

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 21, 1998**

**Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin**

**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 § 808.10 and RULE 809.62, STATS.**

**No. 96-2838**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**METROPOLITAN LIFE INSURANCE COMPANY, A NEW  
YORK CORPORATION,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES WILSON ASSOCIATES, A WISCONSIN LIMITED  
PARTNERSHIP; DARRELL R. WILD; KEY PERSONNEL,  
INC., A WISCONSIN CORPORATION,**

**DEFENDANTS-APPELLANTS-CROSS-  
RESPONDENTS,**

**FIRST NATIONWIDE BANK, A FEDERAL SAVINGS BANK;**

**DEFENDANT-RESPONDENT-CROSS-  
APPELLANT,**

**THE FIRST NATIONAL BANK OF PORTAGE, A WISCONSIN  
BANKING CORPORATION,**

**DEFENDANT,**

**BANK OF SUN PRAIRIE, A WISCONSIN BANKING**

**CORPORATION,**

**DEFENDANT-RESPONDENT-CROSS-  
RESPONDENT,**

**JWP INVESTORS, A WISCONSIN GENERAL PARTNERSHIP;  
JOHN C. KIRKPATRICK; ASHOK KUMAR; ALAN W.  
BABCOCK; THOMAS C. LALLY; ROBERT W. EDLUND;  
FIAZ A. CHOUDRI,**

**DEFENDANT,**

**BRUCE G. FELLAND,**

**DEFENDANT-RESPONDENT-CROSS-  
RESPONDENT,**

**v.**

**CAPITOL INDEMNITY CORPORATION, A WISCONSIN  
CORPORATION,**

**INTERESTED PARTY-RESPONDENT-  
CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from orders of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Deininger and Anderson, JJ.

PER CURIAM. James Wilson Associates (JWA), Darrell Wild and Key Personnel, Inc., appeal from an order awarding attorneys' fees to First Nationwide Bank during foreclosure and bankruptcy proceedings. First Nationwide cross-appeals from an order awarding disputed rents to another creditor of the appellants, Metropolitan Life, and allowing Capitol Indemnity

Corporation to withdraw a successful bid on the appellants' foreclosed property without forfeiting its deposit. On the appeal, we reverse on the attorneys' fees awarded to First Nationwide for its first, unsuccessful attempt to foreclose on the property, and affirm for those fees incurred during the bankruptcy proceeding. On the cross-appeal, we affirm the trial court's award on the disputed rents, but reverse the decision allowing Capitol Indemnity to keep its deposit after withdrawing its bid.

## FACTS

Metropolitan held the first mortgage and First Nationwide a second mortgage on a building JWA owned. JWA filed a petition in bankruptcy in 1990 because it could not make a balloon payment owed to Metropolitan. While the bankruptcy action was pending, JWA and First Nationwide renegotiated their agreement. In the new contract JWA stipulated to an immediate judgment of foreclosure without redemption rights under certain conditions.

JWA subsequently defaulted on its loan contract with Metropolitan, which then commenced this foreclosure action. First Nationwide also declared its loan to be in default and moved for an immediate judgment of foreclosure under JWA's stipulation. The trial court granted Nationwide's motion, and the appellants' appealed. On that appeal, we reversed the foreclosure judgment, holding that JWA did not violate the conditions that entitled First Nationwide to an accelerated foreclosure without redemption rights. *See Metropolitan Life Ins. Co. v. James Wilson Assocs.*, No. 94-3349, unpublished slip op. (Wis. Ct. App. June 29, 1995) (*JWA I*).

On remand to the trial court, First Nationwide moved for summary judgment under usual foreclosure procedures. Nationwide also claimed the

attorneys' fees it expended in its first unsuccessful attempt at foreclosure and in the bankruptcy proceeding. The appellants stipulated to entry of a foreclosure judgment, but challenged the attorney fee claims. The trial court subsequently resolved the dispute by awarding First Nationwide its disputed fees.

Following entry of the stipulated foreclosure judgment, a sheriff's sale of the foreclosed property was scheduled. The notice of sale informed prospective bidders that the property was being sold subject to Metropolitan's first mortgage. Consequently, prospective buyers could calculate the cost of the property by adding the amount of their bid to the \$3.4 million owed to Metropolitan under JWA's defaulted loan contract.

Capitol Indemnity made the high bid of \$2.5 million at the sale and paid a \$250,000 deposit. Two weeks later, it moved to vacate the sale because its principals made the bid without realizing that the price tag included the \$3.4 million owed Metropolitan. The trial court granted the motion but deferred a decision on whether to refund Capitol Indemnity's deposit. A second sheriff's sale was then scheduled.

Capitol Indemnity subsequently bid \$1.95 million at the second sheriff's sale, and the trial court confirmed the purchase of the property for that amount, subject to Metropolitan's mortgage. The trial court also authorized payment of \$44,000 in attorneys' fees to the other parties out of Capitol Indemnity's \$250,000 deposit on the first sale.

At this point, the only issues remaining were the determination of priority for rents paid by the Secret Service, a tenant of the foreclosed property during the foreclosure proceeding, and disposition of the balance on Capitol Indemnity's deposit. The trial court awarded the rents to Metropolitan based on its

first priority among the creditors, and ordered the deposit balance returned to Capitol Indemnity.

JWA appeals from the order awarding Nationwide its attorneys' fees during the first, unsuccessful attempt at foreclosure, and those it incurred during JWA's bankruptcy proceeding. Nationwide cross-appeals from the order awarding the Secret Service rents to Metropolitan and returning the deposit balance to Capitol Indemnity.

### THE APPEAL

Nationwide claimed attorneys' fees under the following language in its mortgage agreement with JWA:

In any suit to foreclose the lien hereof, there shall be allowed and included ... attorney's fees ... as Mortgagee may deem to be reasonably necessary ... to prosecute such suit ... in connection with ... any proceeding, including ... bankruptcy proceedings ....

Nationwide contended and the trial court agreed that this language plainly allowed the award of attorneys' fees for both the bankruptcy and the unsuccessful foreclosure proceedings. We review this issue as a question of law that we decide independently of the trial court. *See Moran v. Shern*, 60 Wis.2d 39, 46, 208 N.W.2d 348, 351 (1973).

We agree that the mortgage agreement allows Nationwide to collect the reasonable and necessary attorneys' fees it incurred as a result of JWA's bankruptcy petition. A contract is ambiguous if it is reasonably susceptible to more than one meaning. *Central Auto Co. v. Reichert*, 87 Wis.2d 9, 19, 273 N.W.2d 360, 364-65 (Ct. App. 1978). However, only one interpretation is reasonably available for the term "any proceeding, including ... bankruptcy

proceedings.” If the meaning of a contract is plain, with no ambiguity, that plain meaning controls the result. *See Estate of Logan v. Northwestern Nat'l Cas. Co.*, 144 Wis.2d 318, 336, 424 N.W.2d 179, 185 (1988).

Nationwide is not, however, entitled to its attorneys’ fees for the unsuccessful attempt to enforce the acceleration clause in the renegotiated loan contract. The mortgage agreement allowed attorney’s fees in any foreclosure suit that the “mortgagee may deem to be reasonably necessary.” Under Nationwide’s interpretation, it would be the sole judge of necessity and reasonableness, and JWA and the court would have no choice but to accept its subjective determination on those issues. While that may be a reasonable interpretation of the provision, one could also reasonably interpret it to impose an objective measure of necessity and reasonableness, and/or a requirement that the foreclosure effort succeed. The provision is, therefore, ambiguous. *See Reichert*, 87 Wis.2d at 19, 273 N.W.2d at 364-65. We therefore construe it against Nationwide as the party that drafted it. *See Goebel v. First Fed. Sav. & Loan Ass’n*, 83 Wis.2d 668, 675, 266 N.W.2d 352, 356 (1978).<sup>1</sup> The result is a decision against Nationwide because its unsuccessful effort to enforce the acceleration clause failed both the necessity and reasonableness test. *See JWA I*, slip op. at 5.

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<sup>1</sup> “This rule has particular force where, as here, there is a substantial disparity of bargaining power between the parties, and a standard form is supplied by the party drafting the form.” *Goebel v. First Fed. Sav. & Loan Ass’n*, 83 Wis.2d 668, 675, 266 N.W.2d 352, 356 (1978).

## DECISION ON CROSS-APPEAL

The trial court properly awarded Metropolitan the Secret Service rents. By previous court order those rents were turned over to the receiver appointed in the foreclosure action. Where the receiver collects rents or profits and, as here, all lienholders are parties, “the moneys collected by the receiver are to be distributed according to the priorities of the mortgage liens.” *Marshfield Oil Co. v. Zank*, 208 Wis. 139, 141, 242 N.W. 479, 480 (1932). Although Nationwide makes a case that equity favored its claim over Metropolitan’s, we do not read *Marshfield* to allow discretion in the matter. In any event, Nationwide presents no persuasive reasons that would have compelled the trial court to abandon the rule set forth above, even with discretion to do so. That resolves the matter.

The trial court erred by refunding Capitol Indemnity’s deposit from the vacated sale. The trial court found that Capitol Indemnity made an honest and genuine mistake of fact. That finding is not disputed. However, the trial court also found, without dispute, that the mistake was solely attributable to Capitol Indemnity’s own negligence. The notice of sale provided, in language that could not be plainer, that “the property is being sold subject to a first mortgage in favor of Metropolitan Life Insurance Company.” One who overbids at a sheriff’s sale through a unilateral mistake must bear the consequences. *See Horicon State Bank v. Kant Lumber Co.*, 165 Wis.2d 543, 548, 478 N.W.2d 26, 28 (Ct. App. 1991); *Wilson v. Craite*, 60 Wis.2d 350, 355, 210 N.W.2d 700, 703 (1973). The trial court therefore exceeded its authority when it granted the motion to vacate the sale, and Nationwide is entitled to a remedy. An order awarding it the balance of the deposit is the appropriate remedy under the circumstances, and is also consistent with the legislative intent in § 846.17, STATS., which provides:

In the event of the failure of such purchaser to pay any part of the purchase price remaining to be paid within 10 days after the confirmation of [the sheriff's sale], the amount so deposited shall be forfeited and paid to the parties who would be entitled to the proceeds of such sale as ordered by the court ....

Costs may be taxed against Capitol Indemnity Corporation on the cross-appeal. No other costs shall be awarded.

*By the Court.*—Orders affirmed in part; reversed in part and cause remanded.

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

