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No. 413230-II

IN THE COURT OF APPEALS, DIVISION TWO FOR
THE STATE OF WASHINGTON

SUE LEVINE,

Appellant,

v.

TIMBERLAND BANK,

Respondent.

BRIEF OF APPELLANT SUE LEVINE

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INTRODUCTION

This case involves real property in Grays Harbor County, Washington (the “Property”), formerly owned by appellant Sue Levine and Rory Navis (collectively referred to herein as “Levine”)¹ and pledged as security for a construction loan from respondent Timberland Bank (the “Bank”). Levine purchased the Property as vacant land with the intention of building condominiums for resale. To this end she obtained a construction loan from the Bank. The construction loan matured before Levine sold any units, primarily because of the collapse of the real estate market in Washington and the rest of the country and the unprecedented seizure of credit markets. When the loan matured, the Bank declared a default, sued to foreclose judicially and obtained a money judgment on the note for \$1,657,332.88 (“Judgment”), which accrued post judgment interest at eighteen percent (18%) per annum. The Bank then purchased the Property at a sheriff’s sale with a credit bid of only \$720,000, which was forty-three percent (43%) of the development costs and only thirty-six percent (36%) of the original appraised value of the completed project, leaving Levine liable for a deficiency of over \$1 million. The deficiency

judgment continues to bear interest at eighteen percent (18%) per annum, while the rate on United States Treasury obligations hovers below four percent (4%), thus assuring the Bank an enormous profit when it resells the Property in a more normal market and collects on the current deficiency.

Levine sought the statutory protection of an upset price. The circumstances of this case made a compelling argument for relief, particularly with the temporarily depressed economy, the distressed real estate market and the frozen credit markets existing since 2008 and continuing through the date of the sheriff's sale. The trial court refused to entertain this request for relief, turning a deaf ear to Levine and rubber stamping the bid of the Bank, while commenting to Levine in open court that the Property was a "white elephant" and that anyone else should only expect a single bidder at a sheriff's sale of real property in Grays Harbor County. The court confirmed the sale, thus giving the Bank a completed condominium project it had originally appraised for \$1.985 million (in the course of approving its construction loan of \$1.25 million), and into which Levine had invested \$1.673 million, and leaving Levine liable for a deficiency judgment that now exceeds \$1.2 million.

¹ Mr. Navis is not a party to this appeal.

A. ASSIGNMENTS OF ERROR

1. Findings of fact BB and CC are not supported by substantial evidence and are contradicted by the transcript of the hearing.

2. The court erred in failing to inquire as to or consider the impact of national and local economic conditions existing at the time of the sale in order to determine if an upset price was warranted.

3. The trial court erred in refusing to establish an upset price that was consistent with the appraisal evidence before it, the cost of the project and the original valuation of the project by the Bank when it originated the loan.

4. The trial court erred in penalizing Levine for filing her motion to establish an upset price near the end of the redemption period when prior orders establishing the hearing date for this motion were inconsistent and confusing, and when the hearing was scheduled before the earliest court-ordered deadline in any event.

Issues Pertaining to Assignments of Error.

1. When a court sits in equity to determine if an upset price is warranted pursuant to RCW 61.12.060, is it error to enter findings of fact and conclusions of law that are contradicted by the court's stated view that the only issue is whether the sale comported with the customary practice in Grays Harbor County?

2. Is it an abuse of discretion for a court hearing an upset price motion pursuant to RCW 61.12.060 to deny relief based on its personal perception as to the norm for a sheriff's sale in the county, and to fail to address the evidence before it concerning contemporaneous valuation, cost, original appraised value and national and local economic circumstances?

3. Is there substantial evidence to support Finding of Fact BB, that the Property value might be as low as \$645,000 when that valuation is based on a use as an apartment rather than as a condominium because of parking issues and when there is no evidence that parking is unavailable and in fact ample evidence that parking is readily available?

4. Is there substantial evidence to support the conclusion that \$720,000 is a fair value for the Property when only one highly discredited appraisal update is close to that value and is based on an unsubstantiated if not faulty assumption as to a lack of available parking?

5. Is it an abuse of discretion for a trial court to pick a fair value that is supported only by a suspect appraisal update and that is between forty percent (40%) and fifty percent (50%) less than the two most recent appraisals and is one-third of the bank appraisal supporting the original loan approval, and when no adjustment is made to account for the severe economic and credit crisis as of the date of sale?

6. Is it an abuse of discretion for a court hearing an upset price motion pursuant to RCW 61.12.060 to deny a motion because it was filed towards the end of the time period for seeking relief when prior orders specifically dictated when such motions would be heard?

B. STATEMENT OF THE CASE

1. The Subject Property.

The Property is a recently-constructed, never occupied nine-unit condominium located at 978 Point Brown Avenue SE, Ocean Shores, Washington. See CP 231. Levine purchased the Property as a vacant lot in 2004 for \$35,000 and spent \$1.673 million developing it, as follows:

Purchase Price of Land	\$ 35,000
Timberland Loan	\$ 1,250,000
Levine & Navis' Funds	\$ 388,000
TOTAL	\$ 1,673,000

Id.; CP 323 (¶ 5). Levine also purchased an adjacent lot (“Lot 105”) for \$108,000 with the thought of building a second building and connecting the two via a walkway.² *Id.*

The Property is in a neighborhood that was approximately seventy percent (70%) developed as of August 2009. CP 233. Each of the nine units has a balcony overlooking Ocean Shores’ Grand Canal and the units on the second and third floors also have views of a marina and of the

² The lot adjacent to the subject property is described as Lot 105 in various portions of the record and it was owned by Levine and Navis at all pertinent times. CP 476.

Pacific Ocean. A wooden dock in front of the Property allows access to nearby lakes and unit owners will have access to a clubhouse with a pool and exercise facilities. CP 232 (property listing).

2. Procedural History.

The Bank filed its foreclosure action in Grays Harbor County Superior Court on December 4, 2008, which was just two months after President Bush signed the Troubled Asset Relief Program (“TARP”). CP 1-16. The Bank moved for partial summary judgment on its note and the Court entered an Order on Summary Judgment as to the promissory note and deed of trust on April 20, 2009. CP 132-134. The judgment amount of \$1,657,332.88 includes the original loan advances of \$1.38 million and the additional \$270,000 is for default interest at eighteen percent (18%) and attorney fees. CP 135-139. The Order stated in pertinent part: “Defendants’ counterclaims are preserved for trial; Trial shall also include the hearing on Defendants’ motion for an upset price. The motion for upset price shall be determined at trial.” CP 134 (handwritten addition) (emphasis added).

The Bank orchestrated a Sheriff’s Sale on July 17, 2009 at which it was the only bidder, submitting a bid of \$720,000. The Bank then sought to confirm the sale and an Order Confirming Sale was entered on August 24, 2009. This Order left a deficiency on the Judgment as of the sale date

of \$1,001,644.49. CP 202-204. The Order Confirming Sale added without further explanation the following: “the court reserves jurisdiction to set an upset price pursuant to RCW 61.12.020 [sic] at any time before the expiration of the redemption period after a hearing to be scheduled upon application of Defendants”. CP 203-204. While the court did not specifically negate its Order on Summary Judgment that set the upset price hearing during the trial of the remaining claims, it created ambiguity as to when this would occur. The redemption period ended twelve months after the sale or on July 17, 2010. CP 209-212. RCW 6.23.020(1).

Following the events set forth above, in late June of 2010, Levine retained new counsel. Given the ambiguity as to whether a motion for an upset price should be heard at trial (which was set for September 13, 2010) or on or before July 17, 2010, Levine’s new counsel filed a Motion for Order Setting Upset Price Pursuant to RCW 61.12.060 on July 6, 2010, with the hearing set for July 12, 2010. CP 305-321. The motion was supported by competent appraisals of the Property value and general economic information, both of which supported an upset price.

3. Evidence of Fair Value.

With her moving papers, Levine submitted an Appraisal Report, Land and Improvements Located at 978 Point Brown Avenue SE, Ocean Shores, Washington 98569 dated August 7, 2009 by Paul Bowen,

Certified Asset Analysts (“Bowen Appraisal”). CP 213-271. The Bowen Appraisal established that the Property had an “as is” value as of August 7, 2009 (three weeks after the sheriff’s sale) of \$1,350,000. CP 221.

Levine submitted the “Complete Summary Appraisal Report, Proposed Sivan Condominiums, 978 Point Brown Avenue S.E., Ocean Shores, Washington” by Fred C. Strickland and Chad C. Johnson of Strickland Heischman & Hoss, Inc. (“Strickland Appraisal”). The Strickland Appraisal dated March 9, 2006 was completed at the request of Timberland Bank, and provided the basis for Timberland’s construction loan to Levine of \$1.25 million. Strickland determined that the value “at completion” of the condominiums on the Property would be \$1,985,000, thus leaving a comfortable equity cushion of \$745,000 for both Levine and the Bank. CP 329. From the Strickland and Bowen appraisals alone, the court could see the devastating effect of the economic downturn on the Property value, resulting in a one-third drop in value from 2006 to 2009 with the only apparent cause being the economic downturn and the credit crisis.

In opposition to Levine’s motions, the Bank submitted two declarations from David H. Pollock (an appraiser), a declaration from Michael Sands (president of the Bank) and a Motion to Strike the Declaration of Sue Levine, which was denied. CP 435-436; 439-578; 592-

596; 617. The Bank did not rebut Levine's summary of the procedural history of the case, the controlling case law summarized in Levine's motion or the evidence of the amount Levine had invested in the Property.

The appraisal completed by David H. Pollock dated April 21, 2009 ("Pollock Appraisal") agrees with the Bowen and Strickland Appraisals in affirming the highest and best use for the Property as individual condominiums for resale. This should not be surprising in the least bit. Levine spent \$1.673 million (in excess of \$180,000/unit) building nine condominium units for resale rather than a low budget rental property. From the onset the Bank envisioned that Levine would build a condominium and not an apartment when it approved her construction loan based on the Strickland Appraisal. CP 350-355. Notably absent from the Pollock Appraisal and Update are any observations or conclusions that Levine failed to build the kind and quality of condominium that both she and the Bank expected when the Bank approved the \$1.25 million construction loan.

The Pollock Appraisal, however, noted a concern that there are only eight parking spaces on the Property (whereas fourteen were required in the building permit). CP 476-477. The parking issue is something Levine had addressed earlier by acquiring Lot 105, but it appears that the Bank did not also have a deed of trust on Lot 105. Thus while the

appraisal correctly noted this concern, the “availability” of Lot 105 to the Bank should have caused only slight concern given the judgment lien of the Bank.

The Pollock Appraisal incorporates a relatively modest \$135,000 downward adjustment to the Property value in order to compensate for the estimated cost to acquire parking on the open market, obtain a conditional use permit from the City of Ocean Shores for that purpose, and obtain all further permits required to obtain the final certificate of occupancy for the building as condominiums. CP 522. Pollock supported his \$135,000 downward adjustment with research including calls to the realtor handling the sale of a suitable neighboring lot and to the City of Ocean Shores planning department. In this regard, the Pollock Appraisal comports with the facts known to the court, namely that Lot 105 had been purchased by Levine for \$108,000. CP 323 at ¶ 5. Notwithstanding the \$135,000 downward adjustment for parking Pollock still appraised the Property at \$1,060,000. CP 528.

As the Bank prepared for the Sheriff’s Sale in July, Pollock “updated” the April 2009 appraisal (“Pollock Update” or “Update”) CP 436 (at ¶ 4). In the Update, Pollock discarded his conclusion that suitable parking could be obtained. Pollock did not say why he did this and he did not provide any facts supporting this new conclusion. CP 575-578. Not

only are Pollock's conclusions as to parking in the Pollock Update contradicted by his earlier reported conversations with a realtor concerning available properties in the vicinity, he also ignored contrary evidence in front of his face and in the Pollock Update, namely:

- Levine owned Lot 105;
- Lot 105 is encumbered by the City of Ocean Shores with a requirement for the requisite six parking spaces;³ and
- Levine was not going to be disposing of Lot 105 in any event because the Bank had a judgment lien against it since entry of the Judgment, and because it had appointed a receiver to ensure this and other properties were not sold. RCW 4.56.190; CP 172-173.

With the parking issues conveniently brushed aside (or perhaps more accurately described as exaggerated by several orders of magnitude), Pollock valued the Property as a nine-unit rental apartment rather than as condominiums for resale. This arbitrary and utterly unexplained and unsubstantiated change in use drove Pollock's valuation down by an additional forty percent (40%), from \$1,060,000 to \$645,000. *Id.*; *see also* CP 575-578. Because the Pollock Update contradicts the conclusion in the

³ CP 575. "City Planning Officials indicate that the adjacent property is encumbered with the requirement for the six additional spaces and no building permit would be granted without . . . dedicating the six parking spaces to support the subject property. . . ."

Final Value Conclusion. Both appraisers reached similar conclusions as to value. The Pollock Appraisal concludes that the “as is” market value of the Property would be \$1,195,000 when adequate parking is included. CP 492. Bowen arrives at a figure of \$1,350,000 – a difference of only \$155,000. CP 22.

Discount Rate. The biggest difference between the Bowen Appraisal and the Pollock Appraisal is the discount rate used during the absorption period, which is the period during which an investor would resell the condominiums. The discount rate reduces the net sales proceeds to a present value for investment purposes. *See* CP 585 (¶ 14). A higher discount rate yields a lower present value and so it is not surprising that Bowen’s discount rate was 8.97 percent (*see* CP 253) while the Pollock Appraisal discount rate was fifteen percent (15%). (CP 527.) Yet the Pollock Appraisal supports a far lower discount rate, closer to the rate used by Bowen, stating: “The above table indicates an opinion of discount rate for investment grade properties **ranging from 5.50% to 12% with an average of 7.77% to 9.02%.**” CP 527 (emphasis added). Bowen’s chosen discount rate of 8.97 percent, falls at the high end of Pollock’s average rates. The Pollock Appraisal, however, opined *without support* or comparison to any other project that Levine’s project was riskier than any

⁴ CP 492-493; CP 249-250. Strickland reaches the same conclusion. CP 359.

other project and so he chose a fifteen percent discount rate, as if out of thin air. *Id.* The Pollock Update inexplicably *increased* the discount rate another one-third to *twenty percent*, which is more than twice the high end of the average discount rates identified in the Pollock Appraisal. CP 585-586 at ¶ 15.

At the hearing on July 12, 2010, the trial court thus had before it the following:

- Four appraisals containing estimated values from between \$645,000 at the low end to \$1.985 million at the high end, with the Pollock Update completely out of line with the other three appraisals both as to highest and best use and as to value;
- Undisputed testimony from Levine totaling the investment in the Property at approximately \$1.7 million;⁵
- Evidence that the Bank had loaned \$1.25 million to improve the Property and that it did so in reliance on the Strickland Appraisal; and
- Uncontroverted evidence regarding the state of the economy, the collapse of the real estate markets and the seizure of the credit markets.

⁵ The Bank filed a Motion to Strike Ms. Levine's declaration, in which it objected on the basis of relevancy. Cost is relevant pursuant to *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 926-27, 506 P.2d 20, 44 (1973).

Although the Bowen and Pollock Appraisals are closest in time to the sale, the court's decision should not necessarily have been bounded by these two Appraisals. The economic factors existing as of the sale date (a national recession if not depression, ten percent unemployment, a near meltdown of credit markets from which recovery was not certain, a stock market crash that in retrospect had only bottomed out in March 2009, and a severe recession in commercial properties coupled by attendant problems financing the same) all point to a panic or fear that further affected the pool of bidders and thus value as of the date of the sheriff's sale. These factors, combined with the fact that the Bank's interest at the default rate of eighteen percent (18%), support a fair value higher than Bowen's \$1.35 million value in order to achieve the statutory objective of "fair valuation." Levine submitted in her motion that the correct upset price should be \$1,721,644.49, which is \$50,000 less than the cost of the project and twelve percent (12%) less than the Strickland Appraisal and the amount that would eliminate any deficiency as of the sale date.

4. The Trial Court's Decision Denying an Upset Price.

Commissioner Jean A. Cotton, who had not been otherwise involved in this matter, presided at the upset price hearing on Levine's motion to establish an upset price ("Hearing"). Verbatim Report of Proceedings, Motion Hearing before Commissioner Jean A. Cotton, July

12, 2010 (hereinafter, “RP”), at 1. Commissioner Cotton did little to hide her disdain for Levine and her position. She questioned why Levine had not acted earlier, criticizing Levine for making no effort prior to the hearing date to “contest or deal with” the upset price issue, and stating that it concerned her “substantially . . . that this matter has been sitting . . . for 360 days. . . . They could have objected at the time of the confirmation of the sale, and the list goes on and on and on, and they did nothing. And here we are July 12th, when the redemption period is going to expire on July 17th, suddenly arguing these things with last-minute filings and urgency to it and request for three day’s time. It just – my husband is a Southern boy. ‘The dog don’t hunt’ is what this equates to.” RP at 14:22-15:4; 39:40-40:11. It therefore appears that the Court started from the premise that the Upset Price Motion was untimely, even though the timing of the hearing was specifically addressed in not one but two prior orders of the court, one of which required that the Hearing be conducted at the trial of Levine’s counterclaims.⁶

Whether the court’s views as to timeliness infected its opinion of the Property and of the merits of the motion or whether its views on the merits gave rise to the criticism as to timeliness is irrelevant. The court’s criticism of the timing carried over to its view of the merits. The court

⁶ See also CP 115 (Motion for Hearing to Establish Upset Price).

mischaracterized the Property, a completed nine-unit building that had cost \$1.673 million to construct, with a certificate of occupancy and appraised at over a million dollars even by Pollock, as: “four walls and a roof, and that’s about all it is”. The court also called it a “white elephant”. RP at 40:12-21. The trial court did not identify or refer to any evidence supporting this conclusion, although she referenced “the parking issue [and] the failure to comply with ordinances”. RP at 40:12-13. A review of the record does not disclose a shred of evidence supporting such a finding or conclusion.

Even Pollock, who was all too willing to do the Bank’s bidding, did not go this far in degrading the Property. Pollock assumed that the entire cost to complete was \$135,000 and this included the cost to acquire additional parking and the cost of all remaining permits. For the court to have jumped from a 10 percent discount in value to account primarily for the cost to acquire additional parking to “four walls and a roof” reflects a refusal to weigh the evidence on this matter and to make an informed judgment based on the evidence.

Throughout the Hearing, the trial court ignored the appraisal evidence as to fair value and the case law defining the circumstances under which an upset price is warranted and instead drew from its own personal experiences as to what constituted a fair sheriff’s sale.

I find it interesting that counsel argues that one bidder appearing at a sheriff's sale is evidence that we don't have a fair price or a competitive process. I've practiced in this county for a number of years, and those sales are conducted on the first floor of this building on a regular basis with Deputy O'Connor or some other person reading the notice and accepting bids. And it is a very rare day, probably equivalent to a 115-degree summer in Grays Harbor County, that you have multiple bidders. And by your definition, counsel, none of those bidding processes would be fair. So I take exception to that. . . .

[T]here is no red tape in a sheriff's sale. It's pretty cut and dry. I personally have participated in those. The man could have appeared, seen what the bid is, either yea's or nay's. . . .

In terms of what is a normal economy, anyone that's lived in Grays Harbor County at any point in time in their life can tell you that in 2006 we were all ecstatic, but I don't think there was a soul here, including probably [Respondent's counsel], that didn't know the balloon was going to burst at some point in time.

We see foreclosures every day, year in and year out, in Ocean Shores. . . . We are not King County. And the people here have struggled for years and years.

RP at 38:12-41:14. The court's reliance on personal experience as to the norm for sheriff's sales in Grays Harbor County and its refusal to examine the evidence, except insofar as it supported the court's perceived notion of the norm for sheriff's sales in Grays Harbor County, constitutes an abuse of discretion and warrants reversal.

C. ARGUMENT & AUTHORITY

1. The Trial Court Ruling Ignores Case Law Defining the Circumstances when an Upset Price is Appropriate.

RCW 61.12.060⁷ states that the Court “may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.” Prior to enactment of this statute a trial court could not refuse to confirm a sheriff’s sale of real property based on inadequacy of price. *American Federal Savings v. McCaffrey*, 107 Wn.2d 181, 186-7, 728 P3d 155, 159-60 (1987). Under RCW 61.12.060 and controlling case law, the court is to first determine whether economic conditions warrant an upset price, and, if so, hold a hearing to determine value. Here, it appears that the first step had already been decided, as two separate Orders entered in the case specified that the upset price hearing would be held at a later date. Of course the Order Confirming Sale was entered after the court knew the Bank had bid only \$720,000 for the Property. Even if this first step had not already been decided there was overwhelming evidence before the court at the hearing on July 12, 2010 that the economic conditions prevailing at the time of the sheriff’s sale justified an upset price.

⁷ App. 1.

From the Order Denying Motion for Upset Price and specifically paragraphs BB and CC, one might think the court undertook a rigorous analysis of economic conditions and the appraisals. A review of the transcript reveals that the court did nothing of the sort and focused solely on its own concepts of procedural fairness rather than the elements relevant to fair value under RCW 61.12.060, with the result that substantial evidence supporting these findings does not exist in the record. *See Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 390, 220 P.2d 1259, 1262 (2009) (where trial court has weighed evidence, “appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court’s conclusions of law”).

From the transcript it is unclear whether the court believed that an upset price hearing was not warranted because it did not believe the economy was in dire straits or whether it concluded that the price was as fair as one could obtain in Grays Harbor County, as its remarks focused on what is the norm in Grays Harbor County and on whether the sheriff’s sale was “fair” from a procedural standpoint. But conforming to a norm is not the focus – or even an element - of an upset price motion. Rather than focusing on whether a sale met the norm or even if it was *procedurally fair*, the court should determine whether, economic and other

circumstances being what they are, the foreclosure sale has or will result in “fair value” paid for the property being sold, whether this is a cash bid by a third party, or as in this case a credit bid against a judgment where the creditor retains a deficiency. That the focus of an upset price motion is on fair value, not procedural fairness, was first enunciated almost 50 years ago and it has not changed.

The factors to be considered in determining whether and in what amount an upset price should be prescribed are found in *Lee v. Barnes*, 61 Wn.2d 581, 379 P.2d 362, 365 (1963). There, tracing the history of the statute, we said, “(T)he purpose of fixing an upset price is to assure the mortgagor of a fair price, as would be attained were there willing and competitive bidders available at the time of sale. . . . [Lee], we think, established a basis for the statute not only during the then-current economic depression generally but was founded more particularly on the premises that the want of competitive bidding fails to produce a sale price equivalent to the value in terms of usefulness of the property. It is of little moment in a particular case whether it is temporary economic fluctuations, peculiarly local conditions in the real-estate market, or a national economic depression which will militate against reasonably competitive bidding. If, because of the kind, nature, scope or peculiarities of the property, or a depressed economy, local or general, genuinely competitive bidding will be substantially discouraged or even stifled, the court in its discretion may, under the statute, prescribe an upset price. Thus, we think that the statute is properly invoked in any case where all of the circumstances leading to and surrounding a distress or foreclosure sale warrant the superior court in the exercise of a sound discretion in finding that there will be no true competitive bidding.

National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 925, 506

P.2d 20, 43 (1973) (emphasis added). *See also Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 813 P.2d 619 (1991).

Washington case law clearly states that the “want of competitive bidding” creates a sale price that is unfair to the mortgagor. The Bank’s judgment was so large (\$1.72 million) it was almost a certainty that even if one bidder sales were not the norm most third parties would consider it futile, if not an outright waste of time, to bid against the Bank, as the Bank could keep raising its bid until other bidders became discouraged and stopped bidding. Under *National Bank*, it does not matter whether the absence of competitive bidding is caused by conditions peculiar to the local community or whether the lack of competitive bidding is the result of a national depression. If single bidder sales are the norm in Grays Harbor County then the court should have been on a heightened alert that the Bank’s bid might not equal fair value under RCW 61.12.060. Thus, the court’s belief that a single bidder sale is presumptively fair in Grays Harbor County, because that is the way it always has been, and its admonition to counsel that “we are not King County” reveal the extent to which the court ignored controlling precedent in upset price motions.

The Bank’s confirmed bid was only thirty-six percent (36%) of the \$1.985 million value established by Strickland in 2006 when the Bank originated the loan for \$1.25 million. It was forty-three percent (43%) of

the value established by the Bowen Appraisal. It was forty-two percent (42%) of the Bank's Judgment amount as of the sale date and forty-three percent (43%) of Levine's cost to develop.

The Strickland and Bowen Appraisals assumed a highest and best use as condominiums for resale, which is the assumption on which the Bank issued the loan. The Strickland Appraisal of course came at a time when the real estate market locally and nationally was much more robust. As of July 2009, the national economy as a whole had been in a downward spiral for at least a year. This downward spiral was precipitated by the credit crunch of 2008, involving the failure of Bear Stearns and Lehman Brothers, the bail out of AIG and General Motors and the implementation of TARP in which the great majority of banks participated.⁸

These factors demonstrate that the lack of competitive bidding affected the fair value credited to the Bank's judgment against Levine, and the court's one-sentence findings in BB and CC are therefore not supported by substantial evidence.

2. The Trial Court Ignored Case Law Regarding the Factors Relevant in Setting an Upset Price, and the Findings of the Court Are Not Supported by the Transcript of the Hearing.

As for the amount of an upset price, *National Bank* states that it

⁸ According to a letter dated March 5, 2009 from Michael R. Sand to the Office of the Special Inspector General, Timberland Bancorp, Inc., received \$16.641 million of TARP funds. CP 293-295.

should not be the Property's "minimum value, but rather its fair value". Therefore the court "should assume the position of a competitive bidder determining a fair bid at the time of sale under normal conditions." *Id.*, 81 Wn.2d at 926, 506 P.2d at 44 (emphasis added). The factors to be considered include:

[T]he state of the economy and local economic conditions, the usefulness of the property under normal conditions, its potential or future value, the type of property involved, its unique qualities, if any, and any other characteristics and conditions affecting its marketability along with any other factors which such a bidder might consider in determining a fair bid for the mortgaged property. The court may properly receive any competent evidence, whether opinion or of direct facts which might affect the amount of a such a bid.

Id. Thus in *National Bank*, the court considered: (1) the actual investment in the property; (2) the appraisal relied upon by the bank in determining the advisability of the loan; (3) and appraisal testimony. *Id.* at 926-27, 506 P.2d at 44.

Levine provided the court with all of the information identified in *National Bank*: The actual investment amount (approximately \$1.7 million),⁹ the appraisal relied upon by the Bank in making the loan (\$1.985 million),¹⁰ and expert appraisal testimony (\$1.3 million by

⁹ CP 323 (¶5).

¹⁰ CP 329.

Bowen).¹¹ The transcript reveals that the court disregarded each and every one of these factors, and instead ruled on the basis of its personal beliefs or opinions as to the Property's worth and/or condition and the norms for sales in Grays Harbor County. Just as the Bank papered its file with the Pollock Update to justify its low bid, so paragraphs BB and CC of the Order (drafted by the Bank) pad the record here as the findings are flatly contradicted by the transcript of the Hearing and the evidence.

During the entire Hearing the trial court did not utter a single word about the appraisal evidence before it (except to address parking). It did not analyze the economic evidence before it except to comment that everyone in Grays Harbor County knew the "balloon was going to burst." To the extent the court "assumed the position of a competitive bidder" it appears to have acted as it thought everyone else in Grays Harbor County would have acted and that would be to decide there was no use bidding against the Bank. The court's analysis of the relevant facts is so remote from the factors set forth under RCW 61.12.060 and the relevant case law as to constitute an abuse of discretion.¹²

The Bank briefly argued in its Motion to Strike that the economic

¹¹ CP 219.

¹² If in fact the court felt there was inadequate evidence regarding the fair value, she could have (and was asked to) continue the matter for trial, but instead she denied the matter outright, suggesting to counsel that a continuance was foreclosed by statute, again ignoring the court's previous orders reserving jurisdiction over the issue. RP at 14:12-21.

conditions should not be before the court on a motion for an upset price *after* the sale had occurred, and that the court's only inquiry should be as to value. This is incorrect, however, because as set forth in *National Bank*, above, "the state of the economy and local economic conditions" bear not only on whether an upset price is necessary, but also on the fair value of the property, as these are factors which would inform a competitive bidder at the sale. To the extent the trial court considered economic conditions, it asserted (again based on personal experience, rather than the evidence before it) that there was "not a soul" in Ocean Shores who did not know the economy of 2006 would not last.

This statement betrays a *caveat emptor* view of the relationship between the mortgagor and mortgagee that is not supported by Washington case law. RCW 61.12.060 is intended to offer a measure of protection to the borrower/mortgagor in troubled economic times even if one of the lenders or other parties might be prescient enough to foresee a downturn: "The purpose of fixing an upset price is to assure the mortgagor a *fair price* as would be attained were there willing and competitive bidders available at the time of sale." *National Bank*, 81 Wn.2d at 924-25, 506 P.2d at 43, quoting *Lee*, 61 Wn.2d at 581, 379 P.2d at 362. The Bank, which is in the business of making loans secured by mortgages and deeds of trust, knows better than borrowers that an upset

price might be a factor at foreclosure, and presumably considers this in its loan approval process at the outset – or at least it should do this. Here the Bank had an equity cushion at loan origination of \$745,000 and a cash infusion by Levine of over \$500,000 to protect its downside. We submit this is one of the reasons why *National Bank* approved consideration of the appraisal relied on by the bank when originating the loan. *Id.*, 81 Wn.2d at 926-7, 506 P.2d at 44. If the temporary economic downturn of 2008-09 was severe enough to wipe out this equity cushion then it is equitable that the court establish an upset price high enough to ensure little or no deficiency, particularly in light of the eighteen percent (18%) default interest rate.

The trial court's findings BB and CC do not even address the Strickland Appraisal obtained by the Bank in March of 2006, which estimated the Property would be worth over \$1.985 million once the planned condominiums were completed. The Strickland Appraisal has the most bearing as to the fair value of the Property because it was completed during normal economic conditions, as required by *National Bank*. See CP 359 (“development of a nine-unit condominium project . . . represents the highest and best use of the property”); CP 250 (“The highest and best use of the subject properties, as improved, is continued existing use”).

The trial court's confirmation of a sale that is thirty-six percent

(36%) of the Strickland Appraisal value demonstrates that it ignored evidence as to the national economy at the relevant time, the appraisal report relied upon by the Bank, the amount invested by Levine, and other indicators of the fair value of the Property, and instead relied on the Pollock Update and its own beliefs regarding the Grays Harbor County economy and foreclosures in general.

3. The Trial Court Abused Its Discretion in Failing to Set an Upset Price of at least \$1.7 million.

The fixing of an upset price is an exercise of judicial discretion, and will be overturned upon a showing of an abuse of that discretion.

Judicial discretion is a composite of many things, among which are conclusions drawn from *objective criteria*; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)

(internal citation omitted) (emphasis added).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

Feree v. Fleetham, 7 Wn. App. 767, 773, 502 P.2d 490, 493-94 (1971);

see also Cogdell, 153 Wn. App. at 391, 220 P.2d at 1262. A court acting in equity, such as in setting an upset price, “has broad discretion to fashion

a remedy to do substantial justice. *Cogdell*, 153 Wn. App. at 391, 220 P.2d at 1262. Thus in *Feree* the trial court properly denied an upset price motion when a receiver selling real property exposed it to more than twenty of the largest builders in King County. Here, the Bank did not submit any evidence that the Property had been exposed to numerous qualified buyers or even that the economy had stabilized in July 2009. The only evidence as to value that was close to the Bank's bid was the Pollock Update.

For the court to have adopted the Pollock Update to support its determination of fair value in light of the overwhelming evidence that it was flatly wrong was manifestly unreasonable or merely a disguise for its true view that procedural fairness is the only criteria. The court bolstered its ruling, at every opportunity, not with the evidence before it but from personal anecdotes and experience. The ruling was an abuse of discretion that ignored the objective criteria presented by both sides, including: (1) previous orders of the court retaining jurisdiction over the upset price issue; (2) three expert opinions as to value, two of which were paid for by the Bank; (3) the cost of the project; and (4) case law to the effect that both local and national economic conditions are relevant, and that in the absence of a competitive bidding process the mortgagor does not obtain fair value for mortgaged property lost to foreclosure.

Although the Bowen Appraisal valued the Property at \$1,350,000, representing the value to an investor intending to resell the individual units, even this was not necessarily the fair value. CP 263. Bowen's \$1.35 million valuation assumed an investor purchasing in the depressed market of the summer of 2009. Under *National Bank*, the court may set a higher value precisely because of depressed economic conditions in Grays Harbor County or in the nation as a whole. The Bowen Appraisal Value is \$630,000 *more* than the Bank's bid. Levine's proposed upset price of \$1.72 million was midway between the Strickland Appraisal and the Bowen Cost Approach and only \$50,000 more than Levine's investment in the Property. It also is the amount that would eliminate a deficiency.

The Strickland Appraisal (completed during the more robust economy of 2006) supports such a value of \$1.985 million. CP 329. Bowen's Cost Approach (CP 255-256) also supports a higher value of \$1,615,000 and it considers land value, replacement cost of the improvements and developer's profits and applies appropriate depreciation. Levine invested \$1.673 million into the Property. The Bank approved a loan of \$1.25 million to build the Property. The Bank's bid is less than 50% of every valuation amount except the Bowen Appraisal and the Bank's original loan balance. Even the assessed value of the Property

is \$1,055,000, over three hundred thousand dollars more than the Bank's confirmed bid.¹³

In *Lee v. Barnes*, 58 Wn. 2d 265, 362 P.2d 237 (1961), a trial court rightly established an upset price that was almost the exact amount of the debt owed. The Washington Supreme Court emphasized that the creditor who had purchased the property at a sale had in fact sold the same property to the debtor for five times the bid price that was rejected in favor of an upset price that was four times greater than the bid. *Id.*, 58 Wn. 2d at 273-74, 362 P.2d at 242. Although the Bank did not technically sell the Property to Levine it thoroughly analyzed the project and the collateral before approving the construction loan of \$1.25 million, which had ballooned to \$1.7 million by the sale date because of eighteen percent (18%) interest and fees. Without this loan the Property would never have been improved and so when the court determined "fair value" the Bank's loan balance of \$1.72 million should have been given considerable weight.

RCW 61.12.060 is designed to ensure that banks or any other lenders who originate loans secured by real estate do not act like pure capitalists when foreclosing by bidding an absolute rock bottom price

¹³ CP 304. In setting an upset price, the Court may not rely *exclusively* on assessed value. *Tucker*, 62 Wn. App. at 297, 813 P.2d at 619, citing *McClure v. Delguzzi*, 53 Wn. App. 404, 408, 767 P.2d 146 (1989). However, under *National Bank*, the court may consider any "factors which [a competitive] bidder might consider in determining a fair bid for the mortgaged property". 81 Wn.2d at 927, 506 P.2d at 44. Assessed value is one such factor.

regardless of economic conditions, in the absence of multiple bidders or fair value. Fair value is also measured from the perspective of the debtor, not the creditor. The case law is very clear in this regard that “fair value” is not the “*minimum value*, but rather its *fair value*.” *National Bank*, 81 Wn. 2d at 926, 506 P.2d at 43-44 (emphasis in original). An upset price was necessary in order for Levine and to receive fair value for the Property, and the court abused its discretion in holding otherwise. This Court should establish the upset price at \$1.72 million.

D. REQUEST FOR FEES

Pursuant to RAP 18.1 Levine requests fees as the prevailing party. The loan agreements between Levine and the Bank provide for an award of attorneys’ fees to the prevailing party. *See* CP 1-16. The Bank recovered fees against Levine in the trial court below. CP 135-139. The appeal here presents a discreet issue, namely, whether an upset price should be established. Thus, in the event Levine prevails here she should recover her fees on appeal and her fees for bringing the upset price motion in the trial court as the upset price is inseparable from the partial summary judgment in favor of the Bank, and it relates directly to whether Levine owes a deficiency, and if so, then how much she owes.

E. CONCLUSION

The trial court abused its discretion in failing to consider the evidence regarding the need for an upset price and the fair value of the Property and failing to set the upset price at an amount significantly higher than the amount paid by the Bank. The transcript portrays a remarkable hostility towards Levine, or perhaps protectiveness of the local Bank, and a frontier mentality as to sheriff's sales. There is little basis to believe that a remand without very specific instructions will result in anything more than another trip to the Court of Appeals. RAP 12.2 provides that the appellate court may "reverse, affirm or modify the decision being reviewed *and take any other action as the merits of the case and the interest of justice may require.*" (Emphasis added.)

Lee v. Barnes is instructive because it involves an upset price issue that went up on appeal twice. In the earlier *Lee* case the court remanded with these instructions:

The cause is remanded to the superior court with instructions to establish the fair value of the property sold, in conformity with RCW 61.12.060, and to modify the appropriate judgments with respect to the payments made under the purported lease of the concession bar at the Lake Theatre of Moses Lake. The parties shall bear their own costs on this appeal.

Lee, 58 Wn.2d at 274, 362 P.2d at 242.

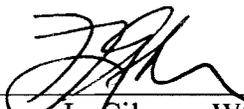
The trial court did not perform these tasks to the court's

satisfaction, however, because the case was appealed, and again remanded, this time with instructions court remanded with instructions that the court reconsider the upset price issue. The trial court was admonished that it should consider all evidence consistent with the guidelines set forth in the opinion. *Lee v. Barnes*, 61 Wn.2d 581, 587, 379 P.2d 362, 366 (1963).

This Court has ample evidence to establish an upset price and that upset price should be \$1.72 million as of the date of the sale, July 17, 2009. The case should be remanded to the trial court with instructions to establish the upset price at \$1.72 million and to direct the clerk to satisfy the Bank's judgment in this amount effective as of July 17, 2009, and to hold a hearing to establish attorneys' fees to be awarded in favor of Levine for work on the upset price motion at the trial court level.

RESPECTFULLY SUBMITTED this 25th day of March, 2011.

BARRETT & GILMAN

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CERTIFICATE OF SERVICE

On March 25, 2011, I caused a copy of the document to which this certificate is attached to be delivered to each of the following, as indicated:

Kenneth W. Masters
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 25th day of March 2011, in Seattle, Washington.



Jennifer Micheau

RCW 4.56.190

Lien of judgment.

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the district court of the United States rendered in this state and any judgment of the supreme court, court of appeals, superior court, or district court of this state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200 and to run for a period of not to exceed ten years from the day on which such judgment was entered unless the ten-year period is extended in accordance with RCW 6.17.020(3). As used in this chapter, real estate shall not include the vendor's interest under a real estate contract for judgments rendered after August 23, 1983. If a judgment debtor owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien on the interest of the defendant only. Personal property of the judgment debtor shall be held only from the time it is actually levied upon.

RCW 6.23.020

Time for redemption from

purchaser — Amount to be paid.

(1) Unless redemption rights have been precluded pursuant to RCW 61.12.093 et seq., the judgment debtor or any redemptioner may redeem the property from the purchaser at any time (a) within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment, or (b) otherwise within one year after the date of the sale. (2) The person who redeems from the purchaser must pay: (a) The amount of the bid, with interest thereon at the rate provided in the judgment to the time of redemption, together with (b) the amount of any assessment or taxes which the purchaser has paid thereon after purchase, and like interest on such amount from time of payment to time of redemption, together with (c) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor or a redemptioner, and like interest upon every payment made from the date of payment to the time of redemption, and (d) if the redemption is by a redemptioner and if the purchaser is also a creditor having a lien, by judgment, decree, deed of trust, or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the redemptioner shall also pay the amount of such lien with like interest: PROVIDED, HOWEVER, That a purchaser who makes any payment as mentioned in (c) of this subsection shall submit to the sheriff the affidavit required by RCW 6.23.080, and any purchaser who pays any taxes or assessments or has or acquires any such lien as mentioned in (d) of this subsection must file the statement required in RCW 6.23.050 and provide evidence of the lien as required by RCW 6.23.080.

RCW 61.12.060**Judgment — Order of sale —****Satisfaction — Upset price.**

In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale. The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted.

Findings of Fact BB and CC:

BB. The most reliable appraisal reports on the property place its fair value in a range from \$645,000 to \$1,350,000 however it appears that the higher appraisals assume that the conditions necessary to marketing the building and to comply with applicable codes and zoning (including acquisition of additional real property for parking) have be satisfied which is not the case; and

CC. The weight of the evidence does not indicate that the amount bid at the Sheriff's sale (\$720,000) was unfair or unreasonable considering all of the circumstances, therefore