

IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

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CAPITAL BANK, N.A.,)
)
 PLAINTIFF,)
)
 VS.) CASE NO. 39411
)
 JOHN P. THONI JR.,)
)
 DEFENDANT.)

ENTERED 6-7-13

MEMORANDUM AND ORDER

This matter is before the Court on a hearing conducted April 10, 2013.

Background

Plaintiff, Capital Bank, N.A., is a national banking association headquartered in Coral Gables, Florida. It acquired and merged with GreenBank in September 2011. GreenBank was a Tennessee banking corporation with offices throughout the State of Tennessee, including Nashville, Davidson County, Tennessee. GreenBank's corporate headquarters was in Greene County, Tennessee. GreenBank is a successor-in-interest to Cumberland Bank.

This lawsuit relates to four (4) loans; deficiencies owed by Defendant on three (3) loans; and a default by Defendant on an additional loan owed as a result of a draw on a letter of credit. Defendant failed to pay off Note Nos. xx7700, xx5300, and xx0415 when they matured.

GreenBank exercised its remedies under certain Promissory Notes as modified, and declared a default on Note Nos. xx7700, xx5300, and xx0415 by certified letter to Defendant dated August 18, 2010, and requested that he pay off the notes no later than

September 3, 2010, which Defendant failed to do. Thereafter, Plaintiff scheduled a foreclosure for December 8, 2010 related to the real property secured by a Deed of Trust pertaining to Promissory Note Nos. xx7700, xx5300, and xx0415. Plaintiff then obtained an appraisal for the fair market value of the real property secured by the Deed of Trust in relation to Note No. xx7700. Plaintiff secured the services of Mr. Randy Button, a state certified real estate appraiser, who opined that the fair market value of the real property secured by the two Deeds of Trust was \$756,250.00 as of November 23, 2010. In addition, Mr. Button opined that the fair market value of the real property secured by Deed of Trust Note No. xx00415 was \$343,750 as of November 23, 2010. Another appraisal of the same property secured by the two (2) same Deeds of Trust as set forth above was obtained through Mr. Danny Wiley as an *Exterior-only Residential Report*. As a result of the report presented by Mr. Wiley, it was Mr. Wiley's opinion that the fair market value of the real property secured by the Deed of Trust in connection with Note No. xx5300 was \$500,000 as of November 8, 2010. On December 8, 2010, Plaintiff conducted a foreclosure sale of the real property secured by the Deed of Trust in relation to Promissory Note Nos. xx7700, xx5300, and xx0415. The obligations evidenced by the letter of credit Nos. 1199, 1213, 1214, 1223, and 1224 had not expired at the time of the December 8, 2010 foreclosure sale.

At the foreclosure sale on December 8, 2010, the real property secured by a Deed of Trust pertaining to the Promissory Note No. xx7700 was sold to Plaintiff for the highest and best offer of \$605,000, which was a credit bid by Plaintiff against the debt owed under Note No. xx7700.

On the same day, December 8, 2010, at the same foreclosure sale, the real property secured by a Deed of Trust pertaining to Promissory Note No. xx5300, was sold to Plaintiff for the highest and best offer of \$400,000, which was a credit bid by Plaintiff against the debt owed under Promissory Note No. xx5300.

On the same day and date of December 8, 2010, and at the same time as the two (2) previous sales, the real property secured by a Deed of Trust pertaining to Promissory Note No. xx0415, was sold to Plaintiff for the highest and best offer of \$180,000, which was a credit bid by Plaintiff against the debt owed under Note No. xx0415.

Defendant attended the December 8, 2010 foreclosure sale, but did not place a bid for the purchase of any of the properties. No other party who attended the December 8, 2010 foreclosure sale placed a bid for purchase. Exclusive of interest, accrued attorneys' fees, and related charges, the principal balance owed on Note No. xx7700 at the time of the foreclosure sale was \$853,661. Exclusive of accrued interest, accrued attorneys' fees, and related charges, the principal balance owed on Note No. xx0415 at the time of the foreclosure sale was \$180,000. Exclusive of accrued interest, accrued attorneys' fees, and related charges, the principal balance owed on Note No. xx5300 at the time of the foreclosure sale was \$400,000. Plaintiff's bid price for the real property secured by Note Nos. xx0415 and xx5300 equaled the principal balance owed on each Note. In addition, the balances owed on Note Nos. xx7700, xx0415, and xx5300 did not include the additional costs the Plaintiff projected it would incur as part of its foreclosure bid if it was the successful high bidder at the December 8, 2010 foreclosure sale. These costs included the paying of outstanding taxes owed on the

foreclosed property, the maintenance and utilities on the foreclosed property, and the closing costs associated with the sale of the lots located on the foreclosed property, or the depreciation and value of the foreclosed property while it was on the market.

Analysis

It is the position of Defendant that the properties purchased by Plaintiff were for an amount "materially less" as defined in Tenn. Code Ann. § 35-5-118 than the fair market value of property at the time of the foreclosure sale. Plaintiff believes that the applicable statute is Tennessee Code Annotated § 35-5-118, which became effective September 1, 2010, with regard to deficiency judgments has been satisfied as to all bid prices as well as all procedures.

Generally, when real property has been foreclosed upon and the foreclosure does not satisfy the amount of the financial obligation for which the property was secured, the foreclosing party is entitled to a deficiency judgment against the party liable on the underlying obligation. *Lost Mountain Dev. Op. v. King*, 2006 WL 3740791, at *8 (Tenn. Ct. App. Dec. 19, 2006). "A mortgagee who bids less than the full amount of the debt retains its status as a creditor with regard to the deficiency." *First Inv. Co. v. Allstate Ins. Co.*, 917 S.W.2d 229, 231 (Tenn. Ct. Apps. 1994). As stated above, the applicable statute relied upon by both parties is Tennessee Code Annotated § 35-5-118, which also applies to actions for deficiency judgments after a foreclosure sale and applies to the facts of the present lawsuit. The statute provides in relevant part:

- (a) In an action brought by a creditor to recover a balance still owing on an indebtedness after a trustee's or foreclosure sale of real property, secured by a deed of trust or mortgage, the creditor shall be entitled to a deficiency judgment in an amount sufficient to fully satisfy the indebtedness. (emphasis added)

(b) In all actions, **absent a showing of fraud, collusion, misconduct, or irregularity in the sale process**, the deficiency judgment shall be for the total amount of the indebtedness prior to the sale plus the costs of the foreclosure and sale, less the fair market value of the property at the time of the sale. The creditor shall be entitled to a **rebuttable prima facie presumption** that the sale price of the property is equal to the fair market value of the property at the time of the sale. (emphasis added)

(c) To overcome the presumption set forth in subsection (b), the debtor must prove **by a preponderance of the evidence** that the property sold for an amount **materially less** than the fair market value of property at the time of the foreclosure sale. If the debtor overcomes the presumption, the deficiency shall be the total amount of the indebtedness prior to the sale plus the costs of the foreclosure and sale, less the fair market value of the property at the time of the sale as determined by the court. (emphasis added)

Tennessee Code Annotated § 35-5-118 (emphasis added).

Defendant admits that he is not alleging fraud, collusion, misconduct or irregularity by Plaintiff during the foreclosure process. Tennessee Code Annotated § 35-5-118 provides a presumption that Plaintiff's credit bid price was adequate. This *prima facie* presumption that the sale price at the foreclosure sale is equal to the fair market value of the foreclosed property at the time of the sale is a rebuttal presumption. Tennessee Code Annotated § 35-5-118(b). A rebuttable presumption is a substitute for testimony or evidence; it has the force of proof until it is overcome by contradictory evidence. *Bryan v. Aetna Life Ins. Co.*, 169 S.W.2d 423, 426 (Tenn. 1941). The degree of proof required to rebut a presumption generally is proof sufficient to establish, *prima facie*, that the facts giving rise to the presumption do not exist. *Braswell v. Tindall*, 29 S.W.2d 685, 687-88 (Tenn. 1956). Applying the statutory presumption set forth in the statute, Plaintiff is entitled to a presumption that the successful bid prices for the property secured by each note equaled the fair market value of the property at the time

of the foreclosure sale. Unless this fact, which was established *prima facie* by the legal presumption of its truth, is disproved by Defendant, it must stand as proved.

Defendant's Burden Under Tennessee Code Annotated § 35-5-118

In order for Defendant to overcome the presumption granted to Plaintiff under Tennessee Code Annotated § 35-5-118(c), Defendant must show by a preponderance of the evidence that the property sold at the December 8, 2010 foreclosure sale was sold "for an amount **materially less** than the fair market value of the property at the time of the foreclosure sale." Tennessee Code Annotated 35-5-118(c) (emphasis added).

"Preponderance of the evidence" is defined as follows: **Preponderance of the evidence.** The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue whether than the other.

Black's Law Dictionary, 1201 (7th Edition 1999).

Alleging a difference in price is insufficient for showing "materially less." In this case, Defendant attempted to show that Plaintiff's failure to bid the full amount of the Button appraisal and the Wiley appraisal is evidence of the properties being sold at materially less than fair market value for purposes of Tennessee Code Annotated § 35-5-118. The allegation or statement by Defendant that Plaintiff had an obligation to bid in at minimum the value dictated by the appraisals, standing alone is insufficient. Tennessee courts have recognized that even a foreclosure sale conducted with the utmost punctiliousness may achieve only half the price which may be obtained under normal circumstances. *Holt v. Citizens Central Bank*, 688 S.W.2d 414, 416 (Tenn. 1984), *see also*, *Smith v. Chattanooga Prod. Credit Ass'n.*, 1986 WL 6617 at *3 (Tenn.

Ct. App. June 13, 1986) (Tenn. Ct. App. "Know[s] of no obligation...that requires a bidder at an auction even if it is the holder of the indebtedness to bid the amount of appraisal...at the sale.")

Tax Records are Insufficient Proof

In order to bolster his argument that the Plaintiff's bids were materially less than fair market value, Defendant presented certain 2010 Form 1099 evidence as well as tax assessment records in an attempt to provide a fair market value for the properties. The Court finds that although the proof provided by Defendant is some evidence of value, it does not overcome the presumption under the statute nor does it overcome the appraisals presented in Plaintiff's proof. Tax assessment values are determined for purposes entirely different from determining the fair market value of property. Merely coming up with an alternative value does, not in and of itself, rebut the presumption and shift the burden back to the Plaintiff. Therefore, Defendant was unable to present sufficient proof necessary to overcome the presumption that the forced bid price reflected the properties' fair market value.

Conclusion

The Court concludes from all of the evidence that there is no proof that the credit bids were "for an amount materially less than the fair market value of the property at the time of the foreclosure sale." Tenn. Ann. Code § 35-5-118(c). It was the intent of the Tennessee Legislature that the determination of "materially less" be made on a case-by-case basis. *Green Bank v. Sterling Ventures, LLC*, 2012 WL 6115015, at *10 (Tenn. Ct. App. Dec. 7, 2012). Similarly, the Tennessee Court of Appeals has held, in interpreting Tennessee Code Annotated § 35-5-118, that it "cannot establish a bright-line

presumption, above or below which the statutory presumption is rebutted." *Id.* Prior to the enactment of Tennessee Code Annotated § 35-5-118, Tennessee case law focused primarily on the issue of whether the foreclosure price was "grossly inadequate." *Duke v. Daniels*, 660 S.W.2d 793 (Tenn. Ct. App. 1983). Tennessee Code Annotated § 35-5-118(c) adopts the standard set out by case law, but replaces the term "grossly inadequate" with "materially less." In reviewing the proof established in this case, it is clear by the preponderance of the evidence that the bid prices for the sale of the properties at the foreclosure sale in December 2010 are fair and reasonable under all of the circumstances.

The balances owed on each of these loans as of the date of trial are as follows:

Note No. xx7700:	\$315,181.00
Note No. xx5300:	\$ 10,764.00
Note No. xx0415:	\$ 4,621.00
Note No. xx4500:	\$ 45,400.00

The Court finds that the Plaintiff is entitled to recover its reasonable and necessary attorneys' fees, collection costs, and expenses related to the exercise of its rights under the terms of the Notes and in pursuing this cause of action for collection of the deficiencies due and owing.

IT IS SO ORDERED.

ENTERED this 7th day of June, 2013.


Michael W. Binkley
Circuit Court Judge

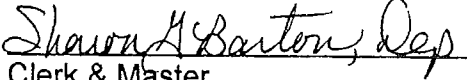
CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum and Opinion was mailed, postage prepaid, and/or emailed, and/or faxed, to:

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This the 10th day of June, 2013.


Clerk & Master