiff submitted to the trial court a copy of a letter from the Joneses dated July 13, 2009, in which they requested a loan modification due to hardship. Furthermore, Hanusek and Maclin stated in their respective certifications that the Joneses were seeking to participate in the HAMP.

As plaintiff points out, the United States Department of Treasury had issued a directive dated April 6, 2009, which states that a loan servicer "should not proceed with a foreclosure sale until the borrower has been evaluated for [the HAMP] and, if eligible, an offer to participate in the HAMP has been made." U.S. Dep't of Treasury, Supplemental Directive 2009-01, at 14 (Apr. 6, 2009). Because the record established that the Joneses were seeking to participate in the HAMP, the foreclosure sale should not have gone forward. In our judgment, the court properly took this fact into consideration in deciding to set aside the sale.

NJHC maintains, however, that the sale was not postponed because plaintiff mistakenly failed to seek an adjournment. As we stated previously, plaintiff inadvertently failed to direct its attorney to seek an adjournment of the sale. Nevertheless, the failure to adjourn the sale was not due to any negligence on the part of the Joneses. In our view, the fact that plaintiff may have been negligent did not preclude the court from considering the Joneses' interest in the matter.

NJHC also contends that, in the event the court affirms the trial court's order setting aside the sale, plaintiff should be required to pay the reasonable costs and

expenses that NJHC incurred in bidding upon the property and participating in the litigation regarding the sale. We agree.

We are satisfied that, under the circumstances, the trial court should have required, as a condition to setting aside the sale, that plaintiff pay all of the reasonable costs and expenses, including reasonable attorneys' fees, incurred by NJHC in bidding upon the property and participating in this litigation. Cf. Davis v. DND/Fidoreo, Inc., [317 N.J. Super. 92](#), 101-03 (App. Div. 1998), certif. denied, [158 N.J. 686](#) (1999) (allowing court to award attorneys' fees and costs as a condition of granting defendant's motion to set aside default judgment).

Therefore, we affirm the court's decision to set aside the sale. We remand the matter to the trial court to require plaintiff to pay NJHC reasonable costs and expenses, including attorneys' fees, for bidding upon the property and participating in this litigation in the trial court and on appeal.

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ffirmed and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.