Supreme Court of the State of Wisconsin

No. 2013AP544

Bank of New York Mellon, fka The Bank of New York, as Trustee for CWABS, Inc. Asset-Backed Certificates, Series 2007-13,
Plaintiff-Respondent-Petitioner,

v.

Shirley T. Carson,
Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,
Defendants.

On appeal from the January 17, 2013 Final Order of the Circuit Court for Milwaukee County, Case No. 11-CV-1330, Honorable Jane V. Carroll presiding, reversed by District I of the Wisconsin Court of Appeals on November 26, 2013

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER BANK OF NEW YORK, AS TRUSTEE FOR CWABS, INC. ASSET-BACKED CERTIFICATES SERIES 2007-13

Valerie Bailey-Rihn
State Bar No. 1000728
QUARLES & BRADY LLP
33 E. Main St. Ste. 900
Madison, Wisconsin 53703
Tel.: (608) 283-2407
Fax: (608) 283-4903
val.bailey@quarles.com

Katherine Maloney Perhach
State Bar No. 1035975
QUARLES & BRADY LLP
411 E. Wisconsin Ave. Ste. 2350
Milwaukee, Wisconsin 53202
Tel.: (414) 277-5699
Fax: (414) 978-8699
katherine.perhach@quarles.com

Of counsel:
James W. McGarry
Benjamin Cox
GOODWIN PROCTER LLP
53 State St.
Boston, Massachusetts 02109
Tel.: (617) 570-1000
Fax: (617) 523-1231
jmcgarry@goodwinprocter.com
bcox@goodwinprocter.com

Keith Levenberg
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20016
Tel.: (202) 346-4000
Fax: (202) 346-4444
klevenberg@goodwinprocter.com

Counsel for Plaintiff-Respondent-Petitioner

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INTRODUCTION

This appeal presents a pure question of statutory interpretation, although Defendant-Appellant attempts to cast it as a question of public policy. The statutory question is a simple one: whether the language in Section 846.102 of Wisconsin's foreclosure scheme means the same thing as the identical language in Section 846.103 of Wisconsin's foreclosure scheme. Defendant-Appellant argues that it does not. Both statutes provide, in identical language, that a foreclosure sale "shall be made upon the expiration" of a statutory redemption period. In *Deutsche Bank National Trust Co. v. Matson*, No. 2012AP1981, unpublished slip op. (Wis. Ct. App. July 30, 2013), *review denied*, 2014 WI 14, 843 N.W.2d 707 (A.33), the Court of Appeals determined that "the most reasonable reading" of this language in WIS. STAT. § 846.103 "is that it directs [the lender] to proceed in a certain manner *if* the property is in fact sold," but "does not force [the lender] to conduct a sale." *Id*., ¶ 15. Defendant-Appellant argues that the same language in WIS. STAT. § 846.102 *does* force a sale.

The trial court stated it was not aware of a single precedent for this reading of the statute. (A.25.) Defendant-

Appellant's brief does not identify any, either, but argues that this unprecedented ruling was appropriate because it will help remedy the "new and growing social ill" of abandoned-property blight. (Resp. Br. at 21.) Achieving this result, however, requires courts to read multiple provisions into the foreclosure statute which are simply not there. If Wisconsin is to adopt them as policy, that decision should come from the legislature.

ARGUMENT

I. Defendant-Appellant's Attempts to Reconcile the Conflicting Court of Appeals Decisions Are Unpersuasive.

Defendant-Appellant argues that "[t]here is no conflict" between this case and *Matson* because they involved "different facts, different procedural postures, and different laws." (Resp. Br. at 16.) But Defendant-Appellant ignores the one crucial thing that is *not* different: the statutory language. The simple fact is that *Matson* held that WIS. STAT. § 846.103's provision that "the sale of the mortgaged premises shall be made upon the expiration" of the redemption period "does not force [the lender] to conduct a sale." *Matson*, *supra*, ¶ 15 (A.40). The Court of Appeals below held that WIS. STAT. § 846.102's provision that "the

sale of such mortgaged premises shall be made upon the expiration" of the redemption period mandates that the property be "sold without delay." (A.10.)

Defendant-Appellant attempts to downplay this conflict by claiming that *Matson* was only "interpreting a particular foreclosure judgment," not WIS. STAT. § 846.103 itself. (Resp. Br. at 13.) That is untrue. The defendant in *Matson* "argue[d] that WIS. STAT. § 846.103(2) requires a plaintiff in a foreclosure action to sell property." *Matson*, *supra*, ¶ 13 (A.38). The Court then cited the familiar canons for "reviewing statutes," and held that "WIS. STAT. § 846.103(2) does not require Deutsche Bank to sell the property." *Id*., ¶¶ 14, 16 (A.39-40). The Court was plainly construing a statute, not merely "judgments issued under" a statute. (Resp. Br. at 12.)

II. The Plain Language of WIS. STAT. § 846.102 Does Not Require a Foreclosure Plaintiff to Hold a Sale.

To the extent Defendant-Appellant's argument is based on the statutory language of WIS. STAT. § 846.102, it is based on a single word—the word "shall." Defendant-Appellant argues that the word "shall" should be construed as mandatory rather than permissive on three grounds: (i) there

is a presumption that "shall" is mandatory (Resp. Br. at 17-18); (ii) "shall" should be given a mandatory reading because the statute uses the word "may" elsewhere (*id*. at 18); and (iii) a mandatory reading serves the statute's "purpose" (*id*. at 20).

The most fundamental problem with this argument is that it does not account for the fact that the Court of Appeals previously held that the same term in the same context in WIS. STAT. § 846.103 is permissive, *not* mandatory. *Matson*, *supra*, ¶ 15 (A.40). This undermines both the first and the second bases Defendant-Appellant urges for the mandatory reading. Even if "shall" is presumed mandatory, the Court of Appeals already found sufficient justification to overcome that presumption here. And if "shall" deserves a mandatory reading in WIS. STAT. § 846.102 simply because another provision of § 846.102 uses the permissive "may," then WIS. STAT. § 846.103 would likewise warrant a mandatory reading because § 846.103 also has another provision using "may."

Furthermore, lexicographers have found no basis for the mandatory "presumption." *Black's Law Dictionary* editor-in-chief Bryan Garner identifies no fewer than eight meanings for the word "shall," some imposing duties, others merely granting permission, and others doing something else

altogether. *See* Bryan Garner, *A Dictionary of Modern Legal Usage* 939-41 (2d ed. 2001). The usage that most closely approximates the way the term is used in Wisconsin's foreclosure scheme is this one:

> "Objections to the proposed modification *shall* be filed and served on the debtor." The word purports to impose a duty on parties to object to proposed modifications, though the decision to object is discretionary. This amounts to a conditional duty: a party that wants to object must file and serve the objections.

Id. at 940. In the same sense, the "duty" imposed by WIS. STAT. § 846.102 is conditional: it does not require a party to hold a sale if it does not want to; it merely instructs the party how to proceed if it does want a sale. As Garner observes, if a legislature really intends a mandatory instruction rather than a permissive or conditional one, it can choose the "more appropriate word" "***must***" and make that intent clear. Garner, *supra*, at 940.

As Petitioner noted in its opening brief, the statutory language actually argues *against* a mandatory construction, because if the statute were intended to impose an obligation to hold a sale, one would expect it to specify *when* the sale must occur. *See Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 571-72, 263 N.W.2d 214 (1978)

(mandatory reading appropriate where statute specifies an "established time limit"). As the trial court observed here, even if WIS. STAT. § 846.102 were mandatory, "[i]t, of course, doesn't have any specific end to that timeline." (A.25); *see also JP Morgan Chase Bank, N.A. v. Green*, 2008 WI App 78, ¶¶ 3, 5, 311 Wis. 2d 715, 753 N.W.2d 536 (sale to occur "***at any time*** after" redemption period (emphasis added)). To achieve the result Defendant-Appellant urges, one must not only read a mandate into the text, but also read the word "immediately" into that mandate, because unless the sale occurs "immediately," it does not remedy the "social ill" with which Defendant-Appellant claims the statute is concerned. (Resp. Br. at 21.)

III. The Legislature's Amendments to WIS. STAT. § 846.102(2) Do Not Change the Meaning of the Unamended Text In WIS. STAT. § 846.102(1).

Defendant-Appellant's primary argument is that it is necessary to read WIS. STAT. § 846.102(1) as mandating a sale in order to fulfill what Defendant-Appellant claims was the purpose behind WIS. STAT. § 846.102(2). It is § 846.102(2) which, in Defendant-Appellant's view, justifies both (i) giving the sale language in § 846.102(1) a meaning contrary to the meaning given to the identical language in

§ 846.103, and (ii) deviating from the principle that "[i]n the mortgage foreclosure context, interpretations of statutes must be based on the context of ch. 846 as a whole, because ch. 846 sets up a comprehensive scheme of foreclosure." *Harbor Credit Union v. Samp*, 2011 WI App 40, ¶ 23, 332 Wis. 2d 214, 796 N.W.2d 813 (internal quotation marks omitted).

WIS. STAT. § 846.102(2) was added as part of a 2012 amendment limited to (i) shortening the redemption period for abandoned properties from two months to five weeks and the notice period from six weeks to three, and (ii) permitting municipalities to present evidence of abandonment. (A.62.) Except for the shortened redemption period, the 2012 amendment did not alter the statutory language pertinent here, *i.e.*, the provision that "judgment shall be entered as provided in s. 846.10 except that the sale of such mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered." WIS. STAT. § 846.102(1). Defendant-Appellant's argument that the statute should be construed as if the 2012 amendment had the effect of replacing the word "shall" with the word "must" violates multiple well-established principles of statutory construction, and finds no support in the legislative history in any event.

It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Reno v. Koray*, 515 U.S. 50, 55 (1995). Contradicting this principle, Defendant-Appellant argues that the language in WIS. STAT. § 846.102(1) providing when "the sale of such mortgaged premises shall be made" means something different from the language in WIS. STAT. § 846.103(2) providing when "the sale of the mortgaged premises shall be made."

Another basic canon of construction states that text that is "not a part of the amendment," but a part of the statute "as it was originally created," "remains in force as of the time of the original enactment." *Wis. Trust Co. v. Munday*, 168 N.W. 393, 398 (Wis. 1918), *aff'd*, 252 U.S. 499 (1920). As another state's high court put it:

> Where a statute is amended only in part, or as respects only certain isolated and integral sections thereof and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected by the amendatory act or acts, it is presumed that the Legislature intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act.

Citizens Bank & Trust Co. v. Dir. of Revenue, State of Mo., 639 S.W.2d 833, 835 (Mo. 1982). Simply put, when a legislature amends a statute, it can be presumed to be

changing the meaning of the text it is amending. It cannot be presumed to be changing the meaning of the text it leaves intact.

Defendant-Appellant argues that the 2012 amendment was "a legislative response to a new and growing social ill" and that the statute should therefore be construed in light of "the obvious purpose" of preventing "the social ills of waste and blight." (Resp. Br. at 20-21.) But insofar as WIS. STAT. § 846.102 was intended to deal with those ills, the mechanisms for doing so are those set forth in the text. Those include *allowing* (not requiring) an earlier sale, and making it easier to obtain an abandonment finding by allowing municipalities to present evidence of abandonment. The state also has numerous other statutory mechanisms to deal with this "social ill," including condemnation and redevelopment powers (*see* Br. of Plaintiff-Respondent-Petitioner at 26-27), so there is no basis for Milwaukee's claim in its *amicus* brief that WIS. STAT. § 846.102 is "the only tool" available to return abandoned properties to "responsible ownership." (Br. of *Amicus Curiae* City of Milwaukee at 11.)

The legislative history of the amendment confirms that a sale requirement is simply not the "tool" the legislature

understood itself to be enacting. A memorandum from the amendment's sponsor describes its effect as "modest" and states that the problem it is attempting to remedy is "the length of time it takes to have a property declared abandoned." Memorandum from Sen. Glenn Grothman to Members of the Assembly Comm. on Fin. Institutions 1 (Feb. 1, 2012) (S.A.1). Nothing in the legislative history suggests an intent to change the process that takes place *after* an abandonment finding.

Defendant-Appellant argues that the amendments are "of no use . . . if the court lacks the authority" to order a sale. (Resp. Br. at 20-21.) But it is actually the Defendant-Appellant's reading of the statute that has the effect of rendering the operative language "of no use." The entire premise of the response brief is that requiring an immediate sale of abandoned properties will serve the goal of "avoid[ing] blight" (Resp. Br. at 22), because it will impose on the lender the obligation to remedy the blight. But for this to occur, the statute would not only need to require a sale, it would also need to require the mortgagee to bid *at* the sale, because an abandoned property that attracts no bids will remain in the possession of the mortgagor. *See* WIS. STAT.

§ 846.17 (providing that title does not "vest in the purchaser" until "confirmation of [the] sale"); *Gerhardt v. Ellis*, 114 N.W. 495, 496 (Wis. 1908); *Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 697, 345 N.W.2d 449 (1984); *Sec. Bank v. Sechen*, 2005 WI App 253, ¶ 8, 288 Wis. 2d 168, 707 N.W.2d 576. Nowhere does Defendant-Appellant argue that WIS. STAT. § 846.102 forces a mortgagee not only to take an abandoned property to sale, but also to purchase the property if nobody else will.

Defendant-Appellant denies that the Court of Appeals' decision "'forces' lenders into foreclosure sales," arguing: "Ms. Carson did not compel The Bank of New York Mellon to commence this foreclosure action." (Resp. Br. at 28.) But Petitioner commenced this action and obtained the foreclosure judgment before the legislature added the amendments to WIS. STAT. § 846.102 which form the basis of Defendant-Appellant's argument that the statute mandates a sale. (*See* A.29-32, A.62.) Petitioner can hardly have been expected to foresee that a future amendment would be cited as the basis for limiting its rights in this fashion.

Regardless, Defendant-Appellant is wrong to insinuate that the blight conditions present here would have been

prevented if only Petitioner had not commenced this action. The Court of Appeals found that "Carson had already vacated the property" "around the time the Bank initiated its foreclosure" because she was "unable to care for the property." (A.3.) Those circumstances, not a lender's "commencing the litigation and then stopping" (Resp. Br. at 29), are why the property was not maintained. No amount of "communication between the court, litigants to a foreclosure action, and local governments" (Resp. Br. at 30) would have prevented that from occurring. Defendant-Appellant is not seeking "communication"; Defendant-Appellant is seeking a foreclosure regime that gives defaulted borrowers the power to pass on costs that are the natural "incidents of ownership" to their lenders. *Canning v. Beneficial Maine, Inc. (In re Canning)*, 706 F.3d 64, 68, 72 (1st Cir. 2013); *In re Arsenault*, 456 B.R. 627, 631-32 (Bankr. S.D. Ga. 2011); *see also Carolina First Bank v. Stambaugh*, No. 10-0174, 2011 WL 6217409 (W.D.N.C. Dec. 14, 2011) (declining to hold bank liable for property damage that occurred "once the Bank announced its decision to foreclose" and borrowers "ceased any efforts to prevent soil erosion or otherwise protect the site's development, resulting in significant environmental

damage to the property. . . . As the record owners of the property, the [borrowers] were charged with the rights and responsibilities of ownership."), *aff'd*, 474 F. App'x 163 (4th Cir. 2012).

The result Defendant-Appellant urges is contrary both to public policy and to the statutory text. If the legislature had intended to "put[] the borrower in control over the aggrieved lender's recovery," *Matson*, *supra*, ¶ 19 (A.42), it had ample opportunity to make that intent evident. Would the 2012 amendment to WIS. STAT. § 846.102 still have passed if it had included text explicitly providing that "the sale of such mortgaged premises ***must*** be made upon the expiration" of the redemption period, the interpretation that Defendant-Appellant urges? Perhaps so—perhaps not. This Court can only speculate. But it *is* clear that other additions municipalities had lobbied for to make the legislation more useful to them failed to garner legislative support. *See* Memorandum from Curt Witynski, Ass't. Dir., League of Wis. Municipalities, to Assembly Comm. on Fin. Institutions 1 (Feb. 1, 2012) (S.A.2) (lobbying for "a municipal cost recovery provision").

Not insignificantly, the legislative history also includes a memorandum from Legal Action of Wisconsin, which represents the Defendant-Appellant in this case, *opposing* the amendment on the ground that it will promote wrongful abandonment findings and thereby "deprive many innocent homeowners . . . of their right to try to avail of federal and state aid programs or other means, including negotiations with the banks, during the redemption period to try to resolve their deficiency." Memorandum from Bob Andersen, Legal Action of Wisconsin, to Sen. Comm. on Fin. Institutions & Rural Issues 2-3 (Dec. 2, 2011) ("Andersen Mem.," S.A.3). Yet Legal Action now says the opposite, scoffing at Petitioner's observation that there are "circumstances in which a sale requirement would not serve the interest of either party" and claiming that "[d]ebtors seeking more time to redeem or renegotiate are not going to abandon their properties." (Resp. Br. at 27-28.) The Legal Action memorandum opposing the 2012 amendment also claims that it "creates a serious problem for tenants who are occupying the premises" declared abandoned, who might "receive no notice of a foreclosure and quick sale until the sheriff appears at the door to put them out on the street." Andersen Mem. at 3

(S.A.3). Insofar as that is a serious concern, mandating a sale "without delay" would only compound it.

Ultimately, rather than speculate as to what manipulations of the statutory language might serve the ostensible purposes of a law more effectively, this Court divines the intent and purpose of a statute "from the text and structure of the statute itself." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 48, 271 Wis. 2d 633, 681 N.W.2d 110. In construing WIS. STAT. § 846.102 to require "that an abandoned property is sold without delay," the Court of Appeals ascribed an intent to the legislature that is not evident in the text and structure of the statute—which neither mandates a sale nor mandates that a sale occur "without delay." This Court should reverse.

/s/Valerie Bailey-Rihn
Valerie Bailey-Rihn
State Bar No. 1000728
QUARLES & BRADY LLP
33 E. Main St., Ste. 900
Madison, Wisconsin 53703
Tel.: (608) 283-2407
Fax: (608) 283-4903
val.bailey@quarles.com

/s/ Katherine Maloney Perhach
Katherine Maloney Perhach
State Bar No. 1035975
QUARLES & BRADY LLP
411 E. Wisconsin Ave., Ste. 2350
Milwaukee, Wisconsin 53202
Tel.: (414) 277-5699
Fax: (414) 978-8699
katherine.perhach@quarles.com

Of counsel:
James W. McGarry
Benjamin Cox
GOODWIN PROCTER LLP
53 State St.
Boston, Massachusetts 02109
Tel.: (617) 570-1000
Fax: (617) 523-1231
jmcgarry@goodwinprocter.com
bcox@goodwinprocter.com

Keith Levenberg
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20016
Tel.: (202) 346-4000
Fax: (202) 346-4444
klevenberg@goodwinprocter.com

Attorneys for Plaintiff-Respondent-Petitioner Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for CWABS, Inc. Asset-Backed Certificates, Series 2007-13

Dated: July 31, 2014

CERTIFICATE OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2975 words.

Dated this 31st day of July, 2014

/s/ Valerie Bailey-Rihn

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 parties.

Dated this 31st day of July, 2014.

/s/Valerie Bailey-Rihn

CERTIFICATE OF SERVICE

I certify that on this day, I caused three correct copies of this brief to be served by U.S. Mail on the following attorneys:

April A.G. Hartman
Legal Action of Wisconsin, Inc.
230 W. Wells Street, Room 800
Milwaukee, WI 53203-1828

Jillian N. Walker
Messerli & Kramer P.A.
3033 Campus Drive, Suite 250
Minneapolis, MN 55441

William N. Foshag
Gray & Associates, LLP
16345 West Glendale Drive
New Berlin, WI 53151-2841

Catherine M. Doyle & Amanda Adrian
Legal Aid Society of Milwaukee Inc.
521 North 8th Street
Milwaukee, WI 53233

Dated this 31st day of July, 2014.

/s/ Valerie Bailey-Rihn