

NO. COA14-907

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2015

PHILLIP A. GLASS,

Fiduciary,

v.

Caldwell County

No. 13 SP 23

ZAFTRIN, LLC,

Upset Bidder.

Appeal by Zaftrin, LLC, upset bidder from judgment entered 6 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 7 January 2015.

No appellee brief filed.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for appellant.

STEELMAN, Judge.

Where the highest bidder at a foreclosure sale defaulted on its bid, and the sale price at a subsequent sale exceeded the defaulted bid, plus the costs of resale, the defaulting bidder was entitled to a refund of its entire deposit.

I. Factual and Procedural Background

On 28 February 2006, James and Robbin Osborne (the Osbornes) procured a loan from New Century Mortgage Corporation.

This loan was secured by a deed of trust on real property located in Caldwell County. On 7 March 2012, the note and deed of trust were assigned to Deutsche Bank National Trust Company (DB). DB appointed Phillip A. Glass (Glass) as substitute trustee. Upon the Osbornes' default in payments due under the note, DB directed Glass to commence foreclosure proceedings. On 7 May 2013, the Clerk of Court in Caldwell County ordered foreclosure, and a public sale was held on 4 June 2013. At that foreclosure sale, DB was the highest bidder, in the amount of \$220,000.00. After the receipt of upset bids, Glass resold the property at a public sale on 13 August 2013. The highest bidder at that sale was Zaftrin, LLC (Zaftrin), in the amount of \$315,000.00. Zaftrin paid a deposit of \$15,750.00 into the office of the Clerk of Court.

On 11 September 2013, Zaftrin notified Glass that it was unable to proceed with purchase of the property, thus defaulting on its bid. Glass moved the Court for an order to resell the property. On 19 November 2013, DB was the highest bidder, in the amount of \$350,000.00.

After the resale was confirmed, Zaftrin sought a refund of its deposit. On 7 January 2014, Glass moved that the Clerk of Court disburse the deposit to Zaftrin, less the costs of resale,

\$1,469.80, a net disbursement of \$14,280.20. The Clerk of Court granted Glass' motion. On 30 January 2014, Zaftrin filed a response to the motion, asserting that N.C. Gen. Stat. § 45-21.30(d) does not provide for the deduction of the costs of resale where the resale price is higher than the defaulting bid. On 5 March 2014, the Clerk of Court ruled that Zaftrin was entitled to a full refund of its deposit.

On 9 April 2014, Glass appealed the Clerk of Court's ruling to the Superior Court of Caldwell County. On 6 June 2014, the trial court ordered the Clerk of Court to disburse \$1,469.80, the costs of resale, to Glass, and the remaining balance of \$14,280.20 to Zaftrin.

Zaftrin appeals.

II. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

III. Analysis

In its sole argument on appeal, Zaftrin contends that the trial court erred in awarding Glass the costs of resale from its deposit. We agree.

The disposition of a defaulting bidder's deposit is governed by N.C. Gen. Stat. § 45-21.30(d):

A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable *to the extent that the final sale price is less than his bid plus all the costs of the resale*. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, *if any*, for which the defaulting bidder remains liable under this section.

N.C. Gen. Stat. § 45-21.30(d) (2013) (emphasis added). The language of the statute is clear. A bidder in default is liable only to the extent that the final sale price is less than his bid plus the costs of resale.

In support of its argument, Zaftrin cites to our Supreme Court's decision in *Harris v. American Bank & Trust Co.*, 198 N.C. 605, 152 S.E. 802 (1930). In *Harris*, the plaintiff made the high bid at a foreclosure sale of \$6,000.00, and deposited \$1,000.00 with the Clerk of Court. Plaintiff subsequently defaulted, and on resale, the property sold for \$6,500. Plaintiff brought an action to have his deposit refunded. The trial court ordered the Clerk of Court to refund the deposit. Defendant appealed. The Supreme Court examined the applicable

statute,¹ and observed that plaintiff's deposit "was a guarantee that there would be no loss occasioned if he be declared the purchaser at the resale; he was so declared and did not comply, but there was no loss, as the property brought more on resale." *Id.* at 610, 152 S.E. at 804. The Supreme Court held that, due to the fact that the resale price was high enough to exceed both the defaulting bid and the costs of resale, the defendant, "in law or equity, has no claim to the \$1,000 [deposit], under the facts and circumstances of this case." *Id.*

In the instant case, the final sale price was \$350,000.00. Zaftrin's defaulting bid was \$315,000.00, and the costs of resale was \$1,469.80. Zaftrin would only be held liable if the sum of these two items, \$316,469.80, exceeded the final sale price, \$350,000.00. As the final sale price clearly exceeded Zaftrin's defaulting bid plus the costs of resale, the trial court erred in holding Zaftrin liable for the costs of resale. The decision of the trial court is reversed, and this matter is remanded to the trial court for entry of an order directing the Clerk of Superior Court of Caldwell County to return to Zaftrin its entire \$15,750.00 deposit.

¹ We note that *Harris* was decided pursuant to C.S. § 2591, a precursor to N.C. Gen. Stat. § 45-21.30. We hold that the reasoning of *Harris* is applicable to the present case.

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REVERSED AND REMANDED.

Judges DIETZ and INMAN concur.