STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2013AP000544

Bank of New York,

Plaintiff-Respondent,

v.

Shirley T. Carson,

Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,

Defendants.

APPEAL FROM A DECISION AND ORDER BY THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HON. JANE CARROLL
CIRCUIT COURT CASE NO: 11CV001330

REPLY BRIEF OF DEFENDANT-APPELLANT SHIRLEY T. CARSON

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I. The circuit court has the statutory authority to order the sale of an abandoned property in a foreclosure, and such sales are mandated by Wis. Stat. § 846.102.

A. Bank of New York's argument ignores the key statute in this case, Wis. Stat. § 846.102.

This appeal concerns the foreclosure and sale of abandoned property. (R. at 26-9:10-25, Appellant's Br. App. at 11:10-25.)[1] In its brief, Bank of New York summarily dismisses that fact and ignores the specific statute that applies to the foreclosure and sale of abandoned property, Wis. Stat. § 846.102. (Resp't's Br. at 1.)

By ignoring Wis. Stat. § 846.102, Bank of New York ignores the primary issues on appeal. Prior to issuing her decision, Judge Carroll stated that her main concern was "whether I have the authority under the statute to order a plaintiff to sell the property at a sheriff's sale within a certain time." (R. at 26-6:4-7, Appellant's Br. App. at 6:4-7.) Judge Carroll then found that she had neither statutory nor equitable authority to compel a sale, stating, "[a]nd maybe this will give the court of appeals a chance to tell me that I could [compel a sale], but I'm specifically finding that I don't have the authority . . . ." (R. at 26-14:5-8, Appellant's Br. App. at 16:5-8.) Contrary to Bank of New York's argument,

[1] Citations to the record will use the following convention: "R. at [Cir. Ct. Record number]-[page number]." If the Record cite contains citations to a transcript, it will use the following convention: "R. at [Cir. Ct. Record number]-[page number]:[line numbers]." Citations to the Appellant's Brief Appendix will use the following convention: "Appellant's Br. App. at [page number]." If the Appendix cite contains citations to a transcript, it will use the following convention: "Appellant's Br. App. at [page number]:[line numbers]."

Judge Carroll never interpreted the circuit court's prior order, or even implied that the language of the prior order was relevant to the finding she made regarding her statutory or equitable authority.

Nor does Bank of New York's argument fit within the principle that a respondent on appeal may argue grounds to sustain the judgment below not relied on by the circuit court. *See, e.g., Auric v. Cont'l Cas. Co.*, 111 Wis. 2d 507, 515, 331 N.W.2d 325 (1983). In this case, interpretation of the prior order is irrelevant. The issue before the Court on appeal is whether the circuit court has the authority to amend the prior judgment and order Bank of New York to hold a sheriff's sale.

B. The language of Wis. Stat. § 846.102 gives the circuit court the authority to mandate a sale.

The language of Wis. Stat. § 846.102 is significantly different than the language of the prior court judgment on which Bank of New York relies. The language of Wis. Stat. § 846.102 plainly reveals a legislative intent to expedite the sale of foreclosed, abandoned properties. Unlike paragraph 6 of the prior judgment relied upon by Bank of New York, (R. at 14-2; Appellant's Br. App. at 52.), Wis. Stat. § 846.102 does not include the phrase "at any time." The statute says that sale of the premises "shall be made upon the expiration of 5 weeks from the date when such judgment is entered." Wis. Stat. § 846.102 (2011-12). The words "shall be made" directly precede the time limit. The words do not describe

the manner in which the sale must proceed; they describe when the sale must take place. The statute mandates sale.

As the Supreme Court of Wisconsin stated in *GMAC v. Gisvold* , "[t]he general rule in interpreting statutory language is that 'the word 'shall' is presumed mandatory when it appears in a statute.'" 215 Wis. 2d 459, 477-78, 572 N.W.2d 466, 475 (1998), quoting *Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978). Also in *Gisvold*, a footnote cites § 846.102 as an example of the legislature specifically using the word "shall," explaining that "shall" evinces the legislature's intent that the language is mandatory. *Id.* at 477 n. 11. Bank of New York does not cite any case law or make any argument regarding the mandatory nature of the word "shall" in Wis. Stat. § 846.102. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (holding that unrefuted arguments are deemed admitted.).

In addition to ignoring the plain language of the statue, Bank of New York ignores the statute's history, as illustrated by 2011 Wisconsin Act 136's amendment to Wis. Stat. § 846.102. (Appellant's. Br. at 13, 17.) That amendment further expedited the process of taking an abandoned property to sale, reducing the redemption period for abandoned properties and allowing municipalities to assert and prove abandonment. *Id.* Bank of New York cannot avoid the clear legislative mandate in Wis. Stat. § 846.102 by ignoring the statute and its history. If the

circuit court makes a finding that a foreclosed property is abandoned, it has the authority to enter judgment and order the bank to hold a sale after five weeks from the date judgment is entered. Wis. Stat. § 846.102.

C. Foreclosure judgments are regulated differently than money judgments.

Bank of New York's proposition that its foreclosure judgment provides it with the rights of any other judgment-creditor is false. Foreclosure judgments are different from ordinary money judgments because they involve the conveyance, alienability, and maintenance of real property. Contrary to Bank of New York's argument, and as stated in Carson's initial brief, there are significant timing and procedural requirements found in Chapter 846 that make foreclosure judgments and the rules pertaining to their execution different from the collection of money judgments described in Chapter 815. (Appellant's Br. at 18-19.) For example, lawsuits for money judgments are complete when judgment is entered, but foreclosures are not complete until the sheriff's sale is confirmed. Money judgments may be executed on immediately, but foreclosure judgments are subject to a redemption period between 5 weeks if the property is abandoned and 52 weeks if a deficiency judgment is sought. Ordinary money judgments are subject to the debtor's homestead exemption, a foreclosure on the homestead is not. The above examples, and other examples stated in the appellant's principal brief, illustrate that the legislature has repeatedly chosen to treat foreclosure judgments differently than ordinary money judgments.

Additionally, the legislature and courts recognize that non-parties to foreclosure actions are affected by the foreclosure process as well. For example, a third-party purchaser at a sheriff's sale has the power to move to compel confirmation of sale even if the judgment creditor determines it could obtain a higher purchase price and withdraws its request for confirmation.[2] *JP Morgan Chase Bank v. Green*, 2008 WI App 78, ¶ 31, 311 Wis. 2d 715, ¶ 31, 753 N.W.2d 536, ¶ 31. *Green* illustrates that sometimes the judgment-creditor's "rights" in a foreclosure proceeding yield to the interests of others.

The legislature's disparate treatment of foreclosure judgments is reasonable given the interests involved. Foreclosure judgments and the proliferation of properties abandoned because of foreclosures have devastating effects on individuals and municipalities. Neighbors and municipalities are stuck with dangerous nuisance properties, reduced property values, and unpaid property taxes. Given the impact on innocent bystanders, there is nothing absurd or illegal about the legislature deciding that when a bank seeks and obtains a foreclosure judgment of an abandoned property, or when a bank contributes to the abandonment of a property during the foreclosure process, the bank must quickly

[2] Bank of New York cites Wis. Stat. § 846.18 for the proposition that a third-party purchaser must wait six years to compel confirmation, arguing that the six-year requirement supposedly proves that it is impossible and absurd that sale can be compelled upon the expiration of five weeks from the date of entry of judgment. (Resp't's Br. at 5.) In a case cited earlier in Bank of New York's brief, however, the Court of Appeals of Wisconsin held that Wis. Stat. § 846.18 does not limit a third-party purchaser's ability to obtain a confirmation hearing and compel confirmation, finding that it was more reasonable to permit the purchaser to apply for confirmation when the judgment creditor withdrew its motion for confirmation of sale. *JP Morgan Chase Bank v. Green*, 2008 WI App 78, ¶ 31, 311 Wis. 2d 715, ¶ 31, 753 N.W.2d 536, ¶ 31.

take action to conclude the litigation. Bank of New York's argument that its foreclosure judgment creates only rights and no duties is disingenuous in light of the realities facing neighborhoods throughout Wisconsin.

II. Courts have the equitable authority to compel plaintiffs to diligently prosecute their cases to completion.

Even without Wis. Stat. § 846.102's statutory mandate, courts have the power to order that foreclosure plaintiffs conclude their litigation. Bank of New York accurately states that a court may not ignore statutes or case law when exercising its equitable authority, but it does not cite any statute or case law that prohibits the circuit court from ordering it to take an abandoned, foreclosed property to sale. (Resp't's Br. at 6-7.)[3]

The cases cited by Bank of New York only hold that the circuit court may not ignore a statutory mandate. For example, the circuit court may not use its equitable authority to ignore the statutory prohibition against frivolous claims and defenses or to ignore the statutory requirement that a foreclosure defendant may redeem at any time prior to confirmation of sale. *First Federated Savings Bank v. McDonah*, 143 Wis. 2d 429, 434, 422 N.W.2d 113, 115-16 (Ct. App. 1988), *Security State Bank v. Sechen*, 2005 WI App 253, ¶ ¶ 5, 8, 288 Wis. 2d 168, ¶¶ 5, 8, 707 N.W.2d 576, ¶¶ 5, 8. Additionally, in *GMAC v. Gisvold*, (also discussed in

[3] Bank of New York asserts that because title to a mortgaged property remains with the mortgagor until confirmation of sheriff's sale, the circuit court is somehow prohibited from ordering that a sale take place. (Resp't's Br. at 7.) However, Bank of New York concedes that it has the right to take the property to sale (Resp't's Br. at 5.) The fact that title remains with Carson until a sale is confirmed does not in any way limit the court's equitable authority to order Bank of New York to hold a sale.

Appellant's Reply Br. Pt. I, p. 3), the Supreme Court of Wisconsin considered whether a circuit court had the equitable authority to excuse a sheriff's sale purchaser's non-compliance with Wis. Stat. § 846.17's 10-day deadline for full payment. 215 Wis. 2d at 462-63, 572 N.W.2d at 469. The Court stated that a circuit court in a foreclosure action has the authority to grant equitable relief when a legally protected right is invaded, even absent a statutory right, and that the circuit court's equitable authority may not be limited absent a clear and valid legislative command. *Id.* at 480. Noting, however, that a circuit court may not exercise its equitable authority by ignoring a statutory mandate, the *Gisvold* Court held that the 10-day time limit for payment was a legislatively mandated time limit that the circuit court could not ignore. *Id.* at 480-81. Thus, *Gisvold* supports two propositions: when the word "shall" is used to describe an action that must occur upon the expiration of an explicit timeline, the action is mandatory, and a court cannot use its equitable authority to ignore a mandatory timeline.

In this case, it is Carson requesting enforcement of a legislatively mandated time limit, and neither *Gisvold* nor the other cases cited by Bank of New York support limiting the circuit court's equitable authority.

III. The circuit court should decide whether an order to take the property to sale is equitable in this case.

The question of whether equity favors Carson was specifically not decided by Judge Carroll in this case, because she found that she did not have the authority, in any case, to order the plaintiff to take an abandoned, foreclosed

property to sale. (R. at 26-14, Appellant's Br. App. at 16.) Because the circuit court never reached the issue of which party equity favors, Bank of New York's characterization of Ms. Carson and her actions, (Resp't's Br. at 7-9.), is uncalled for and without support in the record. The relief Ms. Carson seeks in this appeal is remand to the circuit court with the authority to enter the order, if the circuit court finds that such an order is warranted by Wis. Stat. § 846.102 under the facts of this case, or if the circuit court finds such an order to be equitable.

Carson does not concede Bank of New York's arguments regarding the equities of the situation and specifically denies its characterization of her actions, beliefs, and personality. Bank of New York is at fault in this situation as well, as it too was ordered not to commit waste, and it failed to inform either Carson or the circuit court that it never intended to take the property to sale. However, the circuit court is in a better position to make factual findings, judge credibility, and determine the equities of this case. *GMAC v. Gisvold*, 215 Wis. 2d at 480, 572 N.W.2d at 477; *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714, 719-20 (1976).

Bank of New York's mistake of law argument (Resp't's Br. at 8.) is also misplaced. Judge Carroll stated that she was not deciding whether grounds for reopening exist pursuant to Wis. Stat. § 806.07 because she found that she lacked the authority to compel a sale. (R. at 26-14, Appellant's Br. App. at 16.) Additionally, Carson is not arguing mistake of law as a basis for reopening and

amending the prior foreclosure judgment. From the beginning, Carson correctly conceded her default and the bank's right to foreclose. Her post-judgment motion was brought because, more than sixteen months after judgment had been entered, Bank of New York had done nothing to conclude the litigation. (R. at 14-4, 15-1, Appellant's Br. App. at 54, 19.) Carson's motion was brought pursuant to Wis. Stat. § 806.07(g) & (h), arguing it is no longer equitable for the judgment to have prospective application and that justice requires the relief sought. The circuit court should determine whether grounds exist for reopening and amending the prior judgment and order in this case.

Finally, Bank of New York's argument that the doctrine of laches should be applied against Carson, (Resp't's Br. at 8-9.), is unreasonable. Bank of New York delayed completion of this foreclosure action to Carson's detriment, not the other way around. Carson's default foreclosure judgment was not "strategic." She could not afford the mortgage payments, and she had no defenses to the foreclosure action that Bank of New York filed. Her belief - that a bank that seeks and obtains a foreclosure judgment would then complete the action and take the property to sale - was a reasonable belief. Carson could not have known that Bank of New York was going to delay sale of the property indefinitely. Further, Bank of New York fails to explain how it was placed at any disadvantage by the timing of Carson's motion.

CONCLUSION

For the reasons stated above and in her initial brief, Carson respectfully requests the Court reverse and remand this case to the circuit court to find whether justice requires an amended judgment of foreclosure or an equitable order requiring Bank of New York to timely sell the subject property.

Dated this 25th day of July, 2013 at Milwaukee, Wisconsin.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif fond. The length of this brief is 2,585 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

CERTIFICATION OF SERVICE

I hereby certify that:

Ten (10) copies of Defendant-Appellant's Brief were deposited at the United States Post office for delivery to the Clerk of the Court of Appeals by first class mail or other class of mail that is as expeditious, and three (3) copies of this brief and certifications were similarly deposited at the United States Post office for delivery to the Respondent and each defendant by first class mail or other class of mail that is as expeditious on July 25, 2013. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 25th day of July at Milwaukee, Wisconsin.

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