SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
LISA F. CHRYSTAL
JUDGE

COURTHOUSE
ELIZABETH, NEW JERSEY
07207

LETTER OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE OF OPINIONS

December 6, 2013

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Re: **TD Bank v. 601 Lehigh Associates, LLC, et al.**
Docket No.: **UNN-F-6585-10**

Dear Counsel:

The Court has before it the motion of Defendants, 601 Lehigh Associates, Darken Architectural Woodwork Installation, LLC, metropolitan Architectural Woodwork, LLC and Darren Commander (collectively "Defendants") to set aside the sheriff's sale that occurred on October 16, 2013. The Certification of Avram E. Frisch, Esq. accompanied the motion. Opposition was submitted by Plaintiff, TD Bank, N.A. ("Plaintiff"). The Certification of Lawrence P. Maher, Esq. accompanied the opposition. Defendant submitted a reply to Plaintiff's opposition. Oral argument was heard on December 6, 2013.

## I. Motion to Set Aside Sheriff's Sale

**a. Defendants' Motion to Set Aside Sheriff's Sale**

The instant motion arises out of the sale of mortgaged property located at 601 Lehigh Avenue in Union, New Jersey. Judgment was entered in favor of Plaintiff on May 7, 2012 and a writ of execution issued that same day. The initial sale date for the property was set for July 11, 2012. The sale date for the property was adjourned by Plaintiff until October 16, 2013. The sale of the property took place on October 16, 2013.

Defendants argues that it had no actual notice of the sale date and could not have been expected to be aware of the date. Defendants argues that Plaintiff failed to notify Defendants of the final date for the sale. Defendants maintain that counsel for Defendants attempted to keep track of the sale date by inquiring of the Plaintiff or of the Union County Sheriff. Defendants argue that the buyer of the property, Coba, Inc. received a sheriff's deed dated October 29, 2013 and that the buyer was described by Plaintiff's counsel as a subsidiary of Plaintiff. Defendants argue that they first received notice that the sale had occurred on November 13, 2013 when a copy of the deed was e-mailed to Defendants' counsel. Defendants contend that Plaintiff's counsel has admitted that he failed to notify Defendant of the adjourned sale date because he felt that Defendants were no longer interest in dealing with the property.

Defendants argue that the circumstances of this case are virtually identical to those in First Mut. Corp. v. Somojeden, 214 N.J. Super. 122, 123, 518 A.2d 525, 526 (App. Div. 1986). Defendants argue that the Samojeden Court stated "we hold as a matter of fundamental fairness these rules must be construed as entitling interested parties to actual knowledge of the adjourned date upon which the sale actually takes place." Id. In Samojeden, the plaintiff had regularly adjourned the sale for thirteen months, and allowed the defendants to believe that the sale would continue to be adjourned so long as monthly payments had been received. The defendants relied on this pattern, and were not notified of the ultimate sale date and the Appellate Division determined that they were entitled to actual notice of the sale date.

Defendants argue that in this case, Plaintiff adjourned the sale for at least fourteen months before scheduling the ultimate sale date. Defendants maintain that they attempted to contact Plaintiff and the Sheriff for the revised date prior to each sale, however, in this instance, it was made more difficult by the fact that the Plaintiff did not appear for the scheduled sale date and Defendant had no notice of when the new date was scheduled.

Defendants argue that the Samojeden Court held that the owner of the property was not obligated to make explicit inquiries as to the sale date of the property. Id. at 128. The Court stated "we cannot conclude, at least in the circumstances here, that the owner and third mortgagee were obliged during the thirteen month period to continuously monitor First Mutual's intentions respecting a sale by making period inquiry of First Mutual or the sheriff's office." Id. Defendants argue that similarly to

Samojeden, Defendants' attorney attempted to keep track of the bank's intentions but was not obligated to ensure that the bank provided notice of the ultimate sale date.

**b. Plaintiff's Opposition**

Plaintiff argues that it held a first mortgage on property at 601 Lehigh Avenue as collateral security for a commercial mortgage loan which was made to the defendant, 601 Lehigh Associates. Plaintiff argues that 601 Lehigh Associates defaulted on payments due to the Plaintiff and the Plaintiff recovered a Final Judgment of Foreclosure dated May 7, 2012. A Writ of Execution was issued and a Sheriff's Sale was initially scheduled on July 11, 2012. Plaintiff argues that it had to adjourn the sale to complete access to the property for on-site inspections.

Plaintiff argues that Defendants' reliance on First Mut. Corp. v. Samojeden, 214 N.J. Super. 122 (App. Div. 1986) is misplaced because the facts in First Mutual are distinguishable from the facts in the present case. Plaintiff maintains that the Samojeden Court acknowledged that the Court Rules pertaining to Sheriff's Sales did not require notice for adjourned sale dates. Plaintiff argues that the Court found that equity and fundamental fairness required the plaintiff to provide actual notice to the interested parties. Plaintiff argues that the decision in Samojeden was based on compelling facts which do not exist in the present case.

Plaintiff argues that the motion which was granted by the Court in Samojeden was made by Telmark, Inc. which held a third mortgage on property owned by the defendants, Samojeden. First Mutual held the second mortgage as collateral for a $6,000.00 debt. Plaintiff argues that after obtaining a Foreclosure Judgment and scheduling a Sheriff's Sale, First Mutual advised Telmark that the Sheriff's Dsale would be adjourned on a month-to-month basis while payments were being made. Plaintiff maintains that this course of conduct continued for about a year until First Mutual decided to proceed with the sale without notice to any of the interested parties. Telmark, which held a $31,000 third-mortgage interest, filed the motion to set aside the sale and asserted that it would have protected its third mortgage interest by bidding at the sale if it had received notice of the sale date. The Appellate Division decided that equity and fundamental fairness required First Mutual to give actual notice when it decided to proceed with the sale.

Plaintiff argues that the facts in the present case are radically different than the facts in Samojeden. Plaintiff maintains that it was required to adjourn the sheriff's sale to complete environmental investigations at the property. These investigations were protracted, partly due to Defendants' decision to deny access for testing. Plaintiff argues that no payments were being made on account of Plaintiff's $7,400,000 judgment during this period. Counsel for Defendants inquired about the status of the sale as it was adjourned by the Plaintiff. Plaintiff argues that in contrast to Samojeden, the Defendant was not making any payments or satisfying any obligations which would create an expectation that Plaintiff would forbear

proceeding with the sale whenever its environmental investigations were concluded.

Plaintiff argues that in contrast to the facts considered in Samojeden, the Defendant has not submitted a certification or any other assertion that it would have attended or participated at the sheriff's sale. Plaintiff contends that in Samojeden, Telmark was deprived of the opportunity to protect its third mortgage by bidding at the sale. In the present case, Plaintiff maintains that Defendant has not provided the Court with any indication that its rights were prejudiced.

Moreover, Plaintiff submits that Defendants were not prejudiced by failing to receive actual notice of the sale. Plaintiff maintains that if it is found that Defendants were deprived of certain equitable rights, the Court can still give Defendants the right to redeem the mortgaged property. Plaintiff cites Hardyston Nat. Bank of Hamburg v. Tartamella, 56 N.J. 508 (1970) for the proposition that a mortgagor has the absolute right to redeem the mortgaged property within ten days following the sheriff's sale. Plaintiff argues that this Court can enter an Order which will provide that Defendants have a redemption period within which it can pay the $7,400,000 judgment and redeem the property from sale.

**c. Defendant's Reply**

In a reply certification, Defendant's attorney certified Plaintiff did not notify Defendant's counsel of several prior sale date adjournments and that counsel frequently had to check with the Sheriff o determine the status of the sale. Counsel for Defendant argues that on the sale date in September, he neglected o contact Mr. Maher in advance to check on his intentions with regard to the sale date, and subsequently called the Sheriff o find out that the sale was adjourned when Plaintiff failed to appear. Defendant argues that it was no of the belief that the Plaintiff would proceed with the sale, but should not now be penalized for counsel's failure to confirm that the sale would be adjourned.

Defendant argues that no portion of the case law on this issue imposes the requirement that a Defendant prove that he would have appeared at the sale or otherwise achieved his objective. Defendant argues that it is simply a matter of fairness that he be entitled to appear and exercise his rights, which in this case also would include a filing for protection under the Bankruptcy code. In addition, the implication that First Mut. Corp. v. Samojeden, 214 N.J. Super. 122, 123, 518 A.2d 525, 526 (App. Iv. 1986) is limited to circumstances where a junior mortgagee is the party seeking o set aside the sale, has no merit, as the Samojeden Court indicated that the mortgagor would have similar rights, and the fact that the case involved a second mortgagee was simply a matter of happenstance.

## II. Analysis

**R. 4:65-2. states:**

> If real or personal property is authorized by court order or writ of execution to be sold at public sale, notice of the sale shall be posted in the office of the sheriff of the county or counties where the property is located, and also, in the case of real property, on the premises to be sold, but need not be posted in any other place. If the premises are residential, the notice of sale shall have annexed thereto, in bold type of at least 14-point, the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. The party who obtained the order or writ shall, at least 10 days prior to the date set for sale, serve a notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action, and (3) except in mortgage foreclosure actions, every other person having an ownership or lien interest that is to be divested by the sale and is recorded in the office of the Superior Court Clerk, the United States District Court Clerk or the county recording officer, and in the case of personal property, recorded or filed in pertinent public records of security interests, provided, however, that the name and address of the person in interest is reasonably ascertainable from the public record in which the interest is noted. The notice of sale shall include notice that there may be surplus money and the procedure for claiming it. The party obtaining the order or writ may also file the notice of sale with the county recording officer in the county in which the real estate is situate, pursuant to N.J.S.A. 46:26A-11 , and such filing shall have the effect of the notice of settlement as therein provided.

The Court in First Mut. Corp. v. Samojeden, 214 N.J. Super. 122, 126 (App. Div. 1986), evaluating the notice provisions regarding adjourned sales, explained that:

> Although we recognize that our rules do not expressly provide for the giving of notice of adjourned sales, we are nevertheless persuaded that their implicit predicate is the affording of actual knowledge of the effective sale date to those persons whose interests would be irrevocably affected by the sale and, most particularly, the owners and encumbrancers of the property whose equity and investment are likely to be lost unless they take the protective action of either redeeming after the sale or purchasing at the sale.

The Court further noted, "effective notice is the cornerstone of procedural due process. Our rules are constructed on that cornerstone and the focus of their interpretation must be consistent with that overriding concern." Id. The Samojeden Court noted that the primary significance of R. 4:65-2 is its basic prescription that the sale be attended by the requisite notice and the perception of the courts that absent the required notice, the sale may be set aside. Id. Furthermore, the Samojeden Court stated that it is "inferable that the requirement of a public adjournment was intended not only to give notice to those attending the sale of the fact of adjournment, but also notice of the date of the adjourned sale." Id. at 127.

In the instant case, Plaintiff obtained a Final Judgment of Foreclosure in the amount of $7,452,470.71 on the property located at 601 Lehigh Avenue in Union, New Jersey. See Lawrence Cert. ¶ 2. A Writ of Execution was issued on May 7, 2012 commanding the Sheriff of Union County to sell the mortgaged property at 601 Lehigh Avenue to recover the amounts awarded in the Final Judgment of Foreclosure. Id. at ¶ 4. The initial sale date for the property was scheduled for July 11, 2012. See Frisch Cert. ¶ 4. Plaintiff arranged for inspections and environmental investigations of the mortgaged property at 601 Lehigh Avenue and adjourned the Sheriff's Sale while the investigations were in progress. See Lawrence Cert. at ¶ 5. Plaintiff was concerned with environmental contamination at the property and adjourned the sale date of July 11, 2012 in monthly or biweekly increments until September 2013. See Frisch. Cert. ¶ 5. Counsel for Defendants regularly contacted Plaintiff's counsel to inquire whether Plaintiff would request a further adjournment. See Lawrence Cert. ¶ 6. Plaintiff's counsel stated in his Certification that the sheriff's sale was scheduled for Wednesday, September 11, 2013 but that he inadvertently omitted the date from his calendar and no one appeared at the sale on behalf of Plaintiff. Id. at ¶ 9. As a result, the Sheriff's Officer adjourned the sale until October 16, 2013. Defendants' counsel was told by the Union County Sheriff's Office that the Plaintiff had failed to appear for the scheduled date and that Plaintiff would have to contact the Sheriffs Office to schedule a new date. See Frisch Cert. ¶ 10. Defendants were not informed of the October 16, 2013 sale date. Id. at ¶ 12.

Plaintiff never informed Defendants of the October 16, 2013 sale date. The parties agree notice was never provided of the sale date. While R. 4:65-2 does not discuss notice regarding the adjournment of scheduled sale dates, the Court in Samojeden stated that effective notice is the cornerstone of procedural due process. First Mut. Corp. v. Samojeden, 214 N.J. Super. 122, 126 (App. Div. 1986). It is implicit that all parties be afforded actual knowledge of the effective sale date. Here, Defendant was not afforded actual knowledge of the October 16, 2013 sale date despite meticulous efforts to ascertain the date of sale by contacting Plaintiff's counsel and the Sheriff's Office. Because Defendants were without actual knowledge of the sheriff's sale, Defendants' motion to set aside the sheriff's sale is **GRANTED.**

HON. LISA F. CHRYSTAL, J.S.C.

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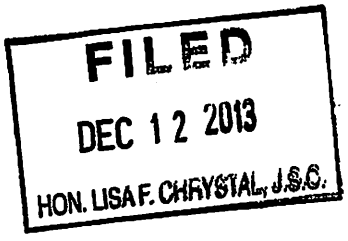


TD BANK, N.A., f/k/a TD BANKNORTH, N.A., successor by merger to INTERCHANGE BANK,

Plaintiff

V.

601 LEHIGH ASSOCIATES, LLC, DARKEN ARCHITECTURAL WOODWORK INSTALLATION, LLC, METROPOLITAN ARCHITECTURAL WOODWORK LLC, KENNETH SKERIANZ AND DARREN COMMANDER

Defendants

**SUPERIOR COURT OF NEW JERSEY**
**CHANCERY DIVISION**
**UNION COUNTY**

DOCKET NO.: F-06585-10

Civil Action

**PROPOSED ORDER**

THIS MATTER having been opened to the Court on December 6, 2013 by The Law Office of Avram E. Frisch LLC, attorneys for Defendants on notice to and in the presence of Greenbaum, Rowe, Smtih & Davis LLP and COBA, Inc. on the return date of Defendant's motion to for an Order setting aside the sheriff sale of the premises at 601 Lehigh Avenue, Union, New Jersey and the Court having read and considered the papers submitted in support of and in opposition to the motion, and for good cause shown,

It is on this 12th day of December 2013

ORDERED:

1. The sheriff sale of October 16, 2013 is set aside;
2. The Sheriff's Deed, dated October 29, 2013 made as a result of the above sale is cancelled;
3. Defendant shall be entitled to record a copy of this order in the records of the Union County Clerk/Register to indicate the cancellation of the deed;
4. Defendant shall serve a copy of this order on all parties within 7 days of receipt of the order.

J.S.C.

X Contested

___Uncontested