

DIRT Periodic Development for Thursday, May 23, 2013
Antion Financial, LC v. Christensen

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Antion Financial, LC v. Christensen, 298 P.3d 681 (Utah Ct. App. March 7, 2013)

Wilson Freyermuth provided the synopsis and report of the case, with some bonus comments from Dale Whitman.

SYNOPSIS: Second-place bidder at nonjudicial foreclosure sale ended up bound to purchase based on its bid after high bidder failed to perform, and was thus liable for damages when it subsequently failed to perform.

FACTS: An unnamed borrower financed the purchase of a home by means of a mortgage loan later assigned to Antion Financial (Antion). After the borrower defaulted, Antion scheduled a nonjudicial foreclosure sale, which was conducted on June 3, 2008. Prior to the sale, the trustee conducting the sale read the bid information sheet, containing the terms of the sale. At the sale, Antion made a credit bid of \$1,500,001. Another bidder, Christensen, then bid \$1,500,002. [Aside: One dollar increments? Really?] Finally, a third bidder bid \$1,510,000, which was the high bid. Following the sale, the successful bidder attempted to negotiate with the trustee for more favorable payment terms than had been listed on the bid information sheet, but without success.

Two days later, in a telephone conference between the trustee and the other bidders, the trustee informed the other bidders that the successful bidder had failed to satisfy the sale terms, and that the trustee thus had the option to sell the property to the next highest bidder, Christensen. The trustee asked Christensen whether he stood by his bid, which Christensen confirmed. However, Christensen failed to perform, at which point the trustee sold the property to Antion for a credit bid of \$1,500,001. Six months later, Antion sold the property for \$1,568,206, receiving \$1,413,845 after costs of sale. Antion then sued Christensen for breach of contract, claiming that by bidding, Christensen had made an "irrevocable offer" to purchase the property for \$1,500,002 and that, as the second highest bidder, Christensen became bound to purchase the property for that price once the winning bidder failed to perform.

The trial court ruled that under the language of Utah Code Ann. § 57-1-27(1)(b), Christensen was liable to Antion for "any loss occasioned by [Christensen's breach], including interest, costs, and trustee's and reasonable attorney fees." The trial court interpreted this language to mean that Christensen was liable for the difference between

his bid and the net amount that Antion received from an eventual resale, plus statutory interest at the rate of 10%. The trial court thus added to Christensen's bid accrued interest of \$85,668, before subtracting Antion's net proceeds from the resale to conclude that Antion's total damages were \$171,825. The court then tacked on an additional \$25,060 for interest from the date of Antion's resale through the trial date, and another \$14,706 in Antion's attorney fees. Christensen appealed.

ANALYSIS: Christensen first argued that his bid at the foreclosure sale was only an "irrevocable offer" until the trustee accepted the highest bid; at that point, Christensen argued, the trustee's acceptance of the highest bid manifested the trustee's intent to reject Christensen's bid and all other lower bids. Antion argued that Christensen's bid was irrevocable based on Utah Code Ann. § 57-1-27(1)(a), which explicitly states that "Each bid is considered an irrevocable offer." The Utah Court of Appeals acknowledged the language of the statute, but concluded that the statute did not resolve the question of how long each bid remains irrevocable. The court concluded that once the trustee accepts the highest bid, this forms a binding contract and thus envisions the trustee's rejection of all lower bids. Therefore, the court noted, Christensen's bid became revocable and Christensen would no longer have been obligated to participate in the foreclosure sale.

This didn't save Christensen, however, for the Court of Appeals went on to conclude that when Christensen advised the trustee on June 5 that he stood by his bid, he effectively resubmitted that bid, which the trustee accepted – thus rendering Christensen liable for breach of contract when he failed to perform in accordance with the terms of the sale.

As to damages, however, Christensen successfully argued that the trial court improperly calculated Antion's damages. The trial court had measured damages based on the amount it thought was necessary to put Antion in the position it would have occupied had Christensen in fact performed. Christensen argued, however, that the proper measure of damages was the difference between the agreed price and the fair market value of the property at the time of the breach. Christensen argued that this amount was only \$2 – the difference between the \$1,500,002 that Christensen offered to pay and the \$1,500,000 that the property had been appraised for at the time of the sale.

The Court of Appeals held that because Utah Code Ann. § 57-1-27(1)(b) was not sufficiently specific as to how a court was to determine the amount of the "loss occasioned by" the bidder's failure to perform, the Court had to look to Utah's deficiency judgment statute to discern the legislature's intent. Noting that Utah Code Ann. § 57-1-32 incorporates an express "fair value" limitation the court concluded that Antion's damages were exactly one dollar:

In a previous analysis of the deficiency statute, this court has summarized section 57-1-32 as “limit[ing] the deficiency judgment obtained after a nonjudicial foreclosure sale to the amount by which the total secured indebtedness exceeds the fair market value of the property.” We explained that the purpose of the statute “ ‘is to protect the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency.’ ”

The parties agree that the fair market value of the property is \$1,500,000. The measure of Antion's loss is the difference between Christensen's bid of \$1,500,002 and the amount for which the property actually sold, so long as the sale price exceeds the fair market value. Here, the sale price, represented by Antion's credit bid, was \$1,500,001, an amount that exceeded the agreed-upon fair market value. Accordingly, Antion's “loss occasioned by the refusal” of Christensen to honor his bid was one dollar....

Our conclusion is consistent with Antion's position that it should be put back in the same position it was in before Christensen breached the agreement. Antion bought the property from the trustee. That sale established Antion's loss for purposes of section 57-1-27(1)(b). The fact that, six months later, Antion sold the property at a loss is not relevant to the calculation. Nor is Christensen accountable for Antion's decision to act as a purchaser in addition to its role as a lender. Accordingly, Antion's “loss occasioned by the refusal” of Christensen to honor his bid is one dollar, plus any incidental costs that Antion may have incurred.

Further, the Court of Appeals added insult to Antion’s claimed injury by concluding that the trial court erred in awarding Antion with attorney fees:

Christensen interprets the statute to mean that a bidder is only liable for the loss, including costs and attorney fees, incurred from his refusal to purchase the property and not for attorney fees incurred in pursuing damages associated with that loss. We agree that the statute's plain language leaves no doubt that the legislature intended to award only those attorney fees and costs, “occasioned by the refusal” of the winning bidder to perform. The intent of the statute is not to award attorney fees incurred in litigating those damages. We determine that Antion was damaged in the amount of only one dollar by Christensen's failure to perform. Accordingly, we reverse the trial court's attorney fee award and remand with instructions to recalculate the award based on this court's damages calculation of one dollar.

REPORTER’S COMMENT 1: The court’s ultimate conclusion that Christensen should be bound by his reaffirmation of his initial bid seems correct. However, it creates something of a potential conundrum with respect to the relationship between the power of sale foreclosure statute and the statute of frauds. Christensen also argued that he could not be liable for breach because there was no memorandum of his agreement that

satisfied the statute of frauds. Utah's statute of frauds provides that a contract for the sale of land "shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the ... sale is to be made" Utah Code Ann. § 25-5-3. Thus, under Utah's statute of frauds, the memorandum must be signed by the seller (in this case, the trustee). The court held that the memorandum requirement was satisfied by the trustee's bid information sheet from the first sale, which was initialed by the trustee, because at the time Christensen reaffirmed his bid, the trustee also reiterated the terms of sale that had been included in the bid information sheet. This makes sense for Utah, because as the court notes, "in providing for the next highest bidder to resubmit his or her bid, the statute creates a scenario where the identical bid information sheet utilized in the original trustee sale carries over and provides the required writing [I]n a trustee's sale, as long as the terms of sale remain the same, a bidder information sheet continues to be a written memorialization of the sale of the foreclosed property."

However, one might have a different kettle of fish in a state where the statute of frauds requires the memorandum to be subscribed by the party sought to be bound. Here, Christensen never initialed or signed the bid information sheet from the original sale, and his reaffirmation of his bid came in a telephone call two days later. Under a statute of frauds that would require his signature, it is not clear that he would have been bound unless his reaffirmation of his bid had come in some form of communication that would have constituted a validly authenticated electronic record (something the court's recitation of the facts doesn't indicate).

This might have implications for how the trustee might prepare the bid instructions and how the trustee might conduct the sale. In a case like this, might a trustee drafted the bid instructions to make clear that the second-highest bid would automatically become the winning bid if the high bidder fails to perform? And might the trustee also prepare the sale report to indicate the lower bids (and to be signed by the lower bidders)? On the one hand, such an approach might obviate any statute of frauds concern in a case like Christensen; on the other hand, might such an approach discourage prospective bidders (who might resist becoming "contingently bound")?

[BONUS COMMENT FROM DALE WHITMAN: The states whose Statutes of Frauds call for the vendor's signature (rather than the "party to be charged") virtually all require some acknowledgement of the contract from the buyer if it is the buyer who is resisting enforcement of the contract. The question is whether the acknowledgement must be written (or an electronic record, as you point out, which would amount to the same thing). It seems to me that a writing should be required; otherwise the whole point of the Statute of Frauds is being ignored. But I must confess that I haven't researched it recently. Older cases which require acknowledgement by the purchaser include *Schwinn v. Griffith*, 303 N.W.2d 258 (Minn.1981), noted 8 Wm.Mitch.L.Rev. 991 (1982) (where statute requires only vendor's signature, a plaintiff-vendor must prove that the

purchaser accepted delivery of the contract); *300 West End Avenue Corp. v. Warner*, 250 N.Y. 221, 165 N.E. 271 (1928); *National Bank v. Louisville Trust Co.*, 67 F.2d 97 (6th Cir.1933), certiorari denied 291 U.S. 665, 54 S.Ct. 440, 78 L.Ed. 1056 (1934). The New York Statute was subsequently amended to require signing by the “party to be charged.” These cases don’t necessarily require the purchaser’s acknowledgement to be in writing – even though I think they should. The Minnesota court, in *Schwinn*, quoted Corbin with approval as follows:

It would seem to be easy enough for the vendor to prepare such a memorandum and sign it at any time prior to bringing suit for enforcement, so that in the case of an oral contract for the sale of land the vendor would have the purchaser at his mercy. But the courts have tried to prevent this result by requiring some sort of “mutuality.” They have held that a memorandum signed by himself does not enable the vendor to enforce the contract unless the memorandum so signed has been delivered to the purchaser or otherwise accepted by him as a correct memorandum of agreement.]

On the bid instructions point, I have some difficulty seeing how the trustee’s bid instructions can vary the court’s interpretation of the statute: namely, that all losing bids are deemed withdrawn when a winning bid is accepted. I wouldn’t bet on the trustee’s getting away with that.]

REPORTER’S COMMENT #2. The Court of Appeals also seems clearly to reach the right result as to the amount of damages for Christensen’s breach, given the well-established principle that damages for breach of a contract for sale are measured by the difference between the contract price and the fair market value of the land. But it is a mystery as to why the court thought that Utah’s “fair value” deficiency statute was relevant to that conclusion. The deficiency statute would be relevant to establishing the liability of the borrower on the note. Christensen was not the borrower on the note, nor did he become liable on the note merely by agreeing to purchase the property at the foreclosure sale. [**BONUS COMMENT FROM DALE WHITMAN:** That’s right. I don’t think the Fair Value statute has any relevance at all.]