

1992

Eleventh Circuit Finds That All Relevant Circumstances Must be Considered before Voiding a Foreclosure Sale

Sharon Hannaford

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Recommended Citation

Sharon Hannaford *Eleventh Circuit Finds That All Relevant Circumstances Must be Considered before Voiding a Foreclosure Sale*, 4 Loy. Consumer L. Rev. 131 (1992).

Available at: <http://lawcommons.luc.edu/lclr/vol4/iss4/10>

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agreed, stating that the fraud claim was separate from the CERCLA claim. The court therefore remanded the attorney fee award for reduction by the amount apportioned to the fraud claim.

Gopher appealed the district court's deferral of the damages award. Gopher argued that this retention of jurisdiction was erroneous under Minnesota law and also violated its Seventh Amendment right to a jury trial on the issue of damages. The court of appeals held that the district court was correct in allowing out-of-pocket damages. However, the calculation of the damages should not have been postponed until the cleanup was substantially complete. Instead, the award should have been made promptly by using expert testimony to estimate the value of the property upon completion of cleanup.

Union Fully Responsible For CERCLA Cleanup Costs

On the CERCLA claim, Union contended that the "as is" clause of the purchase agreement transferred liability for the cleanup from Union to Gopher. Additionally, Union argued that CERCLA allows apportionment of liability among all responsible parties, therefore the apportionment of the full cleanup liability to Union was unfair.

The court of appeals upheld the district court's decision, stating that the allocation of liability under CERCLA is an equitable determination made by the district court's factual findings and legal conclusions. The evidence showed that Union knew of and was responsible for the extensive, toxic pollution. In addition, the district court had found that Gopher had not materially contributed to the pollution and had no knowledge of the pollution until an investigation was ordered by the Authority. The appellate court held that because Gopher was fraudulently induced into entering into the purchase agreement, the "as is" clause was invalid and did not serve to transfer liability to Gopher.

The court of appeals also disagreed with Union's contention that Gopher should not have re-

covered attorney fees for the CERCLA claim. Quoting the statutory language in both CERCLA and MERLA that expressly allows the awarding of attorney fees to the prevailing party, the court of appeals found the district court's decision appropriate to the extent that the attorney fees awarded to Gopher were applied to the CERCLA claim and not to the fraud claim.

Monica A. Murray

Eleventh Circuit Finds That All Relevant Circumstances Must Be Considered Before Voiding A Foreclosure Sale

In *Grissom v. Johnson*, 955 F.2d 1440 (11th Cir. 1992), the United States Court of Appeals for the Eleventh Circuit held that before a court can revoke a residential foreclosure sale, it must be persuaded that the foreclosure sale price was not the reasonably equivalent value of the property. However, in this case, the record lacked specific facts regarding the circumstances of the foreclosure sale, so the court of appeals remanded the case back to the lower court.

Background

In 1971, Johnny Grissom ("Grissom") took out an \$18,000 home loan from Citizens and Southern National Bank ("C&S") and secured the loan with his residence. Subsequently, Grissom defaulted. After C&S notified Grissom about the bank's intention to foreclose on his home, the bank advertised the foreclosure sale once a week for four weeks. On April 4, 1989, the property was sold to Birnet Johnson ("Johnson") for \$14,059, the amount Grissom owed on the note to C&S.

One day after this sale, Grissom and his wife filed for Chapter 13 bankruptcy protection. One month later, they filed a complaint in the United States Bankruptcy Court for the Southern District of Georgia seeking to revoke the foreclosure sale.

Lower Courts Void Foreclosure Sale

In bankruptcy court, Grissom argued that under federal bankruptcy law, the foreclosure sale should be nullified. The court agreed and found that the only substantial question was whether the sale price of \$14,059 was a reasonably equivalent value of the Grissom residence. The court relied upon the "Durrett 70% Rule", set forth by a prior Court of Appeals for the Fifth Circuit in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), which established that in order to meet the reasonable equivalency standard, a property must be sold during a foreclosure sale for at least 70 percent of its actual market price.

The bankruptcy court found that the sale price was less than \$26,000, 70 percent of the property's market value. Since the sale did not meet the Durrett Rule, the bankruptcy court ruled that the foreclosure sale was void. C&S appealed this decision to the United States District Court for the Southern District of Georgia.

The district court also relied upon the Durrett dictum and affirmed the order of the bankruptcy court. The district court mechanically analyzed the issue of reasonably equivalent value and held that the bankruptcy court correctly followed the general rule that a sale for less than 70 percent of the fair market value is less than a reasonably equivalent value. C&S appealed to the United States Court of Appeals for the Eleventh Circuit.

Eleventh Circuit Reverses, Using Totality of Circumstances Rule

On appeal, C&S argued that both the bankruptcy court and district court relied too heavily on the Durrett test while ignoring other potentially relevant factors. The Eleventh Circuit agreed and rejected the lower courts' dependence on the Durrett test. In doing so, the court relied on its recent decision that a determination of reasonable equivalency requires a consideration and analysis of the totality of the circumstances surrounding a

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Voiding Foreclosure Sale

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foreclosure sale.

Also, the court noted that Congress did not intend to make a fixed percentage the sole determining factor of reasonable equivalence. Instead, the decision maker should consider other relevant factors, such as the bargaining position of the parties, the marketability of the property, and the context of a lawful foreclosure.

The court of appeals found that the lower court incorrectly presumed a foreclosure sale brought unreasonable prices if a foreclosing party fails to prove otherwise. Instead, the court noted, a lawfully conducted foreclosure sale is presumed to bring reasonably equivalent value. Furthermore, the foreclosure price-to-market value percentage is only one factor rebutting this presumption of reasonableness. Courts must also consider other factors, such as fair appraisal of the property, advertisement of the foreclosure sale, and competitive conditions surrounding the sale.

Accordingly, the court of appeals concluded that the Durrett 70 percent test should no longer be mistaken as the law of the Eleventh Circuit. Instead, the proper way to determine a property's reasonable equivalent value is to conduct a thorough investigation into all the relevant facts and circumstances.

Competing Policy Concerns Now Met

The Eleventh Circuit concluded that the totality of the circumstances test properly balanced the competing interests of the borrower's equity rights and the secured creditor's concerns. While depending solely on the Durrett Rule to void a foreclosure sale might advance bankruptcy policy, it violates the policy of protecting a secured creditor's rights. Courts, therefore, must conduct a thorough analysis of the facts and circumstances surrounding the foreclosure sale to ensure that a foreclosing party takes all commercially reasonable steps to protect the competing interests of both parties.

Case Remanded Back To District Court

Because the record contained no facts about the circumstances surrounding the foreclosure sale, the appellate court was unable to determine whether the foreclosure sale price was the reasonable equivalent of the property's value. For example, the court could not decide if the bank took the reasonable commercial steps necessary to protect the debtor's equity in the property. The record also contained no facts regarding the competitive conditions surrounding the sale or the bank's efforts to appraise the value of the property. Thus, the appellate court vacated both lower court orders and remanded the case to district court for further proceedings.

Sharon Hannaford

California Supreme Court Finds School Transportation Fees Do Not Violate The State's Constitution

In *Arcadia Unified School District v. State Department of Education*, 825 P.2d 438 (Cal. 1992), the Supreme Court of California concluded that charging fees for school transportation did not conflict with either the free school guarantee or the equal protection clause of the California Constitution.

Taxpayer Wins Initial Suit

In 1985, Francisco Salazar ("Salazar") filed a taxpayers' suit in Ventura County, California against the State Department of Education, the State Board of Education, the Superintendent of Public Instruction, and the Fillmore Unified School District ("Educators"). Salazar claimed that the Educators' implementation of §39807.5 of the California Education Code (Deering 1992), which authorized school districts to charge fees for student transportation, violated the free school guarantee and the equal protection clause of the California Constitution.

The Court of Appeals, Second District, Division Six, found it unnecessary to join the school dis-

tricts as parties to the litigation and concluded that §39807.5 violated both the free school guarantee and the equal protection clause of the California Constitution. The Supreme Court of California denied review of the appellate court decision and ordered that it not be officially published. On remand, the Ventura County Superior Court entered a judgment against the Educators.

School Districts' Suit Involved Same Issue

Following the superior court's order, the State Department of Education ("Department") notified all school districts that §39087.5 was unconstitutional and instructed them to discontinue charging for transportation. However, many school districts that were not parties to the original action did not follow the Department's directive because of their belief that §39807.5 was constitutional. Twenty-five school districts implemented an action in the Sacramento Superior Court against the Department to determine whether §39807.5 was constitutional on its face.

Salazar was permitted to be included as a party and moved to dismiss the lawsuit, arguing that the Department and the school districts, as agents of the Department, were bound by the prior decision in his taxpayer suit. The superior court denied the motion to dismiss and held that §39807.5, on its face, violated the free school guarantee of the California Constitution.

The Court of Appeals, Third District, unanimously reversed, holding that the school districts were not bound by the judgment in the earlier action. The appellate court found that the public interest mandated such a conclusion and therefore, did not reach the issue of whether the school districts were agents of the Department. The appellate court also ruled that §39807.5, on its face, did not violate either the free school guarantee or the equal protection clause of the California Constitution. This decision was appealed to the California Supreme Court.