

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

CHARLES E. BUTLER  
JUDGE

June 4, 2018

NEW CASTLE COUNTY COURTHOUSE  
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**Re: *PNC Bank, National Association v. Charles E. Johnson***  
**C.A. No. N16L-08-131 CEB**  
**Motion of Dayan, LLC to Deny Confirmation**  
**And Set Aside Sheriff's Sale. DENIED.**

Dear Counsel:

In this somewhat unusual case, the bank moved to foreclose a mortgage on a property and the homeowner defaulted in appearance. That much is hardly unusual, but after the default had been granted, the bank realized that it had neglected to include the amount due on a second mortgage in its calculation of the judgment amount. The bank, unsure whether to "go back to GO" by restarting a mortgage foreclosure proceeding with corrected numbers or simply amend its existing judgment to reflect the default in the second mortgage, elected to amend the judgment. This happened after the default judgment had been granted but before the

amount of the lien had been posted publicly in connection with the auction of the property.

The initial default judgment foreclosed on a \$7,000 first mortgage. The amended default judgment, reflecting the second mortgage that was also in default, was for approximately \$80,000.

In any event, the foreclosure sale proceeded apace and Dayan, LLC (“Dayan”) was the winning bidder with a bid of \$210,000, more than enough to satisfy the bank’s interest in the sale. After the conclusion of the sale, but before “confirmation,”<sup>1</sup> Dayan, filed the instant Motion to Deny Confirmation and Set Aside Sheriff’s Sale.

The discerning reader will notice that Dayan is not a party in the caption in this matter. And so the question becomes obvious: what standing does Dayan have to deny the confirmation and set aside the sheriff’s sale? Why would it want to cancel a sale at which it was the winning bidder? The answers eluded the Court in the initial pleadings and the Court invited Dayan to respond further to see if it could articulate the harm it suffered and confirm its standing.

Here the Court notes, parenthetically, that the defendant in the action, Mr. Johnson has never appeared to defend any part of it. So the question of whether the

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<sup>1</sup> Confirmation of the sale occurs “as a matter of course” unless there is objection. Del. Super. Ct. Civ. R. 69(d).

bank acted properly in simply amending its judgment or should have recommenced a new mortgage foreclosure proceeding was not raised by the debtor and most certainly affected by the bank's decision to simply amend the existing judgment. And the Court can sympathize with the bank's indecision, particularly in the context of a defaulted judgment because, by their very nature, there is little in the way of *stare decisis* in an unopposed, default judgment upon which to be guided.<sup>2</sup> The Court understands that it may be called upon to decide the question posed by the bank's decision, but that duty only arises if there is a party before the Court that has standing to press the case.

Dayan has asked the Court to consider the case of *Burge v. Fidelity Bond and Mortgage Company*.<sup>3</sup> This was a case in which the mortgage company clearly erred, this time at the auction itself. Its agent made a unilateral error and underbid on the property by \$50,000 the amount he was authorized to bid. A different bidder was successful and, when the mortgagee realized its error, it sought to set aside the sale. That did not please the successful bidder, which intervened in the mortgagee's efforts. The ultimate resolution of that dispute is not germane to us here. Dayan cites the case for the proposition that it "addresses the issue of the standing of a third

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<sup>2</sup> While Judge Silverman came close in *Campbell v. Makin*, 1996 WL 769199 (Del. Super. Dec. 18, 1996), that case ultimately was decided under the Court's procedural rule for the filing of complaints.

<sup>3</sup> 648 A.2d 414 (Del. 1994).

party high bidder at sheriff's sale to object to the sale or, in the *Burge* case, to object to a plaintiff mortgage company's motion to set the sale aside."<sup>4</sup>

In connection with standing, the *Burge* Court said "a party may challenge a sheriff's sale which is procedurally correct if the party can demonstrate that he or she has suffered a detriment."<sup>5</sup> So, in what way has Dayan demonstrated that it has suffered a detriment?

Here is where Dayan has some difficulty. The auction sale's confirmation extinguishes even the rights of the defaulting borrower to complain about any irregularities in the sale and the purchaser thus takes title to the property free and clear of any "cloud" or encumbrance existing before the sale.<sup>6</sup> This protects the successful bidder from any claim by a latecomer that there was something untoward in the default or the judgment process. Dayan is thus insulated from the error, if any, by the bank in its default judgment paperwork. All bidders understood the bank was seeking to protect the full amount of both defaulted mortgages. Dayan does not complain of some lack of notice or detrimental reliance on a defective judgment.

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<sup>4</sup> Letter to Judge Butler responding to questions from Oral Argument on May 23, 2018, Trans. ID 62060790.

<sup>5</sup> *Id.* at 418 (citing *Girard Tr. Bank v. Castle Apartments, Inc.*, 379 A.2d 1144, 1145 (Del. Super. 1977)).

<sup>6</sup> *See, e.g., Mortg. Elec. Registration Sys., Inc. v. Charalambous*, 2012 WL 1409630, at \*2 (Del. Super. Jan. 13, 2012) ("Confirmation of a foreclosure sale bars collateral attack on [the] foreclosure sale." (alteration in original) (internal quotation marks omitted)).

Dayan says this “flaw” in the default judgment will be noticed by a competent real estate attorney and will cause any subsequent sale of the property to fail. Then, says Dayan, it will have to spend time and money to fix the flaw. And then the next buyer, seeing the previous failed sale, will “low ball” a purchase price and thus Dayan will suffer prejudice caused by the delay, a lower sales price and counsel fees spent trying to fix the flaw.

The Court remains unconvinced that this “flaw” is a flaw at all or, if it is, that it is one that requires “fixing.” It would seem that if it is a problem that needs fixing, confirmation of the sale does just that. Moreover, Dayan gives no hint in its pleadings just what it would do, if permitted, to “fix” the “flaw.” It is not a party to the underlying foreclosure proceedings, it was not the party aggrieved by the bank’s “adjustment” of the amount due under the default judgment, it does not even allege that it knew about this change in the amounts due until some point long after the auction was over, and it does not allege that its bid at auction was entered based upon the figures adjusted by the bank to reflect the default in the second mortgage. Indeed, in light of the mortgage arrearage of about \$80,000 and the ultimate bid of over \$200,000, it does not appear that the default judgment amount was a consideration at all.

The Court therefore concludes that Dayan has not made out a case to justify cancelling the confirmation or setting aside the Sheriff’s sale at which it was the

successful bidder. Accordingly, Dayan's Motion to Deny Confirmation and Set  
Aside the Sheriff's Sale is **DENIED**.

**IT IS SO ORDERED.**



Judge Charles E. Butler