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DISTRICT II

August 21, 2024

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Circuit Court Judge
Electronic Notice

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You are hereby notified that the Court has entered the following opinion and order:

2023AP1671

US Bank Trust National Association v. Ambiguous Asset Corporation (L.C. #2022CV632)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ambiguous Asset Corporation (“AAC”)¹ appeals from two orders: the first denying its emergency motion to vacate the foreclosure sale of a residential property and the second denying

¹ The residential property owner, Jared M. Toth, sold, assigned, and conveyed all of his rights and interests in the real property to Ambiguous Asset Corporation (“AAC”), which was subsequently substituted as a party to this action in place of Toth. AAC stands in Toth’s shoes and has all the rights and privileges that Toth previously held. See *Gould v. Jackson*, 257 Wis. 110, 113, 42 N.W.2d 489

(continued)

its motion to vacate the order confirming the Sheriff's sale. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).² The circuit court's denial of the second order (regarding the motion to vacate an order confirming sale) constituted an erroneous exercise of discretion in that it failed to correctly apply WIS. STAT. § 846.155(6)(a). Thus, we summarily reverse that order and remand with instructions.

Following a foreclosure on a residential property in Oconomowoc, Wisconsin, G Town Investment Properties LLC ("G Town") was the successful bidder on the property at a Sheriff's sale in June 2023. The terms of sale required a ten percent down payment of the successful bid with the remaining balance to be received "no later than ten days after the court's confirmation of the sale" consistent with WIS. STAT. § 846.16. The circuit court confirmed the sale on June 26, 2023. Prior to the expiration of ten days, on June 28, 2023, G Town sought a three-day extension to pay the outstanding balance. The next day, without a response from AAC, the court granted the extension.

On July 12, 2023, the day after the original deadline to pay the balance, AAC filed an emergency motion to vacate the order granting the extension, to vacate the sale, and for forfeiture of the buyer's down payment. It also advised the circuit court that it was able to redeem the property. That same day, after AAC filed the emergency motion, G Town filed its Eligible Third-Party Bidder Affidavit.

(1950). To avoid confusion, all references to AAC's actions in this order include Toth's actions prior to the assignment.

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The circuit court held a hearing on the next day. After argument, the court held that the case relied upon by AAC, *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 459, 481, 572 N.W.2d 466 (1998), was distinguishable because the ten-day deadline had expired in that case before an extension was sought. It determined that in this case, it had legislative authority under WIS. STAT. § 801.15(2a) to grant the extension and that “the enlargement of time was in the interest of justice and not prejudicial to the parties.” The court denied AAC’s motion and permitted G Town to pay the balance of its bid. On July 14, 2023, G Town paid the remaining balance and all required fees.

On July 18, 2023, AAC filed another motion challenging the confirmation of the Sheriff’s sale, this time arguing that the confirmation was void pursuant to WIS. STAT. § 846.155(6)(a) because the court confirmed the sale before the Eligible Third-Party Bidder Affidavit was filed. AAC repeated that it was ready to exercise its redemption rights. US Bank Trust National Association³ objected on the grounds that AAC had waived this argument by not objecting to the motion to confirm the Sheriff’s sale and that any error was harmless.

Following a hearing on the second motion, the circuit court held that AAC was not deprived of its redemption rights because it “could have raised that objection earlier and it would have potentially delayed the confirmation of the Sheriff’s sale” and that the result here was equitable. It further held that WIS. STAT. § 806.07 did not apply because AAC had waived its

³ US Bank Trust National Association had been substituted as plaintiff because it was the holder of the mortgage via an assignment of those rights after the foreclosure judgment, but prior to the Sheriff’s sale. We note that US Bank Trust has not filed a brief “because its interests are not affected by the issues raised” in this appeal.

objection and “circumstances don’t justify vacating or reopening” the order confirming the sale. The court issued written orders denying both motions, and AAC appealed both.

We begin by reviewing the circuit court’s second order. We have a “solemn obligation ... to faithfully give effect to the laws enacted by the legislature.” *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In conducting statutory interpretation, we first look to the language of the statute “because we assume that the legislature’s intent is expressed in the words it used.” *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130 (quoting *State v. Reed*, 2005 WI 53, ¶13, 280 Wis. 2d 68, 695 N.W.2d 315). “Generally, language is given its common, ordinary, and accepted meaning.” *Orion Flight Servs.*, 290 Wis. 2d 421, ¶16.

There is no question that the circuit court confirmed the sale at issue sixteen days before the third-party bidder affidavit was filed. There is also no question that the legislature has expressly and unambiguously mandated that “the court may not confirm the sale until the grantee files the affidavit required under [WIS. STAT. § 846.155(5)].” Sec. 846.155(6)(a). The only questions on appeal, therefore, are whether AAC waived its objection to the confirmation of sale and whether the court’s order denying AAC’s motion challenging the sale constituted harmless error.

Again, the statute is clear; the circuit court had no authority, equitable or otherwise, to confirm a Sheriff’s sale without the third-party bidder’s affidavit. “[A] court may not exercise its equitable authority if such exercise would ignore a statutory mandate.” *Gisvold*, 215 Wis. 2d at 480; *State v. Excel Mgmt. Servs., Inc.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)) (“[T]he comprehensiveness of this

equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.”); *see also First Federated Sav. Bank v. McDonah*, 143 Wis. 2d 429, 434, 422 N.W.2d 113 (Ct. App. 1988) (stating that parties should not “misinterpret ‘equity’ to mean that a court may ignore statutes and case law to enable it to assist someone in trouble”).

Turning to the question of harmless error, because the statutes allow a “mortgagor ... or assigns” to “redeem the mortgaged premises at any time before the sale,” WIS. STAT. § 846.13, AAC has indeed been harmed. Since its first motion filed on July 12, 2023, it has repeatedly declared that it was prepared to exercise its redemption rights. *See Harbor Credit Union v. Samp*, 2011 WI App 40, ¶40, 332 Wis. 2d 214, 796 N.W.2d 813 (A redemption “payment is in fact effective if made before the court confirms the sale.”); *Security State Bank v. Sechen*, 2005 WI App 253, ¶¶8-9, 288 Wis. 2d 168, 707 N.W.2d 576.

Finally, AAC did not waive its objection. “Where the facts and circumstances relating to the conduct are admitted or clearly established, waiver becomes a question of law.” *Rural Mut. Ins. Co. v. Peterson*, 134 Wis. 2d 165, 180, 395 N.W.2d 776 (1986). Here, AAC raised the defect six days after the third-party bidder affidavit was filed; that was less than a month after the Sheriff’s sale was confirmed. The circuit court held that, in equity and because AAC was not harmed, it was appropriate to maintain the confirmation of the sale. We have already concluded that there was harm to AAC and that equity cannot overcome a direct statutory mandate. In those circumstances, we conclude that AAC cannot be deemed to have waived its rights to challenge the confirmation order.

“The decision whether to confirm a sale is committed to the circuit court’s discretion.” *JP Morgan Chase Bank, NA v. Green*, 2008 WI App 78, ¶11, 311 Wis. 2d 715, 753 N.W.2d

536. “We affirm discretionary decisions if the circuit court applies the correct legal standard to the relevant facts and reaches a reasonable outcome.” *Id.* The same applies for a court’s discretionary decision to deny a motion for relief under WIS. STAT. § 806.07. *Samp*, 332 Wis. 2d 214, ¶38. Here, the court did not apply the correct legal standard with respect to both the motion to confirm the Sheriff’s sale and the motion to vacate the same. The court erred when it violated the statutory mandate and confirmed the Sheriff’s sale before all necessary prerequisites were met. Its order denying AAC’s motion seeking to vacate the order confirming the sale and to unwind that sale is reversed and the matter is remanded. All parties are placed in the same position they were before the motion to confirm the Sheriff’s sale was filed.

Because we resolve this appeal as explained above, we need not address whether WIS. STAT. § 846.16 contains a mandatory deadline that cannot be extended pursuant to Sec. 801.15(2), or whether equitable estoppel is applicable.⁴

IT IS ORDERED that the order of the circuit court regarding the motion to vacate an order confirming sale is summarily reversed and that this case is remanded with instructions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

⁴ *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (when one issue is dispositive of an appeal, we need not discuss other issues).