Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-296

MARCH TERM, 2007

Catamount/Infill Springfield, LLC	}	APPEALED FROM:
	}	
	}	
v.	}	Windsor Superior Court
	}	
UPS Capital Business Credit f/k/a	}	
First International Bank	}	DOCKET NO. 583-12-05-Wrcv
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiff Catamount/Infill Springfield, LLC appeals from a summary judgment of the Windsor Superior Court in favor of defendant UPS Capital Business Credit. Catamount contends the court erred in concluding as a matter of law that Capital had not breached a contract for the sale of foreclosed real property, violated the implied covenant of good faith and fair dealing, or contravened the Vermont Consumer Fraud Act. We affirm.

The undisputed material facts may be summarized as follows. Capital was the mortgagee of property known as the Parks & Woolson Mill in Springfield, Vermont. In December 2004, Capital filed a foreclosure action on the property. In May 2005, the superior court issued a judgment of foreclosure and order of public sale. Capital was owed over $917,000 on the note and mortgage.

The foreclosure judgment required that the entity holding the public sale notify the court within ten days of the sale, and further provided that, "[i]f this Court approves the Report of Sale after a hearing on whether to confirm or set aside the sale, it shall issue an Order of Confirmation." This provision reflected the requirements of 12 V.S.A. § 4533, which provides that, following a judicial foreclosure sale, the court upon notice "may confirm the sale or set it aside and order a resale." Capital noticed a public sale of the property in June 2005, and held the sale the following month. Catamount, the successful bidder, agreed to purchase the property for $22,500. Capital and Catamount entered into a sale agreement, dated July 12, 2005, that acknowledged the transaction as a "Mortgagee's Sale at Public Auction" and set a fifteen day closing.

Shortly thereafter, Capital moved to confirm the sale. In response, Alfred Peterson, principal of the mortgagor Parks & Woolson and the personal guarantor of its debt, wrote to the court to oppose confirmation on the ground that the sale was not commercially reasonable due to inadequate or ineffective notice that resulted in an artificially low sale price. Capital thereupon noticed a second public sale of the property, later explaining that it was concerned that Peterson's opposition could result in protracted litigation and damage to the building if left vacant, and that the court would order a resale in any event given the substantial disparity between the sale price and the mortgage debt.

Catamount, in response to the notice, moved to intervene in Capital's pending motion to confirm, arguing that the sale price was commercially reasonable because the mill was functionally obsolete, lacked adequate parking, and might contain environmentally hazardous substances. The court denied the motion to intervene in a brief entry order, stating that there was "nothing to intervene in given that the motion to confirm has been effectively withdrawn by noticing another public sale."

The second public sale was held in August 2005. Catamount was again the highest bidder, although for a substantially higher purchase price of $147,000. Capital moved to confirm the sale and Catamount again moved to intervene, arguing that the first sale was commercially reasonable and should have been confirmed. The court held a hearing in November, granted the motion to intervene, and thereafter issued an order confirming the second sale. The trial court denied Catamount's subsequent motion for permission to appeal, and this Court denied its renewed motion as untimely.

Catamount in the meantime had filed a separate civil action against Capital alleging breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Vermont Consumer Fraud Act. The parties filed cross-motions for summary judgment. In May 2006, the court issued a written decision, denying Catamount's motion and granting Capital's. The court found that the obligations under the original sales agreement were clearly conditioned upon the court's approval, and that "[g]iven the lack of court approval, Catamount does not have a contractual right to enforce the terms of the July 12 agreement." The court also found that Catamount had failed to present evidence of bad faith or consumer fraud sufficient to support the bad faith and consumer fraud claims. The court therefore entered summary judgment in favor of Capital. This appeal followed.

We review a summary judgment applying the same standard as the trial court and will affirm if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In re Jolley Assocs., 2006 VT 132, ¶ 7, 915 A.2d 282. Plaintiff contends the court erred in concluding as a matter of law that no contract existed until the Court approved the contract. Catamount has misconstrued the court's holding, however, which was not that no contract was formed, but rather that the failure of a condition precedent, i.e., court approval of the sale, defeated Catamount's right to enforce the agreement. The court's conclusion was sound. See Sisters & Brothers Inv. Group v. Vt. Nat'l Bank, 172 Vt. 539, 542 (2001) (mem.) (noting the well settled rule that the "nonoccurrence of the condition [precedent] discharges the parties' duty to perform").

Catamount claims, however, that Capital cannot rely on the court's failure to confirm the initial sale because Capital itself filed the second notice of sale, which the court construed as a withdrawal of the motion to confirm. Catamount cites the general principle that, where the fulfillment of a condition precedent is prevented by the other party, the condition may be considered to have been fulfilled. See, e.g., Kooleraire Serv. & Installation Corp. v. Bd. of Educ., 268 N.E.2d 782, 784 (N.Y. 1971) ("a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition"). Catamount's argument in this regard essentially anticipates its second claim, to wit, that Capital breached the implied covenant of good faith and fair dealing by filing the second notice of sale, which resulted in the court's ruling that the motion to confirm had been withdrawn and ultimately defeated the consummation of the initial sales agreement.

Although we have described the covenant of good faith and fair dealing broadly as an implied promise "not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement," Carmichael v. Adirondack Bottled Gas Corp. of Vt., 161 Vt. 200, 208 (1993), we have also stressed that what might constitute a breach is highly "[c]ontextual and fact specific." Id. While difficult to generalize, we have explained that the fundamental purpose of the implied covenant is to protect against "bad faith" conduct that "violate[s] community standards of decency, fairness or reasonableness." Id. at 209 (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)). Although this is normally a question of fact for a jury to determine, we agree with the trial court here that the facts and evidence adduced by Catamount—considered in context—provide no basis on which a jury could determine that Capital violated community standards of decency, fairness, or reasonableness. See Boulton v. CLD Consulting Eng'rs, Inc., 2003 VT 72, ¶ 12, 175 Vt. 413 (upholding summary judgment for the defendant on the plaintiff's claim that defendant breached the covenant of good faith and fair dealing).

Although Catamount treats the memorandum of agreement here as a standard sales transaction, the agreement expressly acknowledged, and both parties were well aware, that it was a judicial foreclosure sale and was therefore subject to review and possible disapproval by the court under 12 V.S.A. § 4533. As noted, this provision codifies the widely accepted principle that courts in their discretion may reject judicial sales which they determine to be inequitable. See, e.g., In re Krohn, 52 P.3d 774, 785 (Ariz. 2002) (en banc) ("Considerable authority exists for the proposition that courts may set aside judicial sales that, although lacking other defects, involve a grossly inadequate sales price."). In addition to the oversight of the court, Catamount as the mortgagee was also plainly cognizant of the interests of the mortgagor Parks & Woolson in terms of assuring a procedurally sound sale and a reasonable price. See, e.g, Bascom Constr., Inc. v. City Bank & Trust, 629 A.2d 797, 800 (N.H. 1993) (reaffirming earlier decisions holding that, in the context of a foreclosure sale, the mortgagee owes the mortgagor a duty of good faith to take all reasonable steps "to [e]nsure that a fair and reasonable price is obtained"). In these circumstances, Catamount's decision to notice a second sale out of concern that the sale price, which amounted to less than three percent of the debt on the note and mortgage, might lead to litigation or to the court's disapproval can hardly be characterized as an act of bad faith contrary to community standards of decency and fairness. Thus, summary judgment on this claim was appropriate. For the same reasons, we discern no support for Catamount's claim that Capital engaged in unfair or deceptive trade practices. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

Marilyn S. Skoglund, Associate Justice

_____

Brian L. Burgess, Associate Justice