SB PB VICTORY, L.P., Plaintiff, v. TONNELLE NORTH BERGEN, LLC, THOMAS F. VERRICHIA, UNITED CANDY & TOBACCO INC., NORTHWEST EXPLOSIVES CORP., AND PERSISTENT CONSTRUCTION, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001979-23 Civil Action On Appeal From: Superior Court of New Jersey Chancery Division, Equity Part Hudson County Docket No. SWC-F-0013346-22 Sat below: Hon. Mary K. Costello, P.J.Ch.

BRIEF OF DEFENDANTS - APPELLEES TONNELLE NORTH BERGEN, LLC, AND THOMAS F. VERRICHIA

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PRELIMINARY STATEMENT

Defendant Tonnelle North Bergen LLC ("Tonnelle") is the owner of certain commercial property on Tonnelle Avenue in North Bergen, New Jersey. Plaintiff SB PB Victory, L.P., is Tonnelle's mortgagee and defendant Thomas F. Verrichia ("Verrichia") is Tonnelle's manager and guarantor of Tonnelle's mortgage. In this appeal, Tonnelle and Verrichia (the "Tonnelle Defendants") challenge the confirmation of the sheriff's sale of the mortgaged premises to plaintiff for $100 by the Honorable Mary K. Costello, P.J.Ch., based upon her determinations that (a) there is no distinction between "lawful postjudgment interest" and "contract postjudgment interest", and (b) the mandate of N.J.S.A. 2A:17-34 that a sheriffs' foreclosure sale notice state the "approximate" amount of the judgment can be satisfied by a notice that states an amount that is not an "egregious variation" of the actual amount.

As set forth more particularly herein, plaintiff's foreclosure judgment states that the postjudgment interest rate is lawful interest, which means the legal rate prescribed by R. 4:42-11; upon the entry of the final judgment, the mortgage merges into the foreclosure judgment and the mortgage interest rate is replaced by the postjudgment legal rate prescribed by R. 4:42-11 unless a different rate is expressly requested by the mortgagee and, before granting that request, the trial court considers the equities for and against an increase; and plaintiff did not ask and Judge Costello

did not weigh any equities. In addition, Judge Costello's subsequent order conditioning a stay of post-sale proceedings pending the filing of the Tonnelle Defendants' appeal upon the posting by the Tonnelle Defendants of a supersedeas bond within one business day was manifestly unreasonable because it was impossible for the Tonnelle Defendants to timely comply within that condition.

Therefore, this Court should reverse Judge Costello's orders; confirm that for purposes of Tonnelle's exercise of its right of redemption of the mortgaged premises, the postjudgment interest rate is the legal rate prescribed by R. 4:42-11; and direct that a new sheriff's sale be conducted if Tonnelle has not already redeemed the mortgaged premises.

PROCEDURAL HISTORY

On December 9, 2022, plaintiff filed its foreclosure complaint against the Tonnelle Defendants and co-defendants United Candy & Tobacco Inc., Northwest Explosive Corp., and Persistent Construction, Inc. Da1.

On April 6, 2023, plaintiff filed with the Office of Foreclosure its motion for the entry of a final judgment of foreclosure, its proposed form of final judgment, and the certification of amount due of Mark Franklin ("Franklin"), plaintiff's authorized signatory, dated April 5, 2023. Da17, Da19, and Da22, respectively.

On April 26, 2023, the Office of Foreclosure denied plaintiff's motion because (a) an order striking a co-defendant's answer had not been filed, and (b) the Office required a clarification relating to late charges. Da29.

On May 2, 2023, plaintiff filed Franklin's April 5, 2023 certification of amount due with an amended amount due schedule. Da33.

On May 10, 2023, plaintiff filed its motion for the entry of a final judgment of foreclosure, its proposal form of foreclosure judgment, and Franklin's April 5, 2023 certification of amount due with the amended amount due schedule. Da40, Da42, and Da45, respectively.

On May 19, 2023, Tonnelle filed its objections to plaintiff's motion. Da52.

On May 24, 2023, the Clerk of the Superior Court entered an administrative order transferring the matter to Hudson County for review by a judge. Da59.

On June 9, 2023, Tonnelle withdrew its objections. Da60.

The foreclosure judgment was entered on June 9, 2023. Da61.

The September 7, 2024 foreclosure sale date was adjourned. The sale was subsequently scheduled for and held on December 14, 2023. Plaintiff was the successful bidder. Da112, ¶16.

On December 26, 2023, the Tonnelle Defendants filed their motion for the hearing of an objection to sheriff's sale and for other relief, and the supporting

certifications of Verrichia and Jan Alan Brody, Esq. ("Brody").[1] Da65, Da70, and Da84, respectively. On January 11, 2024, plaintiff filed the opposing certifications of Franklin and Derek J. Baker, Esq. ("Baker"). Da102 and Da109, respectively. On January 16, 2024, the Tonnelle Defendants filed Verrichia and Brody's reply certifications. Da150 and Da161, respectively.

The motion hearing was held before Judge Costello on January 22, 2024, at which time she denied the Tonnelle Defendants' motion, but granted their request for a stay until their appeal was filed. Da188.

On February 14, 2024, plaintiff filed its motion to dissolve the stay unless the Tonnelle Defendants file a $2,500,000 supersedeas bond within one business day and Baker's certification. Da190 and Da193, respectively. On February 22, 2024, the Tonnelle Defendants filed their cross motion for a stay (a) extending the stay of post-sale proceedings from the date they file their notice of appeal until the final resolution of their appeal, (b) fixing the amount of their supersedeas bond at $645,000, and (c) granting them 60 days to post their supersedeas bond, and Verrichia and Brody's certifications. Da198, Da201 and Da205, respectively.

[1] References to motion briefs, forms of orders and other motion documents that are not essential to the proper consideration of the issues have been omitted from this Procedural History and copies have been omitted from the Tonnelle Defendants' Appendix.

On March 1, 2024, Judge Costello entered orders granting both motions, except that she reduced the amount of the supersedeas bond sought by plaintiff to $645,000. Da210 and Da212, respectively.

On March 6, 2024, the Tonnelle Defendants filed their notice of appeal. Da214. On March 19, 2024, plaintiff filed its notice of cross appeal. Da220.

On March 26, 2024, plaintiff filed its motion to dissolve stay and compel sheriff to deliver the deed and the certification of Gary F. Eisenberg, Esq. ("Eisenberg"). Da227 and Da229, respectively. On April 4, 2024, the Tonnelle Defendants filed Verrichia and Brody's certifications. Da271 and Da274, respectively. On April 8, 2024, plaintiff filed the certification of Robert L. Saldutti, Esq. Da368.

On April 12, 2024, Judge Costello entered her order denying plaintiff's motion. Da405.

On May 1, 2024, plaintiff filed its motion in the Appellate Division to compel sheriff to deliver deed or declare that there is no stay and Eisenberg's certification. Da407 and Da410, respectively.

On May 13, 2024, the Tonnelle Defendants filed their cross motion in the Appellate Division to extend the time within which they may post their supersedeas bond to May 20, 2024 and Verrichia's certification. Da416 and Da419, respectively.

On May 22, 2024, plaintiff filed Franklin's certification. Da426.

On May 23, 2024, the Tonnelle Defendants filed their motion in the Appellate Division to extend the time within which they may post their supersedeas bond to June 3, 2024 and Verrichia's certification. Da482 and Da485, respectively.

On May 30, 2024, the Appellate Division entered orders denying without prejudice plaintiff's motion, the Tonnelle Defendants' cross motion, and the Tonnelle Defendants' motion, and directing the parties to seek relief from the trial court. Da508, Da509 and Da510, respectively.

On May 31, 2024, plaintiff filed an order to show cause to dissolve the stay and compel delivery of the deed and Franklin's certification. Da511 and Da514,[2] respectively. On June 4, 2023, the trial court converted plaintiff's order to show cause to a motion returnable on June 20, 2024.

STATEMENT OF FACTS

On April 6, 2023, plaintiff filed its motion for the entry of a final judgment of foreclosure against Tonnelle. Da17. In his April 5, 2023 supporting certification of amount due, Franklin certified that an arbitrator had determined that the principal amount due to plaintiff based on the underlying loan agreement and promissory note was $16,573,835.18 plus pre arbitration award interest at the 15% contract rate of interest through January 5, 2022 in the amount of $2,762,141.11, for a total due as

[2] The exhibits to Eisenberg's certification, all of which are duplicative of previously filed documents, have been omitted from the Tonnelle Defendants' Appendix.

of January 5, 2022 of $19,335,976.29, together with a per diem of $6,905.76 based on the 15% contract interest rate. Da24-25, ¶18. Franklin also certified that the additional interest at the 15% contract interest rate from January 6, 2022 to April 5, 2023 was $3,142,122.92, and that, as of April 5, 2023, plaintiff had received rents totaling $976,755.74. Da27.

Therefore, according to Franklin, the total amount due to plaintiff from Tonnelle as of April 5, 2023 was $21,501,343.47, calculated as follows:

Principal	$16,573,835.18
Prejudgment interest at 15% from December 1, 2020 to January 5, 2022	2,762,141.11
Prejudgment interest at 15% from January 6, 2022 to April 5, 2023	3,142,122.92
Less rent income received	(976,755.74)
	$21,501,343.47

The form of judgment prepared by plaintiff's counsel and submitted to the Office of Foreclosure with plaintiff's motion provided, in pertinent part, as follows:

> And it further appearing that Plaintiff's Note, Mortgage and other loan documents set forth in the Foreclosure Complaint, have been presented and marked as Exhibits by the Court; and that proofs have been submitted of the amount due on Plaintiff's Note and Mortgage; and that there is presently due and owing to the Plaintiff under the Note and Mortgage more particularly described in the Foreclosure Complaint for the aggregate sum of **$21,501,343.47 as of April 5, 2023, together with lawful interest thereafter on all sums due**, together with costs to be taxed, including lawful counsel fees;

> IT IS on this ___ day of _____, 202_,
>
> ORDERED and ADJUDGED that the Plaintiff is entitled to have the sum of **$21,501,343.47 as of April 5, 2023, together with lawful interest thereafter on the total sum due Plaintiff until the same be paid and satisfied**, together with costs of this suit to be taxed, including attorneys' fees in the sum of $7,500, all to be raised and paid in the first place out of the mortgaged premises; and it is further

Da20 (emphasis added).

Thus, plaintiff's first motion for the entry of a judgment of foreclosure sought a judgment of $21,501,343.47 as of April 5, 2023, which included prejudgment interest at the contract rate, and postjudgment "lawful interest" thereafter. *Id.*

On April 26, 2023, the Office of Foreclosure denied plaintiff's motion because (a) an order striking a co-defendant's answer had not been filed, and (b) the Office required a clarification relating to late charges. Da29. On May 2, 2023, plaintiff refiled Franklin's April 5, 2023 certification of amount due with an amended amount due schedule indicating that no late charges were being sought ("Franklin's Amended April 5, 2023 Certification"). Da37.

On May 10, 2023, plaintiff filed its second motion for the entry of a final judgment of foreclosure, its proposed form of foreclosure judgment, and Franklin's Amended April 5, 2023 Certification. Da40, Da42, and Da45, respectively. The form of judgment was identical to the form of judgment filed by plaintiff with its first motion on April 6, 2023. *Compare* Da19-21 *with* Da42-44.

Thus, plaintiff's second motion for the entry of a judgment of foreclosure also sought a judgment of $21,501,343.47 as of April 5, 2023, which included prejudgment interest at the contract rate, and postjudgment "lawful interest" thereafter. Da43.

On May 19, 2023, Tonnelle filed its objections to plaintiff's motion, which were that the motion was premature and that the calculation of the amount (not the rate) of prejudgment interest was incorrect. Da52-54. Tonnelle did not object to the postjudgment interest rate sought because plaintiff sought "lawful", not contract, postjudgment interest.

On May 24, 2023, the Clerk of the Superior Court entered an administrative order transferring the matter to Hudson County for review by a judge. Da59.

On June 9, 2023, Tonnelle withdrew its objections. Da60.

The judgment with interest after April 5, 2023 at the "lawful interest" rate as requested by plaintiff, together with attorney's fees of $7,500 and costs to be taxed by the Sheriff of Hudson County (the "Sheriff") was entered by Judge Costello on June 9, 2023. Da61. On June 6, 2023, the Sheriff fixed the taxed costs at $540. Da64.

Pursuant to R. 4:42-11, lawful interest for calendar year 2023 was 2.25%. Therefore, the 2023 interest per diem was $1,325.43 ($21,501,343.47 x 2.25% ÷ 365 days) and the total interest due between April 6, 2023 and December 14, 2023 was $335,333.79 ($1,325.43 per diem x 253 days). Accordingly, the judgment amount

as of December 14, 2023, the date of the sheriff's sale, was $21,844,717.26, calculated as follows:

Judgment amount as of 4/5/23	$21,501,343.47
Lawful interest from 4/6/23 to 12/14/23	335,333.79
Taxed costs	540.00
Attorney's fees	7,500.00
	$21,844,717.26

Da85, ¶¶5-6.

Pursuant to N.J.S.A. 2A:17-34 and 35 and R. 4:65-2, sheriffs' posted notices and advertisements "shall state the approximate amount of the judgment." N.J.S.A. 2A:17-34. On August 31, 2023, the Sheriff posted his notice and advertisement of the foreclosure sale pursuant to N.J.S.A. 2A:17-34 and stated that the judgment amount as of the scheduled sale date of September 7, 2023 was $29,563,967.11.[3] Da85-86, ¶7. This sale date was subsequently adjourned. Prior to the December 7, 2024 sale date, the Sheriff posted another notice pursuant to N.J.S.A. 2A:17-34 and stated that the amount due was $25,664,194.21. *Id.* The Sheriff's calculations of both amounts were based on postjudgment interest at the contract rate, not the lawful interest rate set forth in R. 4:42-11. $29,563,967.11 is not "approximately" $21,714,825.12. Da86-87, ¶¶7-8. Nor is $25,664,194.21 "approximately"

[3] Lawful interest from April 6, 2023 to September 7, 2023 totaled $205,441.65 ($1,325.43 x 155 days). Therefore, the judgment amount as of September 7, 2023 was $21,714,825.12 (*i.e.*, $21,501,343.47 + $205,441.65 + $540 + $7,500), not $29,563,967.11.

$21,844,717.26.

The sale occurred on December 14, 2023. There were no bidders other than plaintiff, which was the successful bidder for $100. Da112, ¶16.

On December 26, 2023, the Tonnelle Defendants filed a motion seeking, *inter alia*, the setting aside of the sheriff's sale because (a) the foreclosure judgment fixes the postjudgment interest rate at "lawful interest", not at the contract rate, and (b) the Sheriff's posted notices and advertisements did not include the approximate amount of the judgment and had a negative effect on bidding. Da65, Da70 and Da84.

At the motion hearing on January 22, 2024, Judge Costello denied the Tonnelle Defendants' motion, stating that "this lawful interest versus contract interest is a distinction that has really no effect at all. Lawful interest includes contract interest". T28-19 to 20.[4] She also ruled that the amounts in the Sheriff's notices were not egregious variations from the actual amounts due and did not have a negative effect on the bidding. T27-5 to 28-4. Judge Costello then granted the Tonnelle Defendants' application for a stay, T32-7 to 33-8. The order that she subsequently entered that day provides as follows: "ORDERED that all post-sale proceedings (specifically the delivery of a Deed by the Sheriff of Hudson County) be and hereby are stayed until March 22, 2024 or until such time as Defendants

[4] "T" refers to the transcript of the January 22, 2024 hearing before Judge Costello, which was filed with the Appellate Division on March 12, 2024.

herein file an appeal and move in the Appellate Division for a further stay pending the resolution of the appeal, whichever date is sooner." Da189 (hereinafter the "Sale Confirmation Order").

By the Sale Confirmation Order's express terms, the stay of post-sale proceedings pending the filing of Defendants' appeal would expire when the Tonnelle Defendants filed their notice of appeal of that order and their motion to the Appellate Division for a continuance of the stay, or March 22, 2024, whichever occurred first. *Id.*

On February 14, 2024, plaintiff filed a motion for an order dissolving the stay of post-sale proceedings pending the filing of the Tonnelle Defendants' appeal of the Sale Confirmation Order unless the Tonnelle Defendants posted a supersedeas bond in the amount of $2,500,000 within one business day. Da190.

On February 22, 2024, the Tonnelle Defendants filed a cross motion for an order (a) extending the stay of post-sale proceedings from the date they file their notice of appeal until the final resolution of their appeal, (b) fixing the amount of their supersedeas bond at $645,000, and (c) granting their 60 days to post their supersedeas bond. Da198. They based their calculations of plaintiff's lost interest of $645,000 based upon the lawful interest rate over the next 18 months less the rents plaintiff is receiving from the mortgaged premises. Da202-03, ¶¶7-8.

On March 1, 2024, Judge Costello entered an order (which was not entered on the docket or received by the parties until March 5, 2024) granting plaintiff's motion to dissolve the stay of post-sale proceedings pending the filing of the Tonnelle Defendants' appeal of the Sale Confirmation Order unless they post a supersedeas bond in the amount of $645,000 within one business day. Da210 (hereinafter the "Second Stay Pending the Filing of Defendants' Appeal Order").

On March 1, 2024, Judge Costello also filed an order (which was not entered on the docket or received by the parties until March 5, 2024) granting the Tonnelle Defendants' cross motion extending the stay of post-sale proceedings upon the filing by Defendants of their notice of appeal through to the final resolution of said appeal, fixing the amount of their supersedeas bond at $645,000, and granting them 60 days to post that bond, *i.e.*, until April 30, 2024. Da212 (hereinafter the "Stay Pending Final Resolution of Defendants' Appeal Order").

On March 6, 2024, the Tonnelle Defendants filed their notice of appeal of the Sale Confirmation Order and the Second Stay Pending the Filing of Defendants' Appeal Order. Da214. Therefore, the stay of post-sale proceedings pending the resolution of the Tonnelle Defendants' appeal became effective as of March 6, 2024 pursuant to the express terms of the Stay Pending the Final Resolution of Defendants' Appeal Order.

On March 19, 2024, plaintiff filed its notice of cross appeal of (a) the stay of post-sale proceedings pending the filing of the Tonnelle Defendants' appeal of the Sale Confirmation Order, (b) the fixing of the amount of the Tonnelle Defendants' supersedeas bond in the Second Stay Pending the Filing of Defendants' Appeal Order at $645,000, instead of plaintiffs' requested $2,500,000, and (c) all of the provisions of the Stay Pending Final Resolution of Defendants' Appeal Order. Da220.

On March 26, 2024, plaintiff filed its motion to dissolve stay and compel sheriff to deliver the deed, Da227, which Judge Costello refused to consider and denied on April 12, 2024 because, as a result of the appeals, she lacked jurisdiction. Da405.

On May 1, 2024, plaintiff filed its motion in the Appellate Division to compel sheriff to deliver deed or declare that there is no stay. Da407.

On May 13, 2024, the Tonnelle Defendants filed their cross motion in the Appellate Division to extend the time within which they may post their supersedeas bond to May 20, 2024. Da416.

On May 23, 2024, the Tonnelle Defendants filed their motion in the Appellate Division to extend the time within which they may post their supersedeas bond to June 3, 2024. Da482.

On May 30, 2024, the Appellate Division entered the following three orders:

- Denying plaintiff's motion without prejudice stating that plaintiff "should seek relief from the trial court before requesting relief from this court. The trial court denied the motion to compel the sheriff to act in an April 12, 2024 order because defendants had until April 30, 2024 to post a supersedeas bond." Da508.

- Denying the Tonnelle Defendants' cross motion without prejudice stating that "[t]he request for an extension of time to post a supersedeas bond should be directed to the trial court. The issue may be moot in the event Nationwide Insurance Company issued a bond in the amount of $645,000." Da509.

- Denying the Tonnelle Defendants' motion without prejudice stating "[s]ee May 30, 2024 order on" the Tonnelle Defendants' cross motion. Da510.

On May 31, 2024, plaintiff filed an order to show cause in the trial court to dissolve the stay and compel delivery of the deed. Da511. On June 4, 2024, the trial court converted the order to show cause to a motion returnable on June 20, 2024.

LEGAL ARGUMENT

I. THE POSTJUDGMENT INTEREST RATE IS THE LEGAL RATE PRESCRIBED BY R. 4:42-11(Da188; T28-19 to 20)

A. The Foreclosure Judgment States That The Postjudgment Interest Rate Is The Legal Rate

On two separate occasions, plaintiff submitted its proposed form of final foreclosure judgment requesting that the postjudgment interest rate be "lawful interest." Da20; Da43. After the Tonnelle Defendants withdrew their two objections

to plaintiff's second motion which were unrelated to the postjudgment interest rate, Judge Costello entered the final judgment with the postjudgment interest rate requested by plaintiff, *i.e.*, "lawful interest". Da62. "Lawful interest" means interest at the legal rate prescribed by R. 4:42-11. *See Brinkley v. Western World, Inc.*, 281 N.J. Super. 124, 129-131 (Chan. Div. 1995), *aff'd*, 292 N.J. Super. 134 (App. Div. 1996).

B. Judge Costello's Determination That "Lawful Interest Includes Contract Interest" Was An Error As A Matter Of Law

"Under the doctrine of merger, the mortgage contract is merged into the final judgment of foreclosure and the mortgage contract is extinguished. Thereafter, the mortgage contract interest rate is replaced by the post-judgment rate permitted under the rules of court." *Realty Asset Properties, Ltd., v. Oldham*, 356 N.J. Super. 16, 21 (App. Div. 2002) (internal citations omitted). *See Avatar Capital Finance, LLC v. Nassau Marina Holdings, LLC*, 2022 WL 1495919, at *4 (N.J. App. Div. May 12, 2022)(quoting *Realty Asset*). Thus, "[a]fter entry of [a foreclosure] judgment interest will run at the legal rate except as otherwise ordered by the court and except as may be otherwise provided by law." *Shadow Lawn Sav. and Loan Ass'n. v. Palmarozza*, 190 N.J. Super. 314, 318 (App. Div. 1983) (quoting R. 4:42-11(a)). *See Avatar*, 2022 WL 1495919, at *4 (quoting *Shadow Lawn*).

Indeed, the Supreme Court has recognized that "[i]t has been established practice in New Jersey that after foreclosure, interest runs at the legal rate and not at the rate stated in the bond or mortgage." *Hudson City Sav. Bank v. Hampton Gardens Ltd.*, 88 N.J. 16, 22 (1981) (emphasis added). Thus, it was an error as a matter of law for Judge Costello to determine that "lawful interest versus contract interest is a distinction that has really no effect at all. Lawful interest includes contract interest." It does not.

C. Judge Costello Failed To Consider Whether It Would Be Fair And Equitable To Award Post Judgment Interest At The Contract Rate.

In *Interchange State Bank v. Rinaldi*, 303 N.J. 239 (App. Div. 1997), the Appellate Division reaffirmed that "fixing post-judgment interest at the legal rate is the standard", but that trial courts have the discretion when requested to award a higher rate of interest when such award would be "fair and equitable". *Id*. at 261-64.

Equitable factors to be considered in the trial court's determination of whether to grant a mortgagee's application for postjudgment interest at the contract rate include "whether there was a commercial foreclosure, the contract rate is higher than the legal rate, the mortgagee is over-secured because the mortgagor has sufficient equity in the secured property to pay the principal due and the contract rate, and there is some prejudicial delay", which, when combined, favor the contract rate, and whether "plaintiff submitted the final judgment of foreclosure that expressly

provided for the contract default rate only until entry of judgment, and for post-judgment interest at the legal rate", whether plaintiff did not immediately challenge the judgment or move to modify or correct the postjudgment interest rate in judgment, and whether plaintiff's delay effected the timing of defendant's objection, all of which favor the legal rate. *Avatar*, 2022 WL 1495919, at *6-7 (citing *Interchange*). This list is not exhaustive. The trial court must consider any and all equities supported by the evidence. *Id.* at *7

Here, the equitable factors weighing in favor of the legal rate are the absence of any evidence that Tonnelle is over-secured;[5] plaintiff requested that the postjudgment interest rate be lawful interest, not the contract interest; plaintiff did not immediately challenge the lawful interest rate award in the judgment; and there was no need for the Tonnelle Defendants to object to plaintiff's motion to enter the judgment on postjudgment interest rate grounds because plaintiff did not request contract postjudgment interest in its motion.

To reiterate, "where a court determines to award post-judgment interest under Rule 4:42-11(a) at a rate different than the legal rate, the court must consider and weigh the equities." *Avatar*, at *7 (emphasis added). And, like the trial court in *Avatar* which "abused its discretion by not fully doing so", *id.*, Judge Costello

[5] Had the Tonnelle Defendants had an opportunity to address this issue before Judge Costello, they would have provided proof that Tonnelle was under secured.

abused her discretion by not weighing the equities at all.

Therefore, this Court should reverse Judge Costello's orders; confirm that for purposes of Tonnelle's exercise of its right of redemption of the mortgaged premises, the postjudgment interest rate is the rate prescribed in R. 4:42-11; and direct that a new sheriff's sale be conducted if Tonnelle has not already redeemed the mortgaged premises.

II. THE SHERIFF'S NOTICES OF SALE DID NOT STATE THE APPROXIMATE AMOUNT OF PLAINTIFF'S JUDGMENT (Da188; T27-5 to 28-4)

"The right to redeem was devised by equity to protect [mortgagors] from the forfeiture of [their] title. It is a favored right." *Hardyston National Bank v. Tartamella*, 56 N.J. 508, 513 (1970) (citing *Mansfield v. Hammond*, 117 N.J. Eq. 509, 510 (E. & A. 1935)). Upon the filing of a motion for the hearing of an objection pursuant to R. 4:65-5, the right of redemption is expanded beyond the rule's 10-day period until the entry of an order confirming the sale. *Id*. at 513. Courts have the inherent equitable power to determine the correct redemption amount. *See Morsemere Fed. Sav. & Loan Ass'n. v. Nicolaou*, 206 N.J. Super. 637, 645 (App. Div. 1986); *Little Falls Sav. and Loan Ass'n. v. Chas. O. Holmberg & Sons, Inc.*, 165 N.J. Super. 93, 95 (Chan. Div. 1978).

N.J.S.A. 2A:17-34 mandates that the sheriff's published notices and advertisements "shall state the approximate amount of [plaintiff's] judgment."

(Emphasis added). The definition of "approximate" is "nearly correct or exact". www.meriam-webster.com/dictionary/approximate, last visited May 10, 2024. The Sheriff's August 31, 2023 notice and advertisement pursuant to N.J.S.A. 2A:17-34 stated that the judgment amount as of the scheduled sale date of September 7, 2023 was $29,563,967.11. Da85-86, ¶7. However, the actual amount of plaintiff's judgment as of that date was $21,714,825.12. $29,563,967.11 is not nearly correct or exact to $21,714,825.12.

The Sheriff's notice of sale for the December 14, 2023 sale stated that the judgment amount as of December 14, 2023 was $25,664,199.21. *Id.* However, the actual amount of plaintiff's judgment as of that date was $21,844,717.26. $25,664,199.21 is not nearly correct or exact to $21,714,825.12.

Courts also have "the inherent power to set aside a sale or to order redemption when there is an independent ground for equitable relief, 'such as fraud, accident, surprise, irregularity [or impropriety] in the sale and the like.'" *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 164 (App. Div. 1967) (quoting *Penn Federal Savings and Loan Ass'n. v. Joyce*, 75 N.J. Super. 275, 278 (App. Div. 1962)). *See also Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 317 (App. Div. 2002). Additional grounds include the equitable doctrine of mistake. *Crane v. Bielski*, 15 N.J. 342, 347-48 (1954).

Here, the accident, irregularity, impropriety and/or mistake in the sale was the

posting and advertising by the Sheriff of the incorrect judgment amounts of $29,563,967.11 as of the September 7, 2023 sale date and $25,664,194.21 as of the December 14, 2023 sale date, neither of which was "approximately" the actual amount due on those dates of $21,714,825.11 and $21,844,717.26, respectively. Therefore, both were in violation of N.J.S.A. 2A:17-34. These accidents, irregularities, improprieties and/or mistakes may have negatively affected prospective bidders and resulted in a sale for less than the premises' highest and best price as of that date. *See Burger v. Dumas*, 25 N.J. Super. 473, 476 (Law Div. 1953) (sheriff sale set aside because sheriff erroneously announced existence of a judgment lien and failed to disclose amount due on mortgage, thereby "thwarting competitive bidding"); *In re Ryker*, 301 B.R. 156, 167 (D.N.J. 2003) (citing *Burger*). Pursuant to R. 4:65-5, the court cannot confirm a sale if it is not "satisfied that the real estate was sold at its highest and best price at the time of the sale".

Instead of applying the statutory "approximate" mandate, Judge Costello created her own statutory criteria, *i.e.*, even though the published amounts were not approximately the correct amounts, they were not such "egregious variation[s] from the actual number[s] that it put a chilling effect on bids." T27-1 to 2. That however, is not the statutory mandate of N.J.S.A. 2A:17-34. "[T]he Legislature understood and understands its obligations for the notice from which the selling officer may not depart…." *Fidelity Union Bank v. Trim*, 210 N.J. Super. 476, 478-79 (App. Div. 1986).

Judge Costello was required to apply the law as written, not as she wished it to be, and her application of the wrong criteria was reversible error as a matter of law. *See Frugis v. Bracigliano*, 177 N.J. 250, 280 (2003) (citing *Cornblatt v. Barrow*, 153 N.J. 218, 231 (1998) ("If the language is plain and clearly reveals the statute's meaning, the Court's sole function is to enforce the statute according to its terms."). Nor was there any factual basis in the record for her to conclude that the excessive amounts in the notices did not put a chilling effect on the bids.

Therefore, this Court should reverse Judge Costello's order; confirm that for purposes of Tonnelle's exercise of its right of redemption of the mortgaged premises, the postjudgment interest rate is the rate prescribed in R. 4:42-11; and direct that a new sheriff's sale be conducted if Tonnelle has not already redeemed the mortgaged premises.

III. THE REQUIREMENT IN THE SECOND STAY PENDING THE FILING OF DEFENDANTS' APPEAL ORDER THAT THE TONNELLE DEFENDANTS POST A SUPERSEDEAS BOND IN ONE BUSINESS DAY WAS MANIFESTLY UNREASONABLE (Da210)

Judge Costello abused her discretion in conditioning a stay upon the posting of a supersedeas bond by the Tonnelle Defendants in one business day because the deadline was impossible for the Tonnelle Defendants to comply with and, thus, it was manifestly unreasonable. *See State v. Hayes*, 205 N.J. 522, 539 (2011)(quoting

Smith v. Smith, 17 N.J. Super. 128, 132 (App. Div. 1951), *certif. denied*, 9 N.J. 178 (1952); *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2022).

CONCLUSION

For all of the foregoing reasons, the Tonnelle Defendants respectfully request that this Court reverse Judge Costello's orders; confirm that for purposes of Tonnelle's exercise of its right of redemption of the mortgaged premises, the postjudgment interest rate is the rate prescribed in R. 4:42-11; and direct that a new sheriff's sale be conducted if Tonnelle has not already redeemed the mortgaged premises.

June 7, 2024

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#841385

FILED, Clerk of the Appellate Division, July 09, 2024, **A-001979-23**

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-001979-23

SB PB VICTORY, L.P.,

Plaintiff-Respondent/ Cross-Appellant,

—against—

TONNELLE NORTH BERGEN, LLC, THOMAS F. VERRICHIA, UNITED CANDY & TOBACCO INC., NORTHWEST EXPLOSIVES CORP., and PERSISTENT CONSTRUCTION, INC.,

Defendants-Appellants.

CIVIL ACTION

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, EQUITY PART HUDSON COUNTY DOCKET NO. SWC-F-0013346-22

SAT BELOW: HON. MARY K. COSTELLO, J.S.C.

BRIEF FOR PLAINTIFF-RESPONDENT/CROSS-APPELLANT

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PRELIMINARY STATEMENT

In a thinly-veiled attempt to hold onto, wrongfully, property to which they are no longer entitled, defendants Tonnelle North Bergen, LLC ("Borrower") and Thomas F. Verrichia ("Verrichia," together with Borrower, "Defendants" or "Appellants") cry foul at the logistics of a sheriff's sale. The sale produced a lawful bidder and was confirmed by the court below. Grasping at straws, Defendants have made a last-ditch effort to appeal the lower court's confirmation of the sheriff's sale by arguing that "lawful interest" must be construed as post-judgment interest under R. 4:42-11 and that the sheriff's foreclosure sale notice failed to state the "approximate" amount of the judgment. However, both of these arguments are unfounded in both law and in fact. Accordingly, Defendants' appeal must be dismissed.

PROCEDURAL HISTORY

This litigation arises out of Borrower's default on certain obligations under a promissory note and loan agreement, leading plaintiff SB PB Victory, L.P. ("Plaintiff" or "Respondent") to seek foreclosure on a mortgage (the "Mortgage") in the original principal amount of $17,221,780.00. The Mortgage encumbers certain real property known as 7408-7416 Tonnelle Avenue, North Bergen, New Jersey, and the buildings and improvements located thereon. Da193.

Defendants disputed certain events of default noticed by Plaintiff and commenced an arbitration. Da5. On April 23, 2022, the arbitrator (the "Arbitrator") in this underlying arbitration between Defendants and plaintiff SB PB Victory, L.P. ("Plaintiff"), AAA Case No. 01-20-0015-8668 (the "Arbitration"), issued the Phase I Interim Award wherein the Arbitrator "[found] in favor [Plaintiff] on its claim for breach of Note against [Borrower] and for breach of the Guaranty against Verrichia." Da427; Da453.

On November 7, 2022, the Arbitrator entered the Order on Plaintiff's Request for Notarization of Interim Award and for Clarification Regarding Default Interest ("Default Interest Order"), in the Arbitration following the Phase I Interim Award. In the Default Interest Order, the Arbitrator ruled that Plaintiff was "entitled to default interest for the entire time period past the maturity date, regardless of when that occurs, including the post-award or post-judgment periods." Da427; Da463.

On December 9, 2022, Plaintiff filed a Verified Complaint in Foreclosure since foreclosure is a judicial remedy in New Jersey and the Arbitrator could not award foreclosure on a mortgage as a matter of law. Da1; Da6.

On February 22, 2023, Plaintiff and Defendants jointly filed the Stipulation and Judgment Confirming Arbitration Award in the United States District Court of the Eastern District of Pennsylvania (No. 2:22-CV-05043) ("First Stipulation Confirming Award"). The First Stipulation Confirming Award states:

> The judgment is entered jointly and severally against Tonnelle North Bergen, LLC and Thomas F. Verrichia in the principal sum of $16,573,835.18 ("Principal Sum"), plus pre-judgment interest commencing December 1, 2020 through January 5, 2022 in the amount of $2,762,141.11, plus post award and post judgment interest on the Principal Sum at a rate of 15% per annum commencing on January 6, 2022 until payment.

Da428; Da470. The 15% post-judgment rate awarded by the Arbitrator is the default rate under the Mortgage.

Though sequentially out of order to note this here, the Arbitrator continued with the next phase of the Arbitration and again consistently awarded an amount including interest at the default rate of 15% (the "Phase II Final Award"; together with the Phase I Final Award, the "Arbitration Awards"). In key language, the Phase II Final Award states: "THE TOTAL AWARD IN THIS PHASE II FINAL AWARD IS: $5,127,443.48, plus post-award and post-confirmation interest at the Default Rate as calculated at the time of confirmation of the award." Da428; Da478. The Phase II Final Award with post-award interest in the amount of 15% per annum from June 20, 2023 until judgment is satisfied was subsequently confirmed by the court in the Eastern District of Pennsylvania, who then entered judgment against Defendants on November 30, 2023. Da428-29; Da480 (the "Second Stipulation Confirming Award"; together with the First Stipulation Confirming Award, the "Award Judgments").

On May 10, 2023, Plaintiff moved for final judgment, also filing, in support, the Certification of Amount Due of Mark Franklin where he identified the full amount of the Arbitration Award together with all post award interest as awarded by the Arbitrator and seeking post judgment interest at the contract rate for the post judgment period. Da104; Da40, Da 42, Da45. Defendants subsequently filed an objection on May 19, 2023 but later withdrew the objection. Da104; Da63.

On June 9, 2023, the court below entered a final judgment in foreclosure (the "Final Judgment") that directed the delivery of a deed to the highest bidder upon the bidder's tender of the purchase price at the closing following a judicial sale of the Premises held pursuant to that judgment. Da61. On June 23, 2023, a writ of wxecution was issued pursuant to the valid foreclosure judgment.[1] Pa1.

Pursuant to the Writ, the Sheriff of Hudson County (the "Sheriff") noticed and scheduled the sale for September 7, 2023. Da95; Da100. However, Defendants exercised their two (2) statutory adjournments and the sale was rescheduled for November 2, 2023. Da110.

On the day before the scheduled sale, Borrower and Verrichia sought an emergency stay, representing that they would refinance imminently and pay the

[1] No copy of the writ of execution is included in the Defendants' appendix. Defendants do not dispute the issuance of a writ of execution for the Property. Had one not been issued, it can be presumed that Defendants would have challenged the Sheriff's sale as unauthorized because of the absence of a writ of execution. It should be noted that the court below stated (in its factual summary of the case in the January 22, 2024 hearing whose transcript has been filed with the record) that a writ of execution had been issued.

foreclosure judgment amount (the "Judgment Amount"). On the basis of that representation, the court below stayed the sale to December 14, 2023. Da110-11.

On the morning of the adjourned scheduled sale date of December 14, 2023, counsel for Borrower and Verrichia contacted counsel for Plaintiff in the action below to request yet another adjournment, claiming another imminent refinance closing. Plaintiff did not believe them and noted to them that the Borrower retained its statutory redemption right. Da111-12.

The sale occurred on December 14, 2023 and Plaintiff was the winning bidder in the amount of $100.00. Da250; Da275. Plaintiff has requested that the Sheriff's deed (the "Deed") be executed in favor of SB PB Tonnelle, LLC ("Plaintiff's Designee").

On December 26, 2023, the day of the expiration of the redemption period, Borrower and Verrichia filed another emergency motion (the "Sale Objection") to object to confirmation of the sale and to stay delivery by the Sheriff of the foreclosure deed (the "Deed"). They claimed yet another imminent loan closing that would facilitate payment of the Judgment. Plaintiff opposed the Sale Objection, citing the historic failure of Defendants to close refinancing transactions. Da244.

Plaintiff proved prescient. The refinancing transaction did not close, and on January 22, 2024, after the hearing, the Court overruled the Sale Objection, issuing a written order (the "Sale Confirmation Order"). Upon the Court's decision,

Verrichia orally moved for a stay of the Sale Confirmation Order. The Court granted that stay on terms and conditions set forth in the Sale Confirmation Order but did not require the posting of a supersedeas bond for the stay. The terms and conditions of the Sale Confirmation Order included the following language typed in by the court below at the bottom of the last page of that order:

> IT IS FURTHER ORDERED that all post-sale proceedings (specifically the delivery of a Deed by the Sheriff of Hudson County) be and hereby are stayed until March 22, 2024 or until such time as Defendants herein file an appeal and move in the Appellate Division for a further stay pending the resolution of the appeal, whichever date is sooner. Da189.

In his reply certifications on the Sale Objections, Verrichia claimed that a refinance closing would occur by February 9, 2024. Consistent with the record of futility until then, that did not happen. Da196.

Plaintiff moved to dissolve the stay contained in the Sale Objection Order and also asked that any supersedeas bond not be less than $2,500,000.00. In response to that motion, the Court issued an order dated March 1, 2024 (the "First Stay Continuation Order"). The First Stay Continuation Order required a supersedeas bond of only $645,000 within one business day of the Stay Continuation Order and provided that its posting would preserve the "stay" (quotes of the court below) granted in the Sale Confirmation Order. In addition, on the same date, the Court issued a separate order (the "Second Stay Continuation Order") that (a) set the supersedeas bond amount at $645,000; (b) gave Borrower and Verrichia sixty days

to post the $645,000 supersedeas bond; and (c) stated that "The stay pending the filing by Defendants of their notice of appeal is hereby extended from the date they file their notice of appeal until the final resolution of Defendants' appeal." Da210-13.

On March 6, 2024, Defendants filed their notice of appeal. Da214. On March 19, 2024, Plaintiff filed its notice of cross appeal. Da220.

The Sheriff on or about March 7, 2024 informed counsel below for Plaintiff that the Deed was prepared and awaiting the Sheriff's signature. However, on March 12, 2024, the Sheriff's Office informed counsel for Plaintiff as follows: "Based upon the attached the Sheriff's office will not issue the deed for the property in question until there is a further order of the court." Da247. The "attached" was an attachment to an email that included a letter from counsel for Borrower and Verrichia and, inter alia, copies of the Sale Objection Order and the Second Stay Continuation Order. Da250.

On March 26, 2024, Plaintiff filed a motion with the court below for an order to compel the Sheriff to deliver the Deed or in the alternative, declare that there is no stay (the "Motion to Dissolve the Stay"). Da227. After the Motion to Dissolve the Stay was fully briefed, the lower court heard oral arguments on April 12, 2024 and entered an order denying the motion on April 15, 2024. Da405.

On May 1, 2024, Plaintiff filed a Motion for an Order to Compel the Sheriff to Deliver the Deed or in the Alternative, Declare That There is no Stay in this Court. Da407. On May 13, 2024, Defendants filed its objection and filed a Cross-Motion to Extend Time to Post Supersedeas Bond. Da416. Plaintiff then filed its objection to the cross-motion on May 22, 2024. On May 23, 2024, Defendants filed another motion to extend the time to post their supersedeas bond with this Court. Da482. On May 30, 2024, the Appellate Division denied Defendants' requests for extensions and ordered that requests for extension of time to post the supersedeas bond "should be directed to the trial court." Da509.

On May 31, 2024, Plaintiff filed an Order to Show Cause to dissolve the stay and compel delivery of the deed. Da511. On June 4, 2024, the trial court converted Plaintiff's Order to Show Cause to a motion returnable on June 20, 2024. Pa12. On June 12, 2024, Defendants filed their opposition and a cross-motion requesting an extension of the stay and the time to post their supersedeas bond. Pa14. On June 20, 2024 the lower court denied Defendants' cross-motion holding that "the passage of time demonstrates that inability or unwillingness of the movant to post the bond that was the subject of prior orders. Moving party has squandered the stay period and never posted the bond." Pa39. On the same date, Judge Costello granted Plaintiff's Order to Show Cause similarly noting that "[t]he original stay period and two subsequent extensions have been squandered by the cross-movant who is either

unable or unwilling to post the bond." Pa41. Defendants applied for emergent relief with this Court on June 27, 2024, which was immediately denied. In its disposition, the Appellate Division held that "the emergency is self-generated, given that no good explanation has been offered for the delay." Pa43.

Though technically not part of the record, the following are recent facts Plaintiff submits are appropriate to disclose to the Court. The Sheriff delivered the Deed to Plaintiff on July 3, 2024. Plaintiff has submitted the Deed for recording by overnight mail package transmitted to the Hudson County Register on July 3, 2024; the package arrived there on Friday, July 5, 2024. Plaintiff has received verbal confirmation from the Hudson County Register's office that it has received the Deed and that by July 12, 2024 Plaintiff can expect that the Deed will have been recorded.

LEGAL ARGUMENT

POINT I

THE "LAWFUL INTEREST" AWARDED BELOW WAS CORRECT AND INCLUDES THE CONTRACT RATE (January 22, 2024 T13-T17; Da47-48)

Defendants argue that the "lawful interest" referenced in the Final Judgment refers only to post-judgment interest as prescribed in R. 4:42-11 and that the lower court erred in finding that "lawful interest versus contract interest is a distinction that has really no effect at all. Lawful interest includes contract interest." Brief of Defendants-Appellants Tonnelle North Bergen, LLC, and Thomas F. Verrichia

("Defendants' Brief") at 17. However, Defendants misrepresent the current law on "lawful interest" as used in the Final Judgment as set forth below.

A. The Default Rate Post-Judgment Was Properly Awarded by the Arbitrator. (January 22, 2024 T15; Da47-48)

The Arbitrator properly awarded interest through the date of payoff at the default rate under the Mortgage. Not only did Defendants not challenge that; the Award Judgments (court judgments) confirmed that Plaintiff was entitled to post-judgment interest at the default rate. Defendants cannot now challenge Arbitrator's award of post-judgment interest at default rate.

Defendants improperly attempt to challenge the Arbitration Awards, which were stipulated to by both parties and have been confirmed by a federal court through the Award Judgments. As courts in this jurisdiction have consistently held, parties "cannot raise a challenge to the arbitration award for the first time on appeal. If [Defendants] wanted to preserve a right to appeal based on a challenge to the arbitration award, [they] should have first raised that challenge in the trial court." *K.V.H. v. W.S.H.*, No. A-1494-16T1, 2018 WL 4623385, at *4 (N.J. App. Div. Sept. 27, 2018). "[W]e have expressly held that parties are not 'entitled to create an avenue of direct appeal to this court' from an arbitration award when the parties have failed to challenge the award in the trial court." *Id.* at 135 (citing *Hogoboom v. Hogoboom (n/k/a Grimsley)*, 393 N.J. Super. 509, 515 (App. Div. 2007)).

In addition to Defendants' failure to challenge the Arbitrator's award of default interest, the court is limited in its ability to review an arbitrator's findings. *Minkowitz v. Israeli,* 433 N.J. Super. 111, 134 (App. Div. 2013) ("[W]hen binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends."). Moreover, "[i]t also is well settled that 'there is a strong preference for judicial confirmation of arbitration awards.'" *Id.* (quoting *Linden Bd. of Educ. v. Linden Educ. Ass'n*, 202 N.J. 268, 276 (2010)).

Moreover, Defendants are precluded from challenging the propriety of the underlying Award Judgments, which included default interest as the lawful interest rate, under res judicata and collateral estoppel. "Res judicata…serves the purpose of providing finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusions and uncertainty; and basic fairness. The principle contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." *Wadeer v. N.J. Mfrs. Ins. Co.*, 220 N.J. 591, 606 (2015) (cleaned up).

In a case such as here where parties had a full opportunity to litigate the interest rate in the Arbitration below, the final "arbitration award can have a res judicata or collateral estoppel effect in subsequent litigation." *Habick v. Liberty Mut. Fire Ins. Co.*, 320 N.J. Super. 244, 256 (App. Div. 1999); *see also State v. Gonzalez*,

75 N.J. 181, 186 (1977) ("Collateral estoppel is that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action."). In the Arbitration, "the Parties confirmed that they were provided a full and fair opportunity to present their evidence by examining and cross-examining all fact and expert witnesses and introducing hundreds of exhibits." Da433. Because "[a]rbitration is a favored form of dispute resolution…courts grant arbitration awards considerable deference." *Borough of E. Rutherford v. E. Rutherford PBA Local 275*, 213 N.J. 190, 201 (2013).

Therefore, Defendants are precluded from challenging the Award Judgments holding that the default interest rate is the lawful interest rate. Accordingly, since the default interest rate has been determined to be the "lawful interest" rate here, the calculation by the Sheriff of a judgment amount based on the default rate necessarily is an approximate judgment amount. For this reason alone, Defendants' claim that the sale should be set aside because of a Sheriff notice error based on the amount due must fail.

B. Case Law Warrants Award of Default Interest Post-Judgment. (January 22, 2024 T16-T17; Da109-111)

Even had the Arbitrator not awarded Plaintiff post-judgment interest at the default rate (confirmed by the Award Judgments), Plaintiff is entitled to it here. This

is based on settled case law regarding the appropriateness of awarding post-judgment interest at the default rate.

Although the legal rate in R. 4:42-11 is often used in foreclosure actions, "where [the borrower parties] expressly stated in the trial court that they intended to…appeal and seek a stay of enforcement of the judgment by reason thereof," the contract rate is appropriate because "the mere fact [a mortgagee] has succeeded and been awarded judgment should not necessarily confer a benefit on [borrower parties] by reducing their interest rate." *Avatar Cap. Fin., LLC v. Nassau Marina Holdings, LLC*, No. A-0423-20, 2022 WL 1495919, at *5 (N.J. Super. App. Div. May 12, 2022). As detailed by the court in *Avatar*, R. 4:42-11(a) grants the court "the right…to set a post-judgment interest figure at a different rate than that provided in the rule if [the court] finds particular equitable reasons for doing so." *Id.* (quoting *R. Jennings Mfg. Co. v. N. Elec. Supply Co.*, 286 N.J. Super. 413, 418 (App. Div. 1995)). "Relevant to the inquiry, a court must 'scrutinize the conduct of both parties subsequent to the initial entry of judgment,' including 'what actions the judgment creditor took or could have taken to obtain satisfaction of the judgment sooner and what, if anything, the judgment debtor did to forestall such satisfaction." *Id.* (quoting *R. Jennings,* 286 N.J. Super. at 418) (cleaned up). The *Avatar* court further cited another case where 'we rejected a trial court determination that a post-judgment interest award is limited to the legal rate set forth in Rule 4:42-11(a). We noted that

'when the legal rate is less than the contract rate it may be equitable to allow interest to run on the judgment at the contract rate to avoid prejudice to a mortgagee caused by delays in satisfying the judgment.'" *Id.* (quoting *Interstate State Bank v. Rinaldi*, 303 N.J. Super. 239, 260-61 (App. Div. 1997)).

The significance of this is the following. Defendants in their appellate brief at page 10 acknowledge: "The Sheriff's calculations of both amounts were based on post judgment interest at the contract rate, not the lawful interest rate set forth in R. 4:42-11." This includes the $25,664,194.21 included in the notice posted closest to the sale date. *Id.* Since the court below concluded that the contract rate is the lawful rate, that renders the $25,664,194.21 figure correct so long as Plaintiff is entitled to the contract rate. For the reasons set forth above based on the decision in *Avatar*, *supra*, Plaintiff in fact is entitled to the contract rate.

This is because the instant case is a textbook example of when the contract rate should be applied rather than the legal rate. Throughout the post-foreclosure judgment period of this litigation, Defendants have been adopting every tactic to delay the sale and then to delay enforcement of the sale.

They exercised both adjournments. They requested payoff statements seventeen times. They promised refinancings that have been 'delayed" multiple times. They opposed confirmation of the sale based on claims of impending refinancings that did not materialize. They sought and obtained stays of the Sale

Confirmation Order and delivery of the Deed by requesting a stay conditioned on the delivery of a supersedeas bond. They failed to deliver the bond multiple times despite requests for extensions of time to deliver the bond (during which time the delivery of the Deed was stayed without the posting of a bond). This prompted the court below to issue its June 20, 2024 order dissolving the stay and compelling delivery of the Deed. Pa40. [2]

The Court should not permit Defendants to get a windfall by reducing the rate Borrower must pay from the contract default rate down to the legal rate under these inequitable circumstances. This is particularly so where the lower court recently found that Defendants had "squandered the stay period." Pa39. In essence, the court below reached the same conclusion in finding that lawful interest equaled the contract interest.

Moreover, Defendants do not dispute that the certification of amount due of Plaintiff noted the $6,905.76 per diem, at the default rate. Nor can they, as the basis of this entire action lies with the underlying Arbitration wherein the Arbitrator ruled that Plaintiff is "entitled to default interest for the entire time period past the maturity date, regardless of when that occurs, including the post-award or post-judgment periods." Da463. The Arbitrator consistently held, and the district court confirmed,

[2] As noted above, Respondent has submitted the Deed for recording.

that Plaintiff was entitled to interest at the default rate through the date of redemption. Da430-81.

Based on this rate, the Final Judgment—as entered—and the writ of execution—as issued—all made clear that the "lawful rate" is the "contract rate."

In addition, Defendants previously objected to entry of a foreclosure judgment based on the amount due certification but that objection subsequently was "withdrawn" (as the court below noted in the entry of Final Judgment). Da63. Defendants cannot engage in a slew of delaying steps based on a claim that the judgment does not include post-judgment interest at the default rate when they themselves withdrew their own objection to the inclusion of post-judgment interest at the default rate.

It is proper for the default rate to be the rate at which interest continues to accrue, given that the delays in conducting and finalizing the Sheriff sale have come about through Defendants' actions, as noted by the Order. Pa39. This is all the more so given that the contract rate through redemption is that to which the Arbitrator has found Plaintiff to be entitled. If Defendants had paid the redemption amount instead of failing to do so after promising that to the court below and to Plaintiff, this appeal would not be pending.

C. Defendants Abandoned Any Challenge to the Default Rate as the Post-Judgment Rate. (January 22, 2024 T13-T14; Da47-48)

As noted above, Defendants withdrew their objection to the Franklin Certification in support of the Final Judgment, in which Mr. Franklin asserted that post-judgment interest at the default rate was owing based on the confirmed arbitration award. They cannot now raise an objection to a sheriff sale notice based on a judgment amount to which they withdrew their objection. As the Court below noted: "This matter when it went to final judgment did so uncontested. Whatever objection was crafted at the time was later withdrawn. And that was almost a year ago." January 22, 2024 T27-1-T27-4. As the court below further noted, "The post-judgment per diem interest from my view is an issue to be resolved at the time of final judgment. And more importantly, as counsel pointed out, it was the result of an arbitrator's decision in this case. So I don't think it was really vulnerable to any attack. So that's sort of a, you know, comfort for the fact that there was no serious objection at the time of final judgement." January 22, 2024 T28-9-T28-16.

Defendants in their brief do not cite any legal basis for a contention that these conclusions by the court below were erroneous. This is because they cannot.

The Award Judgments awarded post-judgment interest at the default rate. Defendants withdrew their challenge to the final judgment including post-judgment interest at the default rate. The sheriff sale notice contained an amount that is an approximation of the judgment amount calculated correctly using the arbitration-

awarded, objection-withdrawn default rate as the post-judgment rate. The Defendants, having withdrawn their objection to the Final Judgment awarding the default rate as the post-judgment rate, cannot challenge a sale conducted on the basis of the approximate judgment amount reflecting that to which they withdrew their objection.

POINT II

DEFENDANTS CANNOT SHOW THAT THE JUDGMENT AMOUNT NOTICED BY THE SHERIFF AFFECTED THE SALE OUTCOME ADVERSE TO DEFENDANTS (January 22, 2024 T14-T15)

A. The Sheriff's foreclosure sale notice stated a properly "approximate" amount of the judgment. (January 22, 2024 T14-T15, T21)

Contrary to Defendants' arguments, the Sheriff's notice for the December 14, 2023 sale complied with N.J.S.A. 2A:17-34, which requires the notice to "state the approximate amount of the judgment or order sought to be satisfied by the sale." As already discussed at length, the Final Judgment for purposes of the sale notice was "the aggregate sum of $21,501,343.47 as of April 5, 2023, together with lawful interest thereafter on all sums due, together with costs to be taxed, including lawful counsel fees." Da62 (emphasis added). Therefore, it is disingenuous for Defendants to continuously assert that any posted amount was anything other than "approximate" to the judgment amount. The Sheriff's notice for the December 14, 2023 sale listed the judgment amount as $25,664,194.21 (Da100), which is legitimately "approximate" to the Final Judgment as stated above. *Contrast Wells*

Fargo Bank, N.A. v. Young, No. A-1124-17T2, 2019 WL 1568090, at *2 (N.J. App. Div. Apr. 11, 2019) (finding a 22% delta to be "not 'nearly correct' or 'close in value' to constitute an 'approximate' amount").

This is particularly so here where the judgment amount in the Sheriff notice was calculated on a premise of an award of post-judgment interest at the default rate. That in turn was consistent with the First Stipulation Confirming Award that is one of the Award Judgments giving rise to Plaintiff's entitlement to post-judgment interest at the default rate. This renders even more appropriate the conclusion that the noticed amount by the Sheriff was a legally satisfactory approximation of the judgment amount.

B. Defendants fail to offer any evidence of "fraud, accident, surprise, irregularity" to overturn the Sheriff's sale. (January 22, 2024 T21)

Although Defendants offer the legal proposition that courts have the "inherent power to set aside a sale or to order redemption when there is an independent group for equitable relief, 'such as fraud, accident, surprise, irregularity [or impropriety] in the sale and the like," (Defendants' Brief at 20), Defendants fail to connect this holding to the facts of this case. As argued above, the Sheriff's posted judgment amount was properly approximate to the Final Judgment amount. This is especially so when one considers that the Sheriff's posted judgment amount was consistent with the amount reflecting the Arbitrator's award of post-judgment interest at the default rate confirmed in the Award Judgments. As such, the sale is valid and cannot

be overturned on the grounds Defendants request. Certainly, there has been no attempt by Defendants to make any factual showing of any kind to support a finding of fraud, accident, surprise, or irregularity in the posting of the judgment amount. Accordingly, the sale cannot be re-conducted on this unjustified basis.

C. The posted sale amount had no adverse effect on the sale outcome. (Not raised below)

Furthermore, Defendants failed to produce or present any evidence that anyone was dissuaded from appearing and bidding at the sale because of the amount set forth in the Sheriff's sale notice. Bidders bid based on perception of value of the property, not the notice's statement of the judgment amount. The judgment amount appearing in the sale notice is simply relevant to determine the maximum credit bid that the Plaintiff may make or the amount of the proceeds from the sale to which the Plaintiff is entitled. It does not affect a rational bidder's determination of the value of the property being sold and thus cannot rationally be held to have affected bidding strategy.

This is why, as the Supreme Court has noted, 89% of sheriff sales result in "nominal bid acquisitions ($300 or less) by the mortgagee." *Carteret Sav. & Loan Ass'n, F.A. v. Davis*, 105 N.J. 344 (1987). Defendants have not proffered any evidence to indicate that the reality noted by the Supreme Court in *Carteret* has changed since that decision was issued. Further, Defendants have not proffered any

evidence to show that the extremely rare deviance from this result would have been obtained here.

Defendants do not identify any bidders who contacted them or who appeared at the sale. At the time the sale occurred, and the redemption amount was computed, the advertised judgment amount was only 7% over the redemption amount. The advertisement need only state the "approximate" amount of the judgment. And, since for the reasons above, the amount in the notice is actually correct, all the more so the Defendants' appeal is without merit. [3]

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court dismiss Defendants' appeal and affirm the lower court's January 22, 2024 order confirming the sale and further determine that no stay of delivery of the Deed by the Sheriff remains in place.

[3] Plaintiff cross-appealed from the First and Second Stay Continuation Orders. Those orders granted a stay pending appeal conditioned on posting timely a supersedeas bond that the court below set in the amount of $645,000.00. Plaintiff contended that the bond amount should be higher and that the stay of delivery of the Sheriff's Deed should be dissolved. Defendants failed to post the bond and the stay was dissolved. The Sheriff delivered the Deed, which Plaintiff has submitted for recording. This moots Plaintiff's cross-appeal and therefore Plaintiff has not addressed its own cross-appeal.

Dated: July 8, 2024

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SB PB VICTORY, L.P., Plaintiff, v. TONNELLE NORTH BERGEN, LLC, THOMAS F. VERRICHIA, UNITED CANDY & TOBACCO INC., NORTHWEST EXPLOSIVES CORP., AND PERSISTENT CONSTRUCTION, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-00197-23 Civil Action On Appeal From: Superior Court of New Jersey Chancery Division, Equity Part Hudson County Docket No. SWC-F-0013346-22 Sat below: Hon. Mary K. Costello, P.J.Ch.

REPLY BRIEF OF DEFENDANTS – APPELLANTS/CROSS RESPONDENTS TONNELLE NORTH BERGEN, LLC, AND THOMAS F. VERRICHIA

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PRELIMINARY STATEMENT

Defendant Tonnelle North Bergen LLC ("Tonnelle") is the owner of certain commercial property on Tonnelle Avenue in North Bergen, New Jersey. Plaintiff SB PB Victory, L.P., is Tonnelle's mortgagee and defendant Thomas F. Verrichia ("Verrichia") is Tonnelle's manager and guarantor of Tonnelle's promissory note. In this appeal, Tonnelle and Verrichia (the "Tonnelle Defendants") challenge the confirmation of the sheriff's sale of the mortgaged premises to plaintiff for $100 by the Honorable Mary K. Costello, P.J.Ch., based upon her determinations that (a) there is no distinction between "lawful postjudgment interest" and "contract postjudgment interest", and (b) the mandate of N.J.S.A. 2A:17-34 that a sheriff's foreclosure sale notice state the "approximate" amount of the judgment can be satisfied by a notice that states an amount that is not an "egregious variation" of the actual amount due.

As set forth herein, plaintiff's arguments that "lawful interest" includes "contract interest" and that the amounts due in the the foreclosure sale notices (which were 37% and 17% higher than the actual amounts due) nevertheless satisfied the "approximate" amount requirement are without merit and, accordingly, this Court should reverse Judge Costello's orders; direct that a new sheriff's sale be conducted; and confirm that, for purposes of calculating the amount due under the foreclosure

judgment for the sheriff's sale and for Tonnelle's exercise of its right of redemption, the postjudgment interest rate is the legal rate prescribed by R. 4:42-11.

REPLY STATEMENT OF FACTS

A. Plaintiff Did Not Request That Judge Costello Award Post-Mortgage Foreclosure Judgment Interest At The Contract Rate

The fundamental factual bedrock of plaintiff's opposition to the Tonnelle Defendants' appeal is that, in the two certifications of amounts due of Mark Franklin ("Franklin"), plaintiff's authorized signatory, and in plaintiff's two forms of judgment, plaintiff sought "post [foreclosure] judgment interest at the contract rate for the post [mortgage foreclosure] judgment period". Pb 4 (citing Da104, ¶8; Da40; Da42; and Da45). *See also* Pb17. However, as set forth below, this is simply not true and it is inappropriate for plaintiff to attempt to convince this Court otherwise in reliance upon the illusory truth effect, *i.e.*, that the more plaintiff repeats something that is not true, the greater the likelihood that it will be believed.

On April 6, 2023, plaintiff filed its motion for the entry of a final judgment of foreclosure against Tonnelle. Da17. In his April 5, 2023 supporting certification of amount due, Franklin certified that an arbitrator had determined that the principal amount due to plaintiff based on the underlying loan agreement and promissory note was $16,573,835.18 plus pre arbitration award interest at the 15% contract rate of interest through January 5, 2022 in the amount of $2,762,141.11, for a total due as of January 5, 2022 of $19,335,976.29, together with a per diem of $6,905.76 based

on the 15% contract interest rate. Da24-25, ¶18. Franklin also certified that the additional interest at the 15% contract interest rate from January 6, 2022 to April 5, 2023 was $3,142,122.92, and that, as of April 5, 2023, plaintiff had received rents totaling $976,755.74. Da27. Therefore, according to Franklin, the total amount due to plaintiff from Tonnelle as of April 5, 2023 was $21,501,343.47. Da26-28. Nowhere in this certification of amount due does Franklin request that plaintiff be awarded post-mortgage judgment interest at the contract rate! *See* Da22-28.

The proposed form of judgment prepared by plaintiff's counsel and submitted to the Office of Foreclosure with plaintiff's April 6, 2023 motion provided, in pertinent part, as follows:

> And it further appearing that … there is presently due and owing to the Plaintiff under the Note and Mortgage … the aggregate sum of **$21,501,343.47 as of April 5, 2023, together with lawful interest thereafter on all sums due**, together with costs to be taxed, including lawful counsel fees;
>
> IT IS on this ___ day of _____, 202_,
>
> ORDERED and ADJUDGED that the Plaintiff is entitled to have the sum of **$21,501,343.47 as of April 5, 2023, together with lawful interest thereafter on the total sum due Plaintiff until the same be paid and satisfied**, together with costs of this suit to be taxed, including attorneys' fees in the sum of $7,500, all to be raised and paid in the first place out of the mortgaged premises; and it is further

Da20 (emphasis added).

Thus, plaintiff's first motion for the entry of a final judgment of foreclosure sought a judgment of $21,501,343.47 as of April 5, 2023, which included prejudgment interest at the contract rate, and postjudgment "lawful interest" thereafter. *Id.* If plaintiff sought an award of post-mortgage foreclosure judgement interest at the "contract rate", instead of lawful interest at the "lawful interest" rate, Franklin and plaintiff's counsel knew how to say it (which they did not) and knew how to insert it in the final judgment form (which they failed to do).

On April 26, 2023, the Office of Foreclosure denied plaintiff's motion because (a) an order striking a co-defendant's answer had not been filed, and (b) the Office required a clarification relating to late charges. Da29. On May 2, 2023, plaintiff refiled Franklin's April 5, 2023 certification of amount due with an amended amount due schedule indicating that no late charges were being sought ("Franklin's Amended April 5, 2023 Certification"). Da33-39.

On May 10, 2023, plaintiff filed its second motion for the entry of a final judgment of foreclosure, its proposed form of foreclosure judgment, and Franklin's Amended April 5, 2023 Certification. Da40, Da42, and Da45, respectively. The form of judgment was identical to the one filed by plaintiff with its first motion on April 6, 2023. *Compare* Da19-21 *with* Da42-44. And, just as his April 5, 2023 certification of amount due failed to include a request that plaintiff be awarded post-

mortgage foreclosure judgment interest at the contract rate, Franklin's Amended April 5, 2023 Certification also failed to included such a request. *See* Da45-51.

Thus, plaintiff's second motion for the entry of a final judgment of foreclosure also sought a judgment of $21,501,343.47 as of April 5, 2023, which included prejudgment interest at the contract rate, and postjudgment "lawful interest" thereafter. Da43. Again, if plaintiff was seeking an award of post-mortgage foreclosure judgment interest at the "contract rate", instead of lawful interest at the "lawful interest" rate, Franklin and plaintiff's counsel knew how to say it (which they did not) and knew how to insert it in the final judgment form (which they failed to do).

On May 19, 2023, Tonnelle filed its objections to plaintiff's motion, which were that the motion was premature and that the calculation of the amount (not the rate) of prejudgment interest was incorrect. Da52-54. Tonnelle did not object to the postjudgment interest rate sought because plaintiff sought "lawful", not contract, postjudgment interest. On June 9, 2023, Tonnelle withdrew its objections. Da60.

The foreclosure judgment with interest after April 5, 2023 at the "lawful interest" rate as requested by plaintiff, together with attorney's fees of $7,500 and costs to be taxed by the Sheriff of Hudson County (the "Sheriff") was entered by Judge Costello on June 9, 2023. Da61. On June 6, 2023, the Sheriff fixed the taxed costs at $540. Da64.

Pursuant to R. 4:42-11, lawful interest for calendar year 2023 was 2.25%. Therefore, the 2023 interest per diem was $1,325.43 ($21,501,343.47 x 2.25% ÷ 365 days) and the total interest due between April 6, 2023 and December 14, 2023 was $335,333.79 ($1,325.43 per diem x 253 days). Accordingly, the judgment amount as of December 14, 2023, the date of the sheriff's sale, including the taxed costs and attorney's fees, was $21,844,717.26. Da85, ¶¶5-6.

B. There Were Other Interested Bidders

Plaintiff's contention that there were no other interested bidders, like its contention that it sought post-mortgage foreclosure judgment interest at the contract rate, is equally false. *See* Pb20-21.

There were at least two, if not more, prospective bidders who were interested in the amount of the upset price, *i.e.*, the amount determined by the Sheriff that was owed to plaintiff and which plaintiff could bid up to without having to actually pay any funds at the foreclosure sale. In each instance, plaintiff's counsel disclosed to the bidders the total judgment amount (presumably based on the contract, not lawful, postjudgment interest) and directed them to consult the Sheriff's website to confirm the Sheriff's calculation of the upset prices (which were incorrectly calculated using the contract, not lawful, interest rate). *See* Da111, ¶14.

LEGAL ARGUMENT

I. THE ARBITRATOR DID NOT DETERMINE THE POST- NEW JERSEY MORTGAGE FORECLOSURE JUDGMENT INTEREST RATE

The Arbitrator, sitting in Colorado and applying federal law, was not asked to, and did not, determine what the post-New Jersey mortgage foreclosure judgment interest rate should be. Nor could he have done so. The Arbitrator was only asked to determine what interest rate should apply once his award of the amount due under the promissory note and guaranty was confirmed in an *in personam* judgment. *See* Da435 ("[T]he Arbitrator finds in favor [plaintiff] on its claim for breach of Note against Tonnelle and for breach of the Guaranty against Verrichia."); Da469-71 (*In personam* judgment of the United States District Court for the Eastern District of Pennsylvania confirming the Arbitrator's award of post-judgment interest on the note and guaranty (not the subsequent New Jersey mortgage foreclosure judgment) at the contract rate. Indeed, Franklin's calculations that plaintiff presented to Judge Costello are based exclusively upon what "is currently due Plaintiff under the Note." Da35, ¶18 and Da47, ¶18 (emphasis added). Moreover, there is no mention whatsoever in the Arbitrator's award or the federal *in personam* judgment of a post-New Jersey mortgage foreclosure judgement interest rate. *See* Da430-71.

Thus, plaintiff's reliance on principles that apply to issues actually litigated and decided by the Arbitrator is unavailing. *See* Pb10-11. For example, issue preclusion does not apply because the post-New Jersey mortgage foreclosure

judgment interest rate was not "actually determined" in the arbitration proceeding. *See Habick v. Liberty Mutual Ins. Co.*, 320 N.J. Super. 244, 256 (App. Div. 1999). Further, the impact, or lack thereof, of the Arbitrator's award was, in fact, addressed by plaintiff and the Tonnelle Defendants below, which constitutes a challenge first raised in the trial court and, thus, satisfies the principle expressed in *K.V.H. v. W.S.H.*, 2018 WL 4623385, at *4 (App. Div. Sept. 27, 2018), Pa44.

The Tonnelle Defendants do not dispute that, under the promissory note, the guaranty, and the *in personam* judgment confirming the award, interest continues to run at the contract rate. *See* Da469-71. However, "under the doctrine of merger, the mortgage contract is merged into the final judgment of foreclosure and the mortgage contract is extinguished. Thereafter, the mortgage contract interest rate is replaced by the post-judgment rate permitted under the rules of court." *Realty Asset Properties, Ltd., v. Oldham*, 356 N.J. Super. 16, 21 (App. Div. 2002) (emphasis added) (internal citations omitted). *See Avatar Capital Finance, LLC v. Nassau Marina Holdings, LLC*, 2022 WL 1495919, at *4 (App. Div. May 12, 2022), Da517 (*quoting Realty Asset*). Thus, "[a]fter entry of [a foreclosure] judgment interest will run at the legal rate except as otherwise ordered by the court and except as may be otherwise provided by [New Jersey] law." *Shadow Lawn Sav. and Loan Ass'n. v. Palmarozza*, 190 N.J. Super. 314, 318 (App. Div. 1983) (*quoting* R. 4:42-11(a)). *See Avatar*, 2022 WL 1495919, at *4 (*quoting Shadow Lawn*).

Indeed, the Supreme Court has recognized that "[i]t has been established practice in New Jersey that after foreclosure, interest runs at the legal rate and not at the rate stated in the bond or mortgage." *Hudson City Sav. Bank v. Hampton Gardens Ltd.*, 88 N.J. 16, 22 (1981) (emphasis added). Thus, it was an error as a matter of law for Judge Costello to determine that "lawful interest versus contract interest is a distinction that has really no effect at all. Lawful interest includes contract interest." T28-19 to 20. It does not.

Moreover, plaintiff did not ask Judge Costello to award post-mortgage foreclosure interest at the contract rate. It expressly asked twice for the post-mortgage foreclosure judgment interest to be "lawful" interest by inserting that language in both forms of foreclosure judgement that it submitted, Da20 and Da43, which, as a matter of law, means interest at the legal rate prescribed by R. 4:42-11. *See Brinkley v. Western World, Inc.*, 281 N.J. Super. 124, 129-31 (Ch. Div. 1995), *aff'd*, 292 N.J. Super 134 (App. Div. 1996).

II. JUDGE COSTELLO FAILED TO CONSIDER WHETHER IT WOULD BE FAIR AND EQUITABLE TO AWARD POST JUDGMENT INTEREST AT THE CONTRACT RATE

In *Interchange State Bank v. Rinaldi*, 303 N.J. 239 (App. Div. 1997), the Appellate Division reaffirmed that "fixing post-judgment interest at the legal rate is the standard", but that trial courts have the discretion when requested to award a higher rate of interest when such award would be "fair and equitable". *Id*. at 261-64.

Equitable factors to be considered in a trial court's determination of whether to grant a mortgagee's application for postjudgment interest at the contract rate include "whether there was a commercial foreclosure, the contract rate is higher than the legal rate, the mortgagee is over-secured because the mortgagor has sufficient equity in the secured property to pay the principal due and the contract rate, and there is some prejudicial delay", which, when combined, favor the contract rate; and whether "plaintiff submitted the final judgment of foreclosure that expressly provided for the contract default rate only until entry of judgment, and for post-the judgment interest at the legal rate", whether plaintiff did not immediately challenge the judgment or move to modify or correct the postjudgment interest rate in the judgment[1], and whether plaintiff's delay effected the timing of defendant's objection, all of which favor the legal rate. *Avatar*, 2022 WL 1495919, at *6-7 (*citing Interchange*). This list is not exhaustive. The trial court must consider any and all equities supported by the evidence. *Id.* at *7.

Here, the equitable factors weighing in favor of the legal rate are the absence of any evidence that Tonnelle is over-secured;[2] plaintiff requested that the postjudgment interest rate be lawful interest, not the contract interest; plaintiff did

[1] Notably, unlike the plaintiff in *Avatar*, plaintiff here never made such a motion.

[2] Had the Tonnelle Defendants had an opportunity to address this issue before Judge Costello, they would have provided proof that Tonnelle was under-secured.

not immediately challenge the lawful interest rate award in the judgment; and there was no need for the Tonnelle Defendants to object to plaintiff's motion to enter the judgment on postjudgment interest rate grounds because plaintiff did not request contract postjudgment interest in either of its motions for the entry of a foreclosure judgment.

To reiterate, "where a court determines to award post-judgment interest under Rule 4:42-11(a) at a rate different than the legal rate, the court must consider and weigh the equities." *Avatar*, at *7 (emphasis added). And, like the trial court in *Avatar* which "abused its discretion by not fully doing so", *id.*, Judge Costello abused her discretion by not weighing the equities at all.

Accordingly, plaintiff's reliance on the Tonnelle Defendants' exercise of their rights to seek sale adjournments, their requests for payoff statements, and their applications for stays of the delivery of the deed, *see* Pb14-15, are misplaced. These have not been recognized as considerations in the weighing of the equities and, as previously noted, Judge Costello did not engage in any such weighing whatsoever.

Finally, plaintiff's reliance on the Tonnelle Defendants' withdrawal of their objections to its motion for the entry of the foreclosure judgment is misplaced, *see* Pb16, because, as previously noted, plaintiff expressly sought post-mortgage foreclosure judgment interest at the lawful rate, not the contract rate. Therefore, since their objections were based on other grounds, the Tonnelle Defendants had no

reason to object to the lawful interest rate expressly sought by plaintiff in both motions.

III. THE SHERIFF'S NOTICES OF SALE DID NOT STATE THE APPROXIMATE AMOUNT OF PLAINTIFF'S JUDGMENT (Da188; T27-5 to 28-4)

"The right to redeem was devised by equity to protect [mortgagors] from the forfeiture of [their] title. It is a favored right." *Hardyston National Bank v. Tartamella*, 56 N.J. 508, 513 (1970) (*citing Mansfield v. Hammond*, 117 N.J. Eq. 509, 510 (E. & A. 1935)). Upon the filing of a motion for the hearing of an objection pursuant to R. 4:65-5, the right of redemption is expanded beyond the rule's 10-day period until the entry of an order confirming the sale. *Id*. at 513. Courts have the inherent equitable power to determine the correct redemption amount. *See Morsemere Fed. Sav. & Loan Ass'n. v. Nicolaou*, 206 N.J. Super. 637, 645 (App. Div. 1986); *Little Falls Sav. and Loan Ass'n. v. Chas. O. Holmberg & Sons, Inc.*, 165 N.J. Super. 93, 95 (Ch. Div. 1978).

N.J.S.A. 2A:17-34 mandates that sheriffs' published notices and advertisements "shall state the approximate amount of [plaintiff's] judgment." "The term 'approximate' is not defined in the statute. Thus, we look to the dictionary for a definition. The dictionary defines 'approximate' as 'nearly correct or exact: close in value or amount but not precise.'" *Wells Fargo Bank, N. A. v. Young*, 2019 WL 1568090, at *2 (App. Div. Mar. 20, 2019), Pa48 (*quoting* Approximate, *Merrian*

Website Online Dictionary (last visited April 1, 2019).

In *Wells Fargo*, the Appellate Division held that a 22% difference was "not nearly correct' or 'close in value' to constitute an 'approximate' amount." *Ibid*. Here, (a) the Sheriff's notice and advertisement pursuant to N.J.S.A. 2A:17-34 for the September 7, 2023 scheduled sale stated that the judgment amount as of that date was $29,563,967.11, when the actual amount based upon lawful interest was $21,714,825.12; and (b) the Sheriff's notice and advertisement pursuant to N.J.S.A. 2A-17-34 for the December 14, 2023 scheduled sale date was $25,664,199.21, when the actual amount based upon lawful interest was $21,844,717.26. *See* Da85-86, ¶7.

$29.653,967.11 is not "nearly correct", "exact" or "close in value" to $21,714,825.12 (the former being 37% higher). Similarly, $25,664,199.21 is not "nearly correct", "exact" or "close in value" to $21,844,717.26 (the former being 17% higher). *Compare* 37% and 17% disparities *with* the 22% found to be statutorily deficient in *Wells Fargo*.

Instead of applying the statutory "approximate" mandate, Judge Costello created her own statutory criteria, *i.e.*, even though the published amounts were not approximately the correct amounts, they were not such "egregious variation[s] from the actual number[s] that it put a chilling effect on bids." T27-1 to 2. That, however, is not the statutory mandate of N.J.S.A. 2A:17-34. "[T]he Legislature understood and understands its obligations for the notice from which the selling officer may not depart…." *Fidelity Union Bank v. Trim*, 210 N.J. Super. 476, 478-79 (App. Div. 1986)

(emphasis added). Judge Costello was required to apply the law as written, not as she wished it to be, and her application of the wrong criteria was reversible error as a matter of law. *See Frugis v. Bracigliano*, 177 N.J. 250, 280 (2003) (*citing Cornblatt v. Barrow*, 153 N.J. 218, 231 (1998) ("If the language is plain and clearly reveals the statute's meaning, the Court's sole function is to enforce the statute according to its terms."). Accordingly, whether the amounts, which are not "approximate", had a chilling effect on bids or not is not controlling. But, if it could be considered (it could not), there was no factual basis in the record for Judge Costello to find that the excessive amounts in the notices did not put a chilling effect on the bids. In fact, to the contrary, after being informed of the 37% and 17% higher upset prices, the prospective bidders chose not to attend the sale and to forego bidding.

Courts also have "the inherent power to set aside a sale or to order redemption when there is an independent ground for equitable relief, 'such as fraud, accident, surprise, irregularity [or impropriety] in the sale and the like.'" *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 164 (App. Div. 1967) (*quoting Penn Federal Savings and Loan Ass'n. v. Joyce*, 75 N.J. Super. 275, 278 (App. Div. 1962)). *See also Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 317 (App. Div. 2002). Additional grounds include the equitable doctrine of mistake. *Crane v. Bielski*, 15 N.J. 342, 347-48 (1954).

Here, the accident, irregularity, impropriety and/or mistake in the sale was the

posting and advertising by the Sheriff of the incorrect judgment amounts of $29,563,967.11 as of the September 7, 2023 sale date and $25,664,194.21 as of the December 14, 2023 sale date, which were 37% and 17% higher then the actual amounts due on those dates of $21,714,825.11 and $21,844,717.26, respectively. These accidents, irregularities, improprieties and/or mistakes may have negatively affected prospective bidders and resulted in a sale for less than the premises' highest and best price. Why else would the prospective bidders have failed to attend the sale and bid? *See Burger v. Dumas*, 25 N.J. Super. 473, 476 (Law Div. 1953) (sheriff sale set aside because sheriff erroneously announced existence of a judgment lien and failed to disclose amount due on mortgage, thereby "thwarting competitive bidding"); *In re Ryker*, 301 B.R. 156, 167 (D.N.J. 2003) (*citing Burger*). Pursuant to R. 4:65-5, the court cannot confirm a sale if it is not "satisfied that the real estate was sold at its highest and best price at the time of the sale". There is no requirement that proof that an actual bidder was thwarted must be presented.

IV. THE REQUIREMENT IN THE SECOND STAY PENDING THE FILING OF DEFENDANTS' APPEAL ORDER THAT THE TONNELLE DEFENDANTS POST A SUPERSEDEAS BOND IN ONE BUSINESS DAY WAS MANIFESTLY UNREASONABLE (Da210)

This Point, *see* Db22, is conceded by plaintiff as it does not argue otherwise in its brief.

V. PLAINTIFF HAS WITHDRAWN ITS CROSS-APPEAL

In its brief, plaintiff states that its cross-appeal is moot and, therefore, it did not address its cross-appeal in its brief. Pb21, n.3. Therefore, the Tonnelle Defendants need not, and do not, address it either, and plaintiff does not have any right to now file what would be, in effect, a sur-reply brief.

CONCLUSION

For all of the foregoing reasons, the Tonnelle Defendants respectfully request that this Court reverse Judge Costello's orders; direct that a new sheriff's sale be conducted; and confirm that, for purposes of calculating the amount due under the foreclosure judgment for the sheriff's sale and for Tonnelle's exercise of its right of redemption, the postjudgment interest rate is the legal rate prescribed by R. 4:42-11.

September 18, 2024

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