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CSB Bank v. Christy

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CSB Bank v. Christy, Michigan Court of Appeals, No. 305869 (October 18, 2012) (unpublished)

SYNOPSIS: Michigan Court of Appeals affirms trial court order approving a sale of commercial real estate by a receiver free and clear of the defendant owner's equity of redemption, where the sale occurred in an arms-length transaction and not through foreclosure.

FACTS: Necolaos and Patricia Christy owned commercial real estate in Imlay City, Michigan which they leased in November 2006 to Ronald and Diana Romine for a term of four years. In March 2008, the Christys obtained a first mortgage loan from CSB Bank in the amount of $322,160, but never made any payments on the loan. In July 2010, the Christys filed a Chapter 13 bankruptcy petition, proposing a plan under which they proposed to sell the property. In November 2010, CSB Bank obtained relief from the automatic stay to pursue its state law remedies.

In February 2011, the Christys sent a notice to the Romines, demanding that they vacate the property by March 28, 2011, because the "tenancy had ended." On March 8, 2011, CSB Bank filed a complaint seeking appointment of a receiver to protect its mortgage lien, and that same day sought the ex parte appointment of a receiver on the grounds that the decision of the Christys to force the Romines to vacate would constitute waste by altering the nature of the land's occupancy and use.

At an ex parte hearing on March 21, 2011, the trial court appointed a receiver and authorized the receiver to "perform all acts necessary to preserve the value of the Receivership Property," including a direction to sell the property for cash to a bona fide third party purchaser, subject to court approval at the request of CSB Bank, the Christys, or the receiver.

Several months later, the Romines entered into an agreement with the receiver to purchase the property for $307,236.28. CSB then filed a motion to approve the sale, which the Christys opposed on the grounds that the proposed sale improperly circumvented the foreclosure process and that the proposed sale price was inadequate (according to the Christys, $70,000 too low). At a hearing on August 29, 2011, the receiver testified that the price was reasonable based on evidence of comparable sales in the surrounding area. The lawyer for the Christys acknowledged that the Christys

never provided the receiver with any offer, buyer, appraisal or plan for the property and no evidence of value other than an allegation by the Christys that their broker had advised them to list the house for $375,000. The trial court granted the motion and refused to grant a stay unless the Christys posted a bond for 125% of the sale price, which they were unable to do. The Christys then appealed the order.

ANALYSIS: The Michigan Court of Appeals affirmed in an unpublished opinion. The court first rejected the argument that the Christys had been denied due process of law because the trial court had approved the sale without allowing discovery, conducting a trial, or entering a judgment of foreclosure. The court held that due process did not require all of these, but merely required notice and a meaningful opportunity to be heard before an impartial decision-maker. While the court acknowledged that the Christys were not present at the ex parte hearing where the receiver was appointed, they were present at the hearing where the trial court approved the sale, and their counsel had submitted a brief (with exhibits) arguing against approval of the sale. The court thus concluded that the Christys had not been deprived of a meaningful opportunity to be heard before the sale was approved.

The Christys next argued that the trial court's order appointing the receiver should be reversed, but the court rejected this argument because the Christys had failed to preserve the issue for appeal. The court noted that the Christys never filed a motion with the trial court to set aside the receivership; moreover, the Christys never even argued to the trial court that the appointment was improper, instead arguing that the sale price was too low and that the sale improperly circumvented the foreclosure process.

Finally, the Christys renewed their substantive arguments. They first argued that the sale unlawfully circumvented the Michigan foreclosure procedure, noting that under Michigan law, a judicial foreclosure sale cannot occur until at least six months from the complaint, the sale must occur in a public auction, and the sale is subject to a six-month redemption period. See Mich. Comp. Laws §§ 600.3115, 600.3125, 600.3140. The court rejected this argument, stating:

> [T]his was not a sale pursuant to foreclosure; it was a receivership sale. The sale was being conducted pursuant to the prior order appointing a receiver — not a judicial foreclosure sale. Thus, the various requirements for a sale by foreclosure are simply inapplicable in the instant case.

The Christys also argued that the sale was inadequate because the sale price was too low, but the court rejected this argument, concluding that the trial court did not abuse its discretion in approving the sale. As the court noted, the receiver followed the procedure specified by the trial court for selling the property and provided reasonable evidence based upon comparable sale prices that the sale price was a fair price for the

land. Finally, as the court noted, the Christys had provided no offers, names of prospective buyers, or even a plan for selling the property during the period of the receivership order.

COMMENT 1: This case presents a stark contrast to some recent decisions that have rejected the authority of a receiver to conduct an arms-length sale of real estate outside the confines of the foreclosure process. For example, in *Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. Dist. Ct. App. 2010), the lender instituted a judicial foreclosure proceeding following financial defaults by the mortgagor, and obtained the appointment of a receiver to collect rents. The receiver discovered that rents were not covering property operations; further, the receiver could not borrow funds to continue operating. Thus, the lender moved to have the property sold as soon as a buyer could be identified, and the trial court granted this motion, authorizing the receiver to market the property. After the receiver identified a buyer willing to pay $9 million, the mortgagor objected on the ground that the receiver had no legal authority to sell the hotel and could not convey title, but the trial court entered an order authorizing the sale. On appeal, the Florida District Court of Appeal reversed, noting that no Florida statute authorizes a court-appointed receiver in a foreclosure case to sell mortgaged property. The court further concluded that under prior Florida decisions, "the mere appointment of a receiver does not itself confer any of the owner's power or authority to sell such property" and that the receiver's role in a foreclosure action "is only to preserve the property's value." Finally, the court noted that under Florida law, every mortgagor has a statutory right of redemption and that "[r]ecognizing a general interim power of a receiver to sell mortgaged property in a foreclosure case would contravene" that redemption right.

COMMENT 2: One could attempt to distinguish *CSB Bank v. Christy* from *Shubh Hotels*, as the court essentially did in CSB Bank, by pointing out that CSB Bank never filed a judicial foreclosure proceeding, effectively mooting (in the court's mind, anyway) the "circumvention" argument. But that argument is unsatisfactory. Plainly, by allowing the receiver to sell the property, the court enabled CSB Bank to circumvent Michigan's foreclosure process (which in Michigan could have been either judicial or nonjudicial, as contrasted with the Florida judicial-only process).

However, this does not necessarily answer the legal question of whether a receiver does have the power to order an arms-length sale "free and clear," or the normative question of whether a receiver should have such power. There are a number of states that require judicial foreclosure, but that does not necessarily preclude the possibility of foreclosure through a receiver's sale. For example, Florida's statute provides that "[a]ll mortgages shall be foreclosed in equity," Fla. Stat. Ann. § 702.01, but on its face that statute does not explicitly preclude a receiver's sale — receivership, like foreclosure, is an equitable proceeding.

The appropriate normative question is whether there is any ***good*** reason to preclude a court-appointed receiver from conducting an arms-length sale that has the same title-clearing effect as a foreclosure sale. At least as to commercial real estate, it's hard to see one; instead, most of the relevant factors would appear to support receiver sales. First, a receiver's sale would be subject to judicial supervision that would be at least as robust — and in nonjudicial foreclosure states, more robust — than would occur with respect to a foreclosure sale, and thus should be at least as protective (if not more so) of mortgagors and junior lienholders generally. Second, the sale could occur in an arms-length setting rather than at a public auction sale; thus, sales by a receiver might well be expected to produce higher sale prices. Third, federal law already permits a receiver properly appointed under federal law to conduct a free and clear sale; not recognizing a corresponding power in a state court receiver merely creates incentives in some cases for commercial lenders to engage in needless forum-shopping. Finally, while allowing a receiver's sale might well cut off the statutory right of redemption that would follow a foreclosure sale, why is this troubling in the commercial setting? In the context of a residential owner-occupied mortgage, the earlier extinguishment of a mortgagor's redemption right might be troubling as a policy matter. However, it is exceptionally rare for receivers to be appointed for single-family homes.

COMMENT 3: The Uniform Law Commission has just recently appointed a Drafting Committee to prepare a model law on the appointment and powers of real estate receivers. The Committee will hold its first meeting in April 2013. Without question, the issue of the receiver's power to sell will be high on the Drafting Committee's list of issues. Persons who are interested in serving as Observers to the Drafting Committee should contact the Chair of the Drafting Committee, Thomas Hemmendinger, Brennan, Recupero, Cascione, Scungio & McAllister, LLP, 362 Broadway, Providence, RI 02909; themmendinger@brcsm.com.