

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

EMMANUEL T. CIMINELLO)	CASE NO: CV 03 491343
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
BOJACKS MEAT & POULTRY, INC., <i>et al.</i>)	<u>JOURNAL ENTRY</u>
)	
Defendant,)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

This foreclosure lawsuit was filed by Emmanuel and Maryanne Ciminello on January 14, 2003. The Ciminellos held a fourth mortgage on property owned by defendant Bojacks Meat & Poultry, Inc. Soon after filing, the Ciminellos assigned their interest to the substitute plaintiff Marketing Holdings, LLC.

The property that is the subject of this lawsuit is located at 2000 West 14 Street, Cleveland.¹ The main building there is a mammoth, almost windowless block of a structure just to the west of the Innerbelt bridge in downtown Cleveland.

On February 14, 2005, a judgment of foreclosure was journalized. The court ordered that the proceeds upon sheriff's sale were to be distributed according to the following priority: the Cuyahoga County Treasurer for unpaid taxes; defendant Key Bank in the amount of \$262,194.74; defendant State of Ohio Director of Development in the amount of \$237,498.07; defendant City of Cleveland in the amount of \$89,448.93; then to plaintiff Marketing Holdings,

¹ The foreclosure is on Permanent Parcel No. 004-07-003 only.

LLC, in the amount of \$66,884.84.² Recent evidence shows that the amount of taxes currently owed to the Cuyahoga County Treasurer is \$620,202.17.³

After the judgment entry of foreclosure, the property was ordered to a sheriff's sale. Scheduled sheriff's sales have since been canceled at least twice: in 2005 because of a bankruptcy filing by defendant Bojacks and in 2007 at the request of plaintiff Marketing Holdings. A sheriff's sale was most recently set for October 26, 2009.

On that morning, the court granted a motion by defendant Bojacks to withdraw the property from sheriff's sale. However, that order was not journalized until after the sheriff had auctioned the property and accepted plaintiff Marketing Holdings's minimum bid of \$66,667.00 as the winning bid.⁴ Since the motion to withdraw the property from sheriff's sale was too late, the defendant Bojacks subsequently filed a motion to stay the confirmation of the sheriff's sale and a motion to vacate the sheriff's sale. The motion to stay confirmation was granted on November 3.

The motion to vacate the sheriff's sale was the subject of an evidentiary hearing on January 22, 2010. This entry follows.

STATEMENT OF FACTS

The building in question is sometimes called The Cleveland Cold Storage Building. The principal of both Bojacks Meat and Poultry, Inc., and Cleveland Cold Storage, Inc., is Fred Finley. His company bought the building in 1992 and continues to own it today subject to a long list of liens.

² Each judgment creditor would also receive any amounts it had advanced for real estate taxes, hazard insurance, and property protection.

³ Plaintiff's hearing exhibit 13, Delinquent Taxes Due 2009.

⁴ The sheriff's sale began at 8:30 a.m. and the entry granting the defendant's motion to withdraw the property from sheriff's sale was not journalized until after 9:00 a.m.

However, neither Cleveland Cold Storage, Inc., nor Bojacks Meat and Poultry, Inc., are lessees of the leasehold parcel on the property.⁵ Beautiful Signage, LP, is the lessee of the leasehold parcel. The leasehold parcel may fairly be described as the outside of the building. The long-term lease allows Beautiful Signage to use the building as a canvas for giant billboards. The value of the leasehold rests in the stream of revenue it generates from advertisers.

In fact, there is evidence to suggest that the leasehold is far more valuable than the building itself, which by all accounts is in a state of desuetude, if not decrepitude. Three appraisers evaluated the fee parcel, *i.e.*, the building itself and not the leasehold, at the request of the sheriff pursuant to O.R.C. § 2329.17. These appraisers valued the fee parcel (the building excluding the leasehold) at \$100,000.00.⁶ Although Bojacks disputes that appraisal, all parties seem to agree that the leasehold interest is worth some large multiple of that amount.

Evidence at the hearing showed that the building was not always in a state of disrepair. In the early part of this decade, Finley formulated a plan to redevelop the building into condominiums. That plan projected a profit in the range of \$8 million, more than enough to satisfy his creditors. However, the Ohio Department of Transportation in 2004 advised Finley that it would likely need to acquire the property, and raze the building, as part of the right-of-way for a contemplated new Innerbelt bridge.

In the meantime, ODOT's expressed interest prevented Finley, as a practical matter, from proceeding with redevelopment since no investor was interested in a property that appeared likely to soon be acquired by eminent domain for demolition to accommodate a new bridge. For the same reason, Finley did little to maintain the building and it steadily depreciated to its present condition.

⁵ Permanent Parcel No. 004-07-007.

⁶ That appraisal formed the basis for the minimum bid at sheriff's sale. See O.R.C. § 2329.20.

In 2009, ODOT made explicit its need for the entire premises – the fee and leasehold parcels – to make way for a new bridge. On December 18, 2009, it submitted a notice of intent to acquire and good faith offer to Bojacks and Beautiful Signage. The total offer is for \$4,510,000. The parties at the hearing agreed that this offer was based on a March 11, 2009, appraisal by Dean T. Smith, MAI, of Smith & Nejedlik, Inc. The effective date of Smith's appraisal is November 4, 2008.

Since the hearing, ODOT has filed an eminent domain action as case number 2010 ADV 0154719 in the Probate Division of the Cuyahoga County Court of Common Pleas. Bojacks, Beautiful Signage and Marketing Holdings are among the defendants named in that lawsuit. The eminent domain action has been filed under the "quick take" provision of O.R.C. § 163.06. The amount deposited pursuant to that section is the Smith appraisal estimate of \$4,510,000.

LAW AND ANALYSIS

As its primary argument for why the sheriff's sale should be vacated, Bojacks asserts that the \$100,000.00 sheriff's appraisal of its interest in the premises is not the true value.

A foreclosure action is equitable in nature.⁷ The primary purpose of a foreclosure action is to protect creditors through a sale of the property used as collateral.⁸ In any foreclosure case, the first creditor satisfied from the proceeds of a sheriff's sale is the county treasurer for property taxes.⁹ Thereafter, creditors are satisfied in order of the priority of their liens. Not until all liens have been satisfied will the property owner receive any money.

In this case, there are wildly divergent claims of the value of the collateral: as low as \$66,667¹⁰ to as high as \$8,850,000.¹¹ It is not necessary for this court to decide what figure is

⁷ See, e.g., *First Natl. Bank of Am. v. Pendergrass*, 2009-Ohio-3208, 6th Dist. App. No. E-08-048, at ¶22.

⁸ *National Union Fire Ins. Co. v. Hall*, 2003-Ohio-462, 2d Dist. App. No. 19331, at ¶11.

⁹ See O.R.C. §5721.10.

¹⁰ The sheriff's sale price.

the most credible. It is sufficient to note that confirming the sheriff's sale of \$66,667.00 is certain not to protect the creditors. The only chance the creditors have at any recovery is to participate in the eminent domain action where a jury will hear all of the relevant evidence and decide the value of the property. If a jury finds that the value of Bojacks's interest is only \$66,667, so be it. In that event at least the creditors and Bojacks will have had a full and fair opportunity to have their evidence of value taken into consideration. By contrast, all of that evidence was not taken into account by the sheriff's appraisers before they settled on a value of \$100,000.

It is also worth mentioning that vacating the sheriff's sale would not necessarily be a boon to Bojacks and Finley. The current judgment liens on the property total about \$1,275,000.00, not including interest. This total also does not include various other lienholders whose interests have not yet been reduced to judgment but who have been included as defendants in the eminent domain lawsuit. As a result, Finley himself will not receive any money unless his interest in the property is ultimately found to be worth, estimating conservatively, more than 15 times what the sheriff's appraisers found.

The court does not find that to vacate the sheriff's sale would be inequitable to Marketing Holdings. The plaintiff would then be in the same position it was before the sheriff's sale; a sale that was postponed at least once at the request of Marketing Holdings. If an eminent domain jury values the fee parcel at less than \$66,677, Marketing Holdings will actually have saved the difference. And while it is true that Marketing Holdings may lose a potential benefit equal to the amount in excess of \$66,677 that a jury in the appropriation proceeding finds as the value of the fee parcel, that possible lost profit to one creditor is not of greater importance to the court than protecting the known interests of all creditors.

¹¹ Defendant's hearing exhibit E, 9/11/09 retrospective appraisal of Robert J. Weiler, MAI.

To the extent that the interests of Beautiful Signage and Marketing Holdings are aligned, vacating the sheriff's sale would still leave Beautiful Signage with its separate interest in, and right to compensation for, the leasehold parcel. The evidence presented at the hearing does not support a conclusion that as the value of the fee parcel (Bojacks's interest) rises, the value of the leasehold (Beautiful Signage's interest) falls. As long as the building is standing – and no evidence was presented that it is about to collapse, despite its other problems – the leasehold parcel value should remain nearly constant.¹²

CONCLUSION

Confirming the sheriff's sale would not protect the judgment creditors and other lienholders. The only way that defendant Bojacks's judgment creditors may possibly collect the money owed to them is by virtue of Bojacks participating, and prevailing, in the eminent domain proceedings initiated by ODOT. Therefore, the motion to vacate the October 26, 2009, sheriff's sale is granted.

IT IS SO ORDERED:

Date: _____

Judge John P. O'Donnell

¹² Although the value of the leasehold presumably diminishes with the passage of time as the lease gets closer to its expiration.

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of February, 2010, to the following counsel only, with the expectation that they will distribute it to all other interested counsel:

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Judge John P. O'Donnell