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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010943 12/14/2012

HONORABLE LISA DANIEL FLORES

CLERK OF THE COURT
D. Glab
Deputy

I M H SPECIAL ASSET N T 168 L L C SARAH K LANGENHUIZEN

v.

APERION COMMUNITIES L L L P, et al. SANFORD J GERMAINE

UNDER ADVISEMENT RULING

The Court held a fair market value hearing pursuant to A.R.S. § 33-814 on October 12, 2012. Plaintiffs IMH Special Asset NT 161, LLC and IMH Special Asset NT 168, LLC (collectively, "Plaintiffs" or "IMH") have requested findings of fact and conclusions of law. Through its order dated October 17, 2012, the Court directed the parties to submit findings of fact and conclusions of law by November 5, 2012. In accordance with that order, Plaintiffs submit the following proposed findings and conclusions:

FINDINGS OF FACT

I. Procedural History.

1. The Court previously granted summary judgment as to liability in favor of Plaintiffs, and found that the amount of the debt on the date of the subject trustee's sales had been established.

2. As a result of that partial summary judgment ruling, the sole remaining issue was whether deficiencies existed after the trustee's sales, and if so, in what amounts. More specifically, the issue for the October 12, 2012 hearing was to determine the fair market value of the real property foreclosed upon – two parcels of land located in Denton County, Texas (the "Properties"). Once the fair market values are determined, the existence and amount of a deficiency can be calculated pursuant to A.R.S. § 33-814(A).

3. The Properties consist of a 47-acre commercial parcel (the "Aperion Property") and a 330-acre residential parcel (the "Eladio Property").

The Aperion Property

4. The Aperion Property was sold at a trustee's sale on January 5, 2010.

5. Plaintiff IMH Special Asset NT 168, LLC acquired title to the Aperion Property with its credit bid of $3,200,000.00.

6. On January 5, 2010, the outstanding amount owed on the Promissory Note that was secured by the Aperion Property was $5,364,935.21.

7. Interest is accruing on any remaining deficiency at the default interest rate of 24% per year from January 5, 2010 until paid.

The Eladio Property

8. The Eladio Property was also sold at a trustee's sale on January 5, 2010.

9. Plaintiff IMH Special Asset NT 161, LLC acquired title to the Eladio Property with its credit bid of $3,460,000.00.

10. On January 5, 2010, the outstanding amount owed on the Promissory Note that was secured by the Eladio Property was $9,909,026.06.

11. Interest is accruing on any remaining deficiency at the default interest rate of 24% per year from January 5, 2010 until paid.

II. The Physical Characteristics of the Properties.

12. The Properties are located in a rural area of Denton County, Texas, 30-miles outside of Ft. Worth, Texas.

13. The Properties are located in an unincorporated part of Denton County.

14. The Properties are not zoned or platted.

15. The Properties do not contain any infrastructure, such as roads, sidewalks, curbs, or utilities.

16. The Properties are part of a master-planned development known as the Traditions/Inspiration Master Planned Community (the "Community").

17. The parcels within the Community are now owned by multiple entities.

18. Directly south of the Eladio Property is a parcel owned by Wells Fargo Bank (formerly Wachovia Bank) (the "Wells Fargo Parcel").

19. To the southeast of the Wells Fargo Parcel is the Aperion Property.

20. Landry Burdine of Land Advisors, the real estate broker who has the sales listing on the Properties, testified that the Wells Fargo Parcel is particularly valuable, because it controls the road frontage on Highway 114, key easements, and Phase I of both the development agreement and the municipal utility district agreements.

21. According to Mr. Burdine, the value of the Eladio Property will increase if the same owner also owns the Wells Fargo Parcel, primarily because it will greatly enhance access to the Eladio Property. Without access to the Eladio Property through the Wells Fargo Parcel, the only access point to Eladio is from a 2-lane rural road called Sam Reynolds Road.

22. The Texas Department of Transportation has plans to widen Highway 114, but the widening project had not begun in the area adjacent to the Properties as of the hearing, which was more than 2-1/2 years after the trustee's sales.

23. The Eladio Property has both a floodplain and a gas drilling site on it. As a result, 53 acres of the Eladio Property's 330 acres are undevelopable. In addition, a bridge will need to be built over the floodplain to allow the Eladio Property to be accessed from the Wells Fargo Parcel.

24. The Aperion Property also contains a gas drilling site, making approximately 5 acres of the 47 acre parcel undevelopable.

25. There were two residential developments immediately adjacent to the east of the Properties called Rivers Edge and Harriet Creek. The streets, curbs and utilities had already been installed in those communities as of January 2010, so the lots are considered "finished" lots – meaning they were ready to be built out by homebuilders.

26. There was, and continues to be, a significant quantity of finished lots available in the sub-market where the Properties are located. As of January 5, 2010, there was approximately a five-year supply of available finished lots.

III. The Economic Environment at the Time of the Trustee's Sales.

27. The availability of financing for raw land sales after the financial collapse in September 2008, and continuing through January of 2010, was almost nonexistent.

28. The sub-market where the Properties are located had not begun to recover as of January 5, 2010.

IV. The Parties' Appraisals.

A. Plaintiffs' Appraisals.

Eladio Appraisal

29. The appraiser expert offered by Plaintiffs was Donald Morris of Cushman & Wakefield.

30. The appraisers agree that the Eladio Property's highest and best use is as a residential development.

31. Morris' appraisal on the Eladio Property (the "Eladio Appraisal") used four comparables; two sales that closed in 2009 and two sales that closed in 2007.

32. Morris used the 2007 comparables because of the limited data available, and he adjusted the value of those comparables downward by 40% to account for the decline in market conditions between 2007 and the date of the trustee's sales.

33. Comparable 1 was a 387-acre parcel purchased in October 2009 for $5,500,000.00 ($14,212/acre).

34. Comparable 2 was a 380-acre parcel purchased in July 2009 for $2,660,000.00 ($7,000/acre).

35. Comparable 3 was a 173-acre parcel purchased in August 2007 for $1,096,447.00 ($6,338/acre).

36. Comparable 4 was a 165.46-acre parcel purchased in May 2007 for $2,481,900.00 ($15,000/acre).

37. After applying adjustments to the comparables, the average price per acre was $8,750.00.

38. Morris concluded that as of January 5, 2010, the Eladio Property had a fair market value of not more than $10,830 per acre. When this price per acre is multiplied by the 277 acres that were available for development (after excluding the floodplain and well site), Morris concluded that the total value was not more than $3,000,000.00. This is $460,000 less than Plaintiff's credit bid amount.

The Aperion Appraisal

39. The appraisers agree that the Aperion Property's highest and best use is commercial development.

40. Morris' appraisal on the Aperion Property used five comparables; three from 2009 and two listings from January of 2011.

41. Morris explained that the use of listings as comparables is appropriate in appraising land values as it indicates the upper end of the value range.

42. Comparable 1 was a 108.33-acre parcel (4,718,811 sq. ft.) purchased in November 2009 for $8,124,785 ($1.72/SF).

43. Comparable 2 was a 14.53-acre parcel (632,927 sq. ft.) purchased in September 2009 for $3,300,000.00 ($5.21 SF).

44. Comparable 3 was a 41-acre parcel (1,785,960 sq. ft.) purchased in January 2009 for $2,200,000.00 ($1.23/SF).

45. Comparable 4 was a 120-acre parcel (5,227,200 sq. ft.) listed in January 2011 for $4,800,000.00 ($0.92/SF).

46. Comparable 5 was a 21.31-acre (928,264 sq. ft.) parcel listed in January 2011 for $1,995,767.00 ($2.15/SF).

47. After applying adjustments to the comparables, the average price per square foot was $1.47.

48. Morris concluded that the Aperion Property's fair market value as of January 5, 2010 was not more than $1.52 per square foot. When this price per square foot is multiplied by the number of square feet available for development (1,842,588), Morris concluded that the total value was not more than $2,800,000.00. This is $400,000 less than Plaintiff's credit bid amount.

B. Defendants' Appraisals.

49. Defendants' appraisal expert, Wayne Baer of Bolton and Baer, used none of the same comparables as Mr. Morris.

50. The day before Defendants' appraisals were required to be disclosed, Matt White of Bolton and Baer contacted Landry Burdine and requested Mr. Burdine's help in locating appropriate comparables. Mr. White indicated that he was looking for sales that occurred between "2008 to late 2010."

51. Mr. Baer's appraisal used seven comps for the Aperion Property.

52. Despite Mr. White's statement that comparable sales from 2008 through 2010 were the most suitable, of the comps used by Mr. Baer, one was from 2006, three were from 2007, and two were from 2008 (but prior to the financial collapse in September 2008).

53. The only comp used by Mr. Baer after September 2008 was for a sale dated December 28, 2010. This sale was of 155.782 acres of land for $0.74 per square foot. Mr. Baer used this comparable to support his conclusion that the Aperion Property was worth $3.50 per foot (a value five times higher than the comp), or $6,450,000.00.

54. Mr. Baer used five comps for the Eladio Property. Of those five comps, three were also used for the Aperion Property, though the highest and best uses of the Properties were different.

55. Of those five comps, only one was after September 2008, and the other four were from 2007.

56. One of Mr. Baer's comps was a 4-acre parcel and one was a 6-acre parcel. Mr. Baer acknowledged that these comps would generally have a higher price per acre because the parcels were smaller than the Properties.

57. In his appraisal of the Eladio Property, Mr. Baer failed to net out the 53 acres that were undevelopable due to the floodplain and well site.

58. Mr. Baer used a "qualitative" approach to adjusting comparables that did not include assigning percentages to his adjustments. Consequently, it is not possible to mathematically compute the extent of his adjustments.

59. Defendants emphasize that a municipal utilities district ("MUD") had been approved for the Properties, however Mr. Baer did not analyze the extent to which the MUD may have added value to the Properties. Mr. Morris considered the MUD in arriving at his opinions of value, and determined it was a "somewhat positive" factor, but noted that the MUD did not yet exist. As of the time of the hearing, the City of Fort Worth had merely indicated that it would support the existence of a MUD when development of the Properties was ready to move forward.

60. Mr. Baer did not analyze how long it would likely take to absorb the inventory of finished lots in the area surrounding the Eladio Property, or to get to the point where there was a demand sufficient to justify development of the Eladio Property.

61. Mr. Baer did not believe there would be demand sufficient to develop the Aperion Property for another two to five years.

V. Evidence Regarding Marketing and Sales Efforts on the Properties.

62. Both Plaintiffs' and Defendants' appraisals relied on sales data that post-dated the trustee's sale, and the marketing efforts undertaken by Land Advisors.

63. Land Advisors has been attempting to sell the Properties since the fall of 2010.

64. Since 2010, no purchase offers have been made on the Aperion Property.

65. Since 2010, several purchase offers have been made on the Eladio Property.

66. On February 25, 2011, B500 Land Group, LLC made an offer on the Eladio Property of $9,000 per net developable acre on the 330 acres (totaling approximately $2,493,000 using the 277 net developable acres).

67. On March 13, 2011, Carlisle Communities made an offer on the Eladio Property of $10,500 per gross acres, totaling $3,465,000.00.

68. On June 3, 2011, Forest City Land Group made on offer on the Eladio Property of $12,500 per gross acre, totaling $4,125,000.00.

69. On June 25, 2012, Ridgewood Real Estate Partners made an offer on the Eladio Property of $4,250,000.00 (approximately $12,878 per gross acre).

70. Ridgewood Real Estate Partners ("Ridgewood") is under contract to purchase the Wells Fargo Property.

71. According to Mr. Burdine, the amount Ridgewood offered on the Eladio Property was higher because of its interest in the Wells Fargo Property.

72. According to Mr. Burdine, the Eladio Property's value would be significantly less than $12,500 per acre without the Wells Fargo parcel due to Eladio's lack of utility infrastructure and inferior road access.

Conclusions of Law

73. Defendants Aperion Communities, LLLP, David P. Maniatis, individually and as trustee of the DPM-TT Trust under instrument dated June 6, 1995, by Eugenia Hoof Grantor ("the Trust"), and Mark Faucher as trustee of the Trust, are liable for the deficiency on the Aperion loan.

74. Defendants Aperion Communities, LLLP, Eladio Properties, LLLP, and David P. Maniatis are liable for the deficiency on the Eladio loan.

75. Pursuant to A.R.S. § 33-814(A), fair market value is the most probable price that the property would sell after reasonable exposure in the market, under conditions requisite for a fair sale, and when the buyer and seller is each acting prudently, knowledgeably, and for self-interest.

76. USPAP Statement on Appraisal Standard No. 3 states that “[d]ata subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date.”

77. Based on all of the evidence received, the Court concludes that the fair market value of the Aperion Property on January 5, 2010 was not more than $2,800,000.00.

78. Consequently, the deficiency on the Aperion loan is $2,164,935.21, with interest accruing at the rate of 24% per annum from January 5, 2010 until paid.

79. Based on all of the evidence received, the Court also concludes that the fair market value of the Eladio Property on January 5, 2010 was not more than $3,000,000.00.

80. Consequently, the deficiency on the Eladio loan is $6,449,026.06, with interest accruing at the rate of 24% per annum from January 5, 2010 until paid.

81. Plaintiffs are entitled to their attorneys’ fees and costs of collection pursuant to the Loan Documents and A.R.S. § 12-341.01, which shall be awarded on further application by Plaintiffs.

IT IS ORDERED, pursuant to ARS § 33-814, awarding Plaintiff a deficiency judgment against Defendants in the total amount of $8,613,961.27 ($2,164,935.21 for Aperion and $6,449,026.06 for Eladio). Interest shall continue to accrue at 24% per annum.

IT IS FURTHER ORDERED awarding Plaintiff its reasonable attorneys’ fees and costs. Plaintiff’s counsel shall file a fee application within 30 days.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.