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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2013AP000544

The Bank of New York Mellon,

Plaintiff-Respondent,

v.

Shirley T. Carson,

Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,

Defendants.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY
CASE NUMBER 2011-CV-001330
THE HONORABLE JANE CARROLL, PRESIDING

Attorneys for Plaintiff-Respondent
The Bank of New York Mellon

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STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary, as this appeal presents no new legal issues and the arguments raised in this appeal can adequately be addressed on the briefs.

STATEMENT ON PUBLICATION

Publication is not warranted because this appeal presents no new legal issues.

ARGUMENT

I. MS. CARSON'S MOTION TO AMEND THE JUDGMENT AND TO COMPEL A SHERIFF'S SALE WAS WITHOUT ANY BASIS IN LAW

Ms. Carson's focus on Wis. Stat. § 846.102 is misplaced. Regardless of whether the trial court might make an affirmative finding that the property is abandoned, as opposed to a judgment entered under Wis. Stat. §§ 846.10, 846.101, or 846.103, to adopt Ms. Carson's position under any provision of Chapter 846 would be contrary to the relationship between debtor and creditor, and contrary to the law in Wisconsin that title to a foreclosed-upon property does not pass until the court issues the confirmation of sale order. Wis. Stat. § 846.17; *see also, e.g.,*

JP Morgan Chase Bank, NA v. Green, 2008 WI App 78, ¶ 17, 311 Wis. 2d 715, 753 N.W.2d 536.

This Court should affirm the decision of the trial court. The trial court correctly interpreted the language of its own order and judgment of foreclosure and found that it did not to require that Bank of New York proceed to a sheriff's sale. The trial court's interpretation is consistent with Wisconsin foreclosure law. Nothing in Wisconsin law requires a recipient of a foreclosure judgment to execute upon that judgment by proceeding to a sheriff's sale.

A. The Trial Court Correctly Interpreted the Language of the June 16, 2011 Order and Judgment of Foreclosure

Ms. Carson's motion to the trial court was based on a misreading of language in the order for judgment, specifically paragraph 6, which reads in part:

> That … unless sooner redeemed, said premises shall be sold at public auction under the direction of the sheriff, at any time after three months from the date of entry of judgment.

(R. at 14-2). Ms. Carson's motion failed to appreciate the contextual significance of the language of this paragraph, and within the context of the order as a whole. *Estate of Schultz v.*

Schultz, 194 Wis. 2d 799, 805, 535 N.W. 2d 116 (Ct. App. 1995).

In the proper context, the word "shall" does not indicate that a sheriff's sale *must* occur, but rather, that *if* it occurs, it "shall" proceed in a certain manner. The proper reading of paragraph 6 therefore is that in the event of a sale, it must be a public auction under the direction of the sheriff, and that this can happen *at any time*, but only after the redemption period is expired. The inclusion of the phrase "at any time" in the same sentence confirms that the trial court did not intend the Judgment to require that Bank of New York complete the sheriff's sale by any specified time.

Ms. Carson also failed to recognize the significance of the overall context of the entire order. Paragraph 9 of the order indicates that the defendant is entitled to possession and all rents, issues and profits up to the date of confirmation, and paragraph 13 says that all parties and all persons claiming under them are enjoined from committing waste upon the premises. (R. 14-3). Paragraph 13 is especially relevant to what is at issue here as Ms. Carson is seeking to force plaintiff to foreclose and take away her own responsibility for the apparent waste that she herself committed or allowed to snowball out of control through

her abandonment of the property. Ms. Carson is still the owner of the property and has, according to her own motion to the trial court, apparently allowed the property to fall into such a state of disrepair that the City has been issuing building code violations to Ms. Carson.

Read in context, these provisions of the order make clear that the trial court did not intend, through the Judgment, to mandate that Bank of New York sell the Property. This Court should defer to the trial's court interpretation of its own judgment. The interpretation was reasonable and gives meaning to the judgment as a whole within the context of the action.

B. Wisconsin Law Does Not Require a Judgment Holder to Execute Upon Their Judgment

The trial court also correctly interpreted its order in the larger context of Wisconsin law. As to foreclosures in Wisconsin, it is black letter law that title to the mortgaged property remains with the mortgagor until confirmation of the sheriff's sale by the trial court. *See* Wis. Stat. § 846.17; *Sec. Bank v. Sechen,* 2005 WI App 253, 288 Wis. 2d 168, 172, 707 N.W.2d 576, 578."); *see also JP Morgan Chase Bank, NA v. Green,* 2008 WI App 78, ¶ 17, 311 Wis. 2d 715, 753 N.W.2d 536. A foreclosure judgment creates a *right* of the mortgagee to

right to realize upon their security by selling the mortgaged property if they so choose, it does not create a *duty* to do so. *See Glover v. Marine Bank of Beaver Dam,* 117 Wis. 2d 684, 345 N.W.2d 449 (1984).

There is also no explicit or implicit statutory command in the foreclosure chapter, *Ch 846, Wis. Stats*., or in its corollary Chapter on the execution of judgments, *Ch 815*. The owner of a judgment *may* enforce the same in the manner provided by law. *Wis. Stat. § 815.01* (*emphasis added*). An execution may issue upon a judgment for up to 20 years. *Wis. Stat. § 815.04*. The only reference to restrictions on timing of any kind in *Ch 846* are found in *sec. 846.18*, which provides that in cases where a sheriff's sale has been held but not confirmed, a third party purchaser can apply for an order to confirm that sale after six (6) years. That a third party purchaser must wait *six years* before attempting to compel confirmation illustrates the impossibility and absurdity of Ms. Carson's position.

A judgment upon a mortgage lien represents the creditor's *right* to later attempt to satisfy the debt through a sale. Ms. Carson's motion attempted to convert that right into an obligation. The trial court's interpretation of its own order was appropriate within the larger context of Wisconsin foreclosure

and debtor-creditor law. The decision of the trial court should be affirmed.

II. MS. CARSON'S MOTION IS WITHOUT ANY BASIS IN EQUITY

The trial court properly refused to grant Ms. Carson's Motion based on equity because the court was prohibited from making an order that would stand in contrast to law and even if equitable grounds could be considered, equity does not favor Ms. Carson.

A. Decisions in Equity Cannot Contradict the Law

While a foreclosure is an action in equity, it does not entitle the defendant the right to ignore the rules of Wisconsin procedure and give the Court unfettered discretion. A Court may not ignore statutes and case law on the grounds of equity and it is well established that arguments unsupported by legal authority shall be disregarded. *First Federated Savings v. McDonah*, 143 Wis. 2d 429, 434, 422 N.W. 2d 113; *JP Morgan Chase Bank, NA v. Green*, 2008 WI App 78, at ¶ 11, 311 Wis. 2d 715, 753 N.W.2d 536. *Northwest Wholesale Lumber, Inc. v. Anderson,* 191 Wis. 2d 504, 502 N.W.2d 502 (Wis. App. 1995), *State v. Schaffer*, 96 Wis. 2d 531, 292 N.W.2d 370 (Wis. App.

1980), *Post v. Schwall*, 157 Wis. 2d 652, 460 N.W.2d 794 (Wis. App. 1990).

Title to a mortgaged property remains with the mortgagor until confirmation of sheriff's sale, and there is nothing in Chapter 846 or Wisconsin law that requires a foreclosure judgment holder to proceed to sale. A court's equitable authority does not allow the Court to re-write the law. *Coulee Catholic Sch. V. LIRC*, 2009 WI 88, ¶ 89, 320 Wis. 2d 275, 768 N.W. 2d 868; *GMAC Mortg. Corp. v. Gisvold,* 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). In *Gisvold,* the Supreme Court found that the trial court had "no equitable authority" to afford relief in contrast to the command of Wis. Stat. § 846.17, and where there is no "legally protected right" to do so. *Id.* at 480-81. The same reasoning applies in this case.

The trial court was correct to refuse to rewrite foreclosure and collection law in Wisconsin, all under the false premise that equity demands it. The trial court's decision should be affirmed.

B. Equity Does Not Favor Ms. Carson

Claiming to believe that the bank would take over the property she owned, Ms. Carson asked the trial court to relieve her of an alleged mistake of law, which was more accurately her

conscious ignorance, and later, her outright denial, of her obligations. (R.15-4). "A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect." *Hurd v. Hall*, 12 Wis. 112, 124 (Wis. 1860). Mistakes of law require that those who make them to abide by the consequences of their ignorance. *Id*. Ms. Carson decided to turn a blind eye to the possibility that the foreclosure would not run its course within the timeframe necessary to put her in the clear of the problems with her property.

Even if her 'mistake' were excusable, sitting on her hands was not. The doctrine of laches is "a recognition that a party ought not to be heard when he has not asserted his right for unreasonable length of time or that he was lacking in diligence in discovering and asserting his right in such a manner so as to place the other party at a disadvantage." *Bade v. Badger Mut. Ins. Co*., 31 Wis. 2d 38, 47, 142 N.W.2d 218 (1966); see also, generally, *Flejter v. Estate of Flejter*, 2000 WI App 26, 2001 WI App 26, at ¶41, 240 Wis. 2d 401, 623 N.W.2d 552 (Ct. App. 2000). Equity cannot favor those who bury their heads in the sand, or those that sit on their hands until things spiral out of

control. Ms. Carson's failed strategic default cannot now be thrown into the hands of someone else.

CONCLUSION

This Court should affirm the decision of the trial court denying Carson's Motion to Compel a Sheriff's Sale and to Amend the June 16, 2011 Foreclosure Judgment.

Dated this 9th day of July, 2013.

Gray & Associates, LLP
Attorneys for Plaintiff-Respondent
Bank of New York

By /s/ William N. Foshag
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CERTIFICATION OF FORM, LENGTH AND ELECTRONIC FILING

I hereby certify that this response brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman, 13 point). The length of this brief is 8,403 words (as counted by MS Word).

I certify that this appeal is not taken from a circuit court order or judgment entered in a judicial review of an administrative decision and no part of the record is required by law to be confidential.

I further certify that the text of the electronic copy of this reply brief is identical to the text of the paper copies of the reply brief.

Dated this 9th day of July, 2013.

Gray & Associates, LLP
Attorneys for Plaintiff-Respondent
Bank of New York

By /s/ William N. Foshag
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed 10 copies of this Respondent's Brief via Federal Express delivery on July 10, 2013.

I also hereby certify that I caused to be served three copies of this Respondent's Brief on counsel for Shirley T. Carson via US Mail on July 10, 2013.

I also hereby certify that I caused to be served three copies of this Respondent's Brief on Bayfield Financial, LLC and Collins Financial Service via US Mail on July 10, 2013.

Dated this 9th day of July, 2013.

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