



CAPITAL



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PlainsCapital Bank v. Martin: Re-examining Debtors' Rights in a Post-Foreclosure Deficiency Suit



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Section 51.003 of the Texas Property Code gives debtors an important right in post-foreclosure deficiency suits. When a debtor is sued by a lender to recover the deficiency remaining after a foreclosure sale, the statute allows the debtor to introduce evidence of the fair market value of the property as of the date of the foreclosure sale and, if more than the amount of debt secured by the property, offset the excess amount against the deficiency. The Texas Supreme Court recently delved into the mechanics of when the offset right applies and what evidence may be introduced in proving fair market value in *PlainsCapital Bank v. Martin*¹ and in doing so, articulated a definition of “fair market value” unique to Section 51.003.

In *PlainsCapital Bank v. Martin*, the debtor, Martin, took out a loan from PlainsCapital to build a house that he intended to sell when complete. The loan was secured by a deed of trust on the property, and when Martin was unable to sell the house and defaulted on the note, the bank foreclosed in June 2008. PlainsCapital bought the property at the foreclosure sale for less than the balance of the secured debt, and was finally able to sell the house fifteen months later, in September 2009. When Martin sued the bank for wrongful foreclosure, the bank counterclaimed for the deficiency between the amount of the secured debt (approximately \$789,000) and the amount for which the bank sold the house in September 2009 (\$599,000). Martin claimed he was entitled to an offset against the deficiency and alleged that the fair market value as of the date of the foreclosure sale was \$825,000, relying on an appraisal done a week after the sale and the appraiser’s opinion that the value would have been the same at the time of the foreclosure sale.

When the case reached the Texas Supreme Court, two key issues faced the Court: (i) whether Section 51.003 applied, and (ii) if so, whether a post-foreclosure sale price could be considered as evidence of fair market value as of the date of the sale.

As to the applicability of Section 51.003, PlainsCapital argued that Section 51.003 only applies to lawsuits where “the” deficiency sought is calculated using the actual foreclosure sale price.² Because the deficiency in this case was based not on the price PlainsCapital paid at the foreclosure sale (\$539,000), but rather, the price for which it sold the property in 2009 (\$599,000), the bank argued it fell outside the purview of Section 51.003. The Court rejected the bank’s argument that “the” deficiency is limited to the difference between the debt and the exact foreclosure sale price and instead looked to the context and purpose of the statute as a whole, confirming that Section 51.003 applies to any claim to recover any deficiency after a non-judicial foreclosure sale. As the Court noted, the protections provided to debtors by Section 51.003 would mean very little if lenders could so easily sidestep its applicability by suing on an amount other than the difference between the amount of the secured debt and the exact foreclosure sale price.

Once the Court established that Section 51.003 applied, it turned to the calculation of the fair market value of the property as of the date of the sale. The Dallas Court of Appeals held that there was no evidence linking the price for which PlainsCapital sold the property in September 2009 to the property’s fair market value on the foreclosure sale date, on the basis that “fair market value” under Section 51.003 is the historical and commonly accepted measure of fair market value, which is “the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.”³ The Supreme Court disagreed with the Dallas Court of Appeals on that point, based on the fact that the statute enumerates specific categories of evidence that are

expressly permitted to be included in determining fair market value.⁴ Focusing on Section 51.003(b)(5), which allows a court to consider “the necessity and amount of any discount to be applied to the future sales price,” the Supreme Court said that “[t]his factor is forward looking” and allows the court to consider the price at which the lender ultimately sells the property and apply a discount, if appropriate, to determine the value as of the foreclosure sale date.⁵ It is not necessary to tie the future sales price to the foreclosure sales price, through a showing of similar market conditions or otherwise. While acknowledging that it seems counter-intuitive to include the ultimate sale price *after* the date of foreclosure as part of the evidence of fair market value *as of* the date of foreclosure, the Court concluded that this is clearly what the Legislature intended. Otherwise, it would make the statute nonsensical because the fair market value cannot be determined by applying a discount to an unknown future sales price.⁶ Thus, the statute allows a court to consider evidence that would not normally be considered in a determination of fair market value and thereby modifies the construct for determining fair market value in the context of a post-foreclosure deficiency. In sum, “fair market value” in Section 51.003 does not mean the historical definition, but the historical definition as modified by the evidence enumerated in Section 51.003(b) “to the extent such evidence is not subsumed in the historical definition.”⁷ Under this new construct, the sales price at which the property was sold fifteen months after foreclosure was competent evidence in determining the fair market value on the date of the foreclosure sale.

In a well-written dissent, Justice Boyd interpreted Section 51.003(b)(5) differently, stating that the future sales price may be considered only if other evidence allows the court to arrive a current fair market value as of the date of the foreclosure sale. Justice Boyd points out that Section 51.003 does not simply allow the court to consider the “future sales price” but rather the “*necessity and amount of any discount to be applied to the future sales price . . . to arrive at a current fair market value.*”⁸ After all, the goal of the statute is to determine the fair market value as of the date of the foreclosure sale.

Those in the real estate and commercial lending world will be watching to gauge the impact that the *PlainsCapital Bank v. Martin* holding will have in deficiency suits. With the inherent unpredictability of the real estate market and the added irregularities arising from the foreclosure process, the effect of this “modified” definition of fair market value could be significant. Lenders and debtors should take note. ■

1. 459 S.W.3d 550 (Tex. 2015).

2. Section 51.003(a) states: “If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover *the* deficiency must be brought within two years of the foreclosure sale and is governed by this section.” TEX. PROP. CODE § 51.003(a) (emphasis added).

3. *PlainsCapital Bank*, 459 S.W.3d at 556.

4. Section 51.003(b) states, in relevant part, “The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property to arrive at a current fair market value.”

5. *PlainsCapital Bank*, 459 S.W.3d at 556.

6. The court further noted that requiring a showing of comparable market conditions between the foreclosure sale and the future sale would be “adding words to [the statute].” *Id.*

7. *Id.* at 557.

8. TEX. PROP. CODE § 51.003(b)(5) (emphasis added).