

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1367

Cir. Ct. No. 2006CV899

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PARK BANK,

PLAINTIFF-RESPONDENT,

V.

ZADDO HOLDINGS, LLC,

DEFENDANT-APPELLANT,

**UNITED STATES SMALL BUSINESS ADMINISTRATION AND UNITED
STATES ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,**

DEFENDANTS.

APPEAL from an order of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Zaddo Holdings, LLC appeals from an order confirming a sheriff's sale of foreclosed commercial property to Park Bank for \$800,000 and adding \$259,509.10 to the total amount of the judgment. It argues that the sale price was not fair value for the property and that the circuit court did not consider its objection to the addition to the judgment. We conclude that the evidence supports the order and affirm it.

¶2 In February 2005, commercial property owned by Zaddo Holdings was mortgaged to secure a \$1,575,000 loan by Park Bank to Zaddo Holdings and Zaddo, Inc. The foreclosure action was commenced in October 2006. A judgment of foreclosure was entered in January 2007 with a six-month redemption period and permitting a deficiency judgment to be entered if the total amount of the judgment, \$702,794.17, was not satisfied by sale of the property. The sheriff's sale was held November 27, 2007. Park Bank bid \$800,000. There were no other bidders. The sheriff's report of the sale was filed May 5, 2008.

¶3 Zaddo Holdings objected to confirmation of the \$800,000 sale price. It offered real estate tax appraisals valuing the property at approximately \$1,208,000 in 2005, \$1,716,000 in 2006, and \$1,700,000 in 2007, an appraiser's recertification of value in December 2004 estimating the market value to be \$2,100,000, and an October 2006 appraisal of \$1,280,000. A hearing on the confirmation of the sale was held May 23, 2008. At the start of the hearing the circuit court expressed that it was uncomfortable with the apparent disparity between the bid and the assessments Zaddo Holdings had presented. To support its bid amount Park Bank cited general market decline and demonstrated that it had an April 23, 2008 offer to purchase the property for \$1,000,000 contingent on confirmation of the sheriff's sale and closing by May 30, 2008. Park Bank

indicated its intent to apply the proceeds of the subsequent sale to the judgment so that at least \$900,000 would be applied.

¶4 The circuit court confirmed the sale noting that Zaddo Holdings had not been able to generate any interest in purchasing the property at some price less than the highest appraisal, that the lack of other bidders at the sale reflected the inability to sell the property at a higher price, and that the bank's offer to apply the subsequent sale proceeds would result in \$900,000 being applied and reduce the amount of deficiency. Although the court tested the basis for Park Bank's bid and expressed some dissatisfaction with it, it concluded the price is "as fair as it can be, and I have no reason to believe that we'll do any better. In fact, I'm seriously concerned that we might do worse."

¶5 Park Bank requested that additional costs be added to the judgment, including monthly carrying costs totaling \$180,337. Zaddo Holdings objected to the additions arguing that certain expenses had been assessed against Zaddo, Inc. in a separate action commenced by Park Bank.¹ The court found that joint and several liability of both Zaddo entities was appropriate and that if Zaddo Holdings could demonstrate that Zaddo, Inc. had actually paid some of the claimed additional costs, relief would be given to avoid double recovery. The additional costs were added to the judgment.²

¹ Zaddo, Inc. rented the building owned by Zaddo Holdings. In the separate action the corporation was placed in receivership.

² The order confirming the sale indicates that the deficiency judgment is \$162,303.27. On appeal Park Bank reports that \$923,270.50 was applied against the foreclosure judgment and the parties concur that the actual deficiency is \$39,032.77.

¶6 The confirmation of a judicial sale following a foreclosure is within the circuit court’s discretion. *Bank of New York v. Mills*, 2004 WI App 60, ¶8, 270 Wis. 2d 790, 678 N.W.2d 332. An exercise of discretion will be sustained when the circuit court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *Tynan v. JBVBB, LLC*, 2007 WI App 265, ¶9, 306 Wis. 2d 522, 743 N.W.2d 730. Where, as here, the property sells for less than the amount due, there is no presumption of fair value and the circuit court must be satisfied that the “fair value” of the property is credited on the mortgage debt. *Bank of New York*, 270 Wis. 2d 790, ¶9; WIS. STAT. § 846.165(2) (2007-08).³ “Fair value” of the property is not the same as market value. *Bank of New York*, 270 Wis. 2d 790, ¶10. Fair value is a reasonable value which does not shock the conscience of the court. *Id.*, ¶11. The circuit court is not limited to what it considers in making the determination of fair value. *Id.*, ¶18. It may consider the time the property was offered for sale before the sheriff’s sale, whether any offers were received in that time, and if so, whether they matched appraisals, and property tax assessments. *Id.*

¶7 Here the circuit court considered the tax assessments in the years prior to sale. The circuit court observed that Zaddo Holdings had not been able to generate any interest in the property at a price approximating the assessments and appraisals that Zaddo Holdings relied on as proof of value. It also noted the distressed nature of the sheriff’s sale and the lack of any other bidders. *See id.*, ¶17 (“The distress nature of the sale automatically reduces the price.”). It found that Zaddo Holdings would benefit from the existing \$1,000,000 offer to purchase

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

by application of the sale proceeds to the foreclosure judgment. The circuit court considered the facts presented to it, applied the proper legal standard, and reasoned its way to a rational conclusion. There was a proper exercise of discretion.

¶8 Zaddo Holdings argues that there was not sufficient evidence because Park Bank only relied on the \$1,000,000 offer to purchase as evidence of fair value. On the flip side, Zaddo Holdings contends that the circuit court erred in confirming the sale in the face of the evidence it offered. These are but the same argument—that the circuit court’s determination is not supported by the evidence. The weight of the evidence is for the circuit court to determine as the trier of fact. *Milbauer v. Transport Employes’ Mut. Benefit Soc’y*, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973); *Dickman v. Vollmer*, 2007 WI App 141, ¶29, 303 Wis. 2d 241, 736 N.W.2d 202. To command reversal, the evidence for a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *Dickman*, 303 Wis. 2d 860, ¶15. When we review the sufficiency of the evidence and the evidence gives rise to more than one reasonable inference, we must accept the inference drawn by the circuit court as the trier of fact. *Tynan*, 306 Wis. 2d 522, ¶11.

¶9 With respect to the prior assessments offered by Zaddo Holdings, the circuit court accepted Park Bank’s view that the assessments were, in part, driven by the purchase price Zaddo Holdings paid for the property. Implicitly the court recognized that the assessments and appraisals reflected market value as distinct from fair value. Noting that the lack of interest in the property reflected a market change, the circuit court rejected the past assessments as indicators of value in November 2007. The court may reject the value the property had at some remote time. *Kremer v. Rule*, 216 Wis. 331, 339, 257 N.W. 166 (1934). Although Zaddo Holdings seized upon the \$1,000,000 offer to purchase as a reflection of the

possible sale price a second sheriff's sale could produce, it ignores that the offer to purchase was made outside of a distress situation and was contingent on confirmation of the sale and a May 30, 2008 closing. A second sale could not be utilized simply to avoid the broker's fee on the \$1,000,000 sale by Park Bank. There was no evidence that a second sale would produce a better bid. There were no other bidders at the first sale and no interest in the property had been generated apart from the contingent offer to purchase. The circuit court properly considered the lack of evidence that a better price would be bid and the possible risk or futility of another sale. *See id.* at 341. The circuit court considered the \$1,000,000 offer to purchase garnered by Park Bank five months after the sale to be a closer reflection of the fair value of the property in its current condition. We will not overturn the court's determination of what was the more credible evidence. *See Bank of New York*, 270 Wis. 2d 790, ¶22 (not unreasonable for the court to have more confidence in certain evidence). Sufficient evidence supports the confirmation of the sale.⁴

¶10 With respect to the addition to the judgment, Zaddo Holdings argues that the circuit court erred in summarily rejecting its evidence that a substantial amount of the carrying expenses had already been allocated as the responsibility of

⁴ We summarily reject Zaddo Holdings's argument that the circuit court failed to make the requisite finding of what was the fair value of the property. It is implicit in the confirmation of the sale that a fair value was being applied to the foreclosure judgment. *See State v. Walstad*, 119 Wis. 2d 483, 515, 351 N.W.2d 469 (1984) (we may infer implicit findings from the circuit court's decision). Fixing a particular dollar amount is not necessary.

Zaddo, Inc.⁵ It is true that the circuit court refused to toil over the figures Zaddo Holdings provided because there was no summary how the figures matched the amounts Park Bank itemized. We do not address the evidentiary ruling because regardless of whether the costs claimed had been “allocated” to Zaddo, Inc., there was no proof that Park Bank had been actually reimbursed for the carrying costs of maintaining the property until confirmation of the sheriff’s sale. Park Bank demonstrates that under the mortgage Zaddo Holdings was responsible for the expenses Park Bank itemized in its request for an addition to the judgment. Zaddo Holdings never challenged that the expenses were not due under the mortgage. It merely claimed that the expenses had been assessed to a related party but offered no proof that they had in fact been paid. In the absence of any proof that the addition would in fact constitute double recovery by Park Bank, it was proper to add the carrying expenses to the judgment.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁵ Before the confirmation hearing Zaddo Holdings provided the circuit court with a collection of summaries prepared by Zaddo, Inc.’s receiver regarding account receivable collections, equipment and inventory proceeds, post auction estimated proceeds, other collections, additional Zaddo costs, and additional costs of Zaddo Holdings for carrying costs. In addition, Zaddo Holdings presented an email message from a representative of Park Bank indicating that of the \$142,252.73 in carrying costs, \$137,489.23 is attributed to Zaddo, Inc. and \$4,763.50 is attributable to Zaddo Holdings.

