

DOCKET NO: HHDCV106024727S

SUPERIOR COURT

BANK OF SMITHTOWN

JUDICIAL DISTRICT OF HARTFORD
AT HARTFORD

V.

PRA AT NORWICH, LLC Et Al

12/2/2013

ORDER

ORDER REGARDING:

05/21/2013 390.00 MOTION FOR DEFICIENCY JUDGMENT PB 23-19

The foregoing, having been heard by the Court, is hereby:

ORDER: GRANTED

The matter is before the court on the substitute plaintiff's, CT Norwich, LLC, motion for a deficiency judgment against the defendants, PRA at Norwich, LLC and Joseph Pacitti. PRA at Norwich has not responded to the plaintiff's motion. Pacitti has objected.

The court conducted a hearing pursuant to General Statutes § 49-14 (a). While the parties initially disagreed over the plaintiff's calculation of the outstanding debt due it, the plaintiff has informed the court that it is not pursuing the default interest, late charges, attorneys' fees, and insurance premiums to which the defendant objected. Thus, the parties agree that the debt owed the plaintiff upon the vesting of title on May 2, 2013 was \$10,035,094.00. What is left for the court to determine is the value of the property as of May 2, 2013 and the calculation of any interest due from that date.

As to the valuation of the property, the plaintiff presented the testimony of William Kane, an appraiser who testified as to the fair market value of the foreclosed property as of May 2, 2013, the date title vested in the plaintiff. Kane's full appraisal of the subject property was admitted into evidence as Exhibit 1. According to Kane, the fair market value of the property as of May 2, 2013 was \$1,300,000. Kane arrived at his valuation by using both a sales comparison approach and an income capitalization approach. The sales comparison approach was given less weight by Kane due to the low coefficient of comparability among the properties he reviewed. Kane relied more heavily on the income capitalization approach because it is considered a reliable approach for valuing properties that are incomplete. In particular, Kane analyzed the cost to complete construction of the hotel and the expected cash flows that would be generated from operation of the hotel. He discounted the cash flows to present value using a rate he derived from industry sources and then applied a similarly derived capitalization rate to the result to determine the resale value of the property.

Kane testified that he has appraised 70-80 hotels in the last ten years, and has testified as an expert on property valuation many times. He did admit though that all of his hotel appraisals were either pre-construction or post-construction. Prior to this matter and another property involving these same parties, Kane had never appraised a partially completed hotel.

While Pacitti challenges Kane's conclusion as to valuation, the defendant did not present his own expert to opine as to the value of the foreclosed property. Instead, Pacitti argues that Kane has significantly undervalued the property given that the land alone, on which the hotel was built, was valued at \$1,500,000 at the time that PRA at Norwich purchased it in 2007 and began building the hotel. In addition, Pacitti argues that even by Kane's calculation the value of the work done to date on the hotel and the site work is over \$4,000,000. Consequently, Pacitti claims that the fair market value of the land and improvements, as of May 2, 2013, was \$5,508,025.00.

The court is not persuaded by the defendant's arguments for a number of reasons. First, the defendant presented no expert to opine that the defendant's approach to valuation was reasonable. In fact, counsel for Pacitti candidly admitted that despite his and Pacitti's efforts, they could not find an expert to testify to valuation based on the arguments they advanced. Thus, the court concludes that the approach to valuation suggested by Pacitti is not one that is accepted by qualified appraisers.

Second, Kane's appraisal report was thorough and well-reasoned. He addressed all of the variables one would expect an appraiser to consider. Similarly, he credibly defended his report and analysis on cross-examination. The court found him to be a reliable and experienced expert. In particular, the court found his capitalization of income approach to valuation to be particularly well-suited to the property in its current condition. And while the defendant criticizes Kane's analysis as proceeding from a series of questionable assumptions, he offers the court no alternative income analysis. Furthermore, the assumptions made by Kane as to expected income and expenses, and appropriate discount and capitalization rates, are precisely the types of assumptions valuation experts must make in doing a capitalized income analysis. Furthermore, all of Kane's assumptions were based on data and information he obtained from sources regularly relied upon by valuation experts.

Third, the defendant's approach to valuation looks backwards instead of forward. Its focus is on how the land was valued in 2007 and what monies have already been invested into the partial construction of the hotel. Such information is of little or no relevance to what it will cost to complete the hotel and what the hotel will be worth when it is completed. Nor is it particularly helpful to determining the current value of the partially completed hotel.

Pacitti further argues that Kane's valuation is understated because it includes a deduction of \$877,756.00 due to depreciation in the building over the last two and a half years. According to Pacitti, this depreciation occurred while the property was in the possession and control of the plaintiff or its predecessor in interest. Thus, because the plaintiff is responsible for the depreciation, the loss should be added back to the appraised value of the property for the purpose of determining any deficiency judgment.

The plaintiff does not dispute the underlying premise of the defendant's argument that if the plaintiff is responsible for the depreciation it would be inequitable to reduce the appraised value of the property, and hence increase the deficiency judgment, as a result of the depreciation. Instead, the plaintiff argues that there is no evidence that it or its predecessors had control of the property prior to May 2, 2013 and are responsible for any of the depreciation.

The court agrees with the plaintiff. There was no evidence that the plaintiff was in possession of the property prior to May 2, 2013. To the contrary, a review of the pleadings in this matter shows that the plaintiff made repeated efforts to bring this matter to a swift conclusion so that it could obtain control of the property. Those efforts were delayed for years by other lien holders who claimed their liens were prior in right to the plaintiff's. Overall, there is simply no factual basis for the court to conclude that the plaintiff either caused or is responsible for any depreciation of the property.

In addition, the court finds that the defendant's reliance on paragraph 21 of the original complaint misplaced. The paragraph merely alleged that PRA at Norwich was not in possession of the property. It did not allege that the plaintiff's predecessor was. Consequently, it provides no support for the defendant's claim that the plaintiff or its predecessors ever possessed or controlled the property prior to May 2, 2013.

For all of the foregoing reasons, the court concludes that the fair market value of the foreclosed property as of May 2, 2013 was \$1,300,000. Deducting this value from the debt due as of that date results in a deficiency, before the calculation of any post judgment interest, of \$8,735,094.

The plaintiff requests that the court apply the maximum allowable post judgment interest rate of 10% to the deficiency. The defendant requests that the court apply the loan agreement's 4.25% interest rate.

Given the plaintiff's agreement that it is no longer pursuing the default rate of interest in this matter, the

court concludes that the most equitable rate to use through this ruling and from the entry of the deficiency judgment forward is the 4.25% rate. Applying this rate of interest from May 2, 2013 through today results in additional interest due of \$217,659.40 ($\1017.10×214 days).

The court also awards the plaintiff an additional appraisal fee of \$1,000.

Thus, the court enters a deficiency judgment for the plaintiff and against the defendants PRA at Norwich, LLC and Joseph Pacitti in the amount of \$8,953,753.40. Post judgment interest shall accrue on this amount at the annual rate 4.25%.

Copy mailed to all parties of record. 12/3/2013 CM/TAC

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Judge: WILLIAM H BRIGHT
Processed by: Christina McPhaul