IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

SUNSHINE SHOPPING CENTER, INC., Plaintiff,	)	**CIVIL NO. 681/1996**
vs.	)	**ACTION FOR DEBT**
NATIONAL ENTERPRISES OF ST.CROIX, INC. and PAT MURRAY, Defendants.	)	**NOT FOR PUBLICATION**

APPEARANCES:

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CABRET, Judge

MEMORANDUM OPINION
(Filed: April 7, 1998)

THIS MATTER comes before the Court on defendants' objection to execution sale, motion to quash and set aside sale and request to enjoin continuing execution efforts. A hearing was held pursuant to Title 5 V.I.C. § 489 in the above-captioned matter on March 9, 1998. The plaintiff was represented by Attorney Gerald Groner and the defendants were represented by Attorney Lolita Paiewonsky. For the following reasons, the Court will deny defendants' motion.

STATEMENT OF FACTS and RELEVANT PROCEDURAL HISTORY

The above-captioned matter is a debt action that was instituted by the plaintiff as a result of defendants' failure to pay rents and other charges due under the parties' Shopping Center Lease at Sunshine Mall. A trial was held in this matter on May 12, 1997 which resulted in judgment in the total amount of $43,004.90 for the plaintiff.[1]

On July 1, 1997, the parties entered into a Settlement Agreement ("Agreement") which contained a payment loan schedule for the Judgment. Under the Agreement, defendants agreed to pay in eleven (11) consecutive, even monthly payments of one-thousand dollars together with a "balloon payment" of all outstanding principal and interest in the amount of $30,062.44 on June 1, 1998.[2] The initial payment was to be made on July 1, 1997 and the second payment was to be made thirty (30) days later. Thereafter, payments were to be made on a monthly basis until the Judgment is paid in full on June 1, 1998. All payments were to be made by certified check. Furthermore, defendants were required to execute a Consent to Judgment Lien against the following described real property located in St. Croix, U.S. Virgin Islands, to wit:

> Plot 9-B Estate Washington, East End Quarter "A" consisting of 0.322 U.S. acres, more or less, as more fully shown on PWD No. 2592 dated February 18, 1969.[3]

Finally, in the event that defendants failed to make any of their installment payments within ten days of its due date, plaintiff, without notice, may execute on the Judgment and seek enforcement of the

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1 See Judgment dated May 28, 1997.

2 See Plaintiff's Exhibit No. 1, Settlement Agreement, paragraph 2.4.

3 Id. at paragraph 2.1.

Judgment as it deems fit.[4]

On September 9, 1997, a writ of execution was issued on plaintiff's behalf with regards to Plot 9-B Estate Washington. The Marshal's Sale of this property was conducted on December 5, 1997 and it was sold to William D. Gross for the amount of $12,500.00.

On January 16, 1998, defendants filed their objections to the Marshal's Sale and further moved on February 6, 1998, to quash and set aside the Marshal's Sale as well as to enjoin continuing execution efforts. Defendants raise the following arguments:

> (1) Plaintiff needed to first obtain a Judgment of Foreclosure pursuant to Title 28 V.I.C. § 531 before it could proceed with the execution sale on Plot 9-B;
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> (2) The execution sale should not have occurred since the outstanding installment payments due under the parties Settlement Agreement were current;
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> (3) The execution sale should not be confirmed due to the gross inadequacy of the bid price of $12,500.00 vis-a-vis the fair value of the property of no less than $25,000.00; and
>
> (4) The minimum opening bid demanded should have been at least the amount owed on the judgment claimed by the plaintiff.

During the hearing of March 9, 1998, defendants conceded that plaintiff would have a right to execute despite not having initiated a judgment of foreclosure proceeding. Thus, the issues for this Court to determine are whether

> 1. defendants were in breach of the Settlement Agreement at the time of the execution sale;
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> 2. the bid price of $12,500.00 was grossly inadequate for the sale of Plot 9-B Estate Washington; and

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[4] Id. At 2.7(a) and 2.8.

3. the minimum opening bid should have been at least the amount owed on the judgment claimed by the plaintiff, i.e., $43, 004.90?

DISCUSSION

I. Settlement Agreement

During the March 9 hearing, the parties stipulated that the amount of $10, 575.31 has been paid by the defendants from May 1997 to November 1997 for any purpose whatsoever. A breakdown of these payments and the dates these payments were made are as follows:

May 15, 1997 -	$5,000.00
June 20 or 30, 1997-	$1,000.00
July 1, 1997-	$ 1,531.75
August 4, 1997-	$1,000.00
August 18, 1997 -	$1,000.00
November 12, 1997 -	$1,000.00

Pursuant to the Agreement, plaintiff credited the June 1997 payment to the July 1 installment, the August 4, 1997 payment to the August 1 installment, the August 18, 1997 payment to the September 1 installment, and the November 12 payment to the October 1 installment. Because defendants were still occupying the premises at Sunshine Mall during the time the Agreement was executed, plaintiff credited the $1, 531.75 (July 1, 1997) payment to the defendants' June 1997 rent. Plaintiff argues that since defendants did not make their October 1, 1997 installment payment until November 12, 1997, the defendants were in default of the Agreement and plaintiff had every right to seek execution on Plot 9-B pursuant to the Judgment Lien executed by Antoine Murray.

However, defendants argue that plaintiff should have credited the $1,531.75 payment to the Judgment and not to their June 1997 rent thus making them current under the Agreement. Assuming that defendants are correct, the $1,531.75 payment should have been credited to the August 1 installment, the August 4, 1997 payment to the September 1 installment, the August 18, 1997 payment to the October 1 installment, and the November 12, 1997 payment to the November 1 installment.

The Court cannot find that defendants intended the $1,531.75 payment to be credited to the Judgment. First, the defendants were required to make monthly payments in the amount of $1,000 pursuant to the Agreement. Had defendants intended the $1,531.75 payment to be credited to the Judgment, it was incumbent upon them to inform plaintiff of this intention since plaintiff was only required, pursuant to the Agreement, to credit $1,000 each month to the Judgment. Second, the defendants were still obligated to make monthly rent payments in the amount of $1,569.00 during the same time the Agreement was in effect. There can be no question that the payment of $1,531.75 more closely approximates defendants' monthly rent of $1,569.00 than their $1,000 monthly payment on the Judgment. Finally, defendants were required to make payments by certified check and not by depositing their payments directly into plaintiff's account. This method of payment only served to unnecessarily confuse matters since plaintiff had to wait until its bank sent them their monthly statement in order to determine if defendants had made their payments on time. Thus, defendants have only themselves to blame for any alleged mix-up with regards to the crediting of the $1,531.75 payment to the Judgment. In light of all these circumstances, the Court finds that plaintiff's conduct in crediting said amount to rent was appropriate.

Assuming, for the sake of argument, that plaintiff credited the $1, 531.75 payment to the Judgment, defendants would still be in default of the Agreement at the time of the Marshal's Sale.

Specifically, defendants did not make their November 1 installment until November 12, 1997. Under the agreement, they had until November 10, 1997 to make that payment. Even if the surplus amount of $531.75 was carried over into November, defendants were still required to pay $468.50 by November 10, 1997 in order to be current under the Agreement. Thus, defendants were technically in default under the Agreement when the Marshal's sale took place in December.[5]

II. Gross Inadequacy of Price

Defendants, in the alternative, argue that the Marshal's Sale should not be confirmed due to the gross inadequacy of the bid price of $12,500.00 when compared to the fair market value of the property which defendants claim is no less than $25,000.00.

Title 5 V.I.C. §489, which governs the confirmation proceedings for real property sold on execution, provides in part the following:

> (1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or his representative in case of his death, files with the clerk his objections thereto within five days after the return thereof.
>
> (2) If such objections are filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.

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5 It should be noted that the casefile reveals that a writ of execution was issued on September 9, 1997 against the defendants, almost one month before defendants were in default under the Agreement. However, there can be no question that at the time of the execution sale on December 5, 1997, defendants were in breach of the Agreement and plaintiff had every right to seek an execution against Plot 9-B pursuant to both the Agreement and the Judgment Lien.

Whether a marshal's sale shall be confirmed is largely a matter of sound judicial discretion. *In Christian v. All Persons Claiming Any Right, Title*, 962 F.Supp. 673, 675, 36 V.I. 279 (D.VI, App.Div. 1997). Furthermore, a party seeking to set aside a sale for inadequacy of price has the burden of proof. *See Armstrong v. Csurilla*, 817 P.2d 1221, 1223 (N.M. 1991).

As a general rule, courts confirm sales made to the highest bidder at fairly conducted auctions. *In Christian*, 962 F.Supp. at 675. This not only lends confidence in judicial sales, but also protects the interests of debtors and creditors. *Id.* In the absence of improprieties or irregularities in the sale proceeding, it is the general rule among the courts that a judicial sale properly conducted in the manner prescribed by law and upon due notice will not be set aside or refused confirmation solely on account of inadequacy of price, unless the inadequacy is so gross as to shock the conscience of the court and raise a presumption of fraud, unfairness, or mistake. See 47 AM JUR 2D *Judicial Sales* § 300 (1995); 50A C.J.S. *Judicial Sales* § 80 (1997); *Graffan v. Burgess,* 117 U.S. 180, 6 S.Ct 686 (1886); *Gelfert v. National City Bank of New York*, 313 U.S. 221, 61 S.Ct. 898, 902 (1941); *In Christian*, 962 F.Supp. at 675; *Armstrong*, 817 P.2d at 1234; *Samuel v. Mallory*, 553 So.2d 119 (Ala. 1989); *Looper v. Madison Guar.Sav. & Loan Ass'n*, 729 S.W.2d 156 (Ark. 1987); and *Continental Bank v. Frank*, 495 A.2d 565 (Pa. Super. 1985). Another factor that a court may consider in determining whether or not to confirm a sale is whether a resale may reasonably be expected to result in a substantially higher price[6]. While no fixed mathematical formula exists or can exist to determine the adequacy of the sale price at a judicial sale, all proper and relevant

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6 *See In Christian*, 962 F.Supp. at 675 ("As a benchmark, then, unless there is certainty that a resale will produce a higher price, the court should confirm the sale").

circumstances may be considered by the court in determining whether the sale price is inadequate to warrant setting aside the sale. 50A C.J.S. *Judicial Sales* § 80 and *Kellett v. Pocahontas Fed.Sav.& Loan Ass'n*, 756 S.W.2d 926,927 (Ark.App. 1988). Some of these circumstances include:

1. the value of the property,
2. the circumstances surrounding the sale,
3. the price,
4. the rights of the parties participating in the sale, and
5. the harm that may result if the sale is confirmed.

See Looper, 729 S.W.2d at 157.

In the instant matter, the court finds that no informalities or irregularities tainted the sale of the property at issue. The Marshal's Sale held on December 5, 1997 was published by the St. Croix Avis, a local newspaper of general circulation, on November 3, 10, 17, and 24, 1997. The Territorial Court Marshal conducted the sale of Plot 9-B Estate Washington at 11:00 a.m. Several bidders attended the sale. The highest bid received was in the amount of $12,500.00 made by William D. Gross. There is no evidence that Mr. Gross had any involvement in the above-captioned matter prior to the sale. Absent evidence of procedural impropriety, the court must find that the sale was conducted in a fair manner.

However, defendants argue that Mr. Gross' bid price of $12,500 is grossly inadequate when compared to the fair value of the property which they claim to be in the amount of $25,000. In support of their claim, defendants have submitted a document prepared by a sales agent at Hamilton Real Estate. The document contains a listing of a number of available comparable lots in the Union and Mount Washington area. The "asking price" for the lots listed range from $14,500 for a .445 acre lot to $50,000 for a 1.026 acre lot.[7] The only opinion found in the document states "[b]ased on all the available information, I believe your asking price of $25,000 for lot 9-B Union & Mount Washington is a fair asking price." Plaintiffs, on the other hand, have presented the testimony of Real Estate Broker Julia San Martin, who testified that the fair market value of Plot 9-B Estate Washington in December of 1997 was between $13,000 to 15,000. Ms. Martin also testified that the records indicate that Plot 9-B was sold in 1988 for $11,000, contrary to defendants' position that the property was bought for around $13,500.00.

In light of the following, this Court cannot find that the sale price of $12,500.00 is so grossly inadequate as "to shock the conscience of the court." Defendants' figure of $25,000 and the opinion prepared by Hamilton Real Estate deals solely with what is a fair asking price for Plot 9-B. However, most courts focus on the fair market or appraised value of the property at the time of the sale. *See* 47 AM JUR 2D *Judicial Sales* § 302; *Graffam*, 6 S.Ct. at 686; *Lucerne Investment Co. v. Estate Belvedere, Inc.*, 7 V.I. 275 (D.VI 1969); *Armstrong*, 817 P.2d at 1235; *Continental Bank*, 495 A.2d at 569; *Wandschneider v. Bekeny*, 346 N.Y.S.2d 925 (Misc 2d 1973); and *Brooks v. Bast*, 219 A.2d 84,88 (Md. Ct.App. 1966). Ms. Julia San Martin has presented credible evidence as to the value of the property at the time of the sale. She testified that the fair market value of the property in December 1997 was between $13,000 to $15,000. Although no mathematical formula can ever exist to determine the adequacy of the sale price, Mr. Gross' bid of $12,500 is anywhere from 83 to

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7 Plot 9-B Estate Washington consists of 0.322 acres.

96% of the estimated value of the property. Given the fact that purchasing property through a marshal sale is more informal and slightly inexpensive than purchasing property through a real estate agency, this Court cannot hold that the sale price of $12,500 is "so gross as to shock the conscience of the court", especially in the absence of any irregularities in the sale proceedings or circumstances that would warrant a presumption of fraud. Accordingly, the Court will deny defendants' motion to quash and set aside the sale and request for injunctive relief.

III. Minimum Opening Bid

Defendants' final argument was that the minimum opening bid demanded should have been at least the amount owed on the judgment claimed by the plaintiff. Defendants have failed to support their argument with any case or statutory authority. Thus, their argument lacks merit.

CONCLUSION

The defendants have failed to meet their burden of proof with regards to their motion to quash and set aside the Marshal's Sale that took place on December 5, 1998. Specifically, the evidence presented reveals that the defendants were in default of the Settlement Agreement and that the plaintiff had every right under the Agreement to execute on the Judgment. Furthermore, the Court cannot find that the bid price by Mr. William Gross is grossly inadequate when compared to the fair market value of Plot 9-B as "to shock the conscience of the court." Accordingly, the Court will deny defendants' motion to quash and set aside the sale and request to enjoin continuing execution efforts.

MARIA M. CABRET
Territorial Court Judge