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DAILY BUSINESS REVIEW

FORECLOSURES 'Plaintiff maximum bid' feature criticized

Online auctions spark disputes, discord

by Eric Kalis
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Palm Beach County joined numerous Florida local governments in moving foreclosure auctions online nearly two years ago to help ease the glut of cases in the system.

But the foreclosure bottleneck persists, and at least one aspect of the online system is creating tension between lenders and third party investors.

Both sides say the "plaintiff maximum bid" feature — which allows plaintiffs to post a bid before a scheduled auction and provides the option of hiding the offers — is causing problems.

And a Palm Beach Circuit Court judge said last week that the Florida Legislature is best suited to address complaints about online foreclosure auctions.

Lender representatives say that openly posting a maximum bid opens the door for bad-faith bids and triggers unnecessary increases in documentary stamp



J. ALBERT DIAZ

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taxes because third-party bidders undercut their pre-auction bids.

"The behavior of these third-party bidders is wrong," said Harold Lewis, a partner at Pathman Lewis who heads the Miami law firm's real estate and banking, corporate and transactional departments.

"People should not be allowed to arbitrarily drive the price up when the maximum bid is shown," Lewis said. "That's why the banks are so angry."

ontheweb
Read Palm Beach Circuit Judge
John Hoy's orders on
DailyBusinessReview.com

On the other side, investors say the feature has a chilling effect on auctions. They say that a pricey bid posted by a lender before an auction can discourage outside bidders from participating.

"My clients who are bidders do look at the plaintiff max bid," said real estate attorney Marilyn J. Wiener, who has offices in Boca Raton, Plantation and Miami. Wiener represents distressed real estate investors who use the online foreclosure auction system.

"If they feel it is above fair market value, they won't bid."

Online auctions could be inadvertently depriving the cash-strapped state of much-needed documentary stamp revenue by allowing plaintiffs to bid in ad-

vance.

Nicholas Arsali, one auction regular, complained plaintiffs are submitting lofty maximum bids as a "scheme" to minimize stamp tax costs.

Documentary stamp taxes are state transaction fees based on the recorded value of the property. If a plaintiff was not permitted to post a maximum bid in advance, increased bidding would drive up the value of the winning bid and result in higher documentary stamp collections in some auctions.

"This may be another aspect of the foreclosure world" that needs further examination, Wiener said.

PALM BEACH CASES

A recent Palm Beach Circuit Court dispute between a lender, a family trust and Arsali underscores how the maximum bid feature can cause discord in what has historically been a fairly collegial auction system.

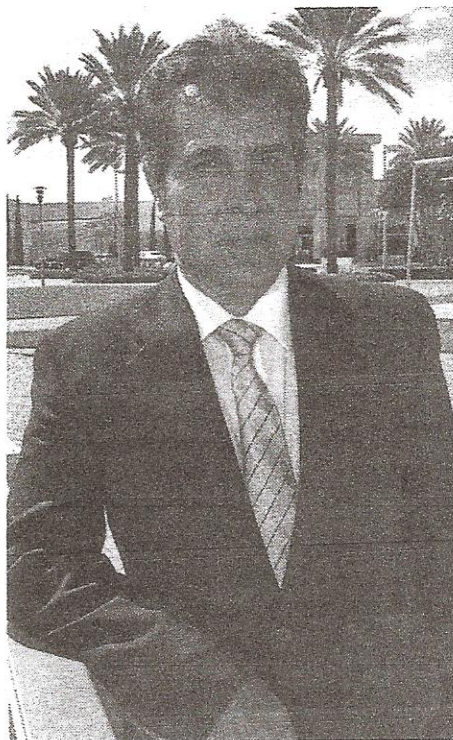
Palm Beach Circuit Judge John Hoy last week rejected two attempts by Iberiabank and one by the North Palm Beach-based Annette C. Whitney Revocable Trust to force Arsali, a West Palm Beach broker, to cover a substantial portion of the documentary stamp fees on a combined \$1.82 million in winning bid amounts from three previous foreclosure auctions.

The bank and trust claimed that Arsali, who frequently buys properties through foreclosure auctions, acted in bad faith when he submitted bids well below the maximum bid amounts previously posted by the plaintiffs. Their attorney, James Telepman of North Palm Beach, asked the judge to prohibit third-party bidders from bidding below a plaintiff's maximum bid.

Hoy refused, writing in the three orders that Telepman's "request is a matter for the Florida state Legislature."

Telepman said he doesn't know if his clients will appeal Hoy's ruling or take the issue to the Legislature, which is expected to scrutinize the state's foreclosure system next spring.

"I think it's an issue worth raising with whoever has the authority to do something about it," Telepman said. "There's clearly a gap in the system regardless of who is right or wrong."



MELANIE BELL

Nicholas Arsali, an auction regular, complains that plaintiffs are submitting lofty maximum bids as a "scheme" to minimize stamp tax costs.

A spokeswoman for the Florida Department of Revenue, which handles documentary stamp tax collections, said the department has not been asked by any House or Senate members to review online auctions.

Eliminating the maximum bid feature, which were implemented "so tire kickers are dissuaded from bidding unnecessarily," could be the solution, Telepman said. But it could seriously hamper the efficiency of the online auctions, since a sale would undoubtedly take longer to complete.

Arsali, who told the Review that he had serious interest in purchasing the properties involved in the three disputed auctions, agrees that the maximum bid feature should be removed, but for a different reason.

"We need to completely get away from the max bid and let the market do its work," Arsali said.

In the days when foreclosure auctions were held in courthouses, regular third-

AT A GLANCE

■ **Case numbers:** 502010CA004490, 502010CA018242 and 502010CA01766

■ **Venue:** Palm Beach Circuit Court

■ **Plaintiffs:** Iberiabank (in two cases) and Annette C. Whitney Revocable Trust

■ **Claims:** The bank and trust filed motions for sanctions against broker Nicholas Arsali, asking Judge John Hoy to force Arsali to pay a substantial portion of documentary stamp taxes from three previous foreclosure auctions. Their attorney also asked Hoy to declare any third party bid below a plaintiff's posted maximum bid amount to be in bad faith.

■ **Ruling:** Hoy denied the motion for sanctions, writing in his orders that the circuit court is not the appropriate venue to restrict third party bidders. He suggested taking the matter to the Florida Legislature.

party bidders would often find out from lender attorneys what they planned to bid in advance, Telepman said. Those conversations would result in "gentleman's agreements" in which outside bidders would not bid if they did not intend to outbid the plaintiffs.

"It was just disclosing information, giving an honest heads up as to how high you had been instructed to go," Telepman said.

But the informal, and often frenetic, nature of live foreclosure auctions opened the door for collusion, according to Realauction.com chief executive Lloyd McClendon. Realauction.com operates the software for Miami-Dade and Broward counties and 22 other Florida counties that conduct online auctions.

The software created by McClendon's company has eliminated the possibility of nefarious activity by plaintiff attorneys and outside bidders, he said. "Let's say I'm an unscrupulous attorney and a bidder comes up to me and asks me how high I'm willing to go," McClendon said.



McClendon

"I say \$100,000, then I tell my buddy a different number. That collusion no longer exists with online auctions."

If the Legislature declines to remove the maximum bid feature, it could instead declare that any bid below a posted maximum bid is in bad faith.

"That rule sort of solidifies the issue and puts the burden on the party making the questionable maneuver of making a lower bid," Telepman said.

The Palm Beach County Clerk & Comptroller's Office, which uses Pittsburgh-based Grant Street Group to operate its auction software, "does not regulate, prevent or sanction bidding of amounts that are less than the visible maximum bid," according to the county auction website.

Under Realauction.com, anyone who bids less than the plaintiff's posted maximum bid could be subject to a permanent ban after multiple offenses.

If the company is alerted that someone is bidding in bad faith, it often contacts the bidder directly, McClendon said.

"Ninety percent of the time we call them and find out that they just didn't understand" how to use the software, he said.

"If something malicious is going on, it jumps right out at you."

If a lender believes bad-faith bidding is occurring, it should pursue a civil action against the offender, McClendon said.



Wiener

The Legislature could also consider exempting plaintiffs from paying documentary stamp taxes if they are forced to outbid someone despite previously entering a maximum bid, Wiener said.

Regardless of what auction websites the counties use, uniformity in governing foreclosure auction practices is needed, she said.

"It shouldn't be county by county," Wiener said. "There is probably an argument that there are local nuances in different counties that have to be taken into account. [But] we may be at a point, certainly with the technology available, where we could move to a uniform system."

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