COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP744 **Cir. Ct. No. 2009CV8049**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ARCH BAY HOLDINGS LLC-SERIES 2008B,

PLAINTIFF-APPELLANT,

V.

JAMES MATSON,

DEFENDANT-RESPONDENT,

LEGACY BANK AND RICHARD NEUMANN,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. This appeal is before us on a grant of permissive appeal pursuant to WIS. STAT. § 809.50 (2011-12)[1] to Arch Bay Holdings LLC-Series 2008B ("Arch Bay") to appeal from an order not appealable as of right. Arch Bay appeals from a non-final order of the circuit court imposing sanctions on Arch Bay and compelling Arch Bay to conduct a sheriff's sale and assume ownership of a mortgaged property. We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 In November 2006, James Matson refinanced an existing loan and received an adjustable rate mortgage note for his rental property at 2219 North 37th Street, Milwaukee. The loan was assigned to Arch Bay. Matson failed to make the contractual payments when due, triggering default. As of July 2008, Matson owed Arch Bay $70,606.08 plus accruing interest. On May 22, 2009, Arch Bay filed a foreclosure complaint in the circuit court. The complaint contained Arch Bay's election to waive its right to seek a deficiency judgment and requested a three-month redemption period. Matson did not file a responsive pleading. Arch Bay moved for default judgment of foreclosure.

¶3 On September 21, 2009, the circuit court[2] granted Arch Bay's motion for default judgment without deficiency. The judgment stated that Matson owed Arch Bay $89,576.03 on the note, unpaid real estate taxes, interest, and other charges. As material to this appeal, the judgment also provided:

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

[2] The Honorable Timothy Dugan granted Arch Bay's motion for default judgment.

> That the mortgaged premises is vacant based upon the property inspection records maintained by the plaintiff and/or the affidavits of service.
>
> ….
>
> That the mortgaged premises … shall be sold at public auction under the direction of the sheriff, at any time after three months from the date of entry of judgment[.]
>
> ….
>
> That [Matson] remain[s] entitled to possession of the mortgaged premises and [is] entitled to all rents, issues and profits therefrom to the date of confirmation of sale.
>
> ….
>
> THAT NO DEFICIENCY JUDGMENT MAY BE OBTAINED AGAINST ANY DEFENDANT.

(Capitalization in the original.)

¶4 It is unclear when Matson began failing to pay taxes on the property; however, Matson continued to fail to pay taxes after the default judgment was issued. The property was vacant when Arch Bay began the foreclosure and fell into disrepair, eventually prompting the City of Milwaukee to issue work orders and citations to Matson for City Building Code violations. Believing that the property's value had diminished, Arch Bay did not conduct a sheriff's sale, but on March 30, 2010, recorded a "Mortgage Release, Satisfaction and Discharge" with the Milwaukee County Register of Deeds. The document had the effect of releasing, satisfying, and discharging all of Matson's debt to Arch Bay. The document also released the security interest upon which the judgment was granted, thereby releasing Arch Bay's lien on the property, forgiving the underlying debt,

and otherwise waiving any security interest in the property. Arch Bay did not send notice of recording this document to Matson.[3]

¶5 In March 2012, two years after Arch Bay recorded the document erasing Matson's debt, Matson surfaced for the first time since the start of this litigation. By counsel, Matson filed a "Motion to Enforce Judgment," seeking "enforcement" of the September 2009 judgment of foreclosure. Matson's motion sought to sanction Arch Bay on the grounds that Arch Bay violated the judgment by failing to conduct a sheriff's sale. Matson also claimed that because he filed for Chapter 7 bankruptcy in November 2008, he did not participate in the foreclosure action. Matson's motion stated that he "believed" he had "surrendered the property in the bankruptcy," and thereby ended his ownership responsibilities.[4]

¶6 The circuit court,[5] in a written order, ruled that Arch Bay's failure to sell the property resulted in inequities between the parties and concluded that the September 2009 judgment required Arch Bay to conduct a sheriff's sale. Arch Bay complied with the order and conducted a sheriff's sale on August 6, 2012; however, there were no bidders.

[3] In view of the numerous unsuccessful efforts to locate Matson for service of process when the foreclosure was commenced, it is hardly surprising that Arch Bay did not repeat those efforts later. The record does not indicate Matson was represented by counsel in March 2010, making service on counsel obviously impossible. Moreover, neither party, nor the circuit court, has cited a statute or court order in this case requiring such notice.

[4] The Bankruptcy Trustee abandoned its interest in the property after concluding that the property was worth less than the secured interest of Arch Bay. Matson remained the owner of the property.

[5] Due to judicial rotations, the Honorable Dominic Amato decided Matson's motion and presided over other matters pertaining to this case.

¶7 On August 27, 2012, Arch Bay informed the circuit court at a hearing that no bidders bid on the property. The circuit court suggested that Arch Bay either hold another sheriff's sale or that it could move forward with a hearing on Matson's motion for sanctions, stating:

> [I]f no one else is going to bid [on] it, maybe you should bid a penny for it. If it's such a piece of nothingness after what was done to this defendant. And on contempt and sanctions, I'm going to talk about restoring the defendant to where he was and go back with all of his losses to restore the status quo because of the actions of the lending institution. And pick up all the legal fees that defense counsel is charging his client.
>
> Do you want to go back and have another sheriff's sale or do you want to proceed with a sanction contempt hearing [?]

¶8 Arch Bay held another sheriff's sale on November 26, 2012. An Arch Bay nominee, AB REO Holdings, LLC, bid $2.00 on the property, as there were no other bidders. Arch Bay submitted a motion to confirm the sale along with the sheriff's report of the sale. The circuit court did not confirm the sale and instead scheduled a hearing for sanctions.

¶9 At the sanctions hearing, Matson's attorney told the court that Matson "has a few other properties," "has been sued by the city of Milwaukee for building code violations," pled no contest to the violations and has "become a bit of a target for the city." Arch Bay told the court that "there are tax liabilities attached to the North 37th Street property" and stated that it attempted numerous times "to offer to take the property back through a quitclaim deed, so that [Matson] no longer has tax obligations and no longer will be bothered by the city ordinances."

¶10 The circuit court granted Matson's motion for sanctions, finding that Matson was a victim of bad faith and misconduct by Arch Bay. As relevant to this appeal, the circuit court stated:

> When I ordered the first sheriff sale, which was objected to strenuously by plaintiff's counsel … [n]o one appealed that. No one went and sought an interlocutory appeal … no one asked for a stay, no one asked for any relief.… [T]he plaintiff didn't ask for any relief.
>
> According to the judgment docket before Judge Dugan, [Arch Bay] asked for a redemption period of three months.
>
> They … didn't ask for any relief. They didn't ask for … relief that the defendant was committing waste on the property. They didn't ask for relief that the defendant has actually abandoned the property.…
>
> They didn't ask for any deficiency judgment. They just got their judgment.
>
> ….
>
> It's been bad faith. It's been egregious. Egregious. [Arch Bay] has tried to avoid responsibilities, disregard the orders of the court that it itself prepared, and has simply done what it has tried to do by escaping its responsibility in this litigation.
>
> ….
>
> And I have said on the record a number of times that I wanted to restore the status quo and to be fair. So the court is going to enter sanctions.

(Some formatting altered.)

¶11 In essence, the circuit court found that: (1) the language of the foreclosure judgment required Arch Bay to conduct a sheriff's sale; (2) Arch Bay released Matson's debt and its security interests without any notice to Matson or the court; (3) Arch Bay failed to first seek relief from the judgment from the court; (4) Arch Bay's actions were "unilaterally ex parte" and in bad faith; and (5) the

property "was left deteriorated, and the *plaintiff* decided to abandon its rights in the foreclosure action." (Emphasis added.)

¶12 The circuit court imposed liability on Arch Bay for any expenses, taxes, assessments, and ordinance violations that had been imposed against the property; ordered Arch Bay to indemnify and hold harmless Matson for any liability relating to Matson's prior ownership of the property; and ordered Arch Bay to pay reasonable attorney fees incurred by Matson relating to this action.

¶13 This appeal follows.[6]

DISCUSSION

¶14 At its core, the circuit court's decision to impose sanctions under WIS. STAT. § 805.03[7] because of bad faith and egregious conduct by Arch Bay is based on two legal conclusions. First, that the mortgage holder was required by the foreclosure judgment to hold a sheriff's sale after the redemption period

[6] The circuit court labeled its order on sanctions a final order for the purposes of appeal; however, at a subsequent hearing to determine attorney's fees, the circuit court recast its sanctions order as an "interlocutory order" and stayed all future proceedings pending appeal. Arch Bay was granted permission to appeal the interlocutory order.

[7] WISCONSIN STAT. § 805.03 provides: "For failure of … any party to … obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2)(a).…"

WISCONSIN STAT. § 804.12(2)(a) authorizes, as material here:

> If a party … fails to obey an order…, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> ….
>
> 4. … an order treating as a contempt of court the failure to obey any orders….

expired, thus failure to do so was a violation of a court judgment and a basis for sanctions. Second, that releasing the debt, and the obligations on the mortgage, recording that release with the Register of Deeds, and failing to give separate notice to Matson permitted sanctions under the statutes.

Standard of Review.

¶15 "'Generally, mortgage foreclosure proceedings are equitable in nature'"; but to the extent resolution of the issues requires statutory construction, "'they present questions of law, which we review *de novo.*'" *See* ***Harbor Credit Union v. Samp***, 2011 WI App 40, ¶19, 332 Wis. 2d 214, 796 N.W.2d 813 (citation omitted; emphasis added). When reviewing statutes, our inquiry "'begins with the language of the statute.'" *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). We give statutory language "its common, ordinary, and accepted meaning," and give "technical or specially-defined words or phrases" "their technical or special definitional meaning." *See* ***id.*** We must also keep in mind that "[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears." *See* ***id.***, ¶46. Therefore, we interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *See* ***id.***; *see also* ***Harbor Credit Union***, 332 Wis. 2d 214, ¶23 ("In the mortgage foreclosure context, interpretations of statutes must be based on 'the context of ch. 846 as a whole,' because ch. 846 'sets up a comprehensive scheme of foreclosure, including the procedural and substantive requirements for obtaining a deficiency judgment for the unpaid balance on the debt remaining after a foreclosure sale.'") (citation omitted).

¶16 A circuit court has both statutory and inherent authority "to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991), *overruled on other grounds* ***by Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898. "The decision to impose sanctions under WIS. STAT. §§ 802.10(7) and 804.12 lies within the [circuit] court's discretion." ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. A circuit court properly exercised its discretion if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). "The question is not whether this court as an original matter would have imposed the sanction; it is whether the circuit court [erroneously exercised] its discretion in doing so." ***Sentry Ins.***, 247 Wis. 2d 501, ¶19. When deciding whether to impose sanctions based on "bad faith" and "egregious conduct," the circuit court looks to Wisconsin case law's definitions of the terms. "Bad faith" has been defined "by reference to 'deceit; duplicity; insincerity[]'" and "as 'a species of fraud.'" ***Roehl Transp., Inc. v. Liberty Mut. Ins. Co.***, 2010 WI 49, ¶122 n.49, 325 Wis. 2d 56, 784 N.W.2d 542 (citations omitted). "Egregious conduct means a conscious attempt to affect the outcome of litigation or a flagrant, knowing disregard of the judicial process." ***Morrison v. Rankin***, 2007 WI App 186, ¶20, 305 Wis. 2d 240, 738 N.W.2d 588.

Arch Bay did not violate the foreclosure judgment.

¶17 The language in the foreclosure judgment substantially follows the relevant statute, WIS. STAT. § 846.103(2), under which Arch Bay elected to seek

foreclosure. Thus we begin with the statute, as material to these proceedings. Section 846.103(2) allows the entity seeking the foreclosure to:

> elect … to waive judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises … and to consent that the mortgagor, unless he or she abandons the property, may remain in possession of the mortgaged property and be entitled to all rents, issues and profits therefrom to the date of confirmation of the sale by the court … and the sale of the mortgaged premises shall be made upon the expiration of 3 months from the date when such judgment is entered.[8]

The judgment language closely follows the statute: "[the] premises shall be sold at public auction under the direction of the sheriff, at any time after three months from the date of entry of judgment." The judgment directs sale "at any time after three months" from entry of the judgment. The plain language of the judgment does not mandate a sale at any particular time. Matson did not seek to reform the judgment to track his view of the statute, but rather sought to enforce the judgment as written.

¶18 We have previously dealt with the question of whether the language of a particular foreclosure judgment mandates a sheriff's sale because Matson and his counsel have previously raised it. We recently decided ***Deutsche Bank National Trust Co. v. Matson***, No. 2012AP1981, unpublished slip op. (WI App July 30, 2013), a case in which both Matson and his counsel were involved. The facts of Matson's previous case and the case before us now do not significantly

[8] The statute suggests that with consent of the mortgage holder (lender), the mortgagor owner (debtor) may remain in possession during the foreclosure "unless he or she abandons the property." Significant evidence in the record, including Matson's numerous admissions, suggest that he in fact abandoned the property. His erroneous opinion about property law does not make him a victim in this case nor does it excuse his conduct and its consequences. *See* ***Tri-State Mech., Inc. v. Northland College***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302 (every person is presumed to know the law).

differ. In ***Deutsche Bank***, Matson refinanced a previous loan and received an adjustable rate mortgage loan for a different Milwaukee-area property. ***Id.***, ¶2. The loan was assigned to Deutsche Bank. ***Id.*** Matson defaulted on the loan and filed for Chapter 7 bankruptcy. ***Id.***, ¶3. Deutsche Bank commenced foreclosure proceedings and was granted a default judgment. ***Id.***, ¶¶3-4. Matson abandoned the property, leading to a decreased property value, and prompting Deutsche Bank to record a satisfaction of the mortgage with the Milwaukee County Register of Deeds. ***Id.***, ¶7. The document "released Deutsche Bank's lien on the property, forgave the underlying debt, and established Matson as the owner." ***Id.*** Like the facts of this case, Matson filed a motion to enforce the foreclosure judgment and compel Deutsche Bank to conduct a sheriff's sale. ***Id.***, ¶9. We concluded "that Deutsche Bank was not required to sell the property" and that the foreclosure order "describes the sheriff's sale process should it actually occur; it does not force Deutsche Bank to conduct a sale, nor does it prohibit it from releasing its lien on the property and forgiving the underlying debt." ***Id.***, ¶15. Similarly, we concluded that WIS. STAT. § 846.103(2) "describes a particular process should a sheriff's sale actually occur," but "does not require Deutsche Bank to sell the property at the end of the three-month redemption period." ***Deutsche Bank***, No. 2012AP1981, unpublished slip op. ¶16. We reach the same conclusion here, adopting and incorporating by reference our analysis in ***Deutsche Bank*** at ¶¶14-17.

Arch Bay was not required to give notice of the Release and Satisfaction in addition to recording it with the Register of Deeds.

¶19 Recording documents effecting title to real estate is for the purpose of protecting the owner of an interest in the real estate by establishing the chain of title applicable to that real estate. *See* ***Bank of New Glarus v. Swartwood***, 2006

WI App 224, ¶20, 297 Wis. 2d 458, 725 N.W.2d 944. WISCONSIN STAT.§ 706.05(8)[9] permits recording a Release and Satisfaction of a mortgage with the Register of Deeds of the county in which the property is located. Arch Bay did exactly that. The effect of such recording is to clear the chain of Matson's title by removing the mortgage lien previously recorded as required by § 706.05(1). Thus, Matson became free to sell the property to whomever he chose without paying any more money to Arch Bay.

¶20 A review of the transcript indicates that the circuit court was clearly influenced by the undisputed fact that Arch Bay did not send additional notice of the Release and Satisfaction to Matson.[10] Neither the court nor the parties have identified a statute which requires such notice, nor have we located one. WISCONSIN STAT. ch. 706 does not require notice to affected parties beyond the recording of documents that affects a title to real estate. The system of recording

[9] WISCONSIN STAT. § 706.05(8) provides:

> A duly recorded certificate signed by or on behalf of the holder of record of any mortgage or other security interest in lands, and authenticated as provided by s.706.06 or 706.07 identifying the mortgage or other interest and stating that the same has been paid or satisfied in whole or in part, shall be sufficient to satisfy such mortgage or other interest of record.

[10] The circuit court chastises Arch Bay for not sending notice of the Release and Satisfaction to Matson's attorney, presumably at or about the time of the release. However, at the time Arch Bay recorded the Release and Satisfaction, on March 30, 2010, the record in this foreclosure contains no evidence that Matson was represented by counsel. Matson's attorney first appears in this record in an entry dated March 29, 2012, two years after the Release and Satisfaction was recorded. Obviously, even if additional notice of the recording was required, giving notice to an attorney with no known involvement in this foreclosure, would present a logistically impossible requirement. In addition, in the foreclosure action, Matson was served by publication because process servers were unable to locate him at any of his properties or his known residences. Thus, even if notice of the Release and Satisfaction should have been provided to Matson, the only evidence in this record of his whereabouts is that they were unknown.

documents impacting ownership of, or claims of interest in, real estate is notice to the world of the claims against a specific piece of real estate.

¶21 Foreclosures of interests in real estate under WIS. STAT. ch. 846, follow the rules of civil procedure found in ch. 801-806. Section 801.14(1) generally requires that "every pleading" and a variety of other documents frequently generated in a civil action, be served on each party. An exception to that general mandate is that "[n]o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in s. 801.11." WIS. STAT. § 801.14(1). Here, Matson failed to appear in any way at any time in this action until two years after the Release and Satisfaction was recorded—nothing in § 801.14(1) required notice of recording the release of existing interests. The Release and Satisfaction did not assert "new or additional claims" but rather forgave old claims. There was no order, scheduling or otherwise, issued by the court before March 30, 2010, which prohibited Arch Bay from releasing its claims against Matson.

¶22 Nothing Arch Bay did was illegal, nor did Arch Bay violate a court order. We conclude that the circuit court proceeded on an error of law when it found Arch Bay had engaged in "bad faith" and "egregious conduct." When Arch Bay released its security interest in the real estate and declared Matson's underlying debt satisfied, the foreclosure litigation appeared to be over; judgment had been entered months before and the time for appeal had expired.[11] The facts in the record before us do not support the circuit court's finding that when Arch

[11] The foreclosure judgment was entered September 23, 2009. The time to appeal that judgment expired ninety days later, on December 20, 2009. *See* WIS. STAT. § 808.04(1). Arch Bay recorded the Release and Satisfaction on March 20, 2010.

Bay recorded the Release and Satisfaction—forgiving Matson's debt of over $70,000 and relinquishing its security interest in Matson's property—it engaged in deceit, duplicity or insincerity. Likewise, the record does not support the finding that Arch Bay engaged in a conscious attempt to affect the outcome of litigation (which had apparently already ended) or that any of Arch Bay's actions constituted a flagrant, knowing disregard of the judicial process.

CONCLUSION

¶23 The circuit court committed an error of law when it concluded that the foreclosure judgment compelled Arch Bay to sell the property. *See* ***Deutsch Bank***, *supra*. Because no statutes, case law, nor any order in these proceedings imposed a personal notice requirement on Arch Bay when it recorded the Release and Satisfaction with the Register of Deeds, the circuit court relied on an error of law when it concluded that Arch Bay acted in bad faith and egregiously when it forgave Matson's debt and discharged his mortgage obligations because Arch Bay did not separately notify Matson it had recorded that Release and Satisfaction. Arch Bay has not violated any statutes or orders that have been brought to our attention. Thus the circuit court committed errors of law when it imposed sanctions under WIS. STAT. §§ 805.03 and 804.12(2)(a).

¶24 For all the foregoing reasons, we reverse the order imposing sanctions against Arch Bay, and remand for further proceedings, if any, consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.