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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BANK OF AMERICA, N.A.,

Plaintiff and Respondent,

v.

ROBERT F. MAGUIRE III,

Defendant and Appellant.

2d Civil No. B263603
(Super. Ct. No. 1402293)
(Santa Barbara County)

Robert F. Maguire III appeals a judgment ordering the sale of his real property which secured a loan he owed to the Bank of America, N.A. ("Bank"). We conclude, among other things, that the trial court did not err in ordering the sale of the property because Maguire had defaulted on his obligations to repay the loan he obtained from the Bank. The issue concerning appraisal of the property remains to be litigated. We affirm.

FACTS

In 2008, the Bank loaned Maguire \$20,150,000. The loan was secured by a deed of trust to real estate ("the Property") that Maguire owned in Carpinteria, California.

Maguire defaulted on payments due on the loan and did not pay taxes on the Property to the county tax collector. As of June 20, 2013, he owed the Bank \$24,078,679.08.

The Bank filed an action for "judicial foreclosure and deficiency" against Maguire. It filed a motion for summary judgment. The parties entered into a settlement

agreement, which included standards for the Bank's two appraisers to use for determining a potential deficiency judgment.

The parties also entered into a "stipulation for judgment of foreclosure and order for sale" ("the Stipulation"). The Stipulation required: 1) Maguire sell the Property by a specified date and pay the property taxes; 2) if Maguire defaulted, the Bank would give notice; and 3) if Maguire did not cure the defaults, the Bank had the right to file "an ex parte" motion in the court for entry of judgment which included an order that the Property be sold.

Maguire did not sell the Property or pay the property taxes. The Bank gave him notice of these defaults, but he did not cure them.

The Bank filed an ex parte application for a judgment pursuant to the Stipulation and sought an order that the Property be sold. It also sought a deficiency judgment of \$11,159,176.80. The Bank said that 1) Maguire owed \$25,909,176.80; 2) it obtained two appraisals of the value of the Property; 3) the lower appraisal was \$14,000,000; and 4) the higher appraisal was \$14,750,000.

Maguire claimed the Bank violated the settlement agreement's standards for appraisals. He argued that the two Bank appraisers lacked sufficient experience in appraising "high-end single-family residences" and their methodology was flawed. Maguire filed a report by his own appraiser showing a market value of \$24,400,000.

The trial court declined to issue a deficiency judgment. It ruled that the issue of whether there would be a deficiency must be decided at a later date after a "judicial foreclosure sale." It ordered the Property to be sold because Maguire defaulted on his obligations and "stipulated to a judgment for judicial sale of the Property."

DISCUSSION

The Bank claims Maguire waived his right to appeal the judgment.

A party may waive the right to appeal. But any waiver must be "clear and express" and any doubt "will be resolved against a waiver." (*Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 952-953.)

The Stipulation provides, "[T]his Stipulation *and any judgment entered thereon* shall be non-appealable." (Italics added.)

Maguire contends the Bank's right to file the motion for judgment depends on its compliance with the procedures it agreed to follow before seeking the judgment. He claims the appeal waiver provision does not apply where the Bank seeks a judicial sale without complying with them.

Maguire contends the error occurred when the trial court ordered a sheriff's sale of the Property. He claims the Bank did not follow the procedures that authorized it to seek a judgment for the sale of the Property. But the Bank contends Maguire signed the Stipulation that authorized the sale of the Property.

A lender may file a judicial foreclosure action to obtain a judicially ordered sale of the real property that secures a loan which is in default. (*Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 470-471.) A trial court may properly enter a judgment based on a stipulation to settle litigation that is signed by the parties. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 580.)

Maguire signed the Stipulation to resolve the judicial foreclosure action filed by the Bank. The Stipulation provides that if Maguire defaulted on his obligations he owed to the Bank, the superior court would order "*the Property . . . be sold*" and that a writ of sale be issued forthwith to the Sheriff" (Italics added.)

The Stipulation set forth a procedure for the Bank to use in case of a default by Maguire. It provided, "[U]pon an Event of Default, Bank *shall be authorized to file this Stipulation and have judgment entered immediately* in accordance with the terms of this Stipulation, upon five (5) business days' notice to Maguire setting forth a factually correct statement and description of the Event of Default, with an opportunity to cure the Event of Default (if possible) within such five (5) business days or contest the factual accuracy of said notice. . . . ¶] . . . [I]f Maguire *has not cured the Event of Default*, Bank may immediately file this Stipulation with a declaration of counsel regarding default . . . and move, on an ex parte basis not less than five (5) business days following delivery of such ex parte notice to Maguire or his counsel, *for the entry of judgment against Maguire* in accordance with paragraph 4 below." (Italics added.)

Paragraph 4 of the Stipulation provides, among other things: 1) "Upon an uncured Event of Default," judgment shall be entered against Maguire for the amount he

owed to the Bank; 2) as of June 20, 2013, he owed "a total amount of \$24,078, 679.08"; 3) "[i]nterest, fees, and costs continue to accrue" from that date; and 4) the court shall order "that the Property, or as much of it as may be necessary, be sold"

The Bank contends it followed the procedure in the Stipulation, which authorized a sale of the Property, because Maguire was in default. We agree.

The trial court found Maguire owed \$25,909,176.80 to the Bank. Maguire was required to sell the Property "on or before April 30, 2014." But he did not sell it by that date or pay the Bank what he owed. He failed to pay \$170,596.08 in property taxes.

Pursuant to the Stipulation, the Bank gave Maguire notice of these "Events of Default." Maguire had an opportunity to take corrective action, but he did not cure the defaults. The trial court found, "[Maguire] does not argue that there has been no event of default." Consequently, the "judgment of foreclosure and order for sale" was consistent with and authorized by the Stipulation.

Appraisals, Deficiency Liability and Bifurcation of Issues

Maguire contends the Bank "was not entitled to file the . . . Stipulation" to obtain the sale of the Property because the settlement agreement's appraisal requirements were conditions precedent to filing that document. But the settlement agreement provides that "[s]hould *any* of the following occur . . . Bank shall have *the right to file* the . . . Stipulation." (Italics added) There are five listed events which authorize that filing and they include: 1) "[a] *Permitted Sale does not close*," or 2) any "covenant or agreement or *condition in the Agreement* or in any of the documents executed in connection herewith *is not fully and timely performed*" (Italics added) Moreover, in the Stipulation, Maguire agreed that, "[u]nder the Settlement Agreement, Maguire has . . . agreed to a *judicial sale* of the Property upon the occurrence of *an Event of Default*" (Italics added.)

Maguire contends the trial court erred by ordering a sale because there were defects in the reports by the Bank's appraisers about the value of the Property. In the Stipulation, Maguire agreed that he is "a defendant against whom a deficiency judgment may be ordered." He also agreed that a deficiency would be calculated by subtracting the value of the real estate from the "outstanding balance" he owed the Bank.

Maguire claims that, "[i]n the event of a foreclosure sale, the settlement specified a strict procedure for determining the value of [his] home to *calculate any deficiency judgment*," and this included obtaining proper appraisals.

But the trial court did not enter a deficiency judgment; it only ordered that the Property be sold.

The Bank contends the trial court properly ruled that appraisals and deficiency liability were issues that must be decided "after the judicial foreclosure sale." We agree.

The trial court reasonably bifurcated these issues because they involve different stages of the foreclosure process. (*Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 205 [trial court has discretion to decide to bifurcate issues].) Deficiency liability is properly determined after a judicial foreclosure sale. (Code Civ. Proc., § 726, subd. (b); *San Paolo U.S. Holding Co. v. 816 South Figueroa Co.* (1998) 62 Cal.App.4th 1010, 1012-1013 ["Code of Civil Procedure section 726, subdivision (b) provides that following a judicial foreclosure of real property, the secured creditor may bring a motion to determine the amount, if any, of a deficiency judgment".]) The court could reasonably find that issues involving appraisals and deficiency were not ripe. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236 ["In a judicial foreclosure, *if the property is sold for less than the amount of the outstanding indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale.*" (Italics added)].)

Maguire claims his appraiser gave a higher value to the Property than the Bank's appraisers. But the trial court said that even if it accepted Maguire's position that the Bank's appraisals were defective, the result would not change regarding ordering the sale. It said the current "dispute is not about the value of the Property to be determined by dueling appraisers"; "Maguire forgets that *he stipulated to a judgment for judicial sale of the property.*" (Italics added) The court added that, even using Maguire's appraisal, it was "for an amount less than the current indebtedness," which consequently "would result in a deficiency." But the court left that issue for future resolution. It said the parties had

agreed to resolve remaining disputes "by general reference to a referee as provided in [Code of Civil Procedure section] 638." The court said it "retains jurisdiction to enter a deficiency judgment against Maguire . . . at a later date following the conclusion of further proceedings before a judicial referee." There was no error.

The order authorizing the judicial sale of the Property was proper. The judgment is affirmed. Costs are awarded to respondents.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James E. Herman, Judge
Superior Court County of Santa Barbara

McKool Smith Hennigan, P.C., J. Michael Hennigan, Matthew P. Gelfand
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