

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1
Appeal No. 2013AP000544

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Bank of New York,

Plaintiff-Respondent,

v.

Shirley T. Carson,

Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,

Defendants.

BRIEF OF THE LEGAL AID SOCIETY OF MILWAUKEE, INC.,
AMICUS CURIAE

APPEALED FROM THE CIRCUIT COURT OF MILWAUKEE
COUNTY, THE HONORABLE JANE CARROLL
CASE NO. 2011-CV-001330

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I. Introduction

“The current situation is a lose, lose, lose situation.” -
Milwaukee Mayor Tom Barrett.¹

As the nation’s foreclosure crisis continues to take its toll on the City of Milwaukee, ever increasing numbers of vacant, vandalized, looted and disintegrating properties have blighted the City’s low-income neighborhoods. The phenomenon of lender walkaway is fast becoming commonplace in distressed neighborhoods, creating scores of abandoned, decaying homes, and leaving confused homeowners and frustrated local government officials scrambling to pick up the pieces.

Lender walkaway often occurs when, after filing for foreclosure, and typically after obtaining a judgment of foreclosure or even after the sheriff’s sale, the lender finally investigates the condition of the property, and concludes that the value is so low that it does not make financial sense to foreclose. The lender then simply disappears, ceasing to prosecute its foreclosure case without any notice or communication to the homeowner, the City, or the court.

¹Quoted by Cary Spivak, Lenders abandoning foreclosed properties, Milwaukee Journal Sentinel (July 11, 2009), <http://www.jsonline.com/watchdog/watchdogreports/50548282.html>.

Having relied on communications from the lender and/or on the notice of sheriff's sale or of the confirmation hearing, many homeowners have already moved out of their homes at this point and have no idea that the lender did not complete the foreclosure process, leaving them as the legal owners of the properties. This results in vacant houses with no one maintaining them or paying property taxes. When homeowners finally discover that they still own these properties, they are in an impossible situation because even though the lender does not want the property, it also has not satisfied the mortgage, instead retaining a lien and therefore the ability to restart foreclosure proceedings at any time. With no certainty or finality as to ownership, homeowners are unable to make the financial investment that would be required to rehabilitate the property and move back in. Many properties fall into such severe disrepair that they are ultimately razed by the City, with homeowners stuck with the bill for building code violations, razing costs, and past-due property taxes.

Lender walkaways are concentrated in economically distressed neighborhoods and typically harm the most vulnerable, low-income homeowners, and the resulting derelict homes further depress property values in already-struggling neighborhoods.

Lender walkaways also harm local municipalities through lost tax

revenue, increased costs from maintaining and demolishing abandoned properties, and pointless foreclosure cases wasting judicial resources.

Taking into account the serious harm wrought by lender walkaways, courts should invoke their equitable powers to require lenders to complete the foreclosure process, and to do so within a reasonable period of time after the expiration of the redemption period. Without this requirement, lender walkaways will continue, further wasting scarce public resources, needlessly driving low-income individuals out of their homes, and harming local communities.

II. Lender Walkaway Is Becoming A Common Occurrence In Distressed Neighborhoods: What It Is And How It Happens

It is difficult to identify the number of lender walkaways but Legal Aid's experience is that it is becoming commonplace in Milwaukee's low-income neighborhoods. *See also, e.g.,* Geoff Smith & Sarah Duda, Left Behind: Troubled Foreclosed Properties and Servicer Accountability in Chicago, Woodstock Inst. at 4 (Jan. 2011), http://www.woodstockinst.org/sites/default/files/attachments/leftbehind_jan2011_smithduda_0.pdf (lender walkaways "have become increasingly common in recent years, particularly in distressed

markets”). A 2012 report by Fox 6 news found 3,737 homes in Milwaukee that had gone into foreclosure since 2009 and were still vacant, indicating that many of them are likely lender walkaways. Bryan Polcyn & Stephen Davis, “Bank walkaways” contribute to glut of abandoned properties in Milwaukee, FOX6 News (July 8, 2012, 9:00 PM), <http://fox6now.com/2012/07/08/bank-walkaways-contribute-to-glut-of-abandoned-properties-in-milwaukee/>. A 2013 Reuters article identified 900 Milwaukee foreclosure cases as lender walkaways. Michelle Conlin, Special Report: The latest foreclosure horror: the zombie title, Reuters (Jan. 10, 2013, 1:58 PM), <http://www.reuters.com/article/2013/01/10/us-usa-foreclosures-zombies-idUSBRE9090G920130110>.

Legal Aid’s own analysis of data collected by the City of Milwaukee and Milwaukee County since November 2010 yields 457 properties that may be lender walkaways. These properties are typically low-value properties bought with non-prime loans and are concentrated in areas with high poverty levels. U.S. Gov’t Accountability Office, GAO-11-93, Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures (Nov. 2010) at 21-28, *available at* <http://www.gao.gov/assets/320/312243.pdf>. *See also* Smith, *supra*

at 7-8 (walkaway properties in Chicago concentrated in African-American communities on the South and West sides).

When a lender files for foreclosure, it asks the court for a judgment of foreclosure and sale, such that the proceeds from the sale can be applied to satisfy the amount due on the mortgage. Wis. Stat. § 846.01 (2011-12). However, in the case of lender walkaway, the lender rejects the very relief it has demanded, and it does so very late in the game, typically after it obtains a judgment of foreclosure, and sometimes even after holding a sheriff's sale.

Lender walkaway often occurs when a lender files for foreclosure without reasonably investigating the value of the property it is seeking for sale. GAO-11-93 at 44 (servicers said they did not always obtain updated valuations before initiating foreclosure “because they did not think it was necessary or because they were not required to do so”). Usually, the decision on whether to foreclose is made by an out-of-state (and out-of-touch) loan servicing company hired to manage billions of dollars worth of mortgages. *See Spivak, supra*. Moreover, these out-of-touch servicers commonly use automated valuation models to estimate property values, not taking into account the actual condition of the property. GAO-11-93 at 43.

Only after obtaining a judgment of foreclosure will the lender actually examine the property in question to determine whether it makes financial sense to foreclose or whether the lender is better off simply charging-off the loan and reaping the associated tax benefits. *Id.* at 44. The lender then simply stops prosecuting the foreclosure case, usually without telling the homeowner that it no longer wants the house. *Id.* at 38. And even though the lender doesn't want the property, it may not satisfy the mortgage, instead retaining its lien and therefore the ability to restart foreclosure proceedings at any time. By the time the lender decides to abandon the foreclosure suit, many homeowners have already moved out of their homes because they have relied on communications from the lender telling them to move out or because, having received notice of the sheriff's sale or confirmation hearing, they believe that they will soon be evicted.

When this occurs, the house sits vacant, is usually stripped of anything of value, vandalized, and falls into total disrepair, frequently to the point that it must be razed by the City. The homeowner has no idea that she is still the legal owner of the property, and thus responsible for the taxes and upkeep—finding out only when a bill for building code violations, razing and/or past due property taxes finally makes its way to her new address. By

that time, it is financially impossible for the homeowner to reassume responsibility for the derelict property—and even if the homeowner has enough money to rehabilitate the property, the fact that the lender retains the mortgage lien and can restart foreclosure proceedings at any time renders any investment in the property too risky. It is then left to the City (the taxpayers) to deal with.

III. Lender Walkaway Has Disastrous Effects On Low-Income Homeowners And Distressed Neighborhoods, And Needlessly Strains Public Resources

A. Homeowners Are Left In A Catch-22 Situation

Lender walkaways do serious harm to homeowners, leaving them in the impossible situation of being saddled with all of a property's liabilities but none of its benefits. The homeowner is left in a catch-22 situation where she is liable for all of the maintenance expenses and taxes on the home but reaps no benefit whatsoever from paying them because her house is still subject to being taken in foreclosure at any time—for instance, a cash-strapped homeowner would not think it wise to spend \$10,000 to put a new roof on her house if the lender could reactivate foreclosure proceedings the next week and sell the house at sheriff's sale within a few months. Additionally, if the mortgage

lien remains on the property, the homeowner is unable to sell it or use it as collateral in any way.

Unsuspecting homeowners have had their wages garnished, their credit destroyed, and their tax refunds seized. They've opened their mail to find bills for back taxes, graffiti-scrubbing services, demolition crews, trash removal, gutter repair, exterior cleaning and lawn clipping. At their front doors, they've encountered bailiffs brandishing summonses to appear in court. In some cities, including Milwaukee, people with zombie title can be put in jail if they don't bring their houses into compliance.

Conlin, *supra*.

On top of these harms, homeowners in a lender walkaway situation who have not yet moved out have no idea when they might have to leave—will it be in one month or one year? Packing up and finding a new place to live is no small task and can take months to accomplish, particularly for homeowners with school-age children and/or tight budgets. Housing counselors and attorneys are unable to give these people solid advice on when to leave when there is no communication from the lender as to its intentions.

The following are real world examples of the harm resulting to homeowners when a lender walks away:

- A lender filed for foreclosure against an 80 year old, low income, widowed homeowner and obtained a judgment of

foreclosure in 2008. When the homeowner received notice that the sheriff's sale had been scheduled, she vacated her home. Two years later she was stopped by police because her taillight was out. The police ran her information and discovered that a warrant was out for her arrest due to her failure to appear in the City of Milwaukee Municipal Court for \$2,500 in citations issued for building code violations on her home. Legal Aid undertook representation of her case and discovered that, without notice to the homeowner, the lender had never held the sheriff's sale, but instead walked away from the property, leaving it vacant and unattended. It was vandalized and used as a drug house. The real estate taxes had not been paid. Ultimately, the City took the property for back taxes. It has now been torn down.

- Another Legal Aid client was sued for foreclosure and moved out of his property in late-2008 because he believed that was what he was supposed to do. When the lender ceased prosecuting its foreclosure case in late-2009, it failed to give any notice to the homeowner. The homeowner came to Legal Aid in 2012 because he received correspondence from the City regarding unpaid property taxes and fees that made him wonder whether he in fact still owned the property. The house had been stripped and vandalized and there are \$10,000 in past due property taxes, as well

as property recording fees. The homeowner would like to move back in but even if he could afford to pay the taxes and fees and make the necessary repairs, it would be too risky for him to invest that much money in a house that could be foreclosed on again at any time. He will continue accruing debts to the City on a home that he cannot live in.

- An Ohio man whose house was in foreclosure received a notice from the bank that his house would be sold at a sheriff's sale in a few weeks. He and his wife promptly moved out, reasonably believing that the bank would do as it said. But a year later, with the house now in shambles due to vandalism and neglect, the bank still had not sold the house, which the homeowner found out when the County sued him for unpaid building code violations. Then he started getting notices of past-due property taxes and the lender's debt collector started pressing him to resume mortgage payments. When the homeowner applied for disability benefits due to advanced liver disease, the Social Security Administration rejected his application because the house was labeled an "asset" that rendered him ineligible. Without disability coverage, he cannot get the liver transplant he needs to survive. Conlin, *supra*.

Additionally, lender walkaway properties are typically low-value properties concentrated in areas of high poverty. GAO-11-93 at 21-28. Therefore, not only low-income homeowners but also their entire neighborhoods are seriously harmed by lender walkaway.

B. Lender Walkaway Needlessly Saddles Local Government And Taxpayers With Extra Costs

Local government, and by extension, taxpayers, end up footing much of the bill for lender walkaways. A random spot check of twenty of the properties identified by Legal Aid reveals that more than half have outstanding building code violation fines, past-due property taxes, or both. Thus, the City is suffering from a loss of property tax revenue on these properties and is also incurring maintenance costs, which will be exacerbated for properties that require razing. *Cf.* GAO-11-93 at 35-37 (in 2006 Cleveland lost over \$6.5 million due to tax delinquency on vacant and abandoned structures; costs of over \$13 million for code enforcement activity to manage vacant and abandoned properties for eight Ohio cities in 2006; Cleveland has budgeted over \$8 million in federal grant money for demolition). According to the Milwaukee Department of Neighborhood Services, the average cost of razing a one-to-two- family residence is \$15,000. *See also*

Smith, *supra* at 4 (costs associated with seizure and demolition of a vacant property range from \$13,000 to \$34,000).

Another expense shouldered by local government and taxpayers are court costs associated with these pointless foreclosure suits. From 2006 through 2012, the number of foreclosure cases filed in Milwaukee County Circuit Courts has risen by 49%. Thus, foreclosure cases are increasingly burdening the court system, with one Milwaukee County court official noting that over the past few years, “Motion Monday” has been dominated by foreclosures. Our court system provides a publicly-subsidized forum where plaintiffs can seek redress for harm done to them. In return, courts demand that they behave honestly and responsibly so as not to waste taxpayer money. In the situation of lender walkaways, lenders are failing to meet this basic requirement.

IV. Taking Into Account The Serious Harm Being Done To Homeowners, Neighborhoods, and Taxpayers, Courts Should Exercise Their Equitable Powers To Prevent Lender Walkaway

Bank of New York’s position in this case makes it clear that lenders will continue to walk away from their foreclosure cases, under any circumstances, for as long as they are permitted to do so. When the lender’s actions create a vacant, abandoned property, for instance by failing to do reasonable due diligence and initiating a

foreclosure without investigating the condition of the property or by indicating to the homeowner that they must move out and then failing to notify the homeowner when they walk away, equity requires that they be required to finish what they started—hold a sheriff’s sale and have the sale confirmed.

Bank of New York rejects this common-sense approach, arguing instead that there is no set of circumstances under which a lender should be estopped from walking away. This argument is contrary to the principle of equity that underpins foreclosure law, holding that the circuit court has the equitable authority to exercise discretion throughout the proceedings and even after confirmation of sale, “if necessary to provide that no injustice shall be done to any of the parties.” *Harvest Sav. Bank v. ROI Inv.*, 228 Wis. 2d 733, 739, 598 N.W.2d 571, 574 (Wis. Ct. App. 1999) (rejecting argument that circuit court lacked authority to enter a particular type of judgment because the foreclosure statutes did not expressly authorize it).

Under the Bank’s reasoning, a lender may sue for foreclosure and whenever it chooses, simply change its mind and walk away from its lawsuit. This course of action also conflicts with Wis. Stat. § 802.05, which requires that actions be brought only for a proper purpose and only after engaging in a reasonable

inquiry as to the basis of the claim, “[§802.05]...creates obligations to one’s adversaries and to the legal system to avoid needless cost, delay and waste of judicial resources.” *Riley v. Isaacson*, 156 Wis. 2d 249, 259, 456 N.W.2d 619, 623 (Wis. Ct. App. 1990).

Moreover, in cases like this one where the lender walks away after obtaining a judgment of foreclosure, it may not simply dismiss the case or disappear. *Bank One Wis. v. Kahl*, 2002 WI App 312, P10, 258 Wis. 2d 937, 943-44, 655 N.W.2d 525, 528 (Wis. Ct. App. 2002). Rather, it must bring a motion pursuant to Wis. Stat. § 806.07 to vacate the judgment—and it must supply the court with a reason. 2002 WI App at P13, 258 Wis. 2d at 945, 655 N.W.2d at 529. In this case, if the Bank desires to walk away because it made a mistake as to the property’s value, or any other mistake of fact, it was required to bring a motion to vacate within one year of obtaining the judgment of foreclosure, which deadline has long since passed. Wis. Stat. § 806.07(2) (2011-12).

When equity demands it, judges are starting to hold lenders accountable in walkaway situations, requiring them to hold a foreclosure sale within a reasonable period of time after the expiration of the redemption period. *See, e.g., Polcyn, supra* (Judge Amato ordered a house to be sold immediately and admonished the servicer in open court “You cannot do what you’re

doing. It's unconscionable. It's inequitable. It's unfair. And it's disgusting."); GAO-11-93 at 58 (staff in one court reported that the judge requires a foreclosure sale to be scheduled within 30 days after the court enters a foreclosure judgment; if servicers do not comply, they can be held in contempt, fined, and perhaps serve jail time). Given the severe harm being done to Milwaukee citizens, neighborhoods, City and County coffers, and the taxpayers who fund them, this Court should find that courts can and should exercise their equitable powers under appropriate circumstances to prevent lender walkaway.

Dated: August 12, 2013

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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 produced with a proportional serif font. The length of this brief is 2,994 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, 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.

Dated this 22nd day of August, 2013 in Milwaukee, Wisconsin.

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

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CERTIFICATE OF SERVICE

I hereby certify that:

Ten (10) copies of the Brief of The Legal Aid Society of Milwaukee, Inc., Amicus Curiae were deposited at FedEx for delivery to the Clerk of the Court of Appeals by FedEx Ground Shipping, and three (3) copies of this brief and certifications were similarly deposited at FedEx for delivery to each party by FedEx Ground Shipping on August 22, 2013. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 22nd day of August, 2013 in Milwaukee, Wisconsin.

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

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