STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: Portland
Docket No. BCD-13-CV-18

THE BANK OF MAINE, f/k/a, SAVINGS BANK OF MAINE,

Plaintiff,

v.

BOOTHBAY COUNTRY CLUB, LLC, et al.,

Defendants

DECISION AND ORDER
(Motion for Attachment)

This matter is before the Court on the Motion for Attachment and Attachment on Trustee Process of Plaintiff The Bank of Maine (the Bank). In particular, the Bank seeks an attachment in the amount of $1,090,567.45 on the property of Defendants Boothbay Country Club (the Club) and James R. Reeves (Defendant Reeves).[1]

FACTUAL BACKGROUND

On October 30, 2008, the Club purchased certain property (real and personal) located in Boothbay and Boothbay Harbor (the Property). At the time, Defendant Reeves was an owner of the Club. To finance the purchase, the Club obtained a loan from the Bank in the amount of $2,890,000, and executed a promissory note in that amount in favor of the Bank. To secure the Club's obligations under the promissory note, the Club granted a mortgage on the Property. In addition, Defendant Reeves executed a commercial guaranty of the Club's financial obligations to the Bank.

[1] The Court will refer to the Club and Defendant Reeves collectively as "Defendants."

The Club defaulted on its obligations, and on October 30, 2012, the Bank forwarded notices of default to the Defendants by certified mail. Neither the Club nor Defendant Reeves cured the default. As of January 28, 2013, the outstanding obligation to the Bank was $2,590,567.45.

Pursuant to 14 M.R.S. § 6203-A, the Bank initiated a power of sale foreclosure of the Property, and scheduled a public sale of the Property for January 28, 2013. The Bank served the Club and Defendant Reeves with notice of the sale. The Bank was the highest bidder at the sale, and obtained the Property for $1.5 million.

In this action, the Bank seeks to recover a judgment in the amount of the difference between the sale price and the balance of the Club's debt to the Bank. The Club and Defendant Reeves contend that the foreclosure sale is invalid because the Bank did not comply with the statutory requirements of the foreclosure process.

DISCUSSION

Pursuant to M.R. Civ. P. 4A and 4B, the Court may approve an order of attachment or trustee process after notice to the defendant, a hearing, and

> upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

M.R. Civ. P. 4A(c); *see* M.R. Civ. P. 4B(c) (containing nearly identical language regarding trustee process). The "more likely than not" standard is "greater than 50% chance of prevailing." *Richardson v. McConologue*, 672 A.2d 599, 600 (Me. 1996) (quotation marks omitted). An attachment motion or motion for trustee process must be supported by affidavits setting "forth specific facts sufficient to warrant the required finding and shall be made upon the affiant's own knowledge, information or belief." M.R. Civ. P. 4A(c), (i); *see* M.R. Civ. P. 4B(c) (requiring a

motion for trustee process to be supported by affidavits meeting the requirements set forth in Rule 4A(i)). In determining whether to grant a motion to attach, the court "assesses the merits of the complaint and the weight and credibility of the supporting affidavits." *Porrazzo v. Karofsky*, 1998 ME 182, ¶ 7, 714 A.2d 826 (citing *Plourde v. Plourde,* 678 A.2d 1032, 1035 (Me. 1996)).

In this case, the undisputed evidence of record establishes that prior to the commencement of the foreclosure action, Defendants were in default, and the Defendants' outstanding indebtedness to the Bank was approximately $2.9 million. It is also uncontroverted that the Bank placed the sole bid at the foreclosure sale, and that the Bank obtained the property for $1.5 million. The record, therefore, plainly establishes a deficiency of more than $1 million.[2]

Defendants nevertheless contend that an attachment is not warranted because the Court should void the sale because the Bank did not conduct the foreclosure sale in accordance with the applicable statute. More specifically, Defendants argue that the Bank did not conduct a "public" sale as required by 14 M.R.S. § 6203-A (2012). In support of their contention, Defendants submitted affidavits from three individuals who appeared at the sale, but were not permitted to enter the room in which the sale occurred. None of the three individuals intended to bid on the property.

Preliminarily, even if Defendants established that the Bank did not satisfy the statutory requirements for the sale of the property, the Court is not convinced that the appropriate remedy would be to void the sale. In *Keybank National Association v. Sargent*, 2000 ME 153, ¶ 23, 758 A.2d 528, 536, the Law Court wrote, "[w]hen the challenge is to the procedures used to conduct the foreclosure sale, the proper analysis for the trial court is whether it would be equitable to set

[2] For purposes of the Bank's request for attachment, the Court finds the sale price of the Property to be most relevant to the Court's determination as to the amount that the Bank is likely to recover. Therefore, the Court did not consider the supplemental affidavit of Alvin W. Butler and thus dismisses Defendant Reeves Motion to Strike the supplemental affidavit of Alvin W. Butler as moot.

aside the sale given the procedures that were employed by the mortgagee." At least at this stage of the proceedings on the current record, the Court is not persuaded that the equities are such that it is likely that the sale will be set aside. Among other things, the record is devoid of any persuasive evidence to suggest that Defendants would have retained the property had the Bank conducted the sale in another manner.

The Court recognizes if the Bank did not satisfy the statutory prerequisites to the sale, the Court could possibly reduce or eliminate any deficiency to which the Bank believes it is entitled. However, the current record contains no persuasive evidence that the sale could have or should have generated a higher price for the Property. While Defendants contend that the sale was not public because several individuals were prevented from attending the sale, Defendants have presented no evidence of the exclusion from the sale of any potential purchaser of the Property. In other words, there is no evidence from which the Court could conclude that a party was prevented from making a higher bid on the Property than the Bank's bid of $1.5 million. Accordingly, the Bank has established that it is more likely than not that it will recover judgment in the amount of the deficiency.

CONCLUSION

Based on the foregoing analysis, the Court concludes that the Bank has established that it is more likely than not that the Bank will recover judgment in the amount of $1,090,567.45, and that there are no liability insurance, bond or other security, and any property or credits attached by other writ of attachment or by trustee process shown to be available to satisfy the judgment. Accordingly, the Court grants the Bank an attachment and attachment on trustee process on the property of the Boothbay Country Club, LLC, and James R. Reeves in the amount of $1,090,567.45.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 6/27/13

Justice, Maine Business & Consumer Court