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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT
HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

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WATERFALL VICTORIA MASTER FUND, LTD.,
Plaintiff(s)

-against-

WILLIAM J. FOWKES, JR., SUFFOLK COUNTY NATIONAL BANK, UNITED STATES OF AMERICA (EASTERN DISTRICT), BOARD OF MANAGERS OF THE EAST HAMPTON OFFICE PARK CONDOMINIUM, et al.,
Defendant(s).

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Index No. **32725/2010**

Motion seq. **009: MotD**
Orig. Date: 10/21/2014
Adj. Date: 8/4/2015

ORDER DENYING VACATUR AND DETERMINING FAIR MARKET VALUE

Upon consideration of the order to show cause why an order should not be issued and entered vacating so much of the judgment of foreclosure that granted the plaintiff a deficiency judgment due to newly discovered evidence, or in the alternative, pursuant to this Court's inherent discretionary power, and staying the fair market value hearing pending the determination of this motion (sequence 009), the supporting affirmation, affidavit, and exhibits, the affirmation in opposition on behalf of the plaintiff Waterfall Victoria Master Fund, LTD [" Waterfall Victoria" or "the plaintiff"], and supporting exhibit, and further,

Upon the hearing conducted before this Court commencing on September 24, 2014, and continuing on December 19, 2014, February 20, 2015, and concluding on May 8, 2015, the exhibits introduced into evidence at the hearing, and the parties' respective post-hearing briefs, it is now

ORDERED that the defendant's motion to vacate so much of the judgment of foreclosure and sale that granted a deficiency judgment in the plaintiff's favor and against the defendant William J. Fowkes, Jr. ["the borrower" or "the defendant"], entered on December 26, 2012, and the plaintiff's application for a determination as to the fair market value of the subject premises as of the foreclosure sale date upon completion of the fair market value hearing, are considered together for purposes of this determination; and it is further

ORDERED that so much of the defendant's motion that seeks to vacate so much of the judgment of foreclosure and sale granting a deficiency judgment due to newly discovered evidence is denied; and it is further

ORDERED that so much of the defendant's motion that seeks to vacate so much of the judgment of foreclosure and sale granting a deficiency judgment pursuant to this Court's inherent discretionary power is denied; and it is further

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ORDERED that so much of the defendant's motion that seeks a stay of the fair market value hearing is denied as moot, the application having been denied prior to the commencement of the fair market value hearing; and it is further

ORDERED that upon the evidence presented at the hearing the Court finds that the fair market value of the subject premises as of the date of the foreclosure sale is $500,000.00.

The parties' familiarity with the underlying facts for the most part set forth in the Court's prior order dated June 6, 2014, confirming the referee's report of sale, is assumed and will not be repeated here except to inform the instant decision. Briefly, this action involves the enforcement of a note and the foreclosure of a mortgage executed and delivered by the defendant on May 31, 2006, encumbering commercial property located at 300 Pantigo Place, East Hampton, New York ["the subject premises"]. The defendant defaulted in his obligations under the loan by failing to make the payment due on April 1, 2010. Notably, notwithstanding that the defendant was represented by counsel, and received notice of the plaintiff's motion for a judgment of foreclosure and sale and a deficiency, the defendant failed to oppose the plaintiff's motion for that relief. Counsel for the defendant maintains that the defendant does not seek to vacate the judgment of foreclosure and sale or the referee's deed transferring title to the subject premises.

Rather, the defendant's request for relief is limited to so much of the foreclosure judgment that granted a deficiency judgment in favor of Waterfall Victoria, a self-described hedge fund that purchased a pool of distressed notes and mortgages from the original lender's assignee, including the loan made to the defendant. The plaintiff now seeks a deficiency judgment in the amount of the total deficiency as reported by the referee, less the fair market value of the subject premises on the date of the foreclosure sale in May of 2013, pursuant to RPAPL §1321.

Before the Court are two main issues. The first issue is the defendant's request for relief in motion sequence 009: whether there is a basis for the Court to vacate only so much of the judgment of foreclosure and sale in the amount of $585,357.46, that granted a deficiency judgment in the plaintiff's favor. Part of that analysis raises a question that the Court and the parties believe is one of first impression- whether a plaintiff, a hedge fund, that is neither a traditional lender nor originator of mortgage loans, may avail itself of RPAPL §1371 allowing for a deficiency judgment.

If the answer to that novel question is answered in the affirmative, the second issue before the Court is, based upon the evidence presented by both parties at the fair market value hearing conducted over the course of four days and concluding on May 8, 2015, to what extent the amount of indebtedness on the mortgage as calculated by the referee exceeded the fair market value of the property. The plaintiff contends that the fair market value of the property was the price for which it sold the subject property to a third party on or about October 22, 2013, the amount of $362,500.00. The defendant contends that according to his appraiser, the fair market value of the subject premises was actually $500,000.00, thereby reducing the amount of any deficiency owed to the plaintiff by the defendant.

With respect to the motion to vacate so much of the judgment of foreclosure that granted a

deficiency judgment against the defendant, the latter makes two arguments. First, the defendant argues that newly discovered evidence provides a justification for vacating so much of the judgment of foreclosure and sale that granted a deficiency to the plaintiff. The defendant purchased the property in May, 2006, for the amount of $750,000.00. The newly discovered evidence relied upon by the defendant consists of assertions that before the foreclosure sale, the defendant had been negotiating with Waterfall Victoria to purchase the subject property and the plaintiff's agent, Peter Marsh, allegedly told the defendant that the plaintiff believed the property was worth $700,000.00, an amount in excess of the amount of indebtedness reported by the referee. The defendant also contends that in negotiating for the purchase of the subject premises the defendant actually offered the plaintiff more than what the plaintiff ultimately received from the third party purchaser. The defendant asserts that it is unjust to allow the deficiency judgment to stand when the specific facts giving rise to the existence of a deficiency judgment did not present themselves until after the foreclosure judgment was signed.

Further, the defendant asserts that when the judgment of foreclosure was entered in late 2012, the original lender's assignee, Capital One, had already sold the subject mortgage and note to the plaintiff hedge fund who had been substituted as a party plaintiff in 2011. When Waterfall Victoria purchased the pool of notes that included the defendant's note, Waterfall Victoria was aware that the note was distressed and, according to the defendant, should not be permitted to profit through the vehicle of a deficiency judgment.

An application to review a judgment based upon newly discovered evidence must be based upon newly discovered evidence which, although in existence at the time of the original motion, was not then known to the defendant, together with a reasonable justification for not previously presenting such evidence (*State of New York v Williams*, 73 A.D.3d 1401, 901 N.Y.S.2d 751 [3d Dept. 2010]). Only evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized as newly discovered evidence (*Commercial Structures v City of Syracuse*, 97 A.D.2d 965, 468 N.Y.S.2d 957 [4th Dept. 1983]). The "newly discovered evidence" asserted by the defendant on this motion clearly does not fit within the parameters of the established case law precedent for vacating a judgment, nor does the case relied upon by the defendant, *Griffo v Swartz*, support the defendant's position (*Griffo v Swartz*, 61 Misc.2d 504, 306 N.Y.S.2d 64 [Monroe County Court 1969]).

In *Griffo,* a default judgment of foreclosure and sale provided, inter alia, that the plaintiff recover of the defendant the whole deficiency or so much thereof as the court determined to be just and equitable of the residue of the mortgage debt remaining unsatisfied after the sale. As in the case at bar, the defendant defaulted in both the action and on the application for a judgment of foreclosure and sale which included a request for a deficiency judgment. No exceptions were ever filed to the Referee's report. The defendant in *Griffo* opposed the application for a deficiency judgment pursuant to §1371 of the REAL PROPERTY ACTIONS AND PROCEEDINGS LAW on the ground that the long delay between the entry of the judgment and the actual foreclosure sale constituted latches (*Griffo*, 61 Misc.2d at 505-06). According to the defendant, had there been no delay in conducting the foreclosure sale, there would have been no deficiency (*Id.* at 508).

The *Griffo* Court rejected the defendant's argument on the basis that a defense to the deficiency could have been raised in pleadings, in opposition to the application for the judgment of foreclosure and sale, or in opposition to the referee's report of sale. The court quoted the following rule:

> "Any defense that may be offered to a decree of foreclosure or against a personal decree for the debt should be presented in due course during the proceedings, or sufficient reason given for not doing so, and it must be germane to the issue and must present a legal reason why plaintiff should not recover. Thus, findings of fact in a decree of foreclosure, showing defendants personally liable for any deficiency that may remain after a sale of the mortgaged premises, preclude defendants, on an application for a deficiency judgment, from presenting any defense which could or should have been interposed prior to the announcement of the decree, since the findings of fact in a mortgage foreclosure decree, on issues properly pleaded, are not reviewable on objections to a deficiency judgment; but, where such decree is not sustained by the pleadings, the application for a deficiency judgment is subject to any defense that the person against whom it is sought may have.' (*Griffo*, at 508-09, *citing* 59 C.J.S. Mortgages s 779, pp. 1478, 1479; *see also*: *In re Casey's Estate*, 186 Misc. 151, 61 N.Y.S.2d 722.)".

Accordingly, the court in *Griffo* did not permit the defaulting defendant's collateral attack on the deficiency judgment notwithstanding that the circumstances upon which the defendant relied, the delay between the judgment of foreclosure and the foreclosure sale, arose after the entry of the judgment of foreclosure. This Court likewise rejects the defendant's first argument for vacating so much of the judgment that granted a deficiency in the plaintiff's favor.

As to the second basis, statutory law provides that the amount which a mortgagee may recover as a deficiency judgment shall be the lesser of (1) the difference between the amount due under the mortgage and the sale price, or (2) the difference between the amount due under the mortgage and the fair market value of the premises (RPAPL §1371). Generally, a court must determine the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction (*Farmers National Bank of Malone v Tulloch*, 55 A.D.2d 773, 389 N.Y.S.2d 494 [3d Dept. 1976]).

The Legislature enacted RPAPL §1371, and its predecessor statutes to protect mortgagors from personal liability during periods when real property had no market value, such as a depression or recession (*First National Bank & Trust Co. of Ellenville v Hyman Novick Realty Corp.*, 68 A.D.2d 191, 416 N.Y.S.2d 844 [3d Dept. 1979], *citing Klinke v. Samuels*, 264 N.Y. 144, 149, 190 N.E. 324, 326). The defendant argues that since the statute was not intended to assist an investor like the plaintiff hedge fund which intentionally bought a pool of distressed mortgages for the express purpose of generating a profit, the court may exercise its equity jurisdiction and enter a deficiency judgment in the sum of zero dollars.

The Court of Appeals has observed that RPAPL §1371 and its predecessor statutes were passed against the background of the Great Depression when many homeowners lost their homes in

foreclosure sales at prices that did not reflect the property's real value (*Sanders v Palmer*, 68 N.Y.2d 180, 183-4, 507 N.Y.S.2d 844, 499 N.E.2d 1242 [1986]). Thus, the statute was designed to benefit the mortgagor and burden the mortgagee by requiring the deficiency amount to be determined with reference to the market value of the foreclosed property or its sale price, whichever is higher, and deeming the proceeds of the foreclosure sale to be in full satisfaction of the outstanding debt if a deficiency judgment is not sought within the 90-day limitations period.

Here, when the application for a judgment of foreclosure and sale was made, the defendant knew that Waterfall Victoria, a hedge fund as distinguished from a loan originator, had been substituted as the plaintiff and was seeking a deficiency judgment. Yet, the defendant failed to take appropriate action to preserve for review the amount due and owing in the final judgment of foreclosure. Even assuming, without conceding, that post-judgment negotiations between the plaintiff and the defendant may even be considered by the court in making its determination as to the fair market value of the subject premises, before the judgment of foreclosure and sale was granted, the defendant knew the nature of the plaintiff's application and that the substituted plaintiff/ hedge fund's ultimate purpose was to profit from the transaction through the vehicle of a deficiency judgment against the defendant. The time to raise the issue of whether an investor, as opposed to a lender, may avail itself of RPAPL § 1371 was before the entry of the judgment of foreclosure and sale that included a deficiency judgment (*see First National Bank & Trust Co. of Ellenville v Hyman Novick Realty Corp.*, 68 A.D.2d at 195).

Notably, no appeal was taken from the judgment of foreclosure and sale. It is axiomatic that judgments may not be attacked in collateral proceedings as to findings therein which are final and binding on the parties. However intriguing the defendant's argument that under general principles of equity an investor that purchases a pool of distressed loans should not be permitted to profit from the provisions RPAPL §1371, as the statute was enacted to benefit mortgagors rather than mortgagees or their assignees, this novel argument has not been preserved for the Court's review.

The second basis asserted in support of vacatur of the deficiency judgment is that the deficiency judgment should be vacated in the exercise of the court's inherent discretionary power to vacate its judgments and orders for good cause shown pursuant to CPLR 5015 (a) (4). Specifically, defendant argues that the plaintiff hedge fund, through its exclusive inside connections on Wall Street, availed itself of the private opportunity to turn a profit at the defendant borrower's expense by purchasing the note for approximately $400,000.00 and then seeking a deficiency judgment which would result in a profit to the plaintiff of over $200,000.00.

Insofar as the defendant asserts this argument as a basis to vacate so much of the judgment of foreclosure that granted a deficiency, the court rejects the argument for the simple reason that the defendant defaulted in the foreclosure action, did not oppose the application for a judgment of foreclosure and sale that included a request for a deficiency judgment, did not move to reargue the motion for a judgment of foreclosure, nor did the defendant take an appeal from that judgment. Since 2011, Waterfall Victoria has been the named plaintiff that sought, inter alia, a deficiency judgment. The plaintiff cannot be heard to request the intervention of equity when he was completely remiss in availing himself of the protections afforded by law; his dilemma was self-

created by his default in appearing in the foreclosure action and subsequent defaults (*Atlantic Bank of New York v Weiss*, 234 A.D.2d 240, 651 N.Y.S.2d 73 [2d Dept. 1996]). Notably, the defendant has not provided the court with any reason, sufficient or otherwise, to justify vacating the court's own judgment in the interests of substantial justice (*see Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d at 68, 760 N.Y.S.2d 727, 790 N.E.2d 1156). Moreover, defense counsel did not contradict the plaintiff counsel's assertions that the right to a deficiency is not only statutory, but contractual. Finally, defense counsel admitted that the defendant did not have a defense to the foreclosure action.

Based on the foregoing the defendant's motion by way of order to show cause to vacate so much of the judgment of foreclosure and sale as granted a deficiency judgment in favor of the plaintiff is denied.

The second issue before the Court is the amount of any deficiency. RPAPL 1371 (2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher (*BTC Mortgage Investors Trust 1997-SI v Altamont Farms, Inc.*, 284 A.D.2d 849, 727 N.Y.S.2d 513 [3d Dept. 2001]).

Although the plaintiff initially offered testimony in the way of a Broker Price Opinion [BPO], that the subject premises had a fair market value of $332,132.00, at the hearing the plaintiff conceded that the fair market value of the subject premises was the sale price from Waterfall Victoria to Andrew Sabin, an owner in the same office condominium complex, in the amount of $362,500.00. The plaintiff initially negotiated with the defendant's tenant for sale of the subject premises. The tenant was a dermatologist who leased office space from the defendant in the adjoining suite. Once the price was negotiated with the defendant's tenant, Andrew Sabin exercised his right of first refusal as an owner in the office condominium complex and ultimately purchased the tenant's offer for $362,500.00. The contract of sale provided that the seller was giving no warranties, that the buyer would hold the seller harmless, and that the buyer was taking the premises "as is".

The two-page BPO introduced by the plaintiff at the fair market value hearing was prepared by Khristopher Pilles ["Pilles"], a commercial real estate broker who listed and sold the subject premises for the plaintiff. Pilles began his career as a broker in the year 2000. Previous to that Pilles owned a software company. Pilles testified that in the last three years he had brokered approximately thirty-three transactions on the South Fork of Long Island. Approximately eight to ten of them were in the town of East Hampton. Pilles testified that he considers himself one of the best experts in the town of East Hampton. He solicited business from Peter Marsh, associated with Waterfall Victoria, three or four years ago when Pilles started to focus on "the distress business". Pilles started following lis pendens and the auction calendar and discovered the Waterfall Victoria entity. Pilles "googled" Waterfall Victoria and found an email address which eventually got forwarded to Peter Marsh.

Frankly, the Court was underwhelmed with Pilles' testimony and his conclusions extrapolated from information Pilles entered on the BPO. Initially, the Court notes that the address for the subject property listed in the BPO was incorrectly stated as being in East Islip, New York, rather than East Hampton, New York. Pilles' efforts in marketing the property were limited to contacting the other owner/tenants in the office condominium complex to gauge their interest in purchasing the subject premises as well as speaking with several other brokers.

Pilles arrived at the market value by using a standard form developed by Coldwell Banker that Pilles testified is used by most brokers, residential or commercial. The BPO form itself is EXCEL based and has entry spaces for three listed comparables and three current listings. The most recent sale within the subject condominium complex was the defendant's purchase of the subject premises in 2006. There were no other comparables in the condominium complex itself. According to Pilles, brokers use public records and other tools to find the most similar, comparable properties to determine value. After they find the comparables, they apply applicable adjustments based on the condition of the subject property versus the comparables. Pilles described the BPO as the starting point.

Pilles admitted that "[the BPO] is not perfect ... You're typing into a spreadsheet." Pilles effectively licensed the BPO form from Coldwell Banker and testified that he essentially plugs the information in each of the categories or entry spaces on the form and the program does the calculating and mapping to arrive at the valuations. Pilles' final weighted average value, using valuations applying both the market income approach and the market comparables approach of valuation, respectively, was $332,123.08. Ultimately, however, after consultation with Peter Marsh, the subject premises was listed for the offering price of $399,000.00.

In arriving at the BPO, Pilles testified that the market comparables approach was weighted 80%. However, the testimony at the hearing was undisputed that there were very few true comparables for commercial office space in the Village of East Hampton. The comparables Pilles used to arrive at the weighted average value on the BPO were admittedly not the same size or location as the subject premises. The comparables were based on properties located in Riverhead, Westhampton, and Southold. The square footage of each of the various properties in the BPO was also very different from the subject premises.

Pilles was admittedly not an appraiser. He stated that commercial condominiums are a pink elephant in the Hamptons. Pilles noted that the subject property was encumbered with a very significant monthly maintenance which was the biggest deterrent in selling the property in addition to the fact that the subject premises was partially occupied by the former owner, the defendant. Other detractors from the property included the existence of a right of first refusal for the benefit of existing condominium owners in the complex. However, Pilles admitted that when he prepared the BPO he was not aware of the right of first refusal. The BPO was based solely on Pilles' exterior observation; he had not inspected the interior of either of the defendant's units.

Notably, Pilles testified that in the event of a foreclosure, his goal is to sell the property as fast as he can for as much money as possible. Pilles acknowledged that if there were experienced

brokers in the marketplace they would or could come up with different comparables with different rates and a different program than the one developed by Coldwell Banker to do the calculations. Pilles' admitted purpose in preparing the BPO form is to encourage the client to hire him. He has only sold one commercial condominium in this area and there haven't been any other sales in the community since the borrower purchased the unit in 2006.

The defendant subpoenaed Peter Marsh to testify. Marsh testified that he buys pools of loans that his company, JEMCAP, manages and services. JEMCAP came into being in 2008 or 2009 and at times partners with hedge fund Waterfall Asset Management. Marsh testified that Waterfall Victoria Master Fund, LTD. is a hedge fund. Waterfall Victoria Master Fund, assigned its right, title and interest to the terms of sale dated May 1, 2013, to Waterfall Victoria Mortgage Trust 2011-SBC3 REO-J, LLC ["Waterfall LLC"]. Waterfall LLC is an entity that was formed to purchase [distressed] loans. Waterfall LLC purchased a large pool of loans from Capital One Bank, including the defendant's loan. JEMCAP acts as a manager and special servicer for Waterfall Victoria, managing the foreclosure process from demand letter to REO [real estate owned]. JEMCAP also manages and liquidates REO assets inclusive of evictions and liquidation of assets. Marsh candidly acknowledged that the business of JEMCAP is to make money.

Part of what JEMCAP does is acquire notes at a discount, the goal being to re-sell the notes for profit. JEMCAP and its partner, Waterfall Victoria, purchased a pool of loans that included the subject loan. Waterfall Victoria purchased the entire pool and then allowed participation interests in certain sub-segments of the pool. JEMCAP "participated" in the New York sub-segment. Marsh supervised the pool of approximately 100 loans that were based in New York. JEMCAP paid $449,556.00 for the subject loan. Marsh testified that he looked at the subject premises before he purchased it and believed it was worth more than the price that was listed "on the tape".

Defendant Fowkes testified that in 2006 he paid $750,000.00 for the subject premises which consisted of two suites. He put 300,000.00 down in cash and got a $450,000.00 mortgage from Capital One. When the defendant attempted to continue the loan modification process with JEMCAP that he had started with Capital One, Marsh told Fowkes that servicing anything for more than several months was out of the question. According to Fowkes, Marsh stated that he dealt in months-not years.

The defendant's valuation expert was Jack Grobe. Grobe testified that he has been employed by Rogers and Taylor Appraisers, Inc. as a commercial real estate appraiser since 1990. Grobe has been appraising properties for almost 30 years. One hundred per cent of his practice is appraising commercial properties such as buildings, shopping centers, and commercial, income-producing property on the East End of Long Island.

Grobe did an appraisal of the subject premises on November 8, 2013, and issued a report that was admitted into evidence as defendant's Exhibit D. Grobe spent two days writing the report, looking at comparable sales and rentals. He relied on both the income approach to value and the sales comparison approach to value to arrive at the property's highest and best use, defined as that reasonably probable and legal use of vacant land or an improved property, which is physically

possible, appropriately supported, financially feasible, and that results in the highest value. Key considerations to determine the highest and best use are the location, size, and overall physical characteristics of the site. According to Grobe, based upon site location, immediately surrounding land uses, road frontage, accessibility, configuration, etc., the physical highest and best use of the subject site was for office development. As currently improved, the highest and best use of the subject site was for office condominium use.

Grobe adopted the definition of the income capitalization approach to value in the Dictionary of Real Estate Appraisal, that is, a set of procedures through which an appraiser derives a value indication for income-producing property by converting its anticipated benefits into property value. This conversion can be accomplished in two ways- 1) a single year's income expectancy can be capitalized at a market-derived capitalization rate or capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment, or 2) discounting the annual cash flows for the holding period and the reversion at a specified yield rate. The basic steps of the income approach are projection of potential gross income, estimation of vacancy and collection losses, estimation of effective gross income, expense analysis, net operating income forecast, selection of an appropriate overall rate, and estimation of market value.

Grobe's valuation of fair market value using the income capitalization approach to value was influenced in a positive direction by the location of the subject premises in East Hampton, a desirable area, that the building was relatively new, and that commercial development in East Hampton is restricted as compared with other areas. He was negatively influenced by the fact that the unit next door was being rented for substantially lower than all the other rents that Grobe found in the area. The lower rent of the adjoining unit had a dragging down effect on Grobe's final conclusion with regard to the income capitalization approach to valuation. Applying these values and considerations, Grobe opined that the market value of the subject property applying the income approach to value was approximately $410,000.00.

Grobe also considered the sales comparison approach defined by the Dictionary of Real Estate Appraisal as an estimate of value as indicated by sales of improved properties which have occurred in the market, applying appropriate units of comparison and making adjustments to the sale prices of the comparables based on the elements of comparison. Grobe testified that under this approach, market value is the most probable price a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in his definition is that neither party is under a compulsion to enter into the transaction.

As of November of 2013, Grobe opined that using the sales comparison approach of valuation, the market value of the subject premises was $500,000.00. In coming to this conclusion, Grobe considered five comparable sales and found them to be a reliable indicator of value for the subject premises given that office condominium units are typically purchased by owner users. The comparable listings ranged in value from $291.43 per square foot to a high of $373.65 per square foot. In determining the value, Grobe testified that you multiply the square foot value ($373.65 at

the upper range of the listings) times the square footage of the property (1,657 ft.²), yielding a value of approximately $619,138.05. At the low end of the range was a square foot value of $291.43 per square foot, yielding the low-end of value at $482,187.00. Grobe testified that his evaluation of the subject premises was based upon $300.00 per square foot, rounded up to $500,000.00. He also maintained that there was no significant difference in value of the subject premises between the date of his appraisal in November, 2013, and when the subject premises had been bid in at auction in May, 2013.

The mortgagee has the initial burden to make a prima facie showing of the fair market value of the property as of the foreclosure sale date which in this case was May 1, 2013 (*see National Bank of North America v Systems Home Improvement*, 69 A.D.2d 557, 562, 419 N.Y.S.2d 606, *affirmed* 50 N.Y.2d 814). If the mortgagee does so, the burden shifts to the mortgagor to establish the highest and best use of the property (*id.* at 562), which should be used to determine the property's fair market value. In such cases, the trial court enjoys broad discretion in that it can reject expert testimony and arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court (*ARC Machining and Plating v Dimmick*, 238 A.D.2d 849, 850, 656 N.Y.S.2d 549). The court may deny a deficiency judgment where it determines based upon the evidence that the fair market value exceeded the outstanding mortgage balance after the foreclosure sale (*BTC Mortgage Investors Trust 1997-SI v Altamont Farms, Inc.*, 284 A.D.2d at 850).

The Court as the fact finder accepts Grobe's conclusion that at the time of the foreclosure sale, the fair market value defined as the property's highest and best use, was $500,000.00. Pilles' testimony about the BPO describes a rubric that requires little actual expertise and appeared speculative. The user plugs in subjectively selected numbers and the program does the calculations to arrive at a figure. Both Pilles and JEMCAP had one over-arching motivation that ultimately drove the amount of the offering price- to sell the property as fast as possible for as much money as possible. While that motivation may be understandable from a business perspective, it has little or no correlation to the actual fair market value of the subject property.

While the sale price is an amount which, all things being equal, is the presumptive fair market value, the seller, JEMCAP/Waterfall Victoria and the buyer, Andrew Sabin, did not fit the typical prototype of a willing buyer and a willing seller under no compulsion to enter into the transaction in that the sale price reflected special considerations and concessions made by each. JEMCAP did not want to service a loan; they wanted to turn a quick profit. Stated another way, JEMCAP wanted to make a quick deal and cut its losses. Notably, there was little to no evidence that Pilles on behalf of JEMCAP made a robust attempt to find a willing buyer. During the period of time that Marsh/JEMCAP was to be marketing the property, the tenant testified that no potential buyers or real estate brokers came to look at the subject premises. Pilles' efforts were minimal at best.

For the buyer's part, Sabin testified that to take advantage of the right of first refusal he was forced to make concessions in the contract including that he was taking the premises "as is" and that he was saving the seller harmless. Considering all the evidence, and weighing the witnesses'

demeanor and motivations, the Court concludes that Grobe's testimony was persuasive that the highest and best use of the property and hence, the property's fair market value at the time of the foreclosure sale was $500,000.00.

Based on the foregoing, the plaintiff is directed to submit a proposed judgment on notice within twenty days of the entry of this Order.

Dated: JAN 07 2016

ANDREW G. TARANTINO, JR., A.J.S.C.

_XX_ FINAL DISPOSITION

____NON-FINAL DISPOSITION