

**Daily Development for Monday, September 13, 2010**

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**FORECLOSURES; JUDGMENTS; ♦FAIR VALUE RULE:♦** Even though there is no statutory provision that would give a judgment debtor, in a foreclosure of a non-mortgage lien, a credit for the fair market value of the property when sold for only a nominal value at a sheriff's sale, a court has inherent equity authority to allow such a credit in order to prevent a double recovery by the judgment creditor.

*MMU of New York, Inc. v. Grieser, 2010 WL 3022220 (N.J. App. 8/4/2010)*

The New Jersey Superior Court, Appellate Division, was faced with the issue as to "whether a judgment debtor is entitled to a fair market value credit for property that is executed upon and then purchased by a judgment creditor at a sheriff's sale for a nominal amount." It decided that "a court has inherent equitable authority to allow a fair market value credit in order to prevent a double recovery by a judgment creditor against a judgment debtor."

A tenant failed to pay rent, leaving a substantial deficiency. Although it had filed for bankruptcy, it failed to list its landlord as a creditor. The landlord obtained a judgment essentially covering "unpaid rent for the entire ten-year term of the lease." The judgment was assigned to a company in the business of buying judgments.

Subsequently, the tenant obtained title to a piece of real property in New Jersey and the judgment, by law, became a lien against that property. Four years later, the company holding the judgment, as judgment creditor, "levied an execution on the property to satisfy the default judgment and scheduled a sheriff's sale." Despite some procedural delays, the sheriff's sale took place and the judgment creditor purchased the property for a nominal amount - \$100. Then it quickly resold the property for over \$1,200,000 and collected approximately another \$190,000 by executing on six other properties owned by the judgment debtor. Thus, through its collection activities, the judgment creditor realized about \$1,390,000.

Several years later, the judgment debtor successfully challenged the original default judgment and, on remand from the Appellate Division, the lower court reduced the judgment from about \$1,630,000 (plus accrued interest) to about \$643,000 (including interest). The lower court also ruled that the judgment debtor "was entitled to a credit against his reduced judgment for the full amount [the judgment creditor had] realized from his executions upon" the various properties owned by the judgment debtor, notably including the approximately \$1,200,000 that had been realized from the re-sale of the property acquired at the foreclosure. The lower court "apparently determined [this] was an accurate reflection of [the property's] fair market value." All of these changes meant that the judgment creditor was now being asked to return about \$750,000 to the judgment debtor.

As would be expected, the judgment creditor appealed the lower court's decision. It did not challenge the reduction in the judgment amount or the credits resulting from the sale of the other six properties. Its argument was "directed solely at the part of the judgment that allow[ed] [the judgment debtor] a fair market value credit of [about \$1,200,000] based on the" foreclosure sale. It argued: (a) laches; (b) that the judgment debtor was not entitled to a fair market credit even if the property had been sold for a nominal amount at a sheriff's sale; and (c) even if the fair market value credit was proper it thought the court could not issue an "affirmative money judgment" against it, the judgment creditor.

The Court rejected the laches defense and analyzed the "affirmative money judgment" defense as being inapplicable because all the lower court was seen to be doing was to reduce the original amount of the judgment.

What the Court did do, it said, was to analyze the "fair market credit defense." New Jersey has a statute governing mortgage foreclosures and that statute specifically "allows a fair market value credit if a mortgagee seeks a deficiency judgment." The statutory provisions governing execution sales, however, do "not include express authorization for a fair market value credit."

The Court did have some precedential case law to look at. In 1986, it had examined a situation where a "non-mortgage judgment creditor sought to intervene in a mortgage foreclosure action to assert a claim against surplus funds from the foreclosure sale, at which the judgment creditor was a successful bidder." There, as here, the "fair market value of the property allegedly exceeded the amount required to satisfy both the foreclosure judgment and the non-mortgage judgment of the creditor seeking intervention." While the Court, in that case, did not permit the judgment creditor to intervene in the foreclosure, it allowed the judgment creditor to apply for a share in the surplus funds derived from the foreclosure sale.

The Court then considered the issue directly relevant to the case at hand: "whether the judgment debtor was entitled to a credit for the fair market value of the property." In doing so, it cited, with favor, the following text from an earlier decision: "Although N.J.S.A. 2A:50-3 does not by its express terms extend to a subsequent judgment creditor, we must consider nonetheless whether overriding equitable considerations exist, or whether there is a discernable probable legislative intent. Where property is sold to a holder of the subsequent obligation, by analogy to and in accordance with the spirit of N.J.S.A. 2A:50-3, the debtor in the foreclosure action should be entitled to show the fair market value of the property and obtain a credit against the amount due on the judgment. Likewise, we see no reason why a court of equity should not condition its award of relief to an applying creditor to prevent a possible double recovery or windfall, where the judgment creditor has purchased the property. A court of equity has the inherent power to prevent a potential double recovery or windfall to the judgment creditor who not only may profit on the purchase of the property at the foreclosure sale (if purchased for less than fair market value), but also seeks to obtain satisfaction of his judgment."

*Comment 1:* This case, obviously, could have huge precedential impact in states in which there are ♦fair value♦ limitations that apply only to mortgage foreclosures. One wonders why the New Jersey courts concluded that the legislature did not know what it was doing when it limited

the application of the statute. Or perhaps, because of the wide range of equity the court simply didn't care what the statutes said.

*Comment 2:* It is this second notion that gives the editor even more qualms. Could a court in which there is no fair value limitation decide to impose such a limitation on a deficiency claim or on a judgment debtor's claim as a consequence of this kind of thinking? There is a single case in Missouri in which the court refused to grant a deficiency claim following a non judicial foreclosure where the debtor showed that the lender had pre sold the foreclosed land for a higher price to someone else, and now was trying to double collect that excess sale price. The editor has always found that case troubling, but obviously it stands on narrow facts. The general notion that a court, without statutory authority, could limit deficiency claims might strike fear into any self respecting mortgagee foreclosure specialist (assuming that, these days, they have any self respect left.)

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