

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2010

A. John Voelker
Acting 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. 2010AP1093-FT

Cir. Ct. No. 2009CV169

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

M&I MARSHALL & ILSLEY BANK,

PLAINTIFF-RESPONDENT,

V.

JAMES E. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Order affirmed in part; reversed in part, and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.¹ James Peterson appeals an order confirming a sheriff's sale and entry of a deficiency judgment. Peterson contends the circuit court erred by setting a fair value not supported by evidence and by erroneously subtracting unpaid property taxes from the fair value. We conclude the circuit court properly determined the property's fair value but erred when it deducted the unpaid property taxes. We affirm in part, reverse in part, and remand with directions.

BACKGROUND

¶2 On April 27, 2009, M&I Marshall & Ilsley Bank (M&I) brought an action against Peterson to foreclose a mortgage it held on residential rental property. The circuit court entered a judgment of foreclosure and granted M&I the right to pursue a deficiency judgment. M&I subsequently purchased the property at sheriff's sale for \$96,485.39. M&I moved for confirmation of the sale and requested a deficiency judgment of \$22,822.75.

¶3 The circuit court held a confirmation hearing to determine the property's fair value. At the hearing, Peterson's realtor testified that the property's fair market value was \$120,000 and acknowledged its fair value would be somewhat less than that. M&I submitted a broker price opinion, which estimated the sale price of the property at \$115,000 after 120 days or at \$94,500 after a thirty-day quick sale.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 At the conclusion of the confirmation hearing, the court found the property's fair market value was \$120,000. After subtracting closing costs and a realtor's commission, the court determined the most Peterson could have personally realized on a sale was \$112,000. However, the court noted it was doubtful the property would ever sell for \$120,000, given the distressed nature of the sale and given that the property had been listed for six months without receiving an offer to purchase. The court reasoned, "It seems to me that what's fair is to assess a fair value of \$110,000 on the property. That's somewhat less than [Peterson] would have walked away with, but I think it's an appropriate figure under the circumstances." The court therefore credited \$110,000 against Peterson's mortgage debt and awarded M&I a deficiency for the balance.

¶5 M&I prepared a proposed order confirming sale. The order stated the fair value of the property was \$110,000, but it also included a finding that there were \$3,663.93 in unpaid property taxes. The proposed order therefore credited only \$106,336.07 toward Peterson's mortgage debt instead of the full \$110,000. Peterson objected to the proposed order, contending there was no basis for reducing fair value by the unpaid taxes. The circuit court disagreed and entered M&I's proposed order. Peterson appeals, arguing the circuit court erred by reducing the property's fair value from \$112,000 to \$110,000 and by subtracting the unpaid taxes.

DISCUSSION

¶6 The decision to confirm a foreclosure sale is vested within the sound discretion of the trial court and will not be reversed absent an erroneous exercise of discretion. *Baumgarten v. Bubolz*, 104 Wis. 2d 210, 218, 311 N.W.2d 230 (Ct. App. 1981). A discretionary determination must be based upon facts

appearing in the record and made in reliance on the appropriate and applicable law. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Additionally, a discretionary determination must be the product of a rational mental process. *Id.* In exercising its discretion, a trial court may reasonably reach a conclusion that another court would not reach, but it must be a conclusion that a reasonable court could reach by applying a process of logical reasoning to the relevant law and facts. *Id.*

¶7 Whenever a mortgaged property sells for less than the mortgage debt, before confirming the sale the trial court must make a specific finding of the property's fair value and must determine that the fair value has been credited toward the amount due on the mortgage. See WIS. STAT. § 846.165(2); *First Wis. Nat'l Bank v. KSW Invs., Inc.*, 71 Wis. 2d 359, 368-69, 238 N.W.2d 123 (1976). Fair value does not mean fair market value. Rather, fair value is the price a person willing and able to buy the property would reasonably pay. *Baumgarten*, 104 Wis. 2d at 220.

¶8 Here, the trial court properly exercised its discretion by setting the property's fair value at \$110,000. The court's fair value determination was based on the evidence presented by the parties and was the product of a logical reasoning process. First, relying on M&I's broker price opinion and the testimony of Peterson's realtor, the court determined the property's fair market value was \$120,000. Second, the court deducted closing costs and commissions from that amount and concluded Peterson could have personally realized no more than \$112,000 on the sale. Finally, the court determined the property was unlikely to sell for \$120,000, given the distressed nature of the sale and the lack of any offers during the previous six months. Based on these considerations, the trial court

deliberately and rationally reduced the fair value of the property from \$112,000 to \$110,000.

¶9 Peterson argues the court engaged in a reasoned process to arrive at \$112,000 but then arbitrarily reduced fair value to \$110,000. We do not agree that this reduction was arbitrary. The degree of precision Peterson is demanding of the trial court is unreasonable. The court's \$2,000 reduction in fair value only amounts to a 1.8% decrease. This reduction is de minimis, and does not constitute an erroneous exercise of the trial court's discretion.

¶10 However, the trial court did err by subtracting unpaid property taxes from the property's fair value. Prior to the confirmation hearing, M&I filed with the clerk of court a supplemental memorandum, in which it alleged "there are unpaid real estate taxes of approximately \$3,600." Copies of real estate tax statements were attached to the supplemental memorandum. However, the court never received these tax statements into evidence. The mere filing of a document with the clerk of court does not equate to it being received into evidence at a contested evidentiary hearing. If M&I intended to have the tax statements received into evidence, it should have offered them at the hearing where Peterson could object to their authenticity and admissibility.

¶11 M&I argues the tax statements must have been received into evidence because they were attached to its supplemental memorandum along with its broker price opinion. M&I contends that, because the trial court relied on the broker price opinion in setting fair value, it must also have received the tax statements into evidence. However, while the hearing transcript refers to the broker price opinion, it contains no acknowledgement of the tax statements by the court.

¶12 Furthermore, a court may not reduce fair value by extraneous costs without evidence that those costs actually affected fair value. *First Fin. Sav. Ass’n v. Spranger*, 156 Wis. 2d 440, 444, 456 N.W.2d 897 (Ct. App. 1990). M&I did not introduce any evidence at the confirmation hearing that the unpaid taxes affected the property’s fair value.

¶13 We therefore reverse the circuit court’s order to the extent that it subtracted \$3,663.93 in unpaid taxes from the fair value of the property. We remand with directions to set the fair value at \$110,000 without any deduction for unpaid taxes.²

By the Court.—Order affirmed in part; reversed in part, and cause remanded with directions.

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

² Peterson asks us to remand with instructions to credit his indebtedness by the property’s fair value. However, when a court imposes a fair value condition on confirmation of a sheriff’s sale, “it is optional with the mortgagee whether he will credit the fair value on the mortgage debt as a condition of immediate confirmation.” *Northwestern Loan & Trust Co. v. Bidinger*, 226 Wis. 239, 246, 276 N.W. 645 (1937); *Suring State Bank v. Giese*, 210 Wis. 489, 493, 246 N.W. 556 (1933). As a result, the court cannot compel M&I to credit Peterson’s indebtedness by fair value. If upon remand M&I exercises its option and refuses to credit the fair value of \$110,000, the circuit court must order a resale. See *Bidinger*, 226 Wis. at 246.

