

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 2, 2010**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2009AP2873**

**Cir. Ct. No. 2008CV9277**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**COUNTRYWIDE HOME LOANS, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**DANIEL J. RUSS, DENNIS R. RUSS AND BANK ONE, N.A.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Countrywide Home Loans, Inc., appeals the order denying its motion to confirm the foreclosure sale of Daniel J. and Dennis R. Russ's residential property. Countrywide argues that its bid of \$68,674.54, which was the amount remaining due on the mortgage, was a fair value, and, therefore, the circuit

court erroneously exercised its discretion when it refused to confirm the sale even though Countrywide did not seek a deficiency judgment against the Russes. We agree. Accordingly, we reverse and remand, and direct the circuit court to confirm the sale.

## I.

¶2 In January of 1996, the Russes borrowed money from Knutson Mortgage Corporation to buy a multi-family property in Milwaukee. Countrywide later assumed the mortgage. The Russes stopped paying on the mortgage in February of 2008. Countrywide filed this foreclosure action against the Russes in June of 2008, and elected “to waive judgment for any deficiency which may remain due the plaintiff after the sale of the mortgaged premises.” The Russes did not answer, and a default foreclosure judgment was entered in October of 2008. In April of 2009, at a sheriff’s sale of the property, Countrywide bid \$68,674.54, which was the balance due it on the mortgage loan. No one else bid on the property.

¶3 The circuit court refused to confirm the sale because, as it opined in an oral decision, it perceived that the property had what it called a “\$155,800 estimated fair market value,” apparently reading from a 2008 City of Milwaukee tax bill for the property, which recited that the “Total Est. Fair Market” was “155,800.” Based on that, the circuit court determined that the bid was “insufficient ... in terms of the value [and] would shock the mind of the Court.” The circuit court offered Countrywide an opportunity to “get a broker’s price opinion.” Countrywide gave the circuit court a broker’s price opinion that gave an “Estimated Repaired Value” of \$151,440, and a “Broker Estimated Market Value” of \$155,985. The circuit court again refused to confirm the sale because the

“amount bid is only 45 percent” of “the broker’s price opinion as far as estimated fair market value of \$151,440.” It concluded that “the amount received [*sic*—bid]” “shocks the consciousness [*sic*] of the Court.”

## II.

¶4 A decision to confirm or not to confirm a mortgage-foreclosure sale is in the circuit court’s discretion. *Bank of New York v. Mills*, 2004 WI App 60, ¶8, 270 Wis. 2d 790, 797, 678 N.W.2d 332, 335–336. We will not reverse a discretionary determination if the circuit court considered the pertinent facts, applied the proper law, and reached a reasonable conclusion. *Tynan v. JBVBB, LLC*, 2007 WI App 265, ¶9, 306 Wis. 2d 522, 529, 743 N.W.2d 730, 734.

¶5 WISCONSIN STAT. § 846.165(2) provides:

In case the mortgaged premises sell for less than the amount due and to become due on the mortgage debt and costs of sale, there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

The statute’s command that the circuit court must be “satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs” is triggered by three things: (1) a deficiency judgment is sought; (2) the mortgaged property “sell[s] for less than the amount due and to become due on the mortgage debt and costs of sale”; and (3) the property’s “fair value” “has been credited on the mortgage debt, interest and costs.” Significantly, “mere inadequacy of price is not a sufficient reason for failing to confirm a sale.” *Citizens Bank of Sheboygan v. Rose*, 59 Wis. 2d 385, 387, 208 N.W.2d 110, 111 (1973). Rather, “[t]here are two situations where refusal to confirm is warranted. The first is where there is an

inadequate price which has resulted from circumstances such as a mistake, misapprehension, or inadvertence. The second is where the price is so inadequate as to shock the conscience of the court.” *Id.*, 59 Wis. 2d at 387–388, 208 N.W.2d at 111. Stated another way, a circuit court does not have the unfettered freedom to deny confirmation of a mortgage-foreclosure sale; there must be a demand for a deficiency judgment (so that if the sale is not for “fair value” the mortgagor is unjustly saddled with a deficiency judgment) *and* one or both of the conditions set out in *Rose* are present. See *First Wisconsin Nat’l Bank of Oshkosh v. KSW Investments, Inc.*, 71 Wis. 2d 359, 367, 238 N.W.2d 123, 128 (1976) (“The language of the statute that ‘no sale shall be confirmed and judgment for deficiency rendered[,] until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and cost’ was subsequently interpreted by this court to mean nothing more than ‘such reasonable value as does not shock the conscience of the court.’”) (citation omitted).

¶6 As we have seen, Countrywide did not seek a deficiency judgment. Thus, the *Rose* factors are not in play. Moreover, there is nothing in the Record indicating that the alleged “inadequate price” “resulted from circumstances such as a mistake, misapprehension, or inadvertence.” Further, “fair value” is “what an able and willing buyer will reasonably pay for the property,” and “is not the same as ‘market value,’” which was the calculus used by the circuit court. See *Mills*, 2004 WI App 60, ¶10, 270 Wis. 2d at 798, 678 N.W.2d at 336. If the property here had a “fair value” of more than the mortgage debt, as the Russes contend, or had a “market value” of more than \$150,000 at the circuit court opined, either the Russes or others would have been willing to pay more than the mortgage debt and would have bid on the property. As we have seen, they did not.

¶7 In sum, the circuit court erroneously exercised its discretion in applying the “shock-the-conscience” standard because Countrywide did not seek a deficiency judgment against the Russes. Accordingly, we reverse the circuit court’s order, and remand this matter to the circuit court with directions that it enter an order confirming the sale.

*By the Court.*—Order reversed and cause remanded with directions.

Publication in the official reports is not recommended.

