

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-036

NOVEMBER TERM, 2007

Barbara W. Cowles	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
	}	
David M. Sunshine, et al.	}	DOCKET NO. S1158-04 Cncv
		Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Creditor appeals from the trial court's order granting judgment to debtors on her complaint to recover a deficiency amount after the sale of foreclosed property. Creditor argues that the court erred in concluding that she failed to prove the fair market value of the foreclosed property and that the court's decision is based on clearly erroneous findings. We agree, and we therefore reverse and remand for entry of a deficiency judgment.

The record indicates the following. In November 1988, debtors purchased approximately 234 acres of real property in Richmond, Vermont, and they executed a promissory note and a mortgage deed in favor of creditor. At some point, debtors stopped making monthly payments and in July 2000, creditor filed a foreclosure complaint. She also sought a deficiency amount if the sale of the property was insufficient to cover debtors' obligation to her. A foreclosure decree was issued on June 1, 2001, and at the end of the redemption period, the amount owed to creditor was \$451,875. In May 2001, creditor had the property appraised by a professional appraiser who determined that the fair market value of the property at the time the foreclosure decree became absolute was \$396,000. In July 2002, creditor sold the property to the Richmond Land Trust for this price. In September 2004, creditor commenced a separate action seeking to collect the unsatisfied portion of the debt of \$55,875.13, plus interest, costs, and attorney's fees.

After a hearing, the trial court granted judgment to debtors. As it explained, in an action to recover an unsatisfied balance after foreclosure proceedings, creditor had the burden of showing the extent to which the mortgaged property was insufficient to pay the indebtedness. Vt. Nat'l Bank v. Leninski, 166 Vt. 577, 578 (1996) (mem.). The amount of the deficiency in a strict foreclosure action such as this one is the difference between the fair market value of the premises (determined as of the day that the foreclosure decree becomes absolute) and the debt. Id. Thus, creditor needed to establish the fair market value of the property.

At the hearing, creditor relied upon the May 2001 appraisal and argued that the fair market value of the property was \$396,000. The court found the appraisal to be competent evidence but stated that its persuasiveness remained “something of a question.” The court noted that the appraisal appeared to be “quite sketchy” in its analysis of the strength and weaknesses of comparable sales. It also faulted the appraiser for stating that the highest and best use of the land was for residential subdivision but then failing to analyze the profitability of such a subdivision. The court also found that although creditor had had her attorney float the land’s availability to two local developers, no additional evidence was presented regarding the information provided to these developers or the responses received from them, nor was there any evidence that the land had been advertised for sale or listed with a broker.

Turning to the actual sale of the property, the court was unpersuaded that the sales price reflected the property’s fair market value. It found that the leaders of the Richmond Land Trust met with creditor only once for about an hour, although price was apparently not yet explicitly on the table. Given this, the court stated, it was “reluctant to rule out nostalgia as having played some role in the discussion, whether brought up by the seller or the Trust representatives.” The court indicated that it was mindful that the seller was a woman who had grown up on the family farm, of which the subject land was a part. It found that the parcel at issue was also immediately adjacent to the very prominent monitor barns with which her late father was closely associated. Notwithstanding the Trust’s witness who testified that plaintiff was a “hard bargainer,” the court was not persuaded that price was the sole “consideration” in the sales transaction. It found that to the extent that plaintiff may have viewed the sale as preserving the local community, or her family heritage, or memorializing the role of the latter in the former, all the circumstances—what was done and what was not done—left the court with something of a question.

The court found that the sale of the property covered 89.84% of the indebtedness, even though there had been no advertising, the property was not listed with a broker, and it had been sold to a nonprofit for preservation. As such, the court reasoned, the property was not being put to its highest and best use, which may have undermined its value. Under all these circumstances, the court continued, it was somewhat left wondering if plaintiff was actually motivated to obtain “top dollar” for the foreclosed premises. The court ultimately concluded that the sale to the Land Trust did not provide the most reliable evidence of market value for purposes of calculating a deficiency judgment. The court explained that this was not a case where it was persuaded by the debtors’ evidence of the property’s value, but rather, its decision was based on plaintiff’s failure to meet her burden of proof. The court thus granted judgment for defendants. This appeal followed.

As an initial matter, we note that creditor did not need to prove that she sold the property for “top dollar,” rather, she needed only to establish the fair market value of the property. We agree with creditor that the court erred in concluding that she failed to meet her burden here. While we recognize that the trial court “is not limited in the manner of evidence or the means that may be considered for determining market value,” Vt. Nat’l Bank, 166 Vt. at 578, the court’s conclusion in this case does not appear to be supported by its findings or by the record. First, the court focused its analysis on the reliability of the value established by the sale to the Land Trust, but it does not appear to have conclusively resolved the question of the persuasiveness of the professional appraisal. See Sec’y, Vt. Agency of Natural Res. v. Irish, 169

Vt. 407, 419 (1999) (trial court has fundamental duty to make all findings necessary to support its conclusions, resolve the issues before it, and provide an adequate basis for appellate review).

Moreover, although it is for the trial court to weigh the persuasiveness of the evidence, Cabot v. Cabot, 166 Vt. 485, 497 (1997), many of the court's findings regarding the circumstances surrounding the sale to the Land Trust are clearly erroneous. See V.R.C.P. 52(a)(2); N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 438 (1999) (trial court's findings will stand unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable and credible evidence to support them). As creditor argues, there is no record support for the court's finding that nostalgia may have played a role in the sale to the Land Trust; that creditor grew up on the family farm of which the subject land is a part; or that creditor viewed the sale as "preserving the local community, or her family heritage, or memorializing the role of the latter in the former." In fact, the evidence was to the contrary. Creditor testified that she was approached by someone from the Land Trust who was interested in purchasing the property. She believed that the land should be appraised first, and she hired a professional appraiser. As noted above, the property was professionally appraised at \$396,000, and creditor believed that the appraisal was very thorough. Creditor testified that after she received the appraisal, she informed the Land Trust that she would sell the property to it for \$396,000, which she eventually did. She also indicated that her attorney had contacted two developers about possibly purchasing the property but "[n]obody made any offers."

While a representative of the Land Trust indicated that the parcel was part of large farm once owned by the Wheeler family (creditor's father), he stated his belief that the Wheeler family lived in Bolton, not on the land in question. The Trust representative stated that it "may well have" been discussed at the meeting with creditor that the land had at one time been owned by the Wheeler family. When the court inquired if nostalgia had played a part in creditor's decision to sell to the Land Trust, the Trust representative indicated that while he always hoped that was the case in sales to the Land Trust, creditor was in a better position to answer that question, although he believed that "there was little nostalgia reflected in the price," from the perspective of the Land Trust. The Trust representative indicated that creditor was a "tough negotiator," and it was clear to the Land Trust that if it wanted to acquire the property it would have to do so at the price that creditor established. The representative also stated that he presumed that creditor determined the price for the parcel on the appraisal but he could not remember. He indicated that creditor never expressed any attachment to the property during the negotiations, and in fact, the price had increased during the negotiation process. There similarly does not appear to have been any evidence that the monitor barns on an adjacent parcel were "closely associated" with creditor's father.

In light of the court's clearly erroneous findings, its conclusion that the sale of the property did not establish its fair market value must be reversed. Our review of the record reveals no evidence to suggest that the sale to the Land Trust was not bona fide, and in connection with the professional appraisal, we conclude that creditor presented sufficient evidence to establish the fair market value of her property. See Barrett/Canfield LLC v. City of Rutland, 171 Vt. 196, 198-99 (2000) (explaining that bona fide sale is one that occurs between a willing buyer and a willing seller, at arms-length, in good faith, and not to "rig" a fair market value, and there is no requirement that a property be "actively marketed" to establish a bona fide

sale); see also Royal Parke Corp. v. Town of Essex, 145 Vt. 376, 378-79 (1985) (in assessing fair market value for property tax purposes, the reasons that buyer or seller attributed to agreed value of property are immaterial as long as sales evidence proves a transaction between a willing buyer and a willing seller at arms length, entered into in good faith, and not to “rig” a value). We therefore reverse and remand for entry of a deficiency judgment in creditor’s favor.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice