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DISTRICT II

May 8, 2013

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

2012AP1813

Talmer Bank and Trust v. Windmill Communities LLC
(L.C. #2011CV680)

Before Brown, C.J., Reilly and Gundrum, JJ.

Windmill Communities LLC and Michael R. Reschke (collectively, "Windmill") appeal an order awarding Talmer Bank and Trust a deficiency judgment against Windmill. Windmill failed to timely appeal the entry of the default judgment or to file a written objection to the foreclosure sale. We conclude that the circuit court properly awarded the Bank a deficiency

judgment. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹

Windmill borrowed nearly \$6.4 million from the Bank² pursuant to a series of five promissory notes, one of which was secured by a mortgage. Reschke signed a guaranty of all of Windmill's obligations. Windmill defaulted on all five notes. The Bank commenced this action seeking to foreclose on the mortgage. It also sought monetary judgments against Windmill on the notes and against Reschke on the guaranty. Windmill failed to answer the complaint. The Bank moved for a default judgment. Windmill again did not respond. Instead, at the August 9, 2011 hearing on the Bank's motion, it moved for an extension of time to answer. The circuit court denied Windmill's motion and granted the Bank's default judgment. The court ordered (1) the mortgaged property to be sold at sheriff's sale, (2) a foreclosure judgment for \$8.2 million on the note, with the Bank reserving its rights to a deficiency judgment against Reschke, and (3) a judgment for \$2.4 million against Reschke on his guaranty.

Windmill did not appeal that decision. Rather, it moved to reopen, alleging that the Bank lacked standing because the Federal Deposit Insurance Corporation (FDIC) was appointed receiver before the case began. The court denied Windmill's motion and granted the Bank's motion to substitute Talmer Bank and Trust for the FDIC as plaintiff.

At the sheriff's sale, the Bank was the successful bidder on the mortgaged property. Its motion for confirmation and for deficiency judgment against Reschke was supported by an

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

² Windmill borrowed the money from First Banking Center. Talmer Bank later was substituted.

affidavit of its counsel and an appraisal. Although Windmill filed no objection, at the hearing on the motion, the court granted it a thirty-day extension to file a responsive brief. Windmill again did nothing, its counsel explaining that he was in Minnesota on a Boy Scout canoe trip. Accordingly, on June 29, 2012, the court granted the Bank's motion for confirmation of the sheriff's sale and entered a deficiency judgment against Reschke for approximately \$7.3 million. The court denied Windmill's subsequent motion to reconsider. Windmill appeals.

Windmill attempts to wriggle out from under the circuit court's June 29, 2012 ruling by attacking the previously unchallenged appraisal, raising issues not raised below and looking to a settlement agreement not germane to this case. We generally do not review issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

Windmill also argues that the circuit court erred in granting the Bank's motion for default judgment in August 2011. First, this claim is far too late. A foreclosure action has two steps: the judgment of foreclosure and sale, and the proceedings after the judgment. *Shuput v. Lauer*, 109 Wis. 2d 164, 171, 325 N.W.2d 321 (1982). The judgment of foreclosure and sale disposes of the entire matter in litigation, is appealable as a matter of right under WIS. STAT. § 808.03(1) and must be appealed within the time prescribed. *Shuput*, 109 Wis. 2d at 172. The postjudgment proceedings, including the order confirming the sale, are analogous to the execution of a judgment and simply enforce the parties' adjudicated rights. *Id.* at 173.

Beyond that, Windmill's claim that the circuit court misused its discretion is unsupported. Windmill failed to provide a hearing transcript; we therefore must assume that the missing material supports the court's ruling. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

Windmill also challenges the order confirming the sale and granting the deficiency judgment on the basis that the appraisal was flawed in multiple ways. The fact is, Windmill failed to timely act, despite being afforded additional time. Whether and to what extent the circuit court will enforce its own scheduling order deadlines is within its discretion. *Kustelski v. Taylor*, 2003 WI App 194, ¶15, 266 Wis. 2d 940, 669 N.W.2d 780.

Whether to confirm a foreclosure sale likewise rests within the circuit court's discretion. *Bankers Trust Co. of Cal., N.A. v. Bregant*, 2003 WI App 86, ¶10, 261 Wis. 2d 855, 661 N.W.2d 498. “[N]o 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.” WIS. STAT. § 846.165(2). As distinguished from market value, “fair value” is determined by the property's sale value, that is, what an able and willing buyer will reasonably pay for the property for the use to which the property has been or reasonably may be put. *First Fin. Sav. Ass'n v. Spranger*, 156 Wis. 2d 440, 444-45, 456 N.W.2d 897 (1990).

The Bank was the successful bidder at the sheriff's sale. Its \$1,519,000 bid reasonably compares to the appraiser's \$1,627,000 market value and \$1,058,000 liquidation value figures. This evidence cannot be said to “shock the conscience of the court”; the circuit court's confirmation thus was based on evidence of fair value. See *First Wis. Nat'l Bank of Oshkosh v. KSW Invs., Inc.*, 71 Wis. 2d 359, 367, 238 N.W.2d 123 (1976). Moreover, Windmill only now attacks the appraisal's validity and methodology. We need not address those arguments. See *Wirth*, 93 Wis. 2d at 443-44. Windmill does not address the denial of its motion for reconsideration.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals