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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2013AP000544

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.

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,
REVERSED BY DISTRICT 1 OF THE WISCONSIN COURT OF APPEALS

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This appeal raises an obvious question: Why are we here three years after Bank of New York Mellon ("BONY") was tendered the full relief for which it sued? Sadly, this case reflects a widespread pattern in which foreclosed properties are being thrown into legal limbo. Increasingly, "walkaway" lenders are selling the underlying promissory notes for these mortgages to debt-buyer entities which will bring a new foreclosure action on the same property. This process may repeat multiple times with a new lawsuit after each transfer of the note.

Under the facts of the instant case, the circuit court considered itself powerless to fashion a remedy for the lender walkaway, in spite of the obvious dilemma the lender imposed on the homeowner. As is typically the case, the homeowner relinquished her home to the lender as the lender demanded, but was left responsible for an abandoned home and potentially endless foreclosure litigation. Unless the Court recognizes the circuit court's statutory and equitable authority to compel lenders to either follow through on foreclosure lawsuits, or to treat the borrower's mortgage as satisfied, walkaway lenders will continue to create an expanding class of unresolvable cases. Without court authority to order a definitive remedy, walkaway lenders will continue to

impose hardship on vulnerable homeowners, to burden the City with abandoned properties and to condemn the courts to presiding over foreclosure lawsuits that are mere exercises in futility.

Of equal importance, circuit courts must have the power to address lender misconduct that may be intrinsic to a large number of lender walkaways. Many walkaways involve the lender initiating or maintaining a foreclosure action as a mere "place-holder" action until it decides whether it really wants to foreclose, in violation of Wis. Stat. § 802.05 (prohibiting lawsuits for an "improper purpose" or without reasonable inquiry of the circumstances and basis for a claim). Walkaway lenders also run afoul of Wis. Stat. § 806.07 by failing to seek permission from the court to terminate a foreclosure lawsuit in which a judgment has been granted, instead silently disappearing without indicating its intentions to the homeowner or the court. Finally, walkaways violate Wis. Stat. § 840.10 when the lender takes a lis pendens and then prematurely releases it, in order to evade property upkeep responsibilities imposed by the City of Milwaukee.

Legal Aid has handled more than 1,600 foreclosure matters since 2001 and has encountered the lender walkaway situation dozens of times. This brief is being submitted based on Legal Aid's experience with these cases with the intent to illustrate the

inequity of this practice under certain circumstances and the need for courts to have the authority to address it.

II. WALKAWAY LENDERS CREATE A CLASS OF CASES THAT ARE INCAPABLE OF RESOLUTION, AND WHICH MAY REAPPEAR ON THE COURT'S DOCKET AD-INFINITUM

If circuit courts do not have the statutory and equitable authority to hold foreclosure plaintiffs to the relief they sue for, walkaway lenders will continue to create a class of cases that neither the borrower nor the court has any way to bring to a final resolution, despite the lender being given everything it has asked for. Of particular import to local government and taxpayers,[1] these cases are likely to reappear on the circuit court's docket over and over again, as successive debt buyers sue for foreclosure on the same property, one after the other, before walking away.

Lender walkaways devastate defendants and frustrate the courts because even when the defendant gives the plaintiff everything it is seeking, she still cannot obtain satisfaction of the

[1] Foreclosure matters consume a significant amount of judicial resources. According to court records, there have been 45,955 foreclosure cases filed in the Circuit Court of Milwaukee County from January 2006 through July 2014.

judgment that has been entered.[2] According to BONY, the court cannot fashion an equitable remedy to bring the matter to a close. However, foreclosure is not a lender's only option—it could also elect to sue for a money judgment on the note. *Bank of Sun Prairie v. Marshall Development Co.*, 2001 WI App 64, ¶¶ 12-14, 242 Wis. 2d 355, 626 N.W.2d 319 (an action at law on a note and an action in equity to foreclose on the mortgage can be pursued separately, or can be united into one action by foreclosing and seeking a deficiency judgment). Therefore, a lender who chooses instead to foreclose is declaring, specifically, that it wants to take the house.[3] That is particularly true in the vast majority of foreclosure suits where the lender is not seeking a deficiency because there, the *only* thing the lender is seeking is permission to sell the house at sheriff's sale. In a lender walkaway situation, the

[2] Defendants in other classes of civil actions can satisfy judgments even when plaintiffs are uncooperative. Money judgments may be paid to the Clerk of Courts. Wis. Stat. ¶ 806.20. In replevin actions, the defendant can voluntarily deliver the property that is the subject of the action. Satisfaction of a foreclosure judgment requires action by the plaintiff to conduct a sheriff's sale and confirm the sale.

[3] In Legal Aid's experience, it is almost always the plaintiff itself who buys the property at the sheriff's sale.

lender can refuse to accept the house and instead, according to BONY, let the judgment sit for up to five years before holding the sheriff's sale to complete the process, simply walking away from the suit, or perhaps selling the note to a new entity, whichever the lender happens to prefer at the time.

One of the Legal Aid Society's cases illustrates the impossible position lenders can force upon homeowners and the courts in these situations. Legal Aid represents a married couple who fell behind on their mortgage when the husband lost his job and the lender filed for foreclosure. The homeowners agreed that given their loss of income, they could no longer afford the mortgage payments. They retained Legal Aid to assist them in responsibly agreeing to what the lender was seeking in its complaint. Legal Aid assisted the homeowners in stipulating to issuance of a default judgment and waiver of the redemption period. In exchange, the lender agreed to conduct the sheriff's sale "as soon as possible" and scheduled a sheriff's sale for approximately six weeks later. The homeowners found affordable rental housing and moved out of the house. They advised the lender they had moved out and the property was vacant.

However, the lender cancelled the sheriff's sale and filed a motion to reopen and vacate the judgment and dismiss the action

without prejudice, on the ground that the plaintiff "no longer wishes to proceed" with it. In other words, the lender wished to walk away from the action it had commenced. Legal Aid opposed the lender's motion to reopen as it had failed to meet the requirements of Wis. Stat. §806.07 for vacating a judgment, and the lender withdrew its motion, but still failed to set a sheriff's sale. Several months later, the lender sold the mortgage note to a new lender, who brought a second foreclosure action even though the previous judgment of foreclosure remains unsatisfied. More than a year after agreeing to satisfy the judgment by stipulating to a judgment and waiving redemption period, the homeowners still own this empty house, remain responsible for its upkeep and maintenance and are defendants in multiple foreclosure actions.

Under the BONY's interpretation of Wis. Stat. § 846.102, this lender conduct is permitted because a foreclosure judgment merely gives the lender the right to elect to have the premises sold at sheriff's sale and does not require the sale. Under this theory, there exists no legal remedy for the homeowner and no way for the court to prevent a parade of lenders foreclosing on and walking away from the same property.

BONY implies that the reason lenders choose to walk away is the "determination that the condition of the property precluded

any prospect of recovery and could simply saddle the Trustee with the property's costly liabilities." (Petitioner's Brief 3-4). However, as this example demonstrates, walkaways are often the result of the lender's decision to sell the mortgage loan to investors as part of the increasing trend of buying and selling these distressed mortgage assets. Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-Entering The Market Through Debt Buyers*, 26 Loy. Consumer L. Rev. 25, 39-63 (2013); *see also* discussion *infra* Part III.B.

III. LENDER MISCONDUCT IS OFTEN PRESENT IN WALKAWAY CASES: VIOLATIONS OF WIS. STAT. §§ 802.05, 806.07 AND 840.10 ARE COMMON

Lender walkaway often involves playing fast and loose with the Wisconsin rules of civil procedure and Wisconsin statutes governing lis pendens. Walkaway suits violate Wis. Stat. §802.05 whenever they serve as mere "place-holders" until the lender decides whether it *really* wants to foreclose or not. Unsurprisingly, after obtaining a judgment of foreclosure in such a frivolous lawsuit, lenders attempt to walk away from the suit without seeking the court's permission to vacate the judgment pursuant to the requirements of § 806.07, presumably because the real reason for wanting to vacate would not pass muster with the court. Some walkaway lenders also prematurely release the lis pendens on the

property at issue, in violation of Wis. Stat. § 840.10, in order to evade the reach of the City of Milwaukee ordinance that would otherwise hold them responsible for maintaining the property being foreclosed upon.

A. Lenders Violate The Fundamental Rules Of Pleading Embodied In Wis. Stat. §802.05 When They File And Maintain "Place-holder" Lawsuits, Sometimes Going So Far As To Obtain A Judgment Of Foreclosure Before Investigating The Value Of The Property To Determine Whether They Really Want To Foreclose

Under some circumstances, lenders who walk away from their foreclosure actions are violating the fundamental rules of pleading set forth in Wis. Stat.§802.05. Section 802.05 prohibits papers from being presented for an "improper purpose" and requires "an inquiry reasonable under the circumstances" as to the basis of the claims prior to filing.

Lenders who initiate and maintain a foreclosure suit as a "place-holder," even going so far as to get a judgment of foreclosure before determining whether they really want to foreclose, are in violation of §802.05's prohibition on presenting papers for an improper purpose, and its requirement of conducting reasonable inquiry prior to commencing an action. Lenders admit that they do not always obtain updated property valuations before initiating foreclosure "because they did not think it was necessary

or because they were not required to do so," 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 44, *available at* http://www.gao.gov/assets/320/312243.pdf, and further admit that they commonly use automated valuation models that do not take into account the actual condition of the property at all. *Id.* at 43. Lenders report that only after obtaining a judgment of foreclosure do they examine the property in question to determine whether they actually want to foreclose. *Id.* at 44. *See also Hearing Before the Sen. Comm. On Financial Institutions and Rural Issues*, Reg. Sess. (2011) (Wisconsin Bankers Association testimony implying that lenders do not typically investigate whether the property is abandoned until after obtaining a judgment of foreclosure) (Appendix to the Amicus Curiae Brief of the City of Milwaukee at A4). While the "reasonable inquiry" requirement is most commonly applied to whether the claims asserted are grounded in fact and law, it must also apply to the object of the suit—parties are not permitted to invoke the judicial system on a whim, filing a "place-holder" lawsuit until they decide whether they really want to sue. This dilettante approach to litigation is precisely the type of conduct 802.05 seeks to prevent.

B. Lenders Attempt To Dismiss Their Cases Without Seeking To Vacate The Judgment As Is Required By Wis. Stat. § 806.07 Because There Is Likely No Honest Reason That Would Pass Muster With The Court

In cases where a lender has obtained a judgment of foreclosure, the lender must seek relief from that judgment pursuant to Wis. Stat. § 806.07 in order to dismiss the case, and it must supply the court with one of the enumerated reasons. Obviously, the honest reason, "I changed my mind because I didn't investigate the property to determine whether I really wanted to foreclose until now," is unlikely to persuade the court and may even result in sanctions pursuant to §802.05. Therefore, lenders either simply cease prosecuting, leaving the unsatisfied judgment of foreclosure pending, or they just submit a proposed order of dismissal to the court and hope the court enters it without questioning what's going on.

Even if a lender employs the proper process for terminating its lawsuit, making a motion to set aside the judgment pursuant to § 806.07, courts must exercise caution in granting it. There is evidence that lenders misrepresent their reasons for seeking to vacate a judgment of foreclosure, or provide such vague information that the true reason is not readily ascertainable. Fox, *supra*, at 44 & n. 92. For, example, in a case where Legal Aid

represented an elderly widow suffering from advanced Alzheimer's disease and living in a nursing home, without discussion or notice, plaintiff filed a motion to dismiss the action on the ground that the parties were working out a loan modification, even though this was obviously impossible due to the defendant's mental incapacity. *See also* discussion of Legal Aid case *supra* Part II (lender stated only that it "no longer wishes to proceed," then sold the note to another entity); Fox at 47-55 (describing a case where lender claimed that "the parties had resolved the matter" but later admitted the real reason was the lack of equity in the property; another case where the lender's attorney stated the reason was "loss mitigation" but later admitted he did not know what that meant and that it likely was not the real reason). Thus, it is imperative that courts scrutinize the lender's proffered reason for such a motion, particularly in the case of a default judgment where there is no opposing party present to contest the lender's claim.

It appears that an increasingly common reason for wanting to set aside a foreclosure judgment is the lender's desire to sell the note on the secondary market to a buyer of distressed assets.[4] Fox

[4] Pursuant to the doctrine of merger, when a judgment is entered, the underlying claim merges into that judgment. Fox, *supra*, at 45-46; *Production Credit Ass'n v. Laufenberg*, 143 Wis. 2d 200, 204, 420 N.W.2d 778 (Ct. App.

at 46, 51-52. Unchecked by the courts, this can lead to suit after suit being filed on the same property as each successive debt buyer files and walks away. One researcher revealed that six foreclosure suits were filed on the same property, against the same owner, in a five-year period. Fox at 63, Chart B.

C. Lenders Who Want To Walk Away Often Release Their Lis Pendens On The Property In Violation of Wis. Stat. § 840.10 In Order To Evade City Of Milwaukee Property Maintenance Requirements

Walkaway lenders also play fast and loose with Wis. Stat. § 840.10, which permits the discharge of a lis pendens only when a case has been finally concluded. Pursuant to § 840.10, a lis pendens must stay in place until the matter is resolved with finality, including all opportunities for appeal. *Zweber v. Melar*, 2004 WI App 185, ¶¶ 10, 14-15, 276 Wis. 2d 156, 687 N.W.2d 818. In

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1988). In a foreclosure context, this means that once the judgment is entered, the lender must vacate the judgment in order to sell the note. Fox at 51-52. Similarly, when a plaintiff waives its right to a deficiency and obtains a judgment of foreclosure under Wis. Stat. § 846.101, no deficiency judgment may be "separately rendered against any party," such that the lender could not then proceed to obtain a money judgment on the note. Wis. Stat. § 846.101 (2011-12). Accordingly, this too forecloses the possibility of selling the note to a new entity, requiring the current lender to vacate the judgment it obtained in order to sell the note.

violation of this requirement, lenders who are determined to walk away without properly concluding the matter frequently also prematurely release the lis pendens. By doing this, the lender relieves itself of the responsibility for property maintenance and penalties for non-compliance imposed by City of Milwaukee Ordinance 200-22.5, "Registration of Residential Properties Pending Foreclosure." Milwaukee, Wis., Code of Ordinances Vol. 2, Ch. 200, Subch.3, § 200-22.5(2.5-6) (2014), *available at* http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/OrdinanceO/Volume-2/CH200-sub3.pdf. Pursuant to § 200-22.5(2.5) (d), vacating the lis pendens "dissolves" the lender's registration and its duties as a registrant "cease." *Id.*

IV. CONCLUSION

BONY argues that lenders have unfettered discretion in determining the fate of the homes they sue to take in foreclosure, and that the courts lack statutory and equitable authority to fashion remedies to address the gross inequities that frequently ensue. BONY's argument is contrary to the explicit provisions of Wis. Stat. § 846.102 and 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 Invs.*, 228 Wis. 2d 733, 739, 598 N.W.2d 571 (1999). Given the severe harm being done to homeowners and the burden imposed on the court system, when equity demands it, circuit courts must be permitted to hold lenders accountable in walkaway situations.

For the reasons stated herein, the Legal Aid Society of Milwaukee respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated: August 21, 2014

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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 2,952 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 21st day of August, 2014 in Milwaukee, Wisconsin.

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

s/Amanda E. Adrian

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CERTIFICATE OF SERVICE

I hereby certify that:

Twenty-two (22) 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 Supreme Court 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, 2014. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 22nd day of August, 2014 in Milwaukee, Wisconsin.

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