

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 29, 2010**

A. John Voelker  
Acting 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. 2009AP1122**

**Cir. Ct. No. 2008CV283**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**LOWELL MANAGEMENT SERVICES, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**GENEVA NATIONAL PQC, LLC,**

**DEFENDANT,**

**SECURITY BANK OF KANSAS CITY,**

**DEFENDANT-THIRD-PARTY  
PLAINTIFF-RESPONDENT,**

**V.**

**GENEVA NATIONAL COMMUNITY ASSOCIATION, INC., GENEVA  
NATIONAL CONDOMINIUM MASTER ASSOCIATION, INC. AND PALOMA  
GENEVA NATIONAL, LLC,**

**THIRD-PARTY DEFENDANTS.**

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

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

¶1 PER CURIAM. Lowell Management Services, Inc. appeals from an order confirming the foreclosure sale of property on which it held a construction lien. We previously decided Lowell’s appeal from the judgment of foreclosure. *Lowell Mgmt. Serv. Inc. v. Geneva Nat’l PQC, LLC*, 2009 WI App 149, 321 Wis. 2d 589, 774 N.W.2d 811 (*Lowell I*), review denied (WI Mar. 9, 2010) (No. 2008AP2533). In *Lowell I*, we held that Lowell’s construction lien was junior to the mortgage lien held by Security Bank of Kansas City. *Id.*, ¶1. We also held that Lowell’s complaints about alleged deficiencies in Security Bank’s summary judgment motion could be addressed in a challenge to the judgment of foreclosure and that the issue before the circuit court and on appeal related to the priority of Lowell’s and Security Bank’s respective liens. *Id.*, ¶9.<sup>1</sup>

¶2 The pending appeal is from the order confirming the foreclosure sale. After we set lien priorities, the circuit court entertained sale and confirmation proceedings. At the confirmation hearing, the court noted that Security procured an appraisal of the property and that Security bid the appraised value at the foreclosure sale. Lowell argued that the appraisal was flawed and that the sale price was too low, depriving Lowell of proceeds from which it might be paid on its construction lien. In support of this claim, Lowell submitted the

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<sup>1</sup> The appeal in *Lowell I* was also taken from the September 29, 2008 judgment of foreclosure. However, as we discuss later in this opinion, Lowell’s arguments in *Lowell I* focused on the alleged defects in Security Bank’s summary judgment pleadings, not on the alleged defects in the judgment of foreclosure.

affidavit of its president, Scott Lowell. Scott Lowell opined that he was familiar with the property and that the foreclosed property would sell for a higher price if the parcels were organized differently for sale. The court rejected Lowell's challenge to the sale. The court concluded that the property was properly offered for sale in the parcels determined in the judgment of foreclosure, and the bid was in line with the appraisal, which the court found to be fair. The court confirmed Security's bid at the foreclosure sale. Lowell appeals.

¶3 We will only reverse an order confirming a foreclosure sale if the circuit court misused its discretion in confirming the sale. *Bankers Trust Co. of Cal. N.A. v. Bregant*, 2003 WI App 86, ¶10, 261 Wis. 2d 855, 661 N.W.2d 498. A court may decline to confirm a foreclosure sale "if there is an apparent inadequacy in the price which was caused by mistake, misapprehension or inadvertence on the part of the interested parties or possible bidders." *Id.* (citation omitted). In addition, a court may decline to confirm "if the bid price was so inadequate so as to shock the conscience of the court." *Id.* (citation omitted). The confirmation court inquires whether the sale was conducted as required by the judgment of foreclosure. See *Citizens Bank of Sheboygan v. Rose*, 59 Wis. 2d 385, 390, 208 N.W.2d 110 (1973).

¶4 On appeal, Lowell challenges the sale of the property in parcels. The judgment of foreclosure set out how the parcels were to be treated, yet Lowell's prior appeal from the judgment of foreclosure (*Lowell I*) focused on the insufficiency of Security Bank's summary judgment pleadings, not on the contents of the judgment of foreclosure and its treatment of the property in parcels. *Lowell*

*I*, 321 Wis. 2d 589, ¶9.<sup>2</sup> We addressed the appellate issues raised in *Lowell I*. A party must raise and argue an issue with some prominence in order to allow this court to address the issue and make a ruling. *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). We affirmed the judgment of foreclosure in *Lowell I*, and the judgment of foreclosure provided the guidelines for the foreclosure sale. We will not revisit the provisions of that judgment in this appeal from the confirmation of the sale.

¶5 Lowell argues that the circuit court misused its discretion because it confirmed the sale for less than the value of the property. This argument is premised on Lowell's claim that the properties should have been sold individually or as timeshares rather than as a unit of developed or to-be-developed condominiums. The judgment of foreclosure controlled the manner in which the property was sold.

¶6 Lowell next argues that its president's affidavit highlighted a flaw in Security's appraisal: the appraiser compared property that would accommodate a large duplex with single-family lots, thereby reducing the value of the foreclosed property by \$2.45 million. Lowell also contends that the appraiser failed to account for the fact that owners of the property at issue (originally destined to be timeshares) would have access to the development's amenities (clubhouse and swimming pool) that are not available to other property owners in the development. Considering these two errors, Lowell opined that the property had a value of \$15,843,500, not \$7,737,500 per Security's appraisal and successful bid. The higher value would have

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<sup>2</sup> In fact, this court had the impression that the challenge was solely to the sufficiency of the summary judgment pleadings, not the contents of the judgment of foreclosure. *Lowell Mgmt. Serv. Inc. v. Geneva Nat'l PQC, LLC*, 2009 WI App 149, ¶9, 321 Wis. 2d 589, 774 N.W.2d 811 (*Lowell I*), review denied (WI Mar. 9, 2010) (No. 2008AP2533).

permitted Lowell to be paid from the sale proceeds after satisfaction of Security's claim.

¶7 The circuit court found that Security's appraisal was appropriate because it reflected an intention to develop the property as a planned condominium association on which additional structures could be built. This approach was premised upon the judgment of foreclosure's treatment of this property.

¶8 A foreclosure sale must be for fair value defined as "the price which a person willing and able to buy the property would reasonably pay for it, not for purposes of speculation, but for that use to which it has been or reasonably may be put." *First Wis. Nat'l Bank of Oshkosh v. KSW Invs., Inc.*, 71 Wis. 2d 359, 368, 238 N.W.2d 123 (1976). Here, the court did not find the sale price to be shockingly low or grossly inadequate, and the court considered the use to which the property may be put.

¶9 Lowell objects to the appraiser's use of a twenty-eight percent discount rate for holding and sales costs. This argument dovetails with Lowell's complaints about the manner in which the property was organized for sale. We have rejected those complaints as directed to the judgment of foreclosure which is not before us on appeal.

¶10 The circuit court's decision to confirm the foreclosure sale was based upon the evidence before it, including the appraisal and the judgment of foreclosure which set out how the property was to be sold. We conclude that the circuit court did not misuse its discretion in confirming the foreclosure sale.

*By the Court.*—Order affirmed.

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

