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

BRIEF OF DEFENDANT-APPELLANT SHIRLEY T. CARSON

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STATEMENT OF ISSUES PRESENTED

May a defendant in a foreclosure action move the court for an order pursuant to Wis. Stat. § 846.102 requiring that an abandoned property shall be sold upon the expiration of five weeks, over the objection of the plaintiff?

The Circuit Court answered no.

Does the Court have the statutory authority pursuant to Wis. Stat. § 846.102 to order a foreclosure plaintiff to hold a sheriff's sale when the subject property is abandoned?

The Circuit Court answered no.

Does the Court have the equitable authority to order a foreclosure plaintiff to hold a sheriff's sale of an abandoned property?

The Circuit Court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Carson requests, pursuant to Wis. Stat. §§ 809.19(1)(c), both oral argument and publication. This appeal presents several issues of first impression about foreclosures of abandoned properties, commonly known as "zombie properties" or "bank walkaways." Although the legal issues involve solely questions of law and undisputed facts on this record, oral argument may be beneficial to the court to address the court's questions about the possible justifications for extended delays by foreclosure judgment-creditors and possible adverse effects on foreclosure judgment-debtors and other interested parties. S*ee* § 809.22(2)(a)3.

Publication of the Court's decision will clarify existing Wisconsin law in a factual situation significantly different from the standard mortgage foreclosure proceeding. *See*, Wis. Stats. § 809.23(1)(a)2. Thousands of properties throughout Wisconsin have been abandoned by owners who reasonably believed, and in many cases were told, that their properties would be sold after their foreclosure redemption periods expired. These properties are blights on neighborhoods and drain municipal tax bases. Thus, whether a circuit court may order a foreclosure judgment-creditor to hold a sheriff's sale when the foreclosed property is abandoned is a vital question for Wisconsin's citizens and its courts. A published appellate decision will clarify the law in an area of continuing public interest. *See* § 809.23(1)(a)1, 5.

STATEMENT OF THE CASE

The Defendant-Appellant, Shirley Carson, appeals the circuit court's order entered on January 17, 2013, that it cannot compel Bank of New York to hold a sheriff's sale of an abandoned, foreclosed property, despite the plain language of Wisconsin Statutes, § 846.102 and the court's equitable authority.

Bank of New York filed this foreclosure action against Carson in Milwaukee Circuit Court on January 25, 2011, demanding foreclosure and sale of the mortgaged premises located at 1422 W Concordia Avenue, Milwaukee, Wisconsin. (R. at 1-1, 1-4, 1-6.) Carson did not answer or dispute the foreclosure action. (R. at 8-1, 16-2, App. 24, 55.) She had become physically and financially unable to care for the property, and she believed a foreclosure and timely sale of the property was appropriate. (R. at 16-1, 16-2, App. 23-24.) As reflected in Bank of New York's Affidavit of Reasonable Diligence, Bank of New York was aware that Carson had already vacated the property prior to the filing of the foreclosure action. (R. at 6-1, App. 28.)

The City of Milwaukee requires lenders who initiate foreclosure proceedings to inspect the property subject to foreclosure every thirty days. Milwaukee Municipal Code § 200-22.5. If the property is found abandoned, the lender must register and maintain the property. *Id.* Before filing a motion for default judgment against Carson, on April 26, 2011, Bank of New York had registered the property as an abandoned property with the City of Milwaukee. (R.

at 17-3, App. 27.) Thus, Bank of New York had actual knowledge of the abandoned status of the property prior to obtaining its judgment of foreclosure, and having inspected the property, it was also aware of the condition of the property. The Bank did not, however, choose to file a motion for dismissal of the foreclosure action.

Three days after registering the property as abandoned with the City of Milwaukee, Bank of New York filed a Motion for Default Judgment on April 29, 2011, seeking the remedy of foreclosure. (R. at 14-1 – 14-4, App. 51-54.) In its motion, Bank of New York affirmed that the property was non-owner occupied based upon the property inspection records maintained by the bank. (R. at 8-2, App. 56.) A Notice of Motion was mailed, informing Carson that "YOUR ATTENDANCE AT THIS HEARING IS OPTIONAL. You are not required to appear at this hearing, though you may do so if you so choose." (R. at 7-1, *emphasis in original*.) In May, 2011, the City of Milwaukee ordered both Bank of New York and Carson to remove wood, a door and other litter and debris from the property. A fire set in the garage of the property had already caused the garage to be condemned. (R. at 17-7, App. 31.) Again, Bank of New York did not take the opportunity to seek dismissal or amend its pleading to seek a different remedy. The Bank continued to seek foreclosure of the property.

Carson did not dispute the Motion for Default Judgment, which was granted on June 13, 2011. (R. at 14-4, App. 54.) The circuit court signed the

order provided by Bank of New York finding the property non-owner occupied at the commencement of the action and ordering that the property shall be sold at public auction at any time after three months from the date of entry of judgment. (R. at 14-2, App. 52.) The circuit court further enjoined all parties from committing waste upon the premises. (R. at 14-3, App. 53.) Finally, the circuit court ordered that the plaintiff might take all necessary steps to secure and winterize the subject property in the event it was abandoned by the defendant or became unoccupied during the redemption period or until such time as the matter was concluded. (R. at 14-3, App. 53.)

On July 11, 2011, after the foreclosure judgment was entered, the City of Milwaukee reminded Bank of New York to comply with its duty to inspect the property every 30 days, notify the Department if the property was abandoned, and to maintain the property. (R. 17-5 – 17-6, App. 29-30.) The Bank did not maintain the property, even though the property was clearly abandoned. (R. at 6-1, 17-3, App. 27, 28.)

The redemption period passed, and no sheriff's sale was scheduled. More than a year after the judgment of foreclosure was entered and more than nine months after the redemption period had expired, on June 20, 2012, the City of Milwaukee issued an Order to Correct Condition because the vacant structure was not maintained in a locked or closed condition. (R. at 17-12, App. 36.) The property was burglarized and vandalized. (R. at 16-1, App. 23.) Two months

later, or more than eleven months after the redemption period had expired, on August 21, 2012, a City of Milwaukee inspector noted boxes, scrap wood and loose trash in the alley and rear yard, as well as other debris on the property. (R. at 17-8, App. 32.)

Carson, an elderly widow in poor health, living on a fixed, low income, was not able to maintain the property. (R. at 16-1, App. 23.) She was, however, making monthly $25 payments to the City of Milwaukee toward the fines resulting from the unrepaired building code violations. (R. at 16-1, App. 23.) The nuisance property sat vacant, and there was never a sheriff's sale.

Finally, on November 6, 2012, after realizing that Bank of New York had no intention of going forward with the foreclosure and sale it had demanded in its Complaint, and after obtaining counsel, Carson, now represented by an attorney, filed a Motion to Amend the original judgment of foreclosure. (R. at 15-1, App. 19.) The motion was brought pursuant to Wis. Stat. § 806.07(g) & (h). The motion sought an order amending the original judgment of foreclosure to make a finding that the property was abandoned pursuant to Wis. Stat. § 846.102. (R. at 15-4, App. 22.) Further, the motion sought an order that a sale of the property "shall be made upon the expiration of five weeks from the date of the amended judgment" so the foreclosure order would comply with Wis. Stat. § 846.102 which requires that a sale take place. (R. at 15-4, App. 22.) Bank of New York opposed

Carson's motion, arguing that neither the statutory language nor equity permits the circuit court to order it to hold a sale. (R. at 18-1 – 18-6, App. 40–45.)

A hearing on Carson's motion was held before the Honorable Jane Carroll on January 7, 2013. (R. at 22-1, App. 2.) Judge Carroll noted that there were no published Wisconsin decisions addressing whether the court may order a bank to sell a property within a certain period of time subsequent to the entry of a judgment of foreclosure. (R. at 26-12:4-10, App. 14:4-10.) Citing the dearth of appellate guidance, Judge Carroll reasoned that without any specific cases or similar cases to guide her, she could not find that the circuit court had the authority to order a sale. (R. at 26-13:8-13, App. 15:8 -13.) Further, Judge Carroll construed the statute to mean that only the plaintiff could elect the five-week abandonment redemption period provided in Wis. Stat. § 846.102. (R. at 26-13:22-25, App. 15:22-25.) Because Judge Carroll found that the circuit court did not have the authority to grant the relief sought by Carson, she did not reach the issues of whether there were grounds for relief pursuant to Wis. Stat. § 806.07 or whether the relief would be equitable in light of the facts of the case. (R. at 26-14:5-16, App. 16:5-16.) A final Order denying Carson's motion was entered on January 17, 2013. (R. at 23-1 – 23-2, App. 1-2.) Carson filed a timely Notice of Appeal with the circuit court on March 1, 2013. (R. at 24-1.)

STANDARD OF REVIEW

The Court of Appeals reviews the construction of a statute and its application to undisputed facts de novo. *ECO, Inc. v. City of Elkhorn*, 2001 WI App 302, ¶ 15, 259 Wis. 2d 276, 655 N.W.2d 510.

Whether the court has authority to grant equitable relief based on an uncontested set of facts is a question of law that is reviewed de novo. *May v. May*, 2012 WI 35, ¶ 14, 339 Wis. 2d 626, 813 N.W.2d 179.

Whether a circuit court should grant relief from a prior judgment under Wis. Stats. § 806.07 is within the circuit court's discretion, but that discretion is erroneously exercised when the circuit court applies an incorrect legal standard. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶ 29, 326 Wis. 2d 640, 785 N.W.2d 493; *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992). In this case, Judge Carroll did not exercise her discretion to make a determination pursuant to Wis. Stats. § 806.07, because she decided the circuit court lacked the authority to order the relief Carson requested. (R. at 26-14:5-16, App. 16:5-16.)

INTERPRETATION OF A STATUTE

Much of the following argument relies on the process the court uses to interpret a statute. To interpret a statute, a court begins with the language of the statute. If the meaning of the statute is plain, the court stops its inquiry. *State ex*

rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Statutory language is given its common, ordinary, and accepted meaning, except when technical or specifically-defined words or phrases are given a special definitional meaning. *Id.* at ¶ 45, 217 Wis. 2d at 663, 681 N.W.2d at 124. Courts also consider the context in which the statutory language is used relative to surrounding and/or closely-related statutes. *Id.* at ¶ 46, 217 Wis. 2d at 663, 681 N.W.2d at 124. Further, courts read statutory language to give reasonable effect to each word, to avoid surplusage. *Id.* at ¶ 46, 217 Wis. 2d at 663, 681 N.W.2d at 124. The court will not interpret language in a manner that will lead to absurd results. *Id.* at ¶ 46, 217 Wis. 2d at 663, 681 N.W.2d at 124. Importantly, statutory interpretation is used to ascertain a meaning, not to search for ambiguity. *Id.* at ¶ 47, 217 Wis. 2d at 664, 681 N.W.2d at 124. The court will presume that the legislature chose its language carefully and that the legislature meant what it said. *See id.* at ¶ 44, 217 Wis. 2d at 662, 681 N.W.2d 124.

ARGUMENT

I. The defendant in a foreclosure action may provide evidence relating to whether the mortgaged premises is abandoned and may move the court for entry of judgment pursuant to Wis. Stat. § 846.102, over the objection of the plaintiff.

Carson, the defendant in this foreclosure action, presented evidence of abandonment to the circuit court and requested entry of judgment pursuant to the abandoned premises statute, which provides a shortened, five-week redemption period. Wis. Stat. § 846.102. One of the lines of reasoning by the circuit court in

this case was to infer that, in a foreclosure action, the burden of proof as to abandonment is on the plaintiff, and therefore, the statutory scheme contemplates that only the plaintiff may elect the five-week redemption period required by the abandoned premises statute. (R. at 26-13:17-25, App. 15:17-25); Wis. Stat. § 846.102(2) (2011-12).[1] Therefore, the circuit court held that it could not order an expedited, five-week redemption period over the objection of the plaintiff. *Id.*

Carson disputes this interpretation of the abandoned premises statute. Contrary to the holding of the circuit court, there is no language in Wis. Stat. § 846.102 placing the burden on the plaintiff to prove abandonment or limiting election of the five-week redemption period to the plaintiff's prerogative. *See* Wis. Stat. § 846.102. The defendant is a party to the foreclosure action, and the

[1] Wisconsin Statutes, section 846.102 provides, in its entirety:
846.102 Abandoned premises.
(1) In an action for enforcement of a mortgage lien if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns, 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. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and placement of the notice may commence when judgment is entered. In this section "abandoned" means the relinquishment of possession or control of the premises whether or not the mortgagor or the mortgagor's assigns have relinquished equity and title.
(2) In addition to the parties to the action to enforce a mortgage lien, a representative of the city, town, village, or county where the mortgaged premises are located may provide testimony or evidence to the court under sub. (1) relating to whether the premises have been abandoned by the mortgagor. In determining whether the mortgaged premises have been abandoned, the court shall consider the totality of the circumstances, including the following:
(a) Boarded, closed, or damaged windows or doors to the premises.
(b) Missing, unhinged, or continuously unlocked doors to the premises.
(c) Terminated utility accounts for the premises.
(d) Accumulation of trash or debris on the premises.
(e) At least 2 reports to law enforcement officials of trespassing, vandalism, or other illegal acts being committed on the premises.
(f) Conditions that make the premises unsafe or unsanitary or that make the premises in imminent danger of becoming unsafe or unsanitary.

statute plainly provides that all the parties to the foreclosure action, as well as municipal representatives are permitted to present evidence of abandonment. *Id.* It logically follows that the burden of proof is on the moving party, that is, the parting attempting to prove abandonment. *State v. McFarren*, 62 Wis. 2d 492, 499-500, 215 N.W.2d 459, 463 (1974). If the party meets its burden and proves that the property is abandoned, the court must enter judgment as stated in the abandoned premises statute, which requires a five-week redemption period. Wis. Stat. § 846.102(1).

This plain language interpretation of the statute is consistent with the purpose and context of the statute. The obvious purpose of the statue is to create an expedited process so a foreclosed, abandoned property will be sold quickly. If a mortgaged property is abandoned, there is no reason for a longer redemption period as it is very unlikely that a mortgagor will redeem an abandoned property. The abandoned premises statute provides a five-week redemption period, as opposed to the three-to-twelve-month redemption periods provided in other foreclosure statutes. *Compare* Wis. Stat. § 846.102, with Wis. Stat. §§ 846.10, 846.102, 846.103. Additionally, the abandoned premises statute provides that a notice of sale can be published immediately upon the entry of judgment. Wis. Stat. § 846.102(1). In other foreclosure statutes, strict limitations are placed on the timing of publication of the notice of sale. *Compare* Wis. Stat. § 846.102(1), with Wis. Stat. §§ 846.10(2), 846.101(2), 846.103. Further, local units of government,

with an obvious interest in preventing the blight of foreclosed abandoned properties in their neighborhoods, are expressly empowered by the statute to prove the fact of abandonment. Wis. Stat. § 846.102(2). Clearly, the legislature saw no cause for delaying the sale of an abandoned property.

Additionally, contrary to the circuit court's reasoning, the foreclosure statutes do not generally permit a plaintiff to elect its preferred redemption period. Mandatory redemption periods are explicitly stated, and the length of time for redemption depends on the type of property foreclosed, whether the property is owner-occupied, and whether the property is abandoned. Wis. Stat. §§ 846.10(2), 846.102(1), 846.103(1). Thus, the redemption period depends on the circumstances of the property, not on the plaintiff's preference.

In some circumstances, the plaintiff may elect to shorten the redemption period to either six or three months (depending on whether the property is homestead or commercial property) by conceding a deficiency judgment and its right to possession, rents, issues, and profits from the mortgaged premises prior to confirmation of sale. Wis. Stat. §§ 846.101 & 846.103(2). Those narrow provisions permitting the plaintiff to shorten a redemption period by waiving certain rights do not, however, imply a general right for plaintiffs to choose their redemption periods. The redemption period for an abandoned property is five weeks, even if the plaintiff objects, and the judgment shall so provide, according to the plain language of the statute. Wis. Stat. § 846.102(1).

Finally, Carson's interpretation of the statute – that any party or municipal representative can present evidence and move the court for a finding of abandonment and a five-week redemption period – is consistent with the statute's legislative history.[2] The 2011 Wisconsin Act 136 amended Wisconsin Statutes, section 846.102, shortening the redemption period for abandoned properties from two months to five weeks and created sub-section (2), permitting municipalities, in addition to the parties, to provide evidence of abandonment. If the legislature only intended to permit the plaintiff to move the court for an order pursuant to § 846.102, it would have said so, and it would not have specifically added a provision to allow municipalities to present evidence of abandonment. *See* Wis. Stat. § 846.102(2). The intent of the amendment is illustrated by its effect: parties and cities can more easily bring an abandoned, foreclosed property to the court's attention so the court may order the property to be sold even more quickly, upon the expiration of a five-week redemption period.

II. The circuit court has the statutory authority pursuant to Wis. Stat. § 846.102 and the equitable authority to order a foreclosing plaintiff to hold a sale of an abandoned property upon the expiration of five weeks from the date of entry of judgment.

Judge Carroll reasoned that even if she found that the subject property was abandoned and entered an amended judgment of foreclosure with a five-week

[2] *But see State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, ¶ 51, 681 N.W.2d 110, ¶ 51 (holding that the court only properly considers legislative intent if the statutory language is ambiguous).

redemption period, the circuit court did not have the statutory or equitable authority to order the judgment-creditor to hold a sale upon the expiration of five weeks after the entry of the amended judgment. (R. at 26-13:8-13, App. 15:8-13.) Judge Carroll held that the correct reading of the abandoned premises statute is that the court's authority only permits her to enter an order that a plaintiff "may" hold a sale of an abandoned property "at any time" after the expiration of the redemption period. The court based its decision on its reading of the entire foreclosure statutory process found in Wisconsin Statutes, Chapter 846 and on the general principle that you cannot compel a plaintiff to execute a judgment. (R. at 26-11 to 26-14., App. 13-16.)

Carson argues that the circuit court has both the statutory and equitable authority to order the plaintiff to hold a sale of an abandoned property upon the expiration of five weeks from the date of entry of judgment. Further, Carson argues that the abandoned premises statute requires the court to enter exactly that Order. Finally, Carson argues the circuit court may find a foreclosure plaintiff in contempt of such an order if that plaintiff intentionally disobeys, resists, or obstructs the court's order by failing to hold a sale of an abandoned property within a reasonable time after the expiration of five weeks from the date of entry of judgment.

A. The circuit court has the statutory authority to order the plaintiff to hold a sale of an abandoned property upon the expiration of five weeks from the date of entry of judgment.

The legislature used the word "shall" twice in the first sentence of the abandoned premises statute. Wis. Stat. § 846.102(1). First, judgment shall be entered, and second, sale of the mortgaged premises shall be made upon the expiration of five weeks from the date of entry of judgment. *Id*. The second sentence says that publication of the sheriff's sale notice may commence immediately upon the entry of judgment. *Id.* The plain language of the statute directs the court and the plaintiff to ensure that an abandoned property is sold quickly, without delay. When the meaning of a statute is apparent based on the plain language of the statute, the court makes no further inquiry. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Despite the plain language of the statute, the plaintiff argued and Judge Carroll agreed that an order under § 846.102 would be correct if it provided that the abandoned property *may* be sold *at any time* after the entry of judgment. (R. at 18-3 – 18-4, App. 42-43.) Bank of New York's brief in response to Carson's motion does not distinguish an order entered under § 846.102 from an order foreclosing on a non-abandoned property entered under § 846.10. At the hearing on the motion, however, Bank of New York's counsel addressed § 846.102 by stating that he was unaware of anything under the abandonment statute that would require the bank to hold a sheriff's sale within a certain period of time. (R. at 26-9:5-8, App. 34:5-8.) Bank of New York's counsel also stated that, at the time of

the hearing, he was not aware that Bank of New York was ever planning to take the property to sheriff's sale. (R. at 26-2:23-25, App. 4:23-25.)

Judge Carroll noted the mandatory language requiring that the property "shall" be sold. (R. at 26-12:17-22, App. 14:17-22.) But, she agreed with Plaintiff-Respondent's counsel that the circuit court could not require Bank of New York to sell the property at any specific point in time. (R. at 26-12:17-22; App. 14:17-22.)

The court's holding contravenes the plain, mandatory language of the abandoned premises statute. Wis. Stat. § 846.102(1). Although Carson has been unable to find any cases on point, *GMAC Mortgage Corp. of Penn. V. Gisvold*, 215 Wis. 2d 459, 477 n. 11, 572 N.W.2d 466, 476, n. 11 (1998), mentions the abandoned premises statute in a footnote. In that case, the court cited § 846.102 as an example of the legislature specifically using the word "shall" and explained that "shall" evinces the legislature's intent that the language is mandatory. The legislature could have said that an abandoned property "may" be sold "at any time" after five weeks from the date of entry of judgment, but it did not. It is presumed that the legislature meant what it said. *See State ex rel. Kalal*, 2004 WI at ¶ 45, 271 Wis. 2d at 664, 681 N.W.2d at 124. The circuit court must enter judgment ordering that the property be sold upon the expiration of five weeks from the date of entry of judgment. Once the court finds the property abandoned, the court is

not permitted to order that the property "may" be sold "at any time" after five weeks from the date of entry of judgment.

The legislature's decision to use mandatory language requiring a sale, as opposed to language permitting a sale, is reasonable in light of the state's interest in ensuring that abandoned properties do not stay abandoned for long, creating safety hazards and lowering surrounding property values. In this case, the property deteriorated significantly between the time when the original judgment of foreclosure was entered and Carson brought her motion, trying to compel a sale. (R. at 16-1, 17-8, 17-12, App. 23, 32, 36.) As discussed above, Carson's interpretation of the legislative intent to mandate a quick sale is further supported by the 2011 amendment to the abandoned premises statute, permitting municipalities to provide evidence of abandonment, shortening the redemption period, and providing for immediate publication of a notice of sale. *See* 2011 Wisconsin Act 136 § 2.

Therefore, the language in the abandoned premises statute is plain, mandatory, reasonable, and consistent with the statute's legislative history. Upon a finding of abandonment, the circuit court must order that sale of the property shall be made upon the expiration of five weeks from the entry of judgment.

B. The circuit court has authority through its contempt powers to enforce an order issued pursuant to Wis. Stat. § 846.102.

The final reason articulated by Judge Carroll in denying Carson's motion was that no purpose could be served by entering an order complying with the language of § 846.102 because the court could not enforce such an order anyway.[3] (R. at 26-13, App. 15.) Judge Carroll reasoned that, despite the specific language in the statute mandating a sale, the general principle is that a plaintiff cannot be compelled to execute a judgment that it has obtained. (R. at 26-13:8-13, App. 15:8-13.) Specifically, Wisconsin Statutes, § 815.04 provides that a judgment can be executed at any time within five years. (R. at 26-13:14-16, App. 15:8-13.)

Carson disputes the court's reasoning for two reasons. First, specific statutes control general statutes. *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 20, 325 Wis. 2d 135, ¶ 20, 785 N.W.2d 302, ¶ 20. The abandoned premises statute and the statutory scheme of Wisconsin Statutes, chapter 846 are much more specific regarding the rights of foreclosure judgment-creditors than the generic execution chapter of 815. The differences between Chapter 846 and Chapter 815 are significant. Homestead property is exempted from execution in chapter 815, but, subject to the procedural requirements described in chapter 846, foreclosure judgment-creditors are permitted to take homestead property. Further, foreclosure

[3] Procedurally, Carson had moved the court to amend the judgment of foreclosure pursuant to Wis. Stat. § 806.07(g) & (h), enter a finding of abandonment and order that the sale be made upon the expiration of five weeks from entry of the amended judgment. (R: 15-1). The parties were not arguing a motion for contempt. But, foreseeing the likely result of the Order requested by Carson, the Circuit Court did not reach any other issue except whether it had the statutory or equitable authority to require Bank of New York to hold a sale of the property. (R: 26-14:5-15).

judgment-creditors must follow specific timeline and procedural requirements for executing judgments of foreclosure. For example, a foreclosure plaintiff cannot execute "at any time within five years after the rendition of the judgment," which is the language in Wis. Stat. § 815.04(1)(a), referenced by the circuit court at the motion hearing. A foreclosure plaintiff must wait to execute until the redemption period has expired and notice requirements have been met. *See, e.g.*, Wis. Stat. §§ 846.10(2) & 846.102(1). Another example of general execution principles being inapplicable to foreclosures is that the general writ of assistance provision stated in Wis. Stat. § 815.11 does not apply to foreclosures, as specifically noted in Wis. Stat. § 815.11's annotation cross-referencing Wis. Stat. § 846.17. In foreclosures, a writ of assistance may not issue until after the sheriff's sale. Wis. Stat. § 846.17. If general execution rules cannot be logically applied to foreclosure judgments, the court should not rely on general execution rules to find that it lacks the authority to order the plaintiff to execute its judgment of foreclosure. The circuit court should apply the specific language of Wis. Stat. § 846.102, which grants it the authority order that a sale shall be held upon the expiration of five weeks from the date of entry of judgment.

Second, in addition to the principle that specific statues control general statutes, the circuit court's reasoning results in an unreasonable result. It is absurd to interpret a statute that mandates that a sale "shall be made" to mean that the plaintiff may choose never to hold a sale. It is also unreasonable to interpret a

statute that mandates a sale "upon the expiration of five weeks" to mean a sale may be made any time within five years. A reasonable interpretation of the statute is that it instructs the court to require a plaintiff to hold a sale of an abandoned property within a reasonable time after the five-week redemption period has expired, or to show cause for its non-compliance.

Bank of New York demanded the remedies of foreclosure and sale when Carson defaulted on her mortgage. (R. at 1-1, 1-4, 1-6.) There is nothing absurd or unreasonable about requiring a foreclosure plaintiff to accept the remedy it sought when it filed its Complaint and Motion for Default Judgment.

Inexplicably, Bank of New York argues that requiring a foreclosure plaintiff to accept the remedy it sought and obtained would turn foreclosure law "on its head," (R. at 26-4:20-21; App. 6:20-21.) Bank of New York argued that compelling it to comply with the plain language of § 846.102 would change the way it approaches a case as it relates to a judgment. (R. at 26-8:19-22, App. 10:19-22.)

Whatever Bank of New York's business practices may have been, it is not a virtue to invoke the foreclosure process and then leave the property, the judgment-debtor, the court, and neighborhoods in limbo. If a bank does not intend to go to sale, it should not obtain a judgment of foreclosure and sale. A change in Bank of New York's practices would be a positive change, creating clarity for the court and the parties regarding the plaintiff's intention and avoiding the uncertainty that

developed in this case and similar cases. Abandoned foreclosure properties, commonly known as "zombie properties" or "bank walkaways," often sit abandoned without their former owners even knowing they remain unsold, and often former owners only become aware that the bank has walked away from the foreclosure process after the property has deteriorated to the point that building code violations are issued. In this case, Bank of New York failed to inform Carson and the court that it had no intention of selling the abandoned property until Carson filed her motion and the parties appeared before Judge Carroll on January 7, 2013, more than a year and a half after Bank of New York sought and obtained a default judgment of foreclosure. (R. at 26-2:23-25, App. 4:23-25.)

The legislature and the courts may require foreclosure plaintiffs to hold timely sales of abandoned properties when they seek and obtain foreclosure judgments as surely as the legislature and the courts may dismiss litigation not prosecuted with reasonable diligence. Bank of New York should change the way that it approaches judgments in foreclosure cases. That is exactly what civil process and § 846.102 require. In a particular case, if fair and reasonable cause exists not to require a sale, foreclosure plaintiffs can use routine motions and procedures to give the parties and the court notice of their intentions. Just like any other plaintiff, a foreclosure plaintiff has the option to amend its pleadings or dismiss its case prior to obtaining judgment. *See* Wis. Stat. §§ 802.09(1) & 805.04(1). After judgment is entered, if new information is acquired or

circumstances change, a foreclosure judgment-creditor can seek relief from a judgment, just like any other plaintiff. Wis. Stat. § 806.07 (2011-12); see also *Bank One Wis. v. Kahl*, 2002 WI App 312, ¶ 15, 258 Wis. 2d 937, ¶ 15, 655 N.W.2d 525, ¶ 15. There is nothing so special about plaintiffs in foreclosure actions that should permit them to refuse to accept the remedies they sought and obtained or to ignore civil process.

Wisconsin's abandoned premises statute clearly and specifically mandates an order that sale of the property shall be made upon the expiration of five weeks from the date of entry of judgment. Wis. Stat. § 846.102(1). It also permits the notice of sale to be immediately published so notice requirements will not cause delay. *See id.* But, Bank of New York argues that if the statute were taken literally, and if the statute is not read to mean that a sale *may* take place *at any time* after the expiration of five weeks, the bank would be forced to file a motion to vacate the judgment at the end of the redemption period in just about every case, lest it risk being forced to take ownership. (R. at 26-8:3-10, App. 10:3-10.) Further, Bank of New York argues that such an order would interfere with mortgage work-outs like modifications and forbearance agreements, contested matters involving junior creditors, and other potential reasons for delays in the foreclosure process. (R. at 18-2 – 18-3, App. 41-42.)

Bank of New York's arguments defy common sense. An order pursuant to § 846.102 may only be entered if the court makes an affirmative finding of

abandonment. Wis. Stat. § 846.102(1). An abandoned property is unlikely to be involved in a voluntary work-out process, mediation, or a protective bankruptcy. Additionally, a reasonableness requirement is implicit in all statutes, meaning that they will not be interpreted in a manner that leads to absurd results. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. It would be unreasonable to move the court for contempt sanctions immediately upon the expiration of the five-week redemption period if the plaintiff is taking steps necessary to comply with the order and is dealing with procedural difficulties, or if the plaintiff is complying with a court-ordered mediation process or a federally mandated modification process. More importantly, contempt of court means intentional disobedience, resistance or obstruction of the authority, process or order of a court and is decided at the court's discretion. Wis. Stat. § 785.01(1)(b), *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916, 924 (Wis. Ct. App. 1995). A motion for contempt sanctions is unlikely to be brought or to be granted in the circumstances described by Bank of New York. The Plaintiff-Respondent's arguments are red herrings, threatening the specter of chaos when the more likely result is greater certainty regarding the legal status of property and better communication between the parties and the court in foreclosure actions.

C. **The circuit court has the equitable authority in a foreclosure action to order the plaintiff to hold a sale of an abandoned property.**

The remedy of foreclosure and sale was sought by Bank of New York when it filed this action against Carson. (R. at 1-4.) Foreclosure is an equitable remedy; the court has equitable powers which may extend beyond the statutory remedies provided. (R. at 26-13:4-7, App. 15:4-7.) Judge Carroll, however, held that the Circuit Court lacked the power to order Bank of New York to hold a sale.[4] (R. at 26-13:3-13, 26-14:5-8, App. 15:3-13, 16:5-8.)

Equity affords the court the authority to ensure that no injustice is done. Equity cannot be used to ignore statutes, but there is no statute prohibiting a circuit court from ordering a foreclosure plaintiff to hold a sale. A court's equitable authority in a foreclosure action is broad. *McFarland St. Bank v. Sherry*, 2012 WI App 4, ¶ 2, 338 Wis. 2d 462, ¶ 2, 809 N.W.2d 58, ¶ 2. In fact, a "circuit court's equitable authority may not be limited absent a 'clear and valid' legislative command." *Harvest Savings Bank v. ROI Investments*, 228 Wis. 2d 733, 739, 598 N.W.2d 571, 574. Further, the court has the discretion to use its equitable authority even in the absence of a statutory right. *Id.*

[4] The Circuit Court did not reach the issue of whether such an order would be equitable in this case, so that issue will not be argued here. (R: 26-14, L. 8-16).

In a recent foreclosure-related decision requiring the circuit court to enter a complicated, but fair order to prevent injustice, the Court of Appeals of Wisconsin quoted a 1971 case which stated:

> The court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case; that was one of the great virtues and reasons for the existence of courts of equity.

McFarland St. Bank v. Sherry, 2012 WI App 4, ¶ 32, 338 Wis. 2d 462, ¶ 32, 809 N.W.2d 58, ¶ 32, quoting *American Med. Servs. Inc. v. Mutual Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 205, 188 N.W.2d 529 (1971).

No statute expressly limits or qualifies the circuit court's discretionary power to order a foreclosure plaintiff to take an abandoned, foreclosed property to sale. Therefore, if justice is served and the needs of the case are met, the circuit court has the authority to enter that order. The circuit court's holding to the contrary should be reversed.

CONCLUSION

For the reasons stated above, Carson respectfully requests the Court reverse the circuit court's holdings and remand this case to the circuit court to determine 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 10th day of June, 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 6,459 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 June 10, 2013. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 10th day of June at Milwaukee, Wisconsin.

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