

STATE OF VERMONT

SUPERIOR COURT
RUTLAND UNIT

CIVIL DIVISION
Docket # 333-6-16 Rdcv

WELLS FARGO BANK, N.A.
Plaintiff

v.

MARJORIE W. JOHNSTON,
KAMBERLEIGH JOHNSTON,
Defendants

FILED
FEB 14 2020
VERMONT SUPERIOR COURT
RUTLAND

DECISION

Motion for Confirmation of June 5, 2019 Sale (Motion #69)

This is a foreclosure case in which a Revised Judgment for Foreclosure was issued in March of 2018 on property at 50 Pine Street in Rutland, Vermont with a final redemption date of April 24, 2018. The property was not redeemed by the redemption date, and a sale was originally scheduled for June of 2018. It was postponed twice for various reasons, and a sale was held in October of 2018. A hearing was held on April 4, 2019 on the Plaintiff's motion to confirm that sale, and the court denied confirmation. The court extended the time for sale until July 1, 2019 so that a new sale could be held. A sale was conducted on June 5, 2019, which is the subject of this decision. A Motion to Confirm the sale was filed June 28, 2019.

An evidentiary hearing on the Motion was held on January 29, 2020. Plaintiff was represented by Attorney William R. Dziedzic. Defendant Mortgagor Marjorie Johnston was present and represented herself. Kamberleigh Johnston, a named Defendant with a recorded junior interest in the property and a bidder at the sale, was present and represented himself.

Kamberleigh Johnston asks the court to apply the standards for conduct of foreclosure sales set forth in the trial court decision commonly known as *Campbell*,¹ and asserts that this is the law of the case since those standards were adopted and applied by Judge Hoar in his ruling on April 4, 2019 when he denied confirmation of the previous sale. He claims that the June 5, 2019 sale did not comply with those standards, and he asks for denial of confirmation and in addition he asks for sanctions to be imposed against Plaintiff for claimed bad faith. Plaintiff does not challenge the applicability of the *Campbell* standards, but claims that they were observed and that the sale should be confirmed.

Based on the evidence, the court finds facts by a preponderance of the evidence as follows and makes the following conclusions of law.

¹ The full citation is *Bank of New York Mellon v. Peter Campbell, et al.*, No. 229-4-10 Wrcv (Dec. 3, 2013), available at <https://www.vermontjudiciary.org/20112015%20Tcddecisioncvl/2013-12-5-7.pdf>.

Findings of Fact

Mr. Johnston claims that the sale was invalid in part because the Notice of Sale, which is required by statute to be sent to specified individuals and published, contained two errors. The first claimed error is that in identifying the mortgage, it stated that the mortgage was given "by Marjorie W. Johnston and Kamberleigh Johnston to Wells Fargo Home Mortgage Inc. . ." Mr. Johnston is correct that this is an error, as he was not a mortgagor. He was named as a defendant because of a junior recorded interest in the property, and not because he was a mortgagor. Whether or not such an error is sufficient to invalidate the sale is addressed in the Conclusions of Law section below.

The second claimed error is that although the Notice correctly stated that the \$10,000 deposit required of any bidder could be offered in cash, it omitted cash as an option for payment of the balance of the price on the part of the successful bidder. This is not an error. The form of the Notice of Sale authorized by statute is set forth in 12 V.S.A. § 4952 (e), which states:

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time of the sale, and the schedule for payment of the balance and other terms of sale.)

12 V.S.A. § 4952 (e)

While the statute provides for bidders to be able to pay any deposit at time of sale in cash, it does not require that cash be a permitted form of payment for the balance of the purchase price. Therefore, it was not clearly an error, as a matter of fact, for the Notice of Sale to provide that "[t]he balance of the purchase price shall be paid by a certified check, bank treasurer's or cashier's check within sixty (60) days after the date of sale."

The two witnesses at the evidentiary hearing were Andrew Leith, the auctioneer who conducted the sale, and Kamberleigh Johnston, who was also present at the sale and was a bidder. Mr. Johnston made a video recording of the sale, which was admitted into evidence as Exhibit B. Mr. Leith questioned whether there had been manipulation of the video and thus questioned its evidentiary value. The court finds that the content of the video is consistent with the testimony given by both witnesses and does not appear to have been altered. The court finds that it is a credible audio and visual representation of the portions of the sale that are captured by the audio and visual technology, although it is not a panorama of the entire scene throughout the event, nor are all of the words said during the event discernible. It was evident both on the video and at the hearing that there is a great deal of distrust and animosity between Mr. Leith and Mr. Johnston.

Mr. Leith arrived at the 50 Pine Street property approximately 20 minutes early and put up a sign signifying that a foreclosure sale was about to take place. Melissa Hayden, who was a representative of the Plaintiff there to bid on behalf of the Plaintiff, also arrived early. Mr. Johnston also arrived early, and began his video. Mr. Leith and

Ms. Hayden made small talk for about 10 minutes, and Mr. Johnston's video shows them doing so.

Two other people arrived: Robert Prozzo, who is another auctioneer who conducts foreclosure sales, and another gentleman whom Mr. Johnston identified as the tax assessor for Rutland. Neither intended to bid, but were there only as observers.

Mr. Leith acknowledged in testimony that prior to the time of sale, he had received a copy of the Plaintiff's bidding instructions to Ms. Hayden as part of the "bid package" he received, so he knew what the Plaintiff's bid was going to be. He also testified that the bidding instructions are "proprietary." He testified that they are the instructions the Plaintiff gives to the person bidding on its behalf. Although he did not explain it, the inference from his statement was that these instructions belonged to the bank and need not be shared with others. However, they had been shared with him, the independent auctioneer. He also testified on cross examination that "the reserve bid is the bank defending its price," and that the bank can be the highest bidder if no one else bids. He further testified that his understanding of *Campbell* was that the bank had to send a representative to the sale. Although he did not say so, the reasonable inference was that it was his understanding that that was the only, or at least the primary, requirement of *Campbell*.

When it was time for the auction to start, Mr. Johnston asked Mr. Leith, "So what are the pre-bid instructions?" and referred to the provision in the Notice of Sale which stated, "Other terms to be announced at the sale." Mr. Leith said something to the effect that there was nothing more 'than what is in there.' Mr. Leith then provided for registration of bidders, who were asked to sign a registration form. Both Melissa Hayden, acting on behalf of the Plaintiff, and Mr. Johnston, acting for himself, signed the form. Mr. Leith reviewed and approved the deposit check that Mr. Johnston presented to show that he was a qualified bidder.

After a few more moments of the registration process, Mr. Johnston then asked what the bid procedures were, and specifically, 'how do you recognize the first bidder?' Mr. Leith responded that 'he would see when they got there.'

Mr. Leith then announced the auction and read aloud provisions from the Notice of Sale. He then said, "I will now open the bidding."

Mr. Johnston promptly said, "I'll bid \$1,000."

Ms. Hayden then quickly said, "No, I have a reserve bid for the bank."

Mr. Leith then said, "Do I have an opening bid?" It appears that Mr. Leith intended this question to follow, "I will now open the bidding," but both Mr. Johnston and Ms. Hayden had jumped in with their statements before he could do so.

Ms. Hayden then said, "I have a bid for the Wells Fargo Bank NA of \$100,000."

There was then an interchange directly between Mr. Johnston and Ms. Hayden:

Mr. Johnston: "How do you get the right to bid first?"

Ms. Hayden: "Because I represent the lender." Mr. Johnston then asked her in an agitated voice what gave her the right to bid first and said that there was nothing in the rules that allowed her to do that.

Mr. Leith then said, "I have an opening. . . I have a bid from the Wells Fargo Bank in the amount of \$100,000." Mr. Johnston then protested and began to argue with Mr. Leith, essentially accusing him of letting the bank set the minimum bid price. (In fact, he had already submitted the opening bid of \$1,000.) Mr. Leith then said, "Do I have any other bids?" It was Mr. Johnston who then said, in an accusatory tone, "She set the minimum bid price." He repeated, "The bank just set the minimum bid price." Mr. Johnston then asked Ms. Hayden if he could read her paperwork, and she replied, "I just read to you what was on here." Mr. Johnston continued to pursue this subject with her. In the meantime, Mr. Leith stated that he had a bid of \$100,000.

Mr. Johnston then accused Mr. Leith of having refused Mr. Johnston's bid. The court finds that it was overstatement on Mr. Johnston's part to say that he had done so. The court finds that Mr. Leith was stating the amount of the most recent and highest bid he had received, which was the Plaintiff's bid. He had not said or done anything that showed a rejection of Mr. Johnston's bid—the Plaintiff's higher bid had come quickly on the heels of Mr. Johnston's opening bid. The fact that Mr. Johnston interpreted the situation as a refusal does not make it so. Mr. Leith was dealing with a difficult situation in which the two bidders were challenging each other and engaged in rapid-fire argument, and then Mr. Johnston turned on Mr. Leith and essentially accused him of taking the bank's part. People were talking over each other. It was a confusing, chaotic moment.

Mr. Leith then stated, "I have a bid from Kamberleigh Johnston in the amount of \$1,000" at which point Mr. Johnston interrupted him and said, "You can't redo it. You have already accepted her bid." Mr. Leith then said her bid was the second bid, and Mr. Johnston said, "No, it wasn't. She interrupted me and you accepted her bid." Mr. Johnston raised his voice and claimed, "This is collusion. This is total collusion." In the meantime, Mr. Leith was saying, "Do I have any other bids?"

Mr. Johnston continued to argue the unfairness of his version of what had just happened. In the meantime, Mr. Leith was saying, "Going once, going twice—sold to Wells Fargo Bank for \$100,000." The sale was then over.

In followup conversation in an agitated voice, Mr. Johnston represented to an observer that "the bank set the minimum bid and the auctioneer accepted it."

Mr. Johnston then asked to see the bidding instructions from the bank, and Mr. Leith refused to let him see them. Mr. Johnston testified that at the October 2018 sale, the Plaintiff had bid \$15,000, and that if he had known that was going to be the bank's bid, he could have bid a higher amount. It is unknown whether Mr. Johnston presented

himself as a qualified bidder at the October 2018 sale. It is unknown whether Mr. Leith conducted the October 2018 sale and had received a copy of the Plaintiff's bidding instructions in advance of that auction.

The procedure was complete, and the gathering broke up. Mr. Johnston had challenged Mr. Leith on some aspects of the procedure, and Mr. Leith was clearly extremely annoyed with Mr. Johnston. Mr. Leith testified at the hearing that during the bidding process, Mr. Johnston threatened the other bidder and tried to obstruct the process. The court finds that Mr. Johnston was questioning what was occurring as a matter of procedure and he raised his voice and his tone was anxious such that he could reasonably be perceived as aggressively challenging the propriety of what was occurring, but that he was not physically threatening or intimidating. Ms. Hayden was irritated with Mr. Johnston's effort to enter the first bid and was confrontational with him in asserting what she believed to be a right to enter a first "reserve" bid.

Mr. Leith completed a Report of Sale that identified Melissa Hayden as bidder on behalf of Plaintiff and Kimberleigh Johnston as bidder, and reported that the property sold for \$100,000. It was filed with the court together with the motion to confirm the sale.

Mr. Johnston testified that on January 9, 2020, the Plaintiff put the 50 Pine Street property up for auction on a website, and this is supported by Exhibit F. This was prior to the confirmation of sale hearing held on January 29, 2020, so at the time, it was not clear that the Plaintiff would acquire ownership. The Exhibit is insufficient for the court to determine whether the Plaintiff represented on the website that it actually owned the property, or whether any website auction result was conditional upon it subsequently acquiring ownership. Mr. Johnston testified that the minimum bid was stated on the website to be \$7,500.

For the year 2018, Plaintiff caused a Form 1099-A to be sent to Marjorie Johnston reporting to the IRS results of an "acquisition" on October 17, 2018, the date of the prior invalidated sale. The form appears to have been sent prior to the hearing on the confirmation of the October 17, 2018 auction, so any "acquisition" had actually not yet occurred. Plaintiff reported "Balance of principal outstanding" as \$99,525.08, and "Fair market value of property" as \$51,300.00. It is unknown whether Plaintiff later submitted an amended or corrected 1099-A to Marjorie Johnston. The 1099-A preprinted form has a box to be checked showing if it is a "CORRECTED" form. See Exhibit G. In any event, such conduct did not affect the opportunity of any person, including Mr. Johnston, to be a qualified bidder at the June 5, 2019 auction and submit a bid.

Conclusions of Law

The applicability of the *Campbell* standards appears not to be at issue between the parties. Plaintiff's counsel did not challenge Mr. Johnston's position that the *Campbell* standards apply as the law of the case. Plaintiff's position is that there was compliance,

and the sale should be confirmed. Mr. Johnston challenges confirmation on several grounds, addressed below.

Sufficiency of Notice of Sale

As found above, the Notice of Sale included an error in that it represented that Mr. Johnston was a mortgagor when he was not. The court concludes that although this error existed, it was harmless to the function, purpose, and operation of the Notice of Sale as provided for in 12 V.S.A. § 4952 (e). The purpose is to put all parties on notice of the property for sale, the mortgage being foreclosed upon (which is identified by specific book and page in the land records), the date and time and place of sale, terms, and access to further information. The Notice also identified the court in which the foreclosure case was pending and the docket number. Any person seeking specific information about the parties and their interests under the judgment, the terms of the mortgage, the amount due, the likelihood of redemption prior to the actual sale taking place, or similar information had full access to inspect the mortgage instrument itself and the full record of the foreclosure case, and to discover thereby Mr. Johnston's status in the case. While he claims that the Notice defamed him by representing that he was a defaulting debtor, that is not an issue to be addressed in relation to the court process for reviewing satisfaction of the legal requirements of the sale. Here, the Notice of Sale provided all pertinent information about the sale to the people who might be interested in it and did not mislead them or compromise the fairness of the sale that took place.

As to the omission of an opportunity by the successful bidder to pay the balance of the purchase price in cash as opposed to by some other method sufficient to ensure satisfaction of payment, the statute does not mandate such a requirement. The Notice provided for payment of the balance in three secure forms of noncash payment, and there was nothing to suggest that cash would not also be an acceptable form of payment. Thus, there was no error and no prejudice to potential bidders with respect to the purpose of the Notice of Sale.

Claim that Plaintiff should not be given priority to enter the first bid

Mr. Johnston objects to a plaintiff being able to enter a first "reserve" bid. He is correct about the standard he asserts: reserve bids are inconsistent with the conduct of judicial foreclosure sales, and Plaintiff's counsel does not argue that his client has a right to a reserve bid. In fact, there was no reserve bid, despite Ms. Hayden's attempt to invoke such a concept at the sale and Mr. Leith's use of the term in testimony at the hearing.

The facts as found above show that the claim is unfounded in that the auctioneer did not entitle the Plaintiff to start the bidding with its own price. In reality, it was Mr. Johnston who entered the first bid. Even though he may have voiced his bid a little sooner than the others might have been expecting, he made a clear opening bid, and the auctioneer did not reject it. Ms. Hayden quickly responded by asserting that she had the right to make the first bid as a reserve bid on behalf of Plaintiff. She is wrong about that, but the fact that she said it or that her Plaintiff/employer wants her to make the first bid

does not automatically mean that the auctioneer conducted the auction as if there were a reserve price set by Plaintiff.

Mr. Leith had difficulty maintaining control over the sale procedure as the bidders challenged each other and Mr. Johnston challenged him, but he did not actually conduct the auction in a manner that allowed Ms. Hayden to make a reserve bid that precluded the submission of any lower bid. He actually recognized Mr. Johnston's right to make his bid, which was lower than the Plaintiff's bid. His testimony at the hearing that "the reserve bid is the bank defending its price" was unfortunate because it seems to suggest that he acknowledges the right of the Plaintiff to set a reserve price, but he actually didn't conduct the auction as if there were a reserve price. He did not open the bidding by stating a reserve price, but rather simply opened the bidding. It was Ms. Hayden and Mr. Johnston who vied for position as the first bidder. Mr. Leith is correct that the Plaintiff has the right to 'defend' its interest by placing a bid at the price it chooses, which it did.

Perhaps Mr. Leith could have been more clear in correcting Ms. Hayden's misunderstanding of what she was and was not entitled to do, but in fact Mr. Johnston was not deprived of the opportunity for open bidding and he exercised it. He was just outbid.

Auctioneer's refusal to allow Mr. Johnston to see Plaintiff's bidding instructions

Mr. Johnston claims error on the part of the auctioneer in refusing to allow him to see the Plaintiff's bidding instructions, which Mr. Leith had received in advance of the sale. The request was made after the auction had been concluded, but presents an issue concerning procedural fairness in judicial auctions.

To the extent that bidding instructions are sent directly from a plaintiff or plaintiff's counsel only to its bidding representative such as Ms. Hayden, such instructions are a plaintiff's own instructions and not subject to inspection by anyone else at the sale. To that extent, Mr. Leith is correct that they are "proprietary." Neither Mr. Johnston nor anyone else would have the right to see them. Similarly, any communications a bidder such as Mr. Johnston may have with anyone in advance and any papers he might bring with him to the sale could not be required to be shared with anyone else.

Once any such papers are submitted to the auctioneer, however, they are part of a bidder's submission of its bid. The *Campbell* standards prohibit advance submissions of bids to the auctioneer for the reasons set forth in that decision. Bids are to be submitted *at the sale* and not before. Mr. Leith testified that his understanding of *Campbell* is that it requires that the plaintiff send a personal representative to the sale. That is accurate, but that is only a part of the requirement, which is that a plaintiff may not submit its bid to the auctioneer in advance but must *instead* bid through a bidder who does its bidding *at the sale*. With respect to amounts of bids, a plaintiff stands in the same shoes as any other bidder and must submit its bid only *at the sale*. It is improper for any bidder, whether a plaintiff or other third party interested in bidding (such as an investor or contractor

looking for a good deal), to send the auctioneer information in advance about bid amount. This compromises the fairness of the bidding process at the sale itself, as it diminishes the ability of the auctioneer to conduct the sale impartially at the time and place of sale, and, importantly, to be perceived to be doing so, which is crucial to the integrity of judicial sales. See *Campbell* for a more complete analysis and discussion of this issue.

It appears from the evidence that at least some plaintiffs have continued the practice of sending to the auctioneer, in advance, a "courtesy copy" of the plaintiff's bidding instructions even though they also send a personal representative to the sale. The continuation of this practice results in a continuing pattern of promoting alignment of the plaintiff with the auctioneer. This is inconsistent with the requirement to observe the role of the auctioneer, which is to conduct an independent, transparent, open sale on behalf of the court, independent of influence from either the plaintiff or any bidder, and to do so only on the date and at the time and place of sale. The fact that a personal representative comes to the sale does not eliminate the possible effect of this alignment or the public perception of compromise of the integrity of the process. The practice is inconsistent with the principles and policies and standards of *Campbell*.

This is not a change to the ruling in *Campbell*, but rather a clarification: not only must a plaintiff's bid be made at the time and place of sale through a person in the same manner as any other bidder, a plaintiff may not submit a courtesy copy of its bidding instructions or plan, or any other material about bid amount, to the auctioneer in advance of the sale (and neither may any other bidder). This was inherent in the *Campbell* ruling.

In this situation, once it had happened that Mr. Leith had a copy, and Mr. Johnston made a request to see the bidding instructions, it was error of Mr. Leith to withhold them. For the auctioneer to have inside knowledge of what is in the interest of one bidder in a manner that is not part of the public bidding process is inconsistent with the analysis and standards of *Campbell* and impermissible. Such documents, if transmitted to the auctioneer in advance, should be returned unopened or unread by the auctioneer. If submitted at the sale by a plaintiff's representative, they are part of the plaintiff's bid and should be read or revealed during the bidding so that all bidders have equal exposure to all bidding information and can trust that the auctioneer is being transparent and fair. Plaintiff's attorney acknowledged in argument that any papers submitted to the auctioneer containing bid information constitute part of a bidder's bid, and are subject to public inspection at the sale.

The question then becomes, even if what occurred was improper, does it amount to a basis for invalidating the sale in this case. The situation did not present itself in this manner in *Campbell*. In that case, the auctioneer was clearly acting as agent for the plaintiffs for their benefit in several ways, including placing the plaintiffs' bids himself and signing contracts as their agent. The facts of this case show that Mr. Leith did not actually take any action on behalf of Plaintiff as its agent, and that he was seeking to comply with what he understood to be the requirements for conducting an auction consistent with *Campbell*. He did not understand that the standard meant that in addition

to not accepting any bid from a plaintiff that was not made by a personal representative at the time of sale, he was not permitted to accept advance information about the plaintiff's intended bid. This ruling clarifies that requirement.

Mr. Johnston has not shown that Mr. Leith undertook any action at the sale as agent for Plaintiff, or that Mr. Johnston was prejudiced. Mr. Johnston learned immediately what Ms. Hayden's instructions were and had the opportunity to submit a higher bid and did not do so. The Plaintiff had the right to submit any bid it wished to through Ms. Hayden. The court therefore declines to invalidate this sale on the grounds that Mr. Leith had an advance copy of the Plaintiff's bidding instructions and refused to let Mr. Johnston see them.

Nonetheless, this ruling clarifies the standard in *Campbell* for the future. An auctioneer is not permitted to accept or read or become privy to a plaintiff's bidding instructions (or bidding information from any other bidder) in advance of the sale. Any bidding material submitted to the auctioneer in advance of the sale should be unread and rejected, or if submitted at the sale is subject to inspection by others at the sale. These requirements, implicit in the *Campbell* decision, are now made explicit. Failure to comply with this procedure compromises the integrity of judicial sales and thus makes them vulnerable to non-confirmation in the future.

Bad Faith

Mr. Johnston asks the court to deny confirmation on the grounds that Plaintiff's bad faith is shown by the overall pattern of: errors in the Notice of Sale, failure to comply with the requirements of *Campbell*, placement of 50 Pine Street for sale on an on-line auction before having acquired ownership, issuance of information to the IRS based on a sale that was not confirmed, and a course of conduct that resulted in postponements and delays and protraction of the process. It is true that delays can cause increased liability and difficulty in paying the debt on the part of mortgagor defendants, and to the extent that such delays are caused by plaintiff mortgagees, it is reasonable to ensure that outcomes are consistent with principles of equity.

However, the analysis above does not reveal a pattern of bad faith. The Notice of Sale did not prejudice the interests of Mr. Johnston or any other potential bidder. The auctioneer sought to implement his understanding of *Campbell* and although his understanding was not fully correct, he did not undertake any actions as agent for Plaintiff and did not set a reserve price for the benefit of the Plaintiff. This ruling is intended to correct his misunderstanding to ensure future compliance, but the effect of lack of full compliance in this case was not serious enough to warrant invalidation. The court cannot conclude that there was impropriety in placing 50 Pine Street on an online auction prior to confirmation as the full terms and conditions of such placement are unknown, and the court has insufficient information to conclude that Plaintiff has prejudiced Marjorie Johnston by prematurely reporting sale proceeds to the IRS.

Moreover, the facts do not show that any delays in the case have been caused by bad faith actions on the part of Plaintiff. The evidence at this hearing does not support such a finding, and the record shows that Mr. Johnston himself pursued an appeal to the Vermont Supreme Court that was unsuccessful. The court declines to impose any sanctions requested by Mr. Johnston for bad faith.

Summary

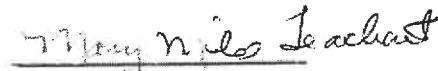
For the foregoing reasons, the motion to confirm the June 5, 2018 sale is *granted*.

No motion for a deficiency judgment has been timely filed, and therefore pursuant to paragraph 9 of the Revised Judgment any such claim has been waived.

ORDER

An Order of Confirmation is issued this day, and Plaintiff's claim for a deficiency judgment is *dismissed with prejudice*.

Dated at Rutland this th12 day of February, 2020.


Mary Miles Teachout
Superior Court Judge