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DISTRICT IV

April 16, 2013

To:

Hon. Todd W. Bjerke
Circuit Court Judge
La Crosse County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2011AP1867

M&I Marshall & Ilsley Bank v. Thomas P. Kumbier
(L.C. # 2010CV915)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

M&I Bank appeals an order denying its motion for the surplus from a foreclosure sale. Due to the lack of a transcript or written factual findings, we remanded the matter to have the circuit court explain why it awarded the surplus to the mortgage holder, Thomas Kumbier. We have now received the circuit court's decision on remand. After reviewing that decision, along with the briefs and previously transmitted record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The bank contends that it is entitled to the surplus under WIS. STAT. § 846.162 as the junior lien holder of a second mortgage on the subject property, notwithstanding that the bank waived any deficiency with respect to the first mortgage, upon which it foreclosed. However, the circuit court has explained in its supplemental findings that the bank did not make any claim for judgment upon the second mortgage, even after it was permitted to amend its complaint. Instead, the bank explicitly stated that it was waiving any deficiency judgment without mentioning the second mortgage, and further, affirmatively alleged that the only other lien holder against the mortgaged property was the Wisconsin Department of Children and Families. In addition, the circuit court points out that the bank itself submitted to the court a proposed judgment of foreclosure—which the court signed—stating that the amount owing to the bank was \$70,845.78. The bank did not raise the issue of a second mortgage until it filed an ex parte motion for reconsideration from the order awarding the surplus to the mortgage holder. The bank has not provided any argument, either in its initial briefing or by supplement following the remand, that persuades us that the circuit court acted improperly in denying the bank’s request for the surplus based upon its own prior representations to the court.

IT IS ORDERED that the order awarding the surplus to the mortgage holder is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals