

STATE OF MICHIGAN
COURT OF APPEALS

COMERICA BANK,

Plaintiff-Appellee,

v

DANIEL J. OAKS, DORIS J. OAKS, and
STATE BANK OF CALEDONIA,

Defendants-Appellants.

UNPUBLISHED
October 11, 1996

No. 171332; 178252
LC No. 92-077386-CK

Before: Sawyer, P.J., and Griffin and M.G. Harrison,* JJ.

PER CURIAM.

Defendants appeal from a judgment of foreclosure and an order confirming the sale of the mortgaged property. We affirm.

Defendants Oaks gave mortgages to plaintiff covering two properties, referred to as the LaPlacita Mall property and the Leonard Street property. Both mortgages contained clauses which cross-collateralized the debts. Defendants had difficulty repaying their indebtedness to plaintiff, and were frequently in default on the LaPlacita mortgage due to untimely payment. This resulted in various litigation, with agreements being reached concerning keeping the mortgage current. In 1990, a balloon payment came due on the Leonard Street mortgage, which defendants failed to make. Also, at this time they were again in default on the LaPlacita mortgage due to a failure to pay property taxes. Eventually, defendants paid the Leonard Street mortgage in full and cured the default on the LaPlacita mortgage by paying the delinquent property taxes.

Having paid the Leonard Street mortgage in full, defendants sought a discharge of that mortgage. Plaintiff refused, noting that that mortgage also secured the LaPlacita mortgage. Thereafter, however, plaintiff offered to discharge the Leonard Street mortgage upon payment of \$5,300 in attorney fees from the prior foreclosure proceedings. Defendants declined this offer.¹

* Circuit judge, sitting on the Court of Appeals by assignment.

Thereafter, defendants began a series of defaults on the LaPlacita mortgage. Eventually, plaintiff declared the mortgage in default, invoked an acceleration clause, and eventually began foreclosure proceedings against both the Leonard Street property and LaPlacita Mall. Following a bench trial, the trial court granted a judgment in favor of plaintiff. The trial court ruled, inter alia, that both mortgages were cross-collateralized. However, it did restrict plaintiff's ability to foreclose on the Leonard Street property by requiring it to first foreclose on the LaPlacita property.

Thereafter, the LaPlacita property was sold for \$349,352.38, reducing defendants' indebtedness to plaintiff to \$145,632.67. Plaintiff moved to confirm the sale and to be permitted to proceed with the foreclosure of the Leonard Street property. The trial court determined that the fair price for the LaPlacita property at the time of the sale was \$563,000, but that that price should be reduced by twenty percent to take into account the forced nature of the sale. Accordingly, the trial court confirmed a purchase price of \$450,400.

On appeal, defendants first argue that the trial court erred in determining that the debt in this matter was \$368,920.52 and interest was \$23,522.55 because plaintiff failed to sustain its burden of proof. We disagree. Defendants argue that the amount of the debt was not sufficiently proven because plaintiff offered no evidence about when the payments had actually been received by plaintiff, there were no records pertaining to rents and their application to the rent, and no proof of the actual interest rate, which was variable. Thus, defendants argue, plaintiff's evidence was a mere guess at the actual amount of the indebtedness. Plaintiff responds by pointing out that it had a witness who testified as to the amount of the indebtedness and that defendants failed to submit any evidence on how plaintiff's calculations were incorrect.

We will disturb the trial court's findings only if they are clearly erroneous, which exists if we are left with a definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564; 516 NW2d 124 (1994). Plaintiff introduced the mortgage and promissory note, a summary of the debt owed, a witness who testified to the accuracy of that summary, two loan interest and principal statements, and a schedule of the prime rates for the time periods in question. Balanced against this was defendants mere assertion that the accrued interest calculation may be inaccurate because they were forced to rely upon plaintiff's records concerning assigned rents. In short, plaintiff did produce evidence of the amount of the indebtedness which, if believed by the trier of fact, would sufficiently establish the amount of the indebtedness. If defendants believed those calculations to be erroneous, they should have introduced their own evidence to so persuade the trial court.

Next, defendants argue that plaintiff wrongfully refused to discharge the mortgage on the Leonard Street property and the trial court erred in allowing foreclosure on it. We disagree. The mortgage clearly included a cross-collateralization clause. Furthermore, as the trial court noted, plaintiff's witnesses testified that cross-collateralization was the normal practice and defendants offered no evidence against an intent then claiming the mortgage had been signed without being read. Accordingly, we cannot say that the trial court clearly erred in concluding that the parties intended to cross-collateralize the loans.

Defendants also argue that the cross-collateralization clause in the Leonard Street mortgage is unenforceable because it only secured amounts that came due during the term of the mortgage. Defendants argue that because no other amounts were due when they paid off the mortgage, it should have been discharged. Even if this position is legally correct, it is not factually correct. Plaintiff did, in fact, offer to discharge the Leonard Street mortgage after it was paid if defendants paid the amounts owing arising out of previous foreclosure actions. Thus, an amount was due during the term of the mortgage. Thus, even under defendants' theory, the mortgage was not subject to being discharged.

Finally, under this issue, defendants argue that the cross-collateralization clause should not be enforced because equity abhors a forfeiture. Despite this well known maxim of equity, defendants overlook the fact that this is a foreclosure proceeding, not a forfeiture proceeding. Any excess amounts from the sale of the mortgaged property would be returned to defendants. Indeed, the trial court took particular care to protect defendants by requiring that the LaPlacita property be sold first before plaintiff could proceed with a foreclosure sale on the Leonard Street property. Simply put, there is not forfeiture for equity to abhor in this case.

Defendants' next argument is that plaintiff's claim for approximately \$55,000 in legal fees was unreasonable and should be denied. The mortgages provided for the payment of legal fees in the event of foreclosure. The trial court carefully considered the evidence concerning the costs incurred in prosecuting the various foreclosures that arose concerning these loans. We are not persuaded that the trial court clearly erred in its findings.

Finally, defendants argue that the trial court erred by adding the amount of taxes paid by Comerica Bank to the deficiency judgment where the sale price confirmed by the court was already reduced by the amount of these taxes. Plaintiff paid \$72,000 in taxes between the time of the foreclosure judgment and the entry of the confirmation order. By statute, the trial court was required to include this payment in the confirmation order. MCL 3145; MSA 27A.3145. Accordingly, it did not err in doing so. Furthermore, the inherent flaw in defendant's argument is the presumption that the amount plaintiff paid in taxes was included in the bid for the property at the foreclosure sale and the trial court's confirmation of that sale. Clearly, the amount confirmed by the trial court, \$450,400 did *not* include the amount paid by plaintiff for taxes owing on the property. Rather, that figure was arrived at based upon the fair market value of the property reduced by twenty percent to reflect the forced sale nature of the transaction. There is no indication that taxes paid by plaintiff were included in that sale amount. In fact, the trial court's order confirming the sale clearly sets forth the taxes as an additional amount owing by defendants not covered by the foreclosure sale. In short, the real question is what the sale price of the property should have been without regard to the tax issue. We cannot say that the trial court clearly erred in its conclusions.

Affirmed. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael G. Harrison

¹ Despite the fact that the Leonard Street mortgage was not discharged, defendants thereafter gave a mortgage to that property to defendant State Bank of Caledonia.