

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2015AP1826

Cir. Ct. No. 2009CV283

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**PNC BANK, NA, SUCCESSOR BY MERGER TO NATIONAL CITY BANK,
SUCCESSOR BY MERGER TO NATIONAL CITY BANK OF INDIANA, A
DIVISION OF WHICH WAS FNMC,**

PLAINTIFF-RESPONDENT,

V.

SHEILA M. SPENCER,

DEFENDANT-APPELLANT,

JOHN DOE SPENCER,

DEFENDANT.

APPEAL from an order of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sheila Spencer appeals a circuit court order confirming a sheriff's sale following a judgment of foreclosure. Spencer argues that she was not properly served with notice of the confirmation of sale and that the circuit court improperly granted a writ of assistance to the successful bidder in the order confirming the sale. For the reasons set forth below, we reject these contentions. We affirm.

¶2 In August 2014, the circuit court entered a judgment of foreclosure in PNC's action to foreclose property owned by Spencer.¹ In July 2015, PNC moved to confirm the sheriff's sale of the foreclosed property. PNC served the motion on Spencer's counsel of record in the foreclosure action, Attorney Wendy Alison Nora, on August 17, 2015.

¶3 On August 26, 2015, the circuit court held a hearing on the motion to confirm the sale. Spencer appeared specially by Attorney Nora at the hearing, and objected to the confirmation of sale on grounds that Spencer had not been served individually and that PNC was not entitled to a writ of assistance. The circuit court determined that PNC provided proper notice of the motion to confirm the sheriff's sale to Spencer by serving Attorney Nora, Spencer's counsel of record in the underlying foreclosure case. The court also determined that PNC was not seeking a writ of assistance, but was requesting that the successful bidder be entitled to a writ of assistance if he or she wished. The court entered an order confirming the sheriff's sale and stating that the successful bidder was entitled to a writ of assistance upon application to the court. Spencer appeals.

¹ By separate appeal, Spencer has also appealed the judgment of foreclosure. Today we release an opinion resolving that separate appeal. *PNC Bank v. Spencer*, 2014AP2353.

¶4 Spencer argues that service of the motion for the confirmation of sale upon her counsel of record in the foreclosure action was insufficient service of process under WIS. STAT. § 846.165(1) (2013-14).² Spencer argues that service of the motion for the confirmation of sale on defense counsel in the foreclosure action is insufficient because confirmation of a sheriff's sale is a separate "special proceeding" rather than part of the foreclosure action. Thus, according to Spencer, § 846.165 requires service on the parties individually, and does not allow for service on defense counsel in the separate foreclosure action. We disagree.

¶5 Under WIS. STAT. § 846.165(1), "[n]o sale on a judgment of mortgage foreclosure shall be confirmed unless 5 days' notice has been given to all parties that have appeared in the action." Spencer reads this language as requiring service on a party individually. She argues that nothing in the statute permits service on the party's attorney under WIS. STAT. § 801.14(2), which requires service on a party's attorney when service "is required or permitted to be made upon a party represented by an attorney." Spencer argues that the foreclosure action was entirely separate from the "special proceeding" initiated by the motion for the confirmation of sale, and thus service on her counsel in the foreclosure action was insufficient as to the confirmation of sale proceedings. Spencer analogizes the circumstances here to the appeal from a condemnation award addressed in *Big Valley Farms, Inc. v. Public Service Corp.*, 66 Wis. 2d 620, 624, 225 N.W.2d 488 (1975), in which the court stated that "service upon the attorney (for either party in the condemnation hearing) is not authorized under the statute providing for such appeals." Spencer argues that, similarly to the

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

condemnation hearing statutes addressed in *Big Valley Farms*, nothing in § 846.165(1) permits service on an attorney rather than on a party directly. We are not persuaded.³

¶6 Our supreme court has explained that the confirmation of sale is the second part of a single foreclosure action.⁴ See *Shuput v. Lauer*, 109 Wis. 2d 164, 171, 325 N.W.2d 321 (1982) (“Wisconsin statutes provide for a foreclosure action that has two steps: The judgment of foreclosure and sale, and the proceedings after the judgment.”). The service of notice requirement under WIS. STAT. § 846.165(1) applies to “all parties that have appeared in the action.” Under the plain language of the statute, any party that has appeared in the foreclosure action is entitled to notice of the confirmation of sale. See *Wells Fargo Bank v. Biba*, 2010 WI App 140, ¶¶1-9, 329 Wis. 2d 787, 793 N.W.2d 95 (notice of the confirmation of sale is required only if a party has “appeared” in the foreclosure action). Here, it is undisputed that Spencer appeared in the foreclosure action, represented by Attorney Nora. Because Spencer appeared by counsel in the foreclosure action, service was required to be made on counsel. See WIS. STAT. § 801.14(2) (“Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party

³ Spencer also argues that she was denied her constitutional due process right to notice because PNC failed to comply with WIS. STAT. § 846.165. Because we conclude that Spencer was served with notice of the confirmation of sale proceedings as required by § 846.165, we reject Spencer’s constitutional argument.

⁴ In her reply brief, Spencer asserts that it is immaterial whether the confirmation of sale is a part of the foreclosure action or a special proceeding. Spencer contends that, in either case, WIS. STAT. § 846.165(1) requires service on a party individually. For the reasons set forth in this opinion, we disagree.

in person is ordered by the court.”). Accordingly, we conclude that PNC complied with the statutory service of notice requirements by serving Spencer’s counsel of record with the motion for the confirmation of sale.

¶7 Next, Spencer argues that the circuit court erred by ordering that the successful bidder at the sheriff’s sale is entitled to a writ of assistance upon application to the court. Spencer argues that a writ of assistance may issue only upon compliance with WIS. STAT. §§ 846.17 and 815.63. However, as PNC points out, the order on appeal did not issue a writ of assistance. Rather, the order states only that the successful bidder is entitled to a writ of assistance “upon application therefore to the clerk of this court.” We read this language as merely stating the obvious proposition that, should the successful bidder comply with the statutory requirements to obtain a writ of assistance, the writ of assistance will issue. Because the court did not, in fact, grant a writ of assistance, the question of whether a writ of assistance may issue is not ripe for review. *See Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783 (if “the resolution of ... issues ‘depends on hypothetical or future facts, [they are] not ripe for adjudication and will not be addressed by this court’” (alteration in original) (quoted source omitted)).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

