2016 IL App (2d) 160041-U
No. 2-16-0041
Order filed August 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BMO HARRIS BANK, N.A., f/k/a Harris N.A., as Assignee of the Federal Deposit Insurance Corporation, as Receiver for Amcore Bank, N.A.,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CH-1991
FUMANCHU GROUP, LLC, CHRISTOPHER NOE, THOMAS MERRYMAN, PETER HAVLIS, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,	)	
Defendants	)	
(Fumanchu Group, LLC, Christopher Noe, Thomas Merryman, and Peter Havlis, Defendants-Appellants).	)	Honorable Michael J. Chmiel, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The appeal was not moot. The trial court did not abuse its discretion in entering its pre-trial scheduling order or in denying Fumanchu's motion to continue the evidentiary hearing under section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2014)). It also acted within its discretion in granting BMO Harris's motion to bar evidence of the property's value after the

foreclosure sale. Finally, it was not against the manifest weight of the evidence or an abuse of discretion for the trial court to find that Fumanchu had not proven that the sale price was unconscionable. Therefore, we affirmed.

¶ 2 Plaintiff, BMO Harris Bank, N.A. (BMO Harris), filed a complaint against defendant, Fumanchu Group, LLC (Fumanchu), to foreclose on an industrial-commercial property at 14212 Washington Street in Woodstock, Illinois (Property). BMO Harris further alleged that defendants Peter Havlis, Christopher Noe, and Thomas Merryman breached their guarantees of the loan. The trial court granted BMO Harris's motion for summary judgment and a judgment of foreclosure and sale, and the Property was sold at auction to BMO Harris for $175,000. The trial court confirmed the sale and entered a deficiency judgment. Fumanchu thereafter sought to vacate the sale and deficiency judgment, arguing, among other things, that the sale price was unconscionable. Following an evidentiary hearing, the trial court denied Fumanchu's motion. On appeal, defendants argue that: (1) the trial court abused its discretion in entering its pre-trial scheduling order and denying Fumanchu's motion to continue the evidentiary hearing; (2) the trial court abused its discretion in granting BMO Harris's motion to bar evidence of the Property's value after the foreclosure sale; and (3) the trial court erred in ruling that the sale price of the Property was not unconscionable. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 27, 2007, Fumanchu executed a promissory note in favor of Amcore Bank, N.A. (Amcore Bank), in the amount of $1,095,000. The note called for regular payments with a final irregular payment of over $1 million due on December 27, 2012, when the note matured. The note was secured by a mortgage on the Property. Moreover, Havlis, Noe, and Merryman signed guarantees of Fumanchu's indebtedness.

¶ 5 On April 23, 2010, the Federal Deposit Insurance Corporation seized Amcore Bank's assets, and BMO Harris purchased the note.

¶ 6 Defendants did not pay off the note when it became due. On December 12, 2013, BMO Harris filed a complaint to foreclose the mortgage and for other relief. On March 27, 2014, after defendants failed to appear, the trial court entered a default judgment against them and a judgment of foreclosure and sale as to the Property. On April 16, 2014, it granted BMO Harris's motion to appoint a receiver for the Property.

¶ 7 On April 28, 2014, defendants appeared through counsel and sought to vacate the default judgment and the judgment of foreclosure and sale. The trial court granted the motion on May 19, 2014.

¶ 8 On October 6, 2014, BMO Harris filed a motion for summary judgment and for a judgment of foreclosure and sale. The trial court set a briefing schedule for the motion, but defendants did not file a response. On December 8, 2014, the trial court entered summary judgment against defendants[1] and a judgment of foreclosure and sale.

¶ 9 The McHenry County sheriff auctioned the Property on March 26, 2015, and BMO Harris offered the highest bid, $175,000. On April 8, 2015, BMO Harris filed a motion for an order confirming the sale and approving the report of sale, and for entry of a deficiency judgment. Defendants did not file a response. On June 3, 2015, the trial court confirmed the sale. It further entered a deficiency judgment against Fumanchu, Merryman, and Noe jointly and severally for $1,062,393.24.

[1] BMO Harris did not initially seek summary judgment against Havlis. It subsequently did so on April 8, 2015, and its motion was granted on June 3, 2015.

¶ 10 On July 2, 2015, BMO Harris assigned the certificate of sale for the Property to Dearborn Street Holdings, LLC, an affiliated entity. On July 17, 2015, the sheriff issued a deed for the Property to Dearborn Street Holdings, and the deed was recorded on August 5, 2015.

¶ 11 Meanwhile, also on July 2, 2015, Fumanchu[2] filed a motion to vacate the judicial sale and deficiency judgment. It argued, among other things, that the sale was improper under section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2014)), because the sale price was so inadequate as to constitute fraud. On July 21, 2015, the trial court entered a briefing schedule on the motion and set the matter for a hearing on the limited issue of whether Fumanchu was entitled to discovery and/or an evidentiary hearing.

¶ 12 On November 20, 2015, the trial court ruled that Fumanchu was entitled to an evidentiary hearing, which it set for December 14, 2015. BMO Harris was ordered to respond to outstanding discovery requests by December 7, 2015, and the parties were also to exchange witness lists and file their pre-trial briefs by that date.

¶ 13 On December 4, 2015, Fumanchu filed a motion to continue the hearing date. It alleged that it was unable to obtain key reports and witnesses as a result of the holidays and the short notice of the evidentiary hearing. At a hearing on December 10, 2015, Fumanchu additionally argued that it had just received discovery documents from BMO Harris, including the "rent rolls" from the time of the sale. The trial court denied the motion to continue. It stated that Fumanchu had owned the Property and should know its potential use and market value. The trial court

[2] The motion was brought by just Fumanchu, without the remaining defendants, and only Fumanchu was involved with the subsequent evidentiary hearing. However, the notice of appeal and briefs again refer to all defendants.

further stated that Fumanchu's motion suggested that the Property was sold at such a price to constitute fraud, so Fumanchu should already have a good faith basis for that assertion, and it should not need a new appraisal report. Finally, the trial court stated that BMO Harris had produced discovery by the court-ordered deadline, and Fumanchu had not filed a motion to compel prior to that deadline being set.

¶ 14 The trial court heard evidence on December 14, 2015, and December 21, 2015. At the beginning of the hearing on December 14, 2015, Fumanchu orally renewed its motion to continue. It stated that in addition to its previous arguments, it received relevant documents on December 11, 2015, that were in response to a request to produce that was served on August 3, 2015. Some of the documents were correspondence between the receiver and the appraiser, and others were from an entity related to the receiver and from the loan servicer for BMO Harris. BMO Harris responded that these documents were in response to Fumanchu's request for additional documentation, and it argued that Fumanchu had not filed a written motion to continue as required by local court rules. Fumanchu replied that the documents were within the purview of the original request to produce. The trial court stated that BMO could have facilitated the exchange of documents from the receiver, but the receiver was a separate party to the proceeding. It further stated that the motion should have been in writing, and that defendants had the opportunity over the previous two years to address many of the issues. It therefore denied the motion to continue.

¶ 15 BMO Harris moved to bar any witnesses and exhibits that Fumanchu disclosed after December 7, 2015. Fumanchu argued that the late disclosures were the result of BMO Harris waiting until December 7 to produce important documents. The trial court denied BMO Harris's motion.

¶ 16 BMO Harris also moved to bar evidence of post-sale activity. It argued that Fumanchu did not object to the sale or respond to the motion to confirm the sale, and that it should not be able to benefit from its delay by introducing evidence that did not exist at the time of the sale. Fumanchu argued that just as BMO Harris was seeking to use an appraisal that was conducted about eight months before the sale to justify its bid, Fumanchu was seeking to introduce evidence within seven or eight months after the sale. BMO Harris responded that its expert did an appraisal in July 2014, but he would be testifying regarding an appraisal from January 27, 2015, about one month before the sale. BMO Harris argued that whatever happened to the Property after the sale was not relevant to whether the bid at the sale was conscionable. The trial court stated that the relevant date under Illinois law was the date of the sale and that allowing evidence beyond that would lead down a "never-ending road." It granted BMO Harris's motion. It clarified that it would allow an appraisal or opinion that was authored after the date of sale if it was opining about the value on the sale date. It was also permissible to discuss what happened in the year before the sale, or within 30 days of the sale. Fumanchu made an offer of proof that two individuals would testify that on October 14, 2015, they purchased the Property for $305,000.

¶ 17 Jeff Schultz was accepted by the court as an expert for a broker price opinion and testified as follows. He had been a real estate broker for three years, and during that time, he had evaluated commercial and industrial real estate. He had toured the Property and had provided a broker price opinion for the receiver on December 17, 2014. A broker price opinion looked at what the property could be sold at in the open market. In addition to touring the Property, he had: looked at "MLS, LoopNet and CoStar," which were tools to view comparable properties that were active or had been sold; talked to neighbors and people familiar with the Property; and

talked to people in Woodstock. The lot was 321,743 square feet, which was a little under 7.38 acres. The building itself was 12,595 square feet, of which 2,366 square feet was office space, and the remainder was a warehouse. He primarily considered three comparables. One was listed at $275,000 and sold for $175,000 on August 1, 2014; the second was listed at $239,900 and sold for $215,000 on May 15, 2014; and the third was listed at $229,900 and had been an active listing for 274 days at that time. There were a total of six sold comparables, with a mean price of $30.55 per square foot and a median price of $33.40 per square foot, so he applied a value of $32.53 per square foot for the building on the Property. Schultz then added $90,000 because the other buildings were on one-acre parcels, as opposed to 7.5 acres. He therefore valued the Property at $500,000 minus the cost to remove several acres of concrete debris on the Property; the receiver stated that he had received quotes of $315,000 and $60,000 to remove the debris. A person would assume that he would have to pay $315,000 to remove the debris, so he "ended up with a net offer of" $185,000. The $500,000 price assumed a 9 to 12-month marketing period. He opined that the Property was worth $425,000 to $500,000 minus the cost to remove the debris.

¶ 18 Schultz agreed that he was a broker rather than an appraiser. He did not physically view the comparable properties, did not know if they had leases, and did not know their occupancy ratios. His price opinion assumed that all outstanding property taxes would be paid at closing. If the Property was marketed for only a 30 to 60-day period and only through a newspaper publication, it would result in a decreased value.

¶ 19 Timothy Fitzgibbons was accepted as an expert on appraisals and valuations in real estate and testified as follows. He was the senior director at Integra Realty Resources (Integra), where he had been employed since 2012. He had been working as an appraiser since 1997 and had the

designation of "MAI appraiser," which was given based on education, credentials, hours on the job, a demonstration report, and a comprehensive exam. Bayview Loan Services (Bayview) had retained him as an expert witness for the proceeding, and he had previously provided that company with appraisal reports for the Property. He performed a few hundred appraisals per year, and Integra did about 20 to 40 per year for Bayview.

¶ 20 Fitzgibbons took part in an appraisal report dated December 12, 2012. He and his team inspected the property, analyzed the rent roll, analyzed market rents in the area, looked at capitalization rates, tried to determine what the projected expenses would be, and came up with a net operating rate. They then applied a "cap rate to come up with a market value opinion via the income approach." To arrive at the Property's value, they relied on this income capitalization approach because the Property was set up to be an investor property, meaning that it was multi-tenant and likely to be purchased by an investor. A little over half of the Property was owner-occupied. There were seven industrial units total, so it would be very difficult for an owner-user to use the space without significant renovation costs. They used the sales comparison as a secondary approach for value, to test the feasibility of the income approach. For the sales comparison approach, they analyzed similar comparable sales in the area that had similar physical characteristics to the Property, and they then analyzed factors such as location, access, exposure, size, building quality, age, condition, and economic characteristics to come up with a price per square foot. The report valued the Property as $430,000. It indicated that the McHenry County real estate market was stable and that there would likely be an increase in market value.

¶ 21 Fitzgibbons was involved with another appraisal of the Property for Bayview dated June 27, 2013. They used the same methodologies, but they applied an adjustment for above-market rent and a $15,200 adjustment for surplus land. They valued the Property at $440,000 using a

10.5% "capitalization rate." Lower capitalization rates would result in a higher valuation, but national capitalization rates were not appropriate here because those were based on superior building classes and locations. The report again stated that the McHenry County real estate market was stable and that there would likely be an increase in market value.

¶ 22 Fitzgibbons was involved in a third appraisal of the Property for Bayview dated February 11, 2014. The Property was 82% occupied, whereas 88% occupancy was considered stabilized occupancy, so they applied a $9,000 discount for "lease-up" costs needed to get the property to stabilized occupancy. They valued the Property at $420,000. They believed the McHenry County real estate market was stable and would improve.

¶ 23 Fitzgibbons was further involved in an appraisal of the Property for Bayview dated July 28, 2014. The report concluded that the Property's market value was $260,000. Fitzgibbons agreed that the lease-up cost adjustment increased from $9,000 in the previous appraisal to $145,000. The change occurred because in the July 2014 appraisal, there was only one tenant paying rent.

¶ 24 Fitzgibbons was also involved in an appraisal of the Property dated January 27, 2015. Integra opined that the market value was $250,000; the liquidation value was $200,000; and the disposition value was $160,000.[3] The Property was 8% leased, but an investor would consider it entirely vacant because the tenant had a month-to-month lease and could vacate at any time. A buyer in the market value scenario would expect to have taxes paid at closing, to receive title insurance, to have transfer taxes paid, and to have any debris removed from the Property. There

[3] The report actually lists $200,000 as the disposition value and $160,000 as the liquidation value. The report also states that the disposition value assumed a marketing time of six months, and the liquidation value assumed a marketing time of 90 days.

were no notable changes in the McHenry County market from February 2014 to January 2015. However, the Property went from being 82% leased to effectively 100% vacant. Fitzgibbons applied a $150,000 discount in the January 2015 report for lease-up costs. Fitzgibbons agreed that in the prior appraisals, he did not consider month-to-month tenancies as vacancies for any tenants related to the ownership entity. Such tenants were not present in January 2015.

¶ 25 Fitzgibbons did not believe that the December 2012 appraisal accurately reflected the Property's value in early 2015. It was previously fully leased, and a less-occupied building would need adjustments for lease-up costs, such as rent loss, leasing costs, and build-out costs. An 8% lease rate would result in a significantly lower valuation. The appraisal included a market valuation, but a forced sale and a sheriff's sale would not fall into the definition. A forced sale would be more closely comparable to a liquidation value. Fitzgibbons similarly did not believe that the July 25, 2013, or the February 11, 2014, appraisals accurately reflected the Property's value in early 2015.

¶ 26 Fitzgibbons did not believe that the estimated assessed value of over $700,000 for the Property, used to determine property taxes, provided a good valuation tool or reflected the Property's actual value. Jurisdictions could have the motivation to increase the assessed market values to obtain more revenue; assessors typically did just an exterior valuation of the property; and assessors were not provided with rent rolls or other financials, which were especially important for an investment-driven property.

¶ 27 David Wolf provided the following testimony. He acquired a managing broker's license in 1993. He had been managing broker at Wolf Realty in Crystal Lake for the past eight years. The company leased and sold commercial buildings, with at least 80% of them located in McHenry County. Wolf also actively managed commercial real estate on the behalf of others for

more than 15 years; he was currently managing about 13 properties. Through this experience, he was familiar with vacancy rates and average capitalization rates in McHenry County. He believed that the going capitalization rate was between 7 and 9%; he had not seen a 10.5% rate used in McHenry County within the last two years.[4] The average vacancy period for commercial real estate in the area was three to six months. He had leased out one 10,000 square foot space within three months and a 5,000 square foot space within one month. Wolf estimated tenant improvement costs at between $1 and $1.50 per square foot; $3 per square foot seemed excessive for the market.

¶ 28 The trial court made the following findings at the conclusion of the evidence and argument on December 21, 2015. It had found Schultz to be an expert on the issue of broker price opinions. He was credible and helpful to some extent, but "the utility in his testimony was slight in that he projected very little experience to buttress his opinion" on a broker price. Such prices were often used to list properties for sale, and they typically did not correspond to the actual sale price. Shultz's opinion "pale[d] in comparison to the evidence that was elicited and [it was] surpassed by more contemporary and more weighty evidence as to the value of the real estate." It had found Fitzgibbons to be an expert on appraisals and valuations of real estate. He provided a thoughtful and helpful explanation of his methods and opinions, and he did not act as if he was favoring one party over the other. Wolf was credible but his testimony was of "very limited utility" in that the trial court did not find that his opinions "connect[ed] up with the environment of the subject property." Real estate was unique, and what was most pertinent was testimony with regard to the Property in particular.

[4] The trial court denied Fumanchu's request to have Wolf admitted as an expert witness as to the going capitalization rate range in McHenry County.

¶ 29 Fumanchu presented absolutely no evidence attacking the way that the sale was conducted, so it forfeited or otherwise did not carry its burden on that issue. The only remaining issue was whether and to what extent the sale was unconscionable. BMO Harris "went through a lot to arrive at their bid," and the last two appraisals put the value as low as $160,000. BMO Harris bid $175,000 and had evidence to support its position. The trial court ruled that Fumanchu had not met its burden on its motion to vacate the judicial sale and the deficiency judgment, and it therefore denied the motion.

¶ 30 Defendants timely appealed.

¶ 31 II. ANALYSIS

¶ 32 We first address BMO Harris's argument that the appeal is moot. BMO Harris argues that defendants overlook that the trial court denied the motion to vacate not only because defendants failed to meet their factual burden, but also because their claims were barred by section 15-1509(c) of the Foreclosure Law (735 ILCS 5/15-1509(c) (West 2014)). That section states that a vesting of title by deed shall bar "all claims of the parties to the foreclosure." *Id.* Section 15-1509(c) additionally states: "Any person seeking relief from any judgment or order entered in the foreclosure in accordance with subsection (g) of Section 2-1301 of the Code of Civil Procedure may claim only an interest in the proceeds of the sale." *Id.*

¶ 33 The trial court did not directly refer to section 15-1509(c) in its findings. Rather, it stated that the statute that BMO Harris cited "with the issuance of a sheriff's deed" was "designed to arrive at finality." It further stated:

> "That notwithstanding, there is the challenge of the interplay between that provision of the code, if you will, or Illinois code more generally, I think the Code of Civil Procedure notes the Illinois Mortgage Foreclosure, but nevertheless under Chapter 735 of the

> Illinois Complied Statutes, but there is the interplay between that and the other provisions that allow [Fumanchu] to address a vacating of the judgment. So to me that's challenging. That notwithstanding, I believe that provision is clear, it's on point, and it serves to address or stave off attempts to undo or further litigate issues."

The trial court then went on to discuss whether Fumanchu met its burden at the evidentiary hearing.

¶ 34 Looking at the trial court's comments in context, we agree with Fumanchu that the trial court did not consider section 15-1509(c) to create an independent bar to Fumanchu's claims. Indeed, BMO Harris raised the issue of section 15-1509(c) in response to Fumanchu's motion to vacate, but the trial court still allowed Fumanchu's claims to proceed to an evidentiary hearing. Even otherwise, section 15-1509(c) has been interpreted to bar claims on the foreclosed property, as opposed to claims for the sale proceeds. See *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 14. Here, Fumanchu ultimately sought relief from only the deficiency judgment, not an interest in the property itself, so section 15-1509(c) would not bar its claims.

¶ 35 BMO Harris also argues that the appeal is moot under Illinois Supreme Court Rule 305(k) (eff. July 1, 2004). That rule states:

> "If a stay is not perfected within the time for filing the notice of appeal, *** the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action

> under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed." Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

"Rule 305(k) protects a third-party buyer from the reversal or modification of a judgment regarding that property." *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 3.

¶ 36 Rule 305(k) will apply if: (1) the property passed pursuant to a final judgment; (2) the property's right, title, and interest passed to a person or entity who is not part of the proceeding; and (3) the litigating party did not perfect a stay of the judgment within the time for filing a notice of appeal. See *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523-24 (2001). BMO Harris argues that all of these elements were met because: (1) the trial court issued a confirmation order on June 3, 2015 (see *MidFirst Bank v. McNeal*, 2016 IL App (1st) 150465, ¶ 30 (the order confirming the sale is the final and appealable order in a foreclosure case)); (2) on July 7, 2015, the sheriff issued a deed to the Property to Dearborn Street Holdings, an entity that is affiliated with BMO Harris but is still a separate legal entity that is not a party to this action; and (3) defendants did not request or obtain a stay pending appeal.

¶ 37 Fumanchu points out that BMO Harris presented this same argument in a motion to dismiss the appeal as moot, and that we denied the motion.

¶ 38 Without a stay, an appeal would be moot if the appellant is seeking relief involving possession or ownership of property that has already been conveyed to a third party who is not a party to the litigation. *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (1989). While Fumanchu filed a motion to vacate both the judicial sale and deficiency judgment, it did so the same day that BMO Harris conveyed the property to Dearborn Street Holdings, and before the latter entity received a deed to the property. Moreover, it is clear that the issue was subsequently

narrowed to whether the purchase price of the Property was unconscionable. Defendants are seeking relief as to BMO Harris's deficiency judgment, which would not affect Dearborn Street Holdings, the third-party buyer whom Rule 305(k) is designed to protect. Accordingly, the appeal is not moot under Rule 305(k).

¶ 39 BMO Harris also argues that section 15-1508 of the Foreclosure Law dictates that the calculation and determination of any deficiencies be based on the amount bid at sale, so even if defendants are trying to vacate only the deficiency, the appeal would still be moot because the deficiency cannot be based on some hypothetical valuation outside of the foreclosure sale. BMO Harris cites *U.S. Bank, N.A. v. Atchley*, 2015 IL App (3d) 150144, and *Illini Federal Savings & Loan Ass'n v. Doering*, 162 Ill. App. 3d 768 (1987).

¶ 40 In *Atchley*, the appellate court held that the trial court had to grant an *in personam* deficiency judgment in the plaintiff's favor when the requirements of section 15-1508(e) of the Foreclosure Law (735 ILCS 5/15-1508(e) (West 2012)) were met. *Atchley*, 2015 IL App (3d) 150144, ¶¶ 10-14. Unlike the present case, *Atchley* did not involve a party challenging the amount of a deficiency judgment.

¶ 41 In *Doering*, the court stated that there was "no provision in Illinois case law for the court, under its equity powers, to set a deficiency judgment based on a judicial determination of value rather than the sale price of the property." *Id.* at 772. However, the *Doering* court also stated that mere inadequacy of price alone is not sufficient for setting aside a judicial sale "unless there is evidence of mistake, fraud, or violation of a duty by the officer conducting the sale." *Id.* at 771; see also *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 71 (the sale price of a property is the conclusive measure of its value where there is no fraud or other irregularity in the foreclosure proceeding). Here, defendants did not argue that the sale price was

merely inadequate, but rather argued that the sale price was so low as to be unconscionable. *Cf. CNB Bank & Trust, N.A. v. Rosentreter*, 2015 IL App (4th) 140141, ¶ 9 (the trial court erroneously assumed that bids in a foreclosure sale constituted evidence of fair market value and therefore could not be considered grossly inadequate); *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 115 (1993) ("[I]f there is an allegation of a current appraisal or other current indicia of value which is so measurably different than the sales price as to be unconscionable, then a hearing should be afforded [to] the defendant."). Moreover, as BMO Harris recognizes, *Doering* was decided prior to the enactment of the Foreclosure Law. The Foreclosure Law specifically allows the trial court to consider whether the terms of the sale were unconscionable, whether the sale was conducted fraudulently, and whether justice was otherwise served, before entering a confirmation order. 735 ILCS 5/15-1508(b) (West 2014); see also *Old Second National Bank v. Jafry*, 2016 IL App (2d) 150825, ¶ 28 ("If a lender's bid is unconscionably low, section 15-1508(b) authorizes the trial court to invalidate the sale.").

¶ 42 We now turn to the issues that defendants raise in their appeal. They first argue that the trial court abused its discretion in entering its pre-trial scheduling order and in denying Fumanchu's motion to continue the evidentiary hearing. Defendants specifically argue as follows. On July 20, 2015, in anticipation of a possible evidentiary hearing, Fumanchu sent BMO Harris requests to produce documents including rent rolls, property inspection reports, and appraisals. The following day, the trial court stayed BMO Harris's obligation to respond to the requests until it determined whether defendants would be allowed an evidentiary hearing under section 15-1508. On November 20, 2015, the trial court granted Fumanchu's request for an evidentiary hearing, which it set for December 14, 2015. It also entered a pre-trial order allowing BMO Harris until December 7, 2015, to respond to the requests to produce, and it

further required that pre-trial witness and exhibit disclosures be made by that date. On that day, BMO Harris produced about 1,372 pages of documents. Fumanchu filed its motion to continue "[i]n response to the impossible disclosure deadlines set by the Pre-trial Order and BMO's late production on the eve of trial." The motion sought to allow Fumanchu's MAI appraiser an opportunity to review the rent roll, market data, and reports on the Property's condition in order to provide an opinion as to its value. BMO Harris's expert identified such information as being crucial components to an appraisal of value. The documents that BMO Harris produced on December 7, 2015, disclosed for the first time the rent roll and lease information for the Property since May 5, 2014; the Property's condition since that date; and BMO Harris's expert's basis for a $175,000 reduction in value for a "lease up cost" adjustment. Due to the last-minute production of this information, Fumanchu was unable to have its MAI appraiser provide an expert opinion or rebuttal opinion as to the Property's value.

¶ 43 Defendants argue that although the trial court believed that Fumanchu had a sufficient opportunity since filing the motion to vacate to obtain an expert opinion and that Fumanchu should have filed a motion to compel production of the documents, these justifications ignore the interim scheduling orders that the trial court set. Specifically, the trial court put discovery on hold pending a determination of whether Fumanchu was even entitled to an evidentiary hearing. Moreover, as a result of the receiver's appointment, Fumanchu had not been in possession of the Property or pertinent rental records since May 2014.

¶ 44 Defendants argue that BMO Harris's production was also incomplete, in that it failed to produce correspondence between its expert and the receiver related to the appraisals until December 11, 2015, a couple of days before the evidentiary hearing. As a result of the late disclosure, Fumanchu was unable to subpoena witnesses for impeachment testimony on BMO

Harris's instruction to its expert to apply a "non-stabilized property" adjustment, resulting in a "lease up cost" adjustment.

¶ 45 Litigants do not have an absolute right to a continuance. *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 88. Instead, whether to grant or deny a motion for a continuance is within the trial court's sound discretion, and we will not disturb its decision unless it has resulted in a palpable injustice or constitutes a manifest abuse of discretion. *Id.* At the trial stage, the party seeking the continuance must have an even stronger justification due to the potential inconvenience to the witnesses, the parties, and the court. *Id.*

¶ 46 We conclude that the trial court did not abuse its discretion in denying Fumanchu's motion to continue. First, defendants never objected or responded to BMO Harris's motion for an order of confirmation and for a deficiency judgment, which alone arguably could have supported a denial of their challenge to the sale price. See *Sewickly, LLC v. Chicago Title Land Trust*, 2012 IL App (1st) 112977, ¶ 36. At a minimum, defendants could have raised their issues earlier and begun discovery sooner. As far as the trial court's pre-scheduling order setting both the discovery and witness/exhibit disclosure deadline for December 7, 2015, defendants have not filed a report of proceedings from that day which would allow us to consider the trial court's reasoning in choosing that date, and we must thus assume that it had an adequate basis to do so. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (the appellant has the burden to provide a sufficiently complete record of trial proceedings to support his or her claims of error, and the reviewing court will resolve any doubts that arise from the incompleteness of the record against the appellant). Correspondingly, we must find no deficiency in BMO Harris responding to the discovery requests by the court-ordered deadline of December 7, 2015. Defendants complain that they were not in possession of the Property at the time of the sale, but as BMO Harris points

out, it also did not possess the Property at that time, as it was in the receiver's hands. Moreover, the receiver presented regular reports to the trial court which included the status of each unit/tenant, summaries of income and expenses, and information about the Property's condition, and there is no indication in the record that defendants sought any additional information from the receiver. Finally, an evidentiary hearing after each foreclosure sale is not required, but rather may be conducted when the defendant presents evidence that the sale did not comply with section 15-1508(b) (*CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 52), meaning that a defendant should already have evidence indicating that the sale price was unconscionable. See *Holtzman*, 248 Ill. App. 3d at 115 (a defendant should be given a hearing if there is an allegation of a current appraisal or other current indicia of value that varies from the sale price so much as to be unconscionable). Considering all of these circumstances together, the trial court did not abuse its discretion in denying Fumanchu's motion to continue on December 10, 2015.

¶ 47 As far as Fumanchu's oral renewal of the motion to continue on December 14, 2015, based on the alleged late disclosure of additional documents, the trial court stated that BMO Harris was not obligated to provide the documents, which consisted of correspondence with the receiver and other entities. It additionally stated that the motion to continue should have been in writing and that it was based on issues that defendants could have addressed during the previous two years. We find no abuse of discretion in the trial court's reasoning for denying the motion to continue on December 14, 2015.

¶ 48 Defendants next argue that the trial court erred in granting BMO Harris's motion to bar the introduction of evidence of the Property's value after the foreclosure sale. Defendants note that relevant material is generally admissible if it is both material and probative, and its probative value is not outweighed by its prejudicial effect. See *Werner v. Nebal*, 377 Ill. App. 3d 447, 454

(2007). Defendants maintain that it is axiomatic that, just like evidence of value prior to the sale, evidence of value after the sale is relevant. Defendants argue that the appellate court has repeatedly held that evidence of post-condemnation sales value is admissible so long as the sale was unaffected by the condemnation proceedings, so evidence of post-sale value should also be applied to hearings under section 15-1508 in foreclosure cases. According to defendants, the trial court failed to recognize that its ruling barred Fumanchu from introducing any evidence of value, because an appraisal is a reflection of the value of the property at the time of the appraisal as opposed to an estimate of value at the time of the foreclosure sale. Defendants argue that the trial court's ruling further prevented them from presenting two appraisals conducted by BMO Harris's expert that took place within three and eight months after the sale, which showed values of $300,000 and $310,000.

¶ 49 The admission of evidence is within the trial court's discretion, and we will not reverse the trial court unless it clearly abused its discretion. *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 28; see also *Sewickley, LLC*, 2012 IL App (1st) 112977, ¶ 29 (the extent of the hearing afforded to a mortgagor challenging a foreclosure sale is left to the trial court's sound discretion). An abuse of discretion occurs where the ruling is arbitrary, fanciful, or unreasonable. *Id.*

¶ 50 We conclude that the trial court acted within its discretion in its evidentiary ruling. We note that the trial court did not limit the evidence to just up to the time of sale, but rather stated that it would also allow evidence of the value 30-days post-sale. The trial court also stated that it would allow an appraisal or opinion made after the sale date as to the value on the sale date. Defendants argue that this precluded Fumanchu from obtaining an appraisal, but given that experts rely on data to make assessments of current values, an expert could have used historical

data and previously-documented information about the Property to opine as to the value of the Property on the sale date. As far as condemnation cases, even in one of the cases quoted by defendants, the court further stated that the decision of whether to admit evidence of comparable sales or prior or subsequent sales of the condemned property is within the trial court's discretion. *Department of Public Works & Buildings v. Kelly*, 40 Ill. App. 3d 896, 911 (1976). Here, Fumanchu alleged that the sale price was so inadequate as to constitute fraud, so it was not arbitrary or fanciful for the trial court to limit the evidence of the Property's value to up to and 30 days past its sale date.

¶ 51 Last, defendants argue that the trial court erred in finding that the Property's sale price was not unconscionable under section 15-1508(b). Defendants maintain that the evidence showed that the Property had an appraised value of: $1,423,500 in 2007; $430,000 in November 2012; $440,000 in June 2013; and $420,000 in February 2014. Defendants argue that Schultz's December 2014 market value approach valued the property at $440,000 (calculated as the $500,000 market value minus $60,000 for the lowest estimate to remove the aggregate debris), and that this was only five months before BMO Harris's $175,000 bid. They point to evidence that in 2014, the McHenry County assessor valued the property at $713,555, and that the values of commercial and industrial property in that county were stable and increasing from the end of 2012 through 2014. Defendants calculate that the purchase price of $175,000 represents an 88% decrease in value since the date of the promissory note and a 60% decrease in value in the 21 months preceding the foreclosure.

¶ 52 Defendants additionally argue that Integra/Fitzgibbons used a higher than appropriate capitalization rate, which resulted in an undervaluation. Particularly, the June 2013 and February 2014 appraisals used a 10.5% capitalization rate, and the January 2015 appraisal used a 10%

capitalization rate. The application of the 10.5% rate in the June 2013 appraisal led to a value of $440,000, whereas application of a 9.5% rate would have resulted in a value of $452,000, and a 7% rate would have resulted in a value of $625,000. Defendants cite testimony by Wolf that the average capitalization rate in McHenry County was between 7% and 9%, and that he had not seen a rate as high as 10.5% applied to commercial and industrial real estate in that county.

¶ 53 Defendants argue that the record also shows that the January 2015 appraisal report's estimate of a $250,000 market value constitutes a sale price of $20 per square foot, where as the average price per square foot of comparables in that report is $31.41 per square foot. They further argue that the evidence on record showed significant flaws in the assumptions used in Integra's lease up cost deductions, namely: Fitzgibbons testified that owner-occupied month-to-month tenancies should be treated as vacant for valuation purposes, but Integra did not apply such a lease up cost adjustment in its June 2013 appraisal even though there were owner-occupied month-to-month tenancies at that time; Integra's lease up cost adjustment increased by $136,000 between the February and July 2014[5] appraisal reports even though the occupancy rate improved by 2% during that time; Integra applied the lease up cost adjustment in July 2014 after receiving an e-mail from an agent of the management company hired by the receiver instructing it to apply a "non-stablized property" discount; the $145,000 lease up cost adjustment applied in that appraisal assumed that the Property would be vacant 36 months, require lease commissions of 6%, and have a tenant improvement cost of $3 per square foot, all of which was based on interviews with undisclosed commercial realtors and comparable properties in McHenry County;

[5] The effective date listed for the latter appraisal is July 28, 2014, so we have referred to it throughout the disposition as the July 2014 appraisal. The appraisal was submitted in August 2014, and defendants refer to it in their briefs as the August 2014 appraisal.

one of those comparables was owned by Wolf, in addition to at least 10 other commercial buildings in the county; Wolf testified that actual vacancy rates for commercial and industrial properties in McHenry County were between three and six months, and that tenant improvement costs were between $1 and $1.50 per square foot.

¶ 54 Defendants maintain that it is inconceivable for any reasonable person to determine that the Property, without any catastrophic changes in its physical characteristics, depreciated by 58% between February 2014 and March 2015 while comparable properties in the area were appreciating during the same time.

¶ 55 Trial courts have broad discretion in approving or disapproving judicial sales under section 15-1508. *CitiMortgage v. Adams*, 2015 IL App (5th) 130470, ¶ 18. A trial court may disapprove a judicial sale if, among other things, the bid was so grossly inadequate that it shocks the conscience. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 264 (2008). Where a trial court holds an evidentiary hearing tantamount to a trial to decide factual issues, we apply a manifest-weight-of-the-evidence standard. See *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964, 969 (2007).

¶ 56 We conclude that the trial court's ruling, that Fumanchu did not meet its burden of showing that the sale price was unconscionable, was neither against the manifest weight of the evidence nor an abuse of discretion. A foreclosure sale is a forced sale, and property does not bring its full value at forced sales. *Rosentreter*, 2015 IL App (4th) 140141, ¶ 9. Debtors must expect to suffer a loss in a foreclosure sale based on a number of circumstances, including "the overall ascertainable condition of the property," the inability to inspect the property's interior condition, possible tax and other liens against the property, and the lack of a provision of title insurance. *Sewickley, LLC*, 2012 IL App (1st) 112977, ¶ 34.

¶ 57 Moreover, it is the trial court's role to determine the credibility of witnesses, the weight to be given to the evidence, and the inferences to be drawn, and we will not substitute our judgment for that of the trial court. See *Offord v. Fitness International, LLC*, 2015 IL App (1st) 150879, ¶ 16; see also *Hasek v. DaimierChrysler Corp.*, 319 Ill. App. 3d 780, 787-88 (2001) (the trial judge is in the best position to weigh the evidence and evaluate expert testimony). The battle of the experts is "a situation in which reviewing courts are especially loathe to second-guess the findings made by the trier of fact." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 216 (2005).

¶ 58 Here, the trial court found that Schultz's testimony was of limited use because he did not have a lot of experience to support his opinion, and because broker price opinions were usually used to list properties for sale and did not typically correspond to actual sales prices. Even otherwise, Schultz testified that in December 2014 he valued the property at $425,000 to $500,000, and that a person would assume that he would have to pay the higher quote of $315,000, to remove the debris, so he "ended up with a net offer of" $185,000. This estimate, months before the actual sale, is close to the $175,000 actual sale price. Wolf did not provide an estimated value for the Property or even comment directly about the Property, so the trial court found his testimony of limited use. The trial court found Fitzgibbons to be an expert on appraisals and valuations of real estate, and it found his testimony to be impartial. His/Integra's January 2015 appraisal report opined that the market value was $250,000; the disposition value was $200,000; and the liquidation value was $160,000. The $175,000 sale price was higher than the estimated liquidation value.

¶ 59 Defendants take issue with the capitalization rate used in the report, pointing out that Wolf testified to lower capitalization rates. However, the trial court denied Fumanchu's request

to have Wolf admitted as an expert witness as to the going capitalization rate range in McHenry County. Regardless, the differing capitalization rates would represent a conflict in the evidence for the trial court to resolve. As for defendants' argument about the price per square foot of comparables, Fitzgibbons testified that he and his team relied primarily on the income capitalization approach, which focused on income generated by the property, rather than the sales comparison approach, which looked at properties in the area with similar physical characteristics. It is true that Fitzgibbons testified that owner-occupied month-to-month tenants should be treated as vacancies for valuation purposes, yet he did not do so in the June 2013 appraisal. However, Fitzgibbons also testified that at the time, the building was otherwise 100% occupied, so Integra did not apply any adjustments for lease-up costs. Defendants argues that the lease up deduction increased by $136,000 between the February and July 2014 reports even though the occupancy rate increased by 2% during that time, but Fitzgibbons testified that the increase was due to the fact that only one tenant was paying rent at the time of the July 2014 report. The July 2014 report further stated that the property manager was in the process of evicting five tenants because they had not paid rent since the property went into receivership. On the subject of Integra's assumptions regarding the time to sell the Property and the price per square foot of tenant improvements, as compared to Wolf's testimony, this represented a conflict in the evidence for the trial court to resolve. The assessed value of the property was over $700,000, but Fitzgibbons testified that the assessment did not reflect the Property's actual value or provide a good assessment tool. He testified that jurisdictions could be motivated to provide a higher valuation to obtain more tax revenue; that assessors typically only viewed a property's exterior; and that assessors were not provided with rent rolls or other financial information, which was especially important for an investment-driven property. Last, as BMO Harris points

out in its brief, an exhibit shows that over $25,000 in prior taxes had been sold and needed to be redeemed by the buyer, which would also affect the Property's value. Accordingly, we find no basis to disturb the trial court's ruling that Fumanchu failed to prove that the sale price for the Property was unconscionable.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 62 Affirmed.