COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1981 **Cir. Ct. No. 2009CV3061**

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HIS ASSET SECURITIZATION CORP TRUST 2007-NCI,

PLAINTIFF-RESPONDENT,

V.

JAMES MATSON,

DEFENDANT-APPELLANT,

LEGACY BANK,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge.[1] *Affirmed*.

[1] The Honorable William W. Brash, III, issued the order at issue in this case: the order denying Matson's motion to enforce the judgment. The judgment Matson sought to enforce, a judgment of foreclosure, was issued by the Honorable John J. DiMotto.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. James Matson appeals an order denying his motion to enforce a foreclosure judgment. Matson had a mortgage on rental property through Deutsche Bank, which was later foreclosed upon when he stopped paying the mortgage. Rather than sell the property at a sheriff's sale per the terms of the foreclosure judgment, Deutsche Bank decided to terminate its lien on the property, forgive Matson's underlying debt, establishing free and clear ownership for Matson. This was because Matson—who, despite the judgment's indications to the contrary, believed he had no claim to the property—abandoned the property before the end of the redemption period, leaving it in a state of disrepair, decreased value, and with outstanding property taxes and code violations. Matson moved the trial court to force Deutsche Bank to sell the property rather than give title to him, but the trial court denied the motion. On appeal, Matson argues: (1) the trial court erred in denying his motion to enforce the judgment because Deutsche Bank was required to sell the property as a matter of law; (2) the trial court erred by not using "its contempt authority" to enforce the judgment; and (3) the equities of the case favor requiring Deutsche Bank to sell the property. We affirm.

BACKGROUND

¶2 In 2006, Matson refinanced a previous loan and received an adjustable rate mortgage loan for his rental property at 2724 West Auer Avenue in Milwaukee. The new loan was assigned to Deutsche Bank, and the adjustable rate was set to apply in early 2008.

¶3 In the summer of 2008, after the adjustable rate kicked in, Matson defaulted on the loan, and in November 2008 Deutsche Bank filed a foreclosure action. An automatic stay initially prevented the foreclosure from moving forward

because Matson voluntarily filed a Chapter 7 bankruptcy petition, but the stay was eventually lifted, and Deutsche Bank commenced foreclosure proceedings against Matson in February 2009. Deutsche Bank elected in its foreclosure complaint to proceed under WIS. STAT. § 846.103(2) (2009-10),[2] with a three-month period of redemption that waived its right to seek a deficiency judgment against Matson. Deutsche Bank also consented to Matson remaining in possession of the Property and receiving all rents and profits until the date of confirmation of the sale by the trial court.

¶4 Matson did not contest the foreclosure, and, in August 2009, the trial court granted default judgment to Deutsche Bank. The trial court's judgment dictated the terms of any sale of the property, stating, in pertinent part:

> [T]he mortgaged premises cannot be sold in parcels without injury to the interests of the parties and unless sooner redeemed, said premises shall be sold at public auction at the direction of the sheriff, at any time after three months from the date of entry of judgment…. [T]he proceeds of [the] sale shall first be applied to the amounts due [Deutsche Bank] … and … the surplus, if any, shall be subject to the further order of this court.

The judgment further stated that Matson was entitled to possession of the premises and "entitled to all rents, issues, and profits" from the property until "the date of confirmation of sale." The judgment also enjoined the parties from committing waste upon the premises.

¶5 Matson believed that his responsibility to maintain the property was discharged at the time he filed for Chapter 7 bankruptcy and that the foreclosure

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

judgment transferred title to Deutsche Bank. Matson also believed the trial court's judgment compelled Deutsche Bank to sell the property, and that Deutsche Bank did in fact sell the property at some point after the judgment was issued.

¶6 Consequently, Matson abandoned the property and it fell into a state of disrepair. Public records show that the tax-assessed value of the property fell from $89,100 in 2008, to $69,000 in 2010, to $44,400 in 2012; and unpaid taxes in the amount of $26,700.35 accrued on the property between 2009 and 2012.[3] Matson began receiving, among other things, work orders and notice of unpaid taxes from the City of Milwaukee.

¶7 Deciding that completing the foreclosure via a sheriff's sale and sale confirmation hearing "would leave it worse off financially" given the property's condition, Deutsche Bank forewent enforcement of the judgment and instead recorded a satisfaction of the mortgage on August 27, 2010, with the Milwaukee County Register of Deeds. The satisfaction released Deutsche Bank's lien on the property, forgave the underlying debt, and established Matson as the owner.

¶8 Meanwhile, Matson's problems regarding the property continued to mount. As a result of the unpaid property taxes and building code violations, Matson was arrested. Matson, in turn, asked Deutsche Bank to conduct a sheriff's

[3] Although Deutsche Bank does not provide a citation to these figures beyond noting that they are public records, we rely on them here because Matson does not dispute them. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("'Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'") (citation omitted). We do, however, remind Deutsche Bank that WIS. STAT. § 809.19(1)(d) requires that all factual allegations be supported by citations to the record. We also remind the parties that if a party wishes us to take judicial notice of a public record, the party must provide a citation whereby we can verify the public record. *See, e.g.*, ***Questions, Inc. v. City of Milwaukee***, 2011 WI App 126, ¶30 n.10, 336 Wis. 2d 654, 807 N.W.2d 131; WIS. STAT. § 902.01.

sale of the property. Deutsche Bank informed Matson that he owned the property free and clear of Deutsche Bank's lien and that Deutsche Bank had no intention of conducting a sheriff's sale.

¶9 Matson then, on March 29, 2012, filed the motion that is the subject of this action: a "motion to enforce judgment" asking the court to compel Deutsche Bank to proceed with a sheriff's sale and confirm the sale within the next thirty days. The motion also sought compensation for injuries from Deutsche Bank's lack of enforcement of the foreclosure judgment and fees incurred from the City's lawsuit.

¶10 Following a hearing, the trial court denied Matson's motion. In its denial, the trial court found, as pertinent here:

> [U]ntil such time as the court confirms the sheriff's sale of the property, the ownership interest in the property remains with the property owner…. Accordingly, regardless of the language in the judgment of foreclosure stating that a property "shall be sold," a mortgagor has the right to redeem foreclosed property at any time prior to a sale; as such, the "sale" occurs only upon confirmation, at which time title vests in the purchaser and extinguishes the mortgagor's right of redemption.
>
> That nowhere in Chapter 846 is there a provision that establishes a deadline by which a plaintiff who obtains a judgment of foreclosure must advance a property to sheriff's sale, but rather only mandates a redemption period. In other words, the statutes presume a plaintiff … will advance the property to sheriff's sale; the parties here have provided no authority, and this Court was able to find no authority, that addresses this particular situation in which a plaintiff has no intention of proceeding with the second step of the foreclosure proceedings.
>
> That although this Court does not favor or endorse this tactic of the Plaintiff [Deutsche Bank], it recognizes that, in the current economic climate, with the influx of foreclosed properties in lenders' inventories … this may be

> deemed to be a "reasonable business decision" and a necessary strategy….

(Citations omitted; some formatting altered.)

¶11 Matson appeals.

ANALYSIS

¶12 Matson raises three issues on appeal. He argues: (1) the trial court erred in denying his motion to enforce the judgment because Deutsche Bank was required to sell the property as a matter of law; (2) the trial court erred by not using "its contempt authority" to enforce the judgment; and (3) the equities of the case favor requiring Deutsche Bank to sell the property. We discuss each issue in turn.[4]

(1) The trial court properly denied Matson's motion to enforce the judgment because Deutsche Bank was not required to sell the property as a matter of law.

¶13 Matson first argues that the trial court erred in denying his motion to enforce the judgment because Deutsche Bank was required to sell the property as a matter of law. Specifically, Matson argues that WIS. STAT. § 846.103(2) requires a plaintiff in a foreclosure action to sell property at the end of the three-month redemption period, and that Deutsche Bank was therefore required to sell the Auer Avenue property instead of giving him the title free and clear of all obligations. Matson further argues that this conclusion is supported by the purpose of

[4] To the extent that Matson raises an argument that we do not address, it is because the issue is not dispositive and does warrant individual attention, *see* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978), or is inadequately briefed, *see* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶20, 261 Wis. 2d 769, 661 N.W.2d 476.

foreclosure law, as well as the two-step foreclosure process outlined in ***Shuput v. Lauer***, 109 Wis. 2d 164, 171, 325 N.W.2d 321 (1982).[5]

¶14 "'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).

[5] In his brief, Matson repeatedly cites to WIS. STAT. § 846.103(4). Subsection (4), however, does not exist; and the language on which Matson relies is from § 846.103(2). We therefore assume that Matson is referring to § 846.103(2), and conduct our analysis under that subsection of the statute.

¶15 After reviewing the applicable law and standard of review, we conclude that Deutsche Bank was not required to sell the property. We turn first to the August 2009 order—*i.e.*, the order that Matson asked the trial court to enforce in his motion. We agree with Deutsche Bank that the most reasonable reading of the trial court's determination that the "premises *shall* be sold at public auction at the direction of the sheriff, at any time after three months from the date of entry of judgment" (emphasis added) is that it directs Deutsche Bank to proceed in a certain manner if the property is in fact sold. *See* ***State ex rel. Marberry v. Macht***, 2003 WI 79, ¶¶15-17, 262 Wis. 2d 720, 665 N.W.2d 155 (use of the word "shall" can be directory, not mandatory). The August 2009 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 as it did in this case.

¶16 Contrary to what Matson argues, WIS. STAT. § 846.103(2) does not require Deutsche Bank to sell the property at the end of the three-month redemption period. Like the trial court's order, the statute, the pertinent portions of which we provide below, describes a particular process should a sheriff's sale actually occur:

> *[T]he plaintiff in a foreclosure action of a mortgage … may elect by express allegation in the complaint to waive judgment for any deficiency* which may remain due to the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage, *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. When the plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered nor separately rendered against any party who is personally liable for the debt secured by the mortgage and the sale of the mortgaged*

> *premises shall be made upon the expiration of 3 months from the date when such judgment is entered. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16* and may be given within the 3-month period except that first printing of the notice shall not be made less than one month after the date when judgment is entered.

(Emphasis added.)

¶17 The statute does not force a plaintiff to sell the property in question. Indeed, Matson points to no provision in Chapter 846, and no relevant case law, establishing a deadline by which a plaintiff who obtains a judgment of foreclosure must advance a property to a sheriff's sale. While the statutory language of WIS. STAT. § 846.103(2) would appear to presume a plaintiff such as Deutsche Bank would sell property at a sheriff's sale, it does not require that it do so.

¶18 Matson's arguments regarding the mechanics of the foreclosure process and expedited foreclosure process set forth under WIS. STAT. § 846.103(2) are similarly unpersuasive. A lender's ability to recover on a mortgaged property under Chapter 846 involves a two-step procedure. ***Bank Mut. v. S.J. Boyer Const., Inc.***, 2010 WI 74, ¶27, 326 Wis. 2d 521, 785 N.W.2d 462. The first step is obtaining a judgment of foreclosure and sale. ***Id.*** The judgment "'determines the parties' legal rights in the underlying obligation and in the mortgaged property and thus determines the default, the right of the mortgagee to realize upon the security, the time and place of sale of the security and the notice required, and the right of the mortgagee to a judgment of deficiency.'" ***Glover v. Marine Bank of Beaver Dam***, 117 Wis. 2d 684, 693, 345 N.W.2d 449 (1984) (citation omitted). The judgment does little more than compute the amount owed to the mortgagee. *See* ***Marshall & Ilsley Bank v. Greene***, 227 Wis. 155, 164, 278 N.W. 425 (1938). "The second step carries into effect and enforces the judgment of foreclosure and sale." ***S.J. Boyer Constr.***, 326 Wis. 2d 521, ¶27. "[T]he court orders confirmation

of the sale, computes the amount of any deficiency, and enters a judgment for the deficiency." ***Id.*** As for the expedited process, § 846.103(2) "shorten[s] the period of redemption in a complicated, and costly time-consuming procedure," *see* ***Glover***, 117 Wis. 2d at 694, which benefits the lender, and it benefits the borrower by absolving him or her from responsibility for any deficiency, *see* ***S.J. Boyer Constr.***, 326 Wis. 2d 521, ¶¶68, 71-72. Again, while the two-step procedure explained above and the expedited process set forth in § 846.103(2) presumes that a lender will sell mortgaged property, we cannot conclude that there is any mandate that the property be sold, much less that—as Matson contends—it be sold immediately upon the expiration of the three-month redemption period.

¶19 Indeed, adopting Matson's interpretation would result in adverse policy consequences. For example, as Deutsche Bank notes, requiring a sheriff's sale simply does not make sense in circumstances where it is in neither the lender's nor borrower's interest to do so: for instance, when there is a post-judgment loan modification between the lender and borrower, or when the borrower pays the debt shortly after the expiration of the redemption period. Moreover, requiring a sheriff's sale essentially puts the borrower in control over the aggrieved lender's recovery, which, as Deutsche Bank notes, creates an incentive for a borrower to commit waste.

¶20 For the foregoing reasons, we conclude that Deutsche Bank was allowed, but not required, to sell the Auer Avenue property as a matter of law, and consequently, the trial court properly denied Matson's motion.

(2) The trial court did not err in refusing to use its "contempt authority" because selling the property was not required as a matter of law.

¶21 Matson also argues that the trial court erred by not using "its contempt authority" to enforce the judgment. Specifically, Matson claims that by electing not to conduct a sheriff's sale, Deutsche Bank "intentionally disobeyed" the August 2009 judgment of foreclosure and that the trial court should have therefore found Deutsche Bank in contempt.

¶22 We reject this argument, however, because it rests on a faulty premise. As we explained more fully above, Deutsche Bank did *not* disobey a court order by deciding not to conduct a sheriff's sale. Therefore, Matson's argument fails.

(3) Equity does not favor Matson in these circumstances.

¶23 Matson additionally argues that the trial court "should have used its equitable discretion to grant" his motion to force Deutsche Bank to conduct a sheriff's sale. He believes the equitable nature of foreclosure actions should not have left him with the responsibility of maintaining the property during the redemption period and likewise prohibited Deutsche Bank from transferring title to him. Matson highlights all the hardships he incurred after the entry of the August 2009 judgment of foreclosure: numerous building code violations, a lawsuit brought by the City, anxiety-induced medical issues, and arrest. Further, he argues these hardships, in combination with his decision to "surrender the property in bankruptcy," his decision to not take advantage of his redemption period benefits, and the property's depreciable effect on surrounding properties should have provided a sufficient basis for the court to force Deutsche Bank to advance to a sheriff's sale.

¶24 We disagree. The judgment of foreclosure made clear that Matson was entitled to all rents, issues, and profits deriving from the property throughout the redemption period; and it made clear that Matson was not to commit waste on the property. While Matson may have been operating under the mistaken belief that either his Chapter 7 bankruptcy and/or the August 2009 judgment of foreclosure essentially transferred title of the property back to Deutsche Bank and absolved him from all responsibility for the property, that simply was not the case. Moreover, we cannot assume, as Matson does, that forcing Deutsche Bank to conduct a sheriff's sale would solve Matson's problems. Even if Deutsche Bank were to conduct a sale, there is no guarantee the property would be sold. The circumstances before us are undoubtedly unusual, but they do not mandate the relief Matson requests. His appeals to equity must be denied.

By the Court.—Order affirmed.

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