FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH DEVELOPMENT AUTHORITY, **Plaintiff,** **v.** **ANGYUTA SHIPPING COMPANY, LTD., FIDEL A. MENDIOLA, FERMINA S. MENDIOLA, FIDEL S. MENDIOLA, JR., CELESTE S. MENDIOLA, the Estate of DIMAS A. HOCOG, JUAN M. AYUYU, and DANIEL D. SASAKURA,** **Defendants.**	**CIVIL ACTION NO. 03-0352** **ORDER DENYING CONFIRMATION AND CERTIFICATION OF SALE OF FORECLOSED PROPERTY**

BACKGROUND

On July 17, 2003, the Commonwealth Development Agency ("CDA") filed a Complaint to Foreclose and for Money Due against Angyuta Shipping Company, Ltd. ("Angyuta"), Fidel A. Mendiola, Fermina S. Mendiola, Fidel S. Mendiola, Jr., Celeste S. Mendiola, The Estate of Dimas A. Hocog, Juan M. Ayuyu, and Daniel D. Sasakura ("Defendants"). The Complaint alleges CDA issued a direct loan to Angyuta in the

principal amount of $665,000.00, with an interest rate of nine percent ("Transaction 1"). This loan was secured by, *inter alia*,[1] a Fee Simple First Mortgage on Tract No. 22080.

On August 7, 1997, Transaction 1 was revised, resulting in a principal amount of $687,462.04 ("Transaction 2"), secured by a Fee Simple First Mortgage on a different property, Lot. No 345 R 215. On January 6, 1999, a second revision of the loan was requested by Defendants, changing the principal amount to $780,236.76 ("Transaction 3"). On July 22, 1999, for the third time the loan was revised, resulting in a principal amount of $818,137.03 ("Transaction 4"). Thereafter, Defendants defaulted on their payments.

On June 30, 2004, default judgment was entered against Angyuta and Fidel S. Mendiola, Jr. On June 15, 2011, default judgment was entered against Fidel A. Mendiola and Fermina S. Mendiola. On December 19, 2011, summary judgment was granted against Daniel D. Sasakura, Juan M. Ayuyu and the Estate of Dimas A. Hocog. On April 1, 2013, the Court granted CDA's Writ of Execution as to Tract No. 22080 and Lot No. 345 R 215.

On July 1, 2011, Tract No. 22080 was appraised at $86,000.00, and on May 9, 2013, Lot No. 345 R 215 was appraised at $4,000.00. On July 9, 2013, CDA filed an Application for an Order of Confirmation of Sale and Certificate, for the sale of both Tract No. 22080 and Lot No. 345 R 215. Tract No. 22080 was sold for $35,000.00 (just under 42% of the appraised value); and Lot No. 345 R 215 was sold for $1,500.00 (just under 38% of the appraised value). Both properties were sold to Ignacio T. Dela Cruz, DVM, at a public auction, on September 27, 2013.

DISCUSSION

CDA's[2] application for an Order for Confirmation and Certification of Sale for Tract No. 22080 and Lot No. 345 R 215, both which sold for approximately 40% of their appraised

[1] Also securing the loan is a Loan Agreement, a Security Agreement (Chattel Mortgage), a Receivables and Inventory Security Agreement, a Guaranty Collateral Mortgage, and five personal Guaranty Agreements, all of which are dated March 14, 1997.

[2] CDA is a government agency created by statute. *See* 4 CMC § 10101. Some of the statutory purposes of CDA are "to stimulate the economic development of the Northern Mariana Islands" and "[t]o receive and hold

values, comes shortly after CDA applied for confirmation and certification for the sale of a foreclosed property for less than 18% of its appraised value. The Court denied CDA's application for confirmation and certification of sale in that case. *See CDA v. Rasa*, Civ. No. 03-0609 (NMI Super. Ct. June 28, 2014) (Order Den. Confirmation and Certification of Sale of Foreclosed Property). Since that time, the Court has been giving special scrutiny to applications for confirmation and certification of foreclosure sales. This scrutiny is meant to ensure that the sale price, along with other circumstances, will not produce an unfair result and to ensure that a grossly inadequate sales price will not be confirmed without sufficient reasoning. *See Armstrong v. Csurilla*, 817 P.2d 1221, 1235 (N.M. 1991). The Court must scrutinize the sale price and decide whether to confirm and certify a sale whenever a sale price is less than the appraised value. This scrutiny is necessary in light of the Court's duty to ensure that sale prices are fair and equitable in comparison to the fair market value ("FMV") of the property being sold. This is also necessary in light of the Court's rejection of CDA's position that the Court essentially must rubberstamp a confirmation and certification of a sale, as long as the statutory steps of 2 CMC § 4537 are followed.

The United States Supreme Court has defined FMV as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. 546, 551 (1973). The CNMI Code does not define FMV; however, it does define "'[a]ppraised value' [as] the *[FMV]* of a parcel of real property at a given point in time as determined by a qualified real estate appraiser." 2 CMC § 4463(a)(1) (emphasis added). The Court observes that, on average, foreclosure sales tend to return a price

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economic United States assistance for economic development loan[s]." 4 CMC §§ 10102 and 10102(a)(1). To stimulate the CNMI's economic development, and because it is a government agency, the Court observes that CDA has more room toward forgiving and giving breaks to its clients than banks have. Its financial responsibilities are so enormous because, in addition to making regular loans, it is tasked with running the Qualifying Certificate Program, which offers tax rebates and abatements to stimulate economic growth and development. The Court has further observed that CDA also purchases loans from banks in line with its duty to help stimulated the growth and development of the island.

that is below what the FMV normally would be; however, a foreclosure could be considered defective if the price is grossly inadequate as compared to the FMV and "a court is warranted in invalidating a sale where the price is less than 20 percent of [FMV]." RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.3 cmt. b, ¶ 4;[3] s*ee generally Ballentyne v. Smith*, 205 U.S. 285, 289-91 (1907). Also, 7 CMC § 4205 provides that the Court must direct reasonable payments of orders in aid of judgment proceedings. The Court is faced with determining whether purchases for approximately 40% of the FMV, as appraised, are fair and reasonable.

The Court considers the steps in 2 CMC § 4537 to be a prerequisite to a judicial determination of the value of the property. Once such steps are satisfied, the Court, as a court of equity, has a duty to determine whether the sale price is fair before confirming and certifying any sale. *See* Order Den. Confirmation and Certification of Sale of Foreclosed Property; *see also Hornback v. Wentworth*, 132 Wn. App. 504, 512-13 (Wash. Ct. App. 2006) (discussing a court of equity's duty to provide for substantial justice and holding that a court sitting in equity has broad discretion for shaping relief).

Looking to other jurisdictions for guidance reveals that the California Court of Appeal found, that when "the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of the relief." *Darden v. Reese*, 88 Cal. App. 2d 904, 908 (1948). Additionally, "Oregon has long recognized the rule that the trial court has equitable power to set aside a sheriff's deed and allow a judgment debtor to redeem property when the price paid by the purchaser is so grossly inadequate as to shock the court's conscience." *Hornbuckle v. Harris*, 69 Ore. App. 272, 276 (Or. Ct. App. 1984).

In *Allied Steel Corp. v. Cooper*, 607 So. 2d 113 (Miss. 1992), the Supreme Court of Mississippi analyzed a similar issue. There, the defendant took out, and fell behind on, several loans. Several parties filed liens on the defendant's commercial property. When the lien-

[3] Pursuant to 7 CMC § 3401, the Court is to apply Restatement of Law in the absence of Commonwealth written law. Recently, our Supreme Court has held "that the Restatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law." *Ogumoro v. Ko*, 2011 MP 11 ¶ 64.

holders began foreclosing, the property was taken and held subject to several appraisals, all returning different values. In analyzing the sale price, the court emphasized the following:

> The threshold of inadequacy, or what it takes to shock the conscience of the court, has been a somewhat imprecise standard. This Court long followed the rule of thumb of "about forty percent" of fair market value first articulated in *Weyburn v. Watkins*, 90 Miss. 728, 733-36, (1907). More recently, in Central *Financial Services, Inc. v. Spears*, 425 So. 2d 403 (1983), we found that a foreclosure sale bid of thirty-six percent (36%) of fair market value was inadequate. A survey of Mississippi cases concluded that the threshold of unconscionability lies around forty percent of fair market value.

Id. at 120 (edited for style).

In *Armstrong*, the Supreme Court of New Mexico also analyzed this issue. *Armstrong*, 817 P.2d at 1235. There the defendants obtained a loan to buy a house and gas station and defaulted on both payments. The plaintiff sued and the court partially granted the plaintiffs motion for summary judgment, ordering foreclosure and judicial sale of the properties. The defendants argued that the properties were sold for less than one third of their value and confirmation of the sale would result in inequitable forfeiture of the property. Using only opinion testimony, and no appraisal, the court found the sale was fair. The defendants appealed, arguing, *inter alia*, that the sale price was so low as to shock the conscience. The court stated, "a court will be justified in setting aside a judicial sale, either because the inadequate price, by itself, is so low as to shock the conscience or because the inadequacy, while not so great is combined with other circumstances resulting in unfairness to the debtor." *Id.* at 1234. The purchase price from the combined properties was $90,000.00, or about 39% of the properties' assumed value. No one knew the properties' actual value at the time of the sale. The foreclosure and sale were affirmed on appeal because, in New Mexico, the burden of proof for establishing unacceptable disparity between price and value was on the defendants and they failed to carry the burden. In analyzing the sale price the court found:

> We do not hold that in every case where the price falls below two-thirds of the fair market value, that price should be held inadequate as a matter of law, or that in every case where the price falls into the 10-40% range (or, conceivably, less) the inadequacy should shock the judicial conscience. We hold only that prices in these ranges call for special scrutiny by the court to

> be sure that, in the first case, additional circumstances do not produce an inequitable result and, in the second case, the grossly inadequate price is not confirmed absent good reasons why it should be.

Id. at 1235

The Court disagrees with the portion of the *Armstrong* holding that states that the burden of proof for establishing unacceptable disparity between sale price and value is on the debtor, for four reasons: first, once property is being foreclosed upon, it seems to flow naturally that the debtor does not have the means to pay for an appraisal; thus, proving value might be beyond the debtor's abilities; second, often in cases like this, the debtor is not being represented by an attorney,[4] likely because the debtor cannot afford one; third, the lender has an incentive to get an appraisal to ensure the value of the property is sufficient as collateral for the loan and to make sure that they, as lender, are not being taken advantage of by selling the property for too low of a price; and finally, the cost of the appraisal can be applied against the sale of the property. Thus, the burden of proving the value and establishing that a sale was fair should be on the foreclosing party. In light of the analysis and holdings in *Darden*, *Hornbuckle*, *Allied Steel*, and *Armstrong*, it is necessary to pay extra-close attention to CDA's foreclosure sales when they result in a sale price that is below the appraised value.

The Court also considers statutes controlling foreclosure, such as 2 CMC § 4466, which compels the Mariana Islands Housing Authority, a division of CDA, to be a purchaser of last resort when a property remains unsold for six months, and 2 CMC § 4537(e), which allows a foreclosing party to purchase the property on which it is foreclosing, just as CDA did in *CDA v. Plastag*, Civ. No. 04-0482 NMI Super. Ct. July 2, 2014) (Amended Order Granting Confirmation and Certification of Sale of Foreclosed Property).

In *Rasa*, *supra*, CDA attempted to sell a property appraised at $17,000.00 for less than 18% of its appraised value. Then in *Plastag*, *supra*, CDA took the initiative to purchase a property it foreclosed on for nearly 150% above the property's appraised value. If CDA is willing to purchase one property so high above its appraised value, the Court is left to wonder

[4] In all three foreclosure sale cases which recently came before the Court (*Rasa*, *Plastag*, and the case at bar), the defendants were not represented by an attorney.

why it is willing to sell others for so far below their appraised values. CDA must treat its clients more consistently than has been its recent practice. The instant case, together with *Rasa* and *Plastag*, indicate that CDA appears to be arbitrarily deciding which clients receive compensation beyond the appraised value, and which receive almost no compensation for the property they are losing. The Court opines that these are arbitrary actions that should stop. The Court urges CDA to look at past practices regarding purchasing foreclosed properties and see how lenders in other jurisdictions handle similar situations. CDA should establish a uniform policy to rectify these concerns.[5] The Court also looks to the Legislature to establish a uniform foreclosure purchasing schedule in the foreclosure statutes.[6]

CONCLUSION

After reviewing the appraisal and the sales price, the Court denies CDA's Application for Confirmation and Certification of Sale. This Order establishes that any sale for notably less than the appraised value of a property will receive a higher level of scrutiny, unless or until a guideline in policy is established by CDA, or in the alternative, a statute is enacted addressing the issues and concerns discussed herein.

IT IS SO ORDERED this 9th day of July, 2014.

/s/
ROBERTO C. NARAJA, Presiding Judge

[5] CDA should look at 2 CMC § 4466 as a possible guideline when making its own decisions.

[6] The Legislature can enact a statute like 2 CMC § 4466, providing, perhaps, that a sale at 75% or greater of the appraised value is considered reasonable, a provision providing that the operative appraisal be conducted within three years of sale date to be valid, and a provision providing that if a property is not sold within three months CDA must purchase the property at the appraised value.