Sherman Atlas Sylvester & Stamelman

BANKING ALERT

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New York Appellate Division, Second Department, Refuses to Set Aside Foreclosure Sale

In *Bank of New York Mellon Trust Company, N.A. v. Gambino*, Docket No. 2020-08876 (N.Y. App. 2d Dept 2023), the New York Appellate Division, Second Department, held that a nonparty bidder had failed to establish that a foreclosure sale should be set aside on the grounds that the referee had refused to accept his bid, which was in excess of the bank's nominal $500 bid.

The plaintiff, Bank of New York Mellon Trust Company, N.A. ("BNY"), commenced a foreclosure action on certain real property in Suffolk County. After obtaining an order and judgment of foreclosure in November 2019, a referee set the amount due to BNY at $996,061.26 and directed the sale of the property at public auction. At the public auction held in February 2020, the referee announced that BNY's upset price was $693,000. A representative of BNY subsequently submitted a bid of $500, and BNY was announced as the prevailing bidder.

After the sale was completed, a non-party, Armand Retamozzo ("Retamozzo"), filed a motion to set aside the sale and compel the referee to accept his bid of $200,000 for the subject property. The trial court hearing the application denied Retamozzo's request for such relief. On appeal, the Second Department affirmed the trial court's order, noting that CPLR 2003 authorizes a trial court to set aside a foreclosure sale on very narrow grounds, i.e., upon a demonstration of fraud, collusion, mistake, or misconduct. In affirming the trial court's decision, the Second Department noted that Retamozzo had failed to produce any evidence of fraud, collusion, mistake or misconduct.

New Jersey Appellate Division Holds That Lender Entitled to Interest Under Guaranty Mortgage

In *Natalie Children, LLC v. Crown Bank*, Docket No. A-2773-21 (N.J. App. Div. May 10, 2023), the New Jersey Appellate Division affirmed a trial court's order granting a bank's motion for summary judgment seeking to dismiss claims asserted by a borrower that the bank was not entitled to repayment of interest on a guaranty mortgage.

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On June 24, 2008, Joseph D. Natale and seven other individuals signed a loan agreement and a note with Crown Bank for $3,100,000. That same day, JDN Properties, IV, LLC, an entity solely managed by Joseph D. Natale, entered into: (1) a guaranty agreement with Crown Bank; and (2) a guaranty mortgage security agreement on a property it owned in an amount "not to exceed $420,000" as security for the $3,100,000 loan. In addition, the guaranty prohibited JDN Properties, IV, LLC from selling, transferring, conveying, or disposing of any assets.

On August 2, 2010, JDN Properties, IV, LLC transferred the property to Natale Children, LLC, and, as a result, defaulted on the guaranty. Crown Bank thereafter sued Joseph D. Natale and obtained a judgment for $3,245,957.22, representing the amount due on the loan.

In 2021, Natale Children, LLC filed a separate complaint and subsequent motion for summary judgment seeking a declaratory judgment that it owed Crown Bank no more than $420,000 to discharge the guaranty mortgage because the mortgage stated it was in an amount not to exceed $420,000. Crown Bank answered the complaint and filed a cross-motion for summary judgment, arguing that it could charge interest under the guaranty, and sought a judgment for more than one million dollars, which represented the $420,000 plus interest as of the date of default. Crown Bank also sought attorney's fees pursuant to the guaranty.

The trial court granted Crown Bank's motion for summary judgment, as wells as Crown Bank's application for attorney's fees. The trial court cited to provisions to the guaranty, which highlighted that, upon default, Crown Bank could foreclose on "the [m]ortgaged [p]roperty, or take such other action at law or in equity for the enforcement of [the m]ortgage[,]" including proceeding to final judgment on the unpaid balance of the $420,000 "with interest at the highest applicable default rate set forth in the [l]oan [a]greement . . . ."

Natale Children, LLC appealed, arguing that the trial court misinterpreted the guaranty and should have limited the judgment. Natale Children, LLC contended, alternatively, that: (1) there were conflicting interpretations of the guaranty, which the trial court could not resolve on summary judgment; (2) even if the trial court interpreted the guaranty correctly to include interest, the default interest rate was no greater than three percent; and (3) the trial court should not have granted Crown Bank's application for attorney's fees because the guaranty limited attorney's fees to costs arising out of a foreclosure and Crown Bank's fees were incurred defending a declaratory action.

The Appellate Division affirmed the trial court's order granting Crown Bank's motion for summary judgment on two grounds: (1) the loan documents did not foreclose Crown Bank from interest on the $420,000.00; and (2) attorney's fees were properly awarded as the guaranty expressly permitted Crown Bank to recover attorney's fees as a form of cost and expense for enforcement of the $420,000 security. With regard to the former, the Appellate Division noted that the guaranty mortgage expressly permitted interest and set it at the rate in the loan agreement.

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