THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0572, Saraswati Mandiram, Inc. & a. v. G&G, LLC & a., the court on July 8, 2008, issued the following order:

The plaintiffs, Saraswati Mandiram, Inc. and Pandit Ramadheen Ramsamooj, appeal an order of the superior court granting a motion of the defendants, G&G, LLC and G&G Epping, LLC, to dismiss for failure to state a claim. The plaintiffs argue that the trial court erred by concluding that their writ did not adequately assert claims for slander of title and breach of fiduciary duty. We affirm in part, reverse in part, and remand.

Our task in reviewing an order granting a motion to dismiss is to determine whether the factual allegations in the plaintiffs' pleadings are reasonably susceptible of a construction that would allow recovery. See Sweeney v. Ragged Mt. Ski Area, 151 N.H. 239, 240 (2004). We assume the well-pleaded allegations of fact to be true, and draw all reasonable inferences from them in the plaintiffs' favor. See id. "We then engage in a threshold inquiry that tests the facts in the complaint against the applicable law." Id. (quotation omitted).

The plaintiffs alleged the following facts. Saraswati Mandiram (Temple) is a Hindu temple which, at the times relevant to the case, was located in Epping on a parcel comprising approximately 100 acres. In the spring of 2003, the Temple sought financing from G&G, LLC (G&G). With its application, the Temple submitted a 2002 market analysis concluding that the highest value of the property was in its development potential. After inspecting the property, G&G agreed to enter into the transaction without conducting an appraisal, relying instead upon the 2002 opinion of value. The Temple conveyed a mortgage to G&G securing a total indebtedness, including future advances, not to exceed $2,400,000. At the time of the closing, the property was worth approximately $3,200,000.

Throughout the course of the parties' relationship, the Temple continued to provide regular opinions of value to G&G, including an opinion that the property was worth $5,500,000 in 2004. Based upon the 2004 opinion, G&G agreed to provide an additional credit line of $800,000. In November 2005, however, G&G issued a notice of default, and the parties amended the agreement on December 9, 2005. Less than two weeks later, on December 21, 2005, G&G again issued a notice of default, and on January 4, 2006, accelerated the loan and noticed its intent to commence a foreclosure.

After obtaining an order confessing judgment against the plaintiffs from a Virginia court in the approximate amount of $2,500,000, G&G conducted a foreclosure pursuant to a power of sale. See RSA 479:25 (2001). At the time of the foreclosure, the tax assessment value of the property was $3,500,000, and the Temple had it appraised at $4,000,000. G&G, however, obtained an appraisal of $2,400,000 from an appraiser who never inspected the property. Although G&G published a notice of the sale in the Manchester Union Leader, it did not engage a real estate agent to market the property to potential developers.

The high bid on the property was $2,000,050. After the successful bidders defaulted under their purchase and sale agreement, G&G created G&G Epping, LLC (Epping), conveyed the property to Epping for $2,000,000 and recorded an affidavit with the foreclosure deed, see RSA 479:26, I (2001), asserting that Epping had been the second highest bidder at the foreclosure sale.

In their writ, the plaintiffs asserted numerous claims against G&G, including claims that G&G slandered the Temple's title by recording the foreclosure deed and affidavit falsely asserting that Epping, which did not exist at the time of the foreclosure sale, was the second highest bidder, and claims that G&G failed to exercise due diligence and to take reasonable actions to market the property and advertise the foreclosure sale. The plaintiffs sought, inter alia, damages in the amount of the difference between the fair market value of the property and the amount G&G obtained through foreclosure. The defendants moved to dismiss, arguing that the writ failed to state a claim, and asserting several affirmative defenses. The trial court granted the motion.

We first address whether the writ stated a claim for slander of title. "Slander of title" is a tort protecting a person's property interest from "a publication of a slanderous statement disparaging [the person's] title." Colquhoun v. Webber, 684 A.2d 405, 409 (Me. 1996). While the foreclosure deed and affidavit may have falsely asserted that Epping was the second highest bidder, we agree with the defendants that, under the circumstances, such a statement could not have disparaged the Temple's title. While legal title does not pass until a foreclosure deed has been recorded, "this rule does not change the fact that the debtor possessed neither a legal nor an equitable interest in the property once the auctioneer's hammer fell and the memorandum of sale was signed." Barrows v. Boles, 141 N.H. 382, 393 (1996) (quotation and brackets omitted). Although the plaintiffs asserted in their motion for reconsideration that the high bidders were, in fact, their "straws," they alleged no facts in their pleadings that would support a finding that they were entitled to the property upon the default of the high bidders. Because the foreclosure deed and affidavit could not have disparaged the Temple's title, we conclude that the trial court properly dismissed the slander of title claim.

We next address whether the plaintiffs stated a claim for breach of fiduciary duty. "In [its] role as a seller, the mortgagee's duty of good faith and due diligence is essentially that of a fiduciary." Murphy v. Financial Development Corp., 126 N.H. 536, 541 (1985). "A mortgagee . . . must exert every reasonable effort to obtain a fair and reasonable price under the circumstances, even to the extent, if necessary, of adjourning the sale or of establishing an upset price below which [it] will not accept any offer." Id. (quotation and citation omitted). Reasonable efforts to obtain a fair price require that the mortgagee "use the ordinary methods of making buyers aware that are used when an owner is voluntarily selling his land." Id. at 544 (quotation omitted). Whether the mortgagee's efforts to obtain a fair price were reasonable, and what constitutes a fair price, are questions of fact. See id. at 541.

At the outset, we reject the defendants' contention that the plaintiffs failed to preserve their argument that they stated a claim for breach of fiduciary duty. While their writ may not have used the term "fiduciary duty," it unambiguously alleged that G&G failed to exercise due diligence and to undertake reasonable efforts to market the property, and as a result, obtained a price it knew to be well below the property's value. Moreover, the record reflects that the trial court issued its order granting the motion to dismiss before the deadline for an objection had passed, and that the plaintiffs, with their timely-filed motion for reconsideration, submitted an objection arguing that they had alleged such a claim. Because the trial court was made aware of its error, and was not deprived of an opportunity to correct it, we conclude that the issue was adequately preserved. See Mortgage Specialists v. Davey, 153 N.H. 764, 786 (2006).

Turning to the merits of the claim, we agree with the plaintiffs that they alleged facts sufficient to articulate a claim for breach of G&G's duty to exert reasonable efforts to obtain a fair and reasonable price at the foreclosure sale. Viewing the allegations of fact in the light most favorable to the plaintiffs, a reasonable jury could find that G&G failed to take any efforts beyond those minimally required to notice the sale, see RSA 479:25, I, obtained an appraisal it knew to have been inadequately performed that stated a value it knew was far below the property's true value, and obtained a price that was inconsistent with every other indicia of value of which it was aware.

To the extent the defendants argue that the auctioneer took steps to market the property by taking out advertisements in newspapers and distributing brochures, we note that these facts are not alleged in the plaintiffs' writ. It is not appropriate to resolve a factual matter such as the adequacy of the auctioneer's alleged advertising on a motion to dismiss. Likewise, the adequacy of G&G's appraisal is a factual matter not properly resolved on a motion to dismiss.

We reject the defendants' argument that res judicata bars the action. The record reflects that the Temple filed an earlier action substantially similar to the present case against G&G, and a separate motion for a preliminary injunction seeking to preclude G&G from conveying the property until the legal action was decided. Although the trial court dismissed the motion for injunctive relief with prejudice, it dismissed the legal action without prejudice for defective service of process. Such a dismissal is not a "judgment on the merits" for purposes of res judicata. See Berg v. Kelley, 134 N.H. 255, 258-59 (1991).

Likewise, we reject the defendants' contention that RSA 479:25, II bars the claim. RSA 479:25, II provides that "[f]ailure to institute [a] petition [to enjoin a foreclosure sale] . . . prior to sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure." This provision bars actions "based on facts which the mortgagor knew or should have known soon enough to reasonably permit the filing of a petition prior to the sale," but not an action based upon the unfairness of the sale price. Murphy, 126 N.H. at 540.

Affirmed in part; reversed in part; remanded.

DUGGAN, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk

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