101 GENEVA LLC V. WYNN: STANDING ON THE SHOULDERS OF MADDOX V. COHN TO DETERMINE WHETHER ASSESSING ATTORNEY'S FEES AGAINST DEFAULTING PURCHASERS IS PERMISSABLE IN FORECLOSURE CASES

by Ground Rules

Benjamin P. Smith of Shulman, Rogers, Gandal, Pordy & Ecker, P.A. provided the following summary of the recent decision of the Court of Appeals on 101 Geneva LLC v. Wynn*:*

I. Comparing Maddox to 101 Geneva LLC

In 2011, the Maryland Court of Appeals in *Maddox v. Cohn*, 424 Md. 379, 36 A.3d 426 (2012) was called upon to address a question that carried with it many potential implications. The question was whether it was proper to advertise as a term of sale a requirement that a successful purchaser pay an attorney's fee of a set amount ($295.00) for reviewing settlement documents.

The clear answer to the question was no.

The narrow holding in *Maddox* was that "…in the absence of specific authority in the contract of indebtedness or contained in statute or court rule, it is an impermissible abuse of discretion for trustees * * * to include the demand for additional legal fees for the benefit of the Trustees in the advertisement of sale, or in any other way, in that it is contrary to the duty of trustees to maximize the proceeds of the sales and, moreover, is not in conformance with state or local rules and as we have said, is against public policy." The court in *Maddox* also found troubling, the fact that: a) the fee was not subject to court review for reasonableness since it was paid at closing directly to the Attorney/Trustee and was outside the court audit process.

In *101 Geneva LLC v. Wynn* (unreported, "*101 Geneva*"), the Court of Appeals had its first opportunity to clarify or explain the *Maddox* decision, and it did.

The advertisement of the foreclosure sale at issue in *101 Geneva* contained terms requiring any purchaser who fails to settle within the advertised period to pay attorney's fees in the amount of $750.00, plus all costs incurred, if the trustees were required to file a motion with the court to resell the property. On its face, without reading the remainder of the opinion, one can tell the difference in the fee advertised in *Maddox* and the one in *101 Geneva*. The fee in *Maddox* applied to any

successful purchaser, while the fee in *101 Geneva* applied only to a defaulting purchaser, and it only applied upon the purchaser's default. More importantly, the fee (but not the exact amount) was authorized by a court rule, namely, Rule 14-305(g), that provides "…[i]f the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale **at the risk and expense of the purchaser** or may take any other appropriate action." (emphasis added). The Rule clearly contemplates the defaulting purchaser be liable for the risk of a resale (that the resale price is less than the prior sale price) and the expenses of resale (including attorney's fees for obtaining the court's order authorizing a resale).

While the court could have ended its opinion in *101 Geneva* after holding that the advertised fee (imposed on defaulting purchasers) was in fact authorized by court rule ([Rule 14-305(g)], it chose to shed additional light on *Maddox* in its examination of the advertisement in *101 Geneva*. The court explained that in *Maddox* it found additional facts which were absent in *101 Geneva*. First, the lender bought-in at the sale (*101 Geneva* property was sold to a third-party); second, the fee was a term of sale requiring all purchasers to pay (fee in *101 Geneva* only imposed if purchaser defaulted); third, the fee was not subject to court review (fee in *101 Geneva* was subject to court review); and fourth, the imposition of the fee likely had a chilling effect on potential bidders to lower the maximum bid by the amount of the fee (fee in *101 Geneva* is not incurred unless purchaser defaults).

Notwithstanding the express authorization in Rule 14-305(g) for imposing additional expenses (including attorney's fees) against a defaulting purchaser, 101 Geneva undoubtedly benefits from a better set of facts. First, it has long been the practice of Maryland courts to examine the propriety of buy-in foreclosure sales with a higher level of scrutiny than third party sales. See *Fagnani v. Fisher*, 418 Md. 371 (2011). Having a lender buy-in purchaser in *Maddox* was absolutely unfavorable to the foreclosure trustees due to the higher level of scrutiny applied by the court in its review of the sale. Second, the fee provision and amount in the *101 Geneva* advertisement will be reviewed by the court when considering the trustees request to re-sell the property and/or during the court audit process. Thus, the court gets to decide the permissibility and the reasonableness of the fee on a case by case basis. Third, the fee in *101 Geneva* could not divert money from the successful bid price since it would not be incurred until after ratification of the sale and only if a purchaser defaulted. The adherence of the trustees to their fiduciary duties could not be called into question and the fee would have no chilling effect.

These differences add up to the simple basis upon which *101 Geneva* appears to be decided: even if a fee is authorized, it is not permissible to advertise or impose a fee in any stated amount that could discourage bidding, but it is permissible to advertise or impose a fee (that is subject to court

review for reasonableness) that discourages default by the successful purchaser.

There was a concurring and dissenting opinion by three Judges, which would have affirmed the trial court's order vacating the foreclosure sale and ordering a resale because of, inter alia, the "…lack of information in the record about the origin and reasonableness of the $750 attorney's fee and the ten-day default period contained in the advertisement of sale." Additionally, the dissent felt these terms of sale: a) "…usurp the circuit court's discretion under Maryland Rule 14-305(g)…" to determine the expenses to be incurred by the defaulting purchaser; and, b) would have a chilling effect on the bidding of "…small or single-property purchasers/homebuyers-those who use the foreclosure market as an opportunity to purchase a first home at a discount price." Notwithstanding its concern regarding the lack of a sufficient record, I believe the reasoning in dissent is flawed for the following reasons: a) including the subject term of sale in the advertisement does not usurp the court's ability to review the risk and expense incurred by a defaulting purchaser since the entire accounting (both first sale and resale) will be reviewed by the court auditor, stated in a filed Auditor's Report, subject to exceptions being filed and must be ratified by the court pursuant to Rule 2-543; and, b) eliminating the subject term of sale in the advertisement does not insulate the "single-property purchaser/homebuyers" or any other successful bidder from liability for such an attorney fee if they default because Rule 14-305(g) still permits the court to "…order a resale at the risk and expense of the [defaulting] purchaser." The Maryland cases have routinely found that the resale 'risk' is the possibility that the price obtained will be less than the original sale price (including difference between real property taxes and interest of the two sales) and the resale "expense" includes items such as additional: advertising (resale and after sale notice), title update, serving notices of resale, auctioneer, trustee's commission, attorney's fee, etc., and, if applicable, incurred because of bankruptcy, litigation, etc.

II. 101 Geneva LLC's Impact Upon Defaulting Purchaser Liability

When a foreclosure purchaser defaults in Maryland the trustees use Md. Rule 14-305(g) to obtain an order to re-sell the foreclosed property at the risk and expense of the defaulting purchaser. Indeed, *Thomas v. Dore*, 183 Md. App. 388, 961 A.2d 655 (2008) and *White v. Simard*, 383 Md. 257, 859 A.2d 168 (2004) both establish that that the memorandum of sale signed by the purchaser at the foreclosure sale constitutes an agreement between the trustees and the purchaser to abide by the terms of the advertisement. One of those terms is that the defaulting purchaser's deposit will be forfeited and the property is to be resold at the risk and expense of the defaulting purchaser in the event of default.

While the *101 Geneva* decision permits trustees to include a set amount that a defaulting purchaser

will incur for defaulting, I still believe the better practice is for trustees not to include such a term of sale in the advertisement. The *101 Geneva* decision does not give sufficient comfort that all courts will find the stated amount of attorney fee in the advertisement is reasonable in all circumstances. There is also the possibility the stated attorney's fee might turn out to be too low if the motion to resell is contested or other complications arise and the court could determine the trustees are limited by the stated amount. The time to claim such a fee is more appropriate during the audit process.

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