

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

FILED
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CLERK OF SUPREME COURT
SEPTEMBER 24, 2009
STATE OF NORTH DAKOTA

First International Bank & Trust,)	
)	
Plaintiff/Appellant,)	Supreme Court No. 20090214
)	
vs.)	
)	
D. Duane Peterson, Mid Am Group, LLC,)	
James R. Bullis, Kevin L. Christianson,)	
Richard R. Jordahl, Douglas H. Peterson,)	
Arlan H. Anderson, Greg Anderson, and)	
Robert Green,)	
)	
Defendants/Appellees.)	

Appeal from the Judgment, Dated May 18, 2009, Civil No. 09-07-C-04280
Cass County District Court, East Central Judicial District
The Honorable Frank L. Racek

**BRIEF OF DEFENDANTS/APPELLEES JAMES R. BULLIS, KEVIN L.
CHRISTIANSON, AND RICHARD R. JORDAHL**

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I. STATEMENT OF THE ISSUES

[1] Defendants Bullis, Christianson and Jordahl (the “Christianson Defendants”) present this issue: Does liability exist under a personal guarantee of a real estate loan after a foreclosure sale, where the underlying indebtedness has been paid in full and no deficiency exists?

II. STATEMENT OF THE FACTS

A. FIB Loans Money to the Mid Am Group.

[2] First International Bank & Trust (“FIB”) entered into a loan with the Mid Am Group, LLC (“Mid Am”) in the original principal amount of \$5,000,000.00 under the terms of a loan agreement dated January 27, 2006. (App. 65.) As security for this loan, Mid Am provided FIB with a mortgage on the subject property, as well as personal guarantees of the Christianson Defendants.

[3] On December 3, 2006, FIB made a second loan to Mid Am in the original principal amount of \$1,500,000.00. This loan was secured by a second, inferior mortgage on the subject real estate, and the personal guarantees of D. Duane Peterson, Arlan H. Anderson, Greg Anderson and Robert Green. (App. 125.)

B. Mid Am Defaults on the Mortgages.

[4] On August 23, 2007, FIB gave notice to Mid Am that it was in default under both of the aforementioned loans.

C. FIB Forecloses its Mortgages.

[5] On October 18, 2007, FIB served Mid Am with a Summons and Complaint, seeking as relief, the foreclosure of the above-reference mortgages. Pursuant

to Plaintiff's Motion for Summary Judgment, final judgment was entered by the Court against Mid Am on February 25, 2008. (App. 182-183)

D. Foreclosure Sale.

[6] On March 3, 2008, Paul Laney, Sheriff of Cass County, North Dakota, gave notice of the sale of the subject property to the highest bidder for cash at public auction.

[7] A sheriff's sale took place at the front door of the Courthouse in the City of Fargo, in the County of Cass, on the 23rd day of April, 2008 at 10:00 a.m.

[8] Cedar Ridge Land Company paid \$6 million for the property. FIB bid the full amount of the indebtedness, and was the winning bidder.

[9] The sheriff paid to FIB the sale proceeds, and FIB acknowledged receipt of the sale proceeds, by and through its attorney, Timothy G. Richard.

[10] On June 4, 2009, FIB conveyed a large portion of the subject property to Adams Development Corporation by the terms of a Warranty Deed dated June 4, 2009 and recorded with the Cass County Recorder on July 7, 2009 at 8:00 a.m. as Document No. 1269355.

III. ARGUMENT

A. The Issues FIB Presents on Appeal are Moot with Respect to the Christianson Defendants.

[11] Even if FIB's argument that a deficiency somehow exists because their credit bid did not extinguish the indebtedness, FIB's subsequent receipt of sale proceeds in excess of the mortgage guaranteed by the Christianson Defendants, let's hope, extinguishes any potential liability. As FIB correctly states in its Brief, the Christianson Defendants only guaranteed the first mortgage in the amount of \$5,000,000.00. While

FIB has not disclosed the amount of its sale to Adams Development Corporation, the real estate mortgage between Adams Development Corporation and FIB dated June 4, 2009 in the amount of \$6,402,500.00, recorded with the Cass County Recorder as Document No. 1269356, seems to indicate that FIB has received an amount sufficient to extinguish any indebtedness owed under the terms of the mortgage guaranteed by the Christianson Defendants. Again, as a result, even if the Court were to rule in favor of FIB, the deficiency issue raised by FIB would be meaningless with regard to the Christianson Defendants.

B. FIB Was Paid in Full After The Sheriff's Sale.

[12] At the sheriff's sale held on April 23, 2008, FIB voluntarily converted its judgment against Mid Am into property by taking the mortgaged property in satisfaction of the debt. This is the identical set of facts presented to this Court in First Federal Savings & Loan Association vs. Scherle, 356 N.W.2d 894 (ND 1984). In Scherle, First Federal loaned its borrower \$1,420,000.00. As security for the loan, it obtained a real estate mortgage and personal guarantees. When the borrower defaulted on the loan, First Federal commenced suit against the personal guarantors and, not unlike the present case, obtained a judgment of foreclosure on the real estate mortgage. First Federal then bid in the full amount of its judgment to purchase the real estate at the sheriff's sale. This Court concluded that:

In this case, First Federal satisfied its mortgage by purchasing the mortgaged property for the amount of the underlying debt, which had been reduced to a foreclosure judgment. Thus, First Federal voluntarily converted the debt into property by taking the mortgaged property in satisfaction of the debt. As a result, the primary debt which the defendants guaranteed to pay was discharged. Because one cannot guarantee payment on a non-existent debt, the defendants' 'individual guarantees were

extinguished when First Federal purchased the property for the judgment amount. Id. at 896.

[13] In the present case, FIB chose to satisfy its mortgage when it made a credit bid of the judgment amount. As is indicated in the sheriff's report of sale, the amount of the deficiency after application of the sale proceeds was \$0.00. This fact was acknowledged by FIB when its attorney, Timothy G. Richard, signed the sheriff's report of sale acknowledging receipt of the sale proceeds and further acknowledging that the sale proceeds would be applied to FIB's judgment.

[14] Consequently, the "indebtedness" as defined by the personal guarantees executed by the Christianson Defendants and the Anderson Defendants have been paid in full and no further liability exists under the terms of the various guarantees.

[15] FIB argues that the above notwithstanding, since it did not receive a "green dollar" payment at the sheriff's sale, somehow a deficiency exists. This Court has addressed a similar argument in Principal Residential Mortgage, Inc. vs. Nash, 2000 ND 21, 606 N.W.2d 120. In Nash, Principal Residential Mortgage brought an action to foreclose a mortgage against the debtor. Principal bid in an amount in excess of the recoverable debt and thus created a surplus. In Nash, the debtor sought to recover that surplus. Principal contended that its credit bid was legally different than a new or "green dollar" bid. The Court disagreed. The Court explained that Principal's argument would render the sheriff's sale a "sham". The Court found that Principal's bid extinguished the underlying debt and in discussing Principal's suggestion that the amount of its bid is inconsequential determined that:

Principal's suggestion that the amount of its bid...would render the sheriff's sale a sham. ...When a creditor bids at a sheriff's sale, its

bid is on the same footing as other bids. The creditors bid is an offer to pay the specified amount for the property.

[16] In the present case, FIB had the option of bidding anything it desired for the subject property. It was under no legal obligation to bid the entire judgment amount. However, by doing so, it virtually assured that it would receive (and in fact did receive) marketable title to the subject property. The idea that FIB should somehow receive the subject property, and a judgment against the guarantors for some as yet to be determined amount is without legal precedent, and would amount to FIB “having its cake and eating it too”.

[17] Finally, subsequent to the Court’s memorandum and final order granting summary judgment in this matter, FIB apparently has sold substantially all of the subject property to Adams Development Corporation. On July 7, 2009, at 8:00 a.m., as Warranty Deed was filed with the Cass County Recorder between FIB and Adams Development Corporation as Document No. 1269355. At that same time and date, a real estate mortgage between Adams Development Corporation and FIB was filed as Document No. 1269356. While the consideration for the purchase is not identified in the Warranty Deed, the real estate mortgage is in the original principal amount of \$6,402,500.00. Assuming these proceeds are properly applied to, initially, the first mortgage, with the remaining proceeds applied to the junior encumbrance, any amount owed by the Christianson Defendants under the terms of their guarantees would, again, be extinguished. Consequently, even if the Court were to determine that a deficiency may somehow exist after a sheriff’s sale, FIB has been paid in full at least with respect to the Christianson Defendants.

C. FIB's Defenses of Waiver and Estoppel are Misplaced.

[18] FIB alleges that because it wrote to each of the Defendants declaring its intention to bid in the entire amount of the indebtedness at the sheriff's sale, the Defendants are either estopped or had waived the right to argue that FIB has been paid in full. For a waiver to be effective, a waiver must be a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim or benefit which the party could have enjoyed, but for the waiver. Tormaschy vs. Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813. In this case, the Defendants neither voluntarily nor intentionally relinquished any right. The defendants simply chose not to respond to Plaintiff's letter setting forth its intention at the sheriff's sale. At no time did any of the Defendants indicate to FIB or its counsel that they agreed with the assertions contained in the correspondence or contained in FIB's March 25, 2008 correspondence. This voluntary correspondence from FIB's counsel does not require or necessitate any response from Defendants or their counsel. Further, FIB was under no contractual or other obligation or duty to actually make a full credit bid at the sheriff's sale. FIB could have bid any lesser or greater amount, for any reason, whether the Defendants replied to its correspondence, or not.

[19] FIB claims that if its loan officer, Mr. Dunkel, had learned that any of the Defendants would have taken the position that a full credit bid would terminate their guarantees of payment, "FIB would have reviewed other bidding strategies and would have made a bid substantially less than a full credit bid at the sheriff's sale on foreclosure conducted on April 23, 2008." (App. 238?). Whether FIB would have bid something less or something more at the sheriff's sale if any of the Defendants had revealed their

bidding strategies will never be known, however, it should have been foreseeable to FIB and its counsel that the Defendants might avail themselves of the well settled law that a full credit bid at a sheriff's sale extinguishes any potential deficiency.

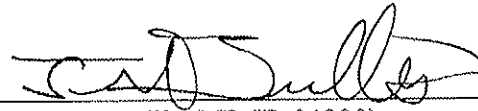
[20] Additionally, had counsel for any of the Defendants informed FIB's counsel that his analysis regarding a deficiency was incorrect, that attorney would not only expose his client to liability, but he himself would be afoul of the North Dakota Rules of Professional Conduct. In re Disciplining Action Against Britton, 484 N.W.2d 110 (ND 1992).

[21] Plaintiff's estoppel argument is equally as misplaced. Among other things, estoppel requires that the Defendants engage in "conduct which amounts to a false representation or concealment of material facts" and subsequent reliance by the Plaintiff on that false representation for concealment. Peterson Mechanical, Inc. vs. Nereson, 466 N.W.2d 568, 571 (ND 1991). In the present case, the Defendants made no representations, let alone false representations, nor did Defendants conceal any material facts – elements that would need to be true where lack of action can be a basis for estoppel. Blocker Drilling Canada, Ltd. vs. Conrad, 354 N.W.2d 912, 920 (ND 1984). In the present case, the Defendants made no representations of any fact to the Plaintiff. FIB was fully aware of all of the facts and circumstances surrounding the sheriff's sale and was aware (or at least should have been aware) of the legal ramifications of its full credit bid.

IV. CONCLUSION

[22] For all of the foregoing reasons, the Christianson Defendants believe this Court should affirm the District Court's Order.

Dated: September 24, 2009.

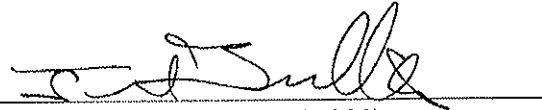
A handwritten signature in black ink, appearing to read "James R. Bullis", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Defendants/Appellees Bullis, Christianson, and Jordahl, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that this Brief was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,976.

Dated: September 24, 2009.



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