

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 1999

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. 98-2287-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**ASSOCIATES FINANCIAL SERVICES
COMPANY OF WISCONSIN, INC.,**

PLAINTIFF-RESPONDENT,

TN COMPANY OF WISCONSIN,

PLAINTIFF,

V.

JEFFREY W. ABBETT,

DEFENDANT-APPELLANT,

**PATRICIA GREBING, KATHRYN ABBETT,
FRANCES GROTH, SNOW CREST CHRISTMAS
TREES, WISCONSIN GAS COMPANY AND
MIDWEST TOPS, INC.,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jeffrey W. Abbett appeals from an order confirming a sheriff's sale of his residence after a judgment of foreclosure had been granted to Associates Financial Services Company of Wisconsin, Inc. (Associates). Abbett claims that the trial court erroneously exercised its discretion when it confirmed the sheriff's sale of his residence. Because the trial court did not erroneously exercise its discretion, we affirm.

BACKGROUND

Associates filed a foreclosure action against Abbett's residence. In due course, a sheriff's sale occurred and the trial court confirmed the sheriff's sale of the premises on February 23, 1998, after it had reviewed the file, and made findings of fact and conclusions of law. Unbeknownst to the court, Abbett filed a Chapter 7 bankruptcy petition on February 20, 1998, which automatically stays any creditor action pursuant to 11 U.S.C. § 362(a). When the trial court was advised of this turn of events, it vacated the order confirming the sale of Abbett's residence. After Abbett received a discharge in the bankruptcy court, Associates scheduled a new confirmation hearing that took place on July 13, 1998. At the hearing, the trial court indicated that it was reinstating both the findings of fact and conclusions of law that it had made earlier. Abbett did not submit any new evidence nor did he propose any findings of fact at variance to those determined by the trial court. The trial court stated the following:

So what I will now do is I will reinstitute my previous confirmation of the sheriff's sale, because I was satisfied before and I'm satisfied now based on the sheriff's report of sale on foreclosure that I previously received and reviewed that the sale was conducted pursuant to law and pursuant to the order of this Court. And under all the facts and circumstances of the case, I'm still satisfied that the sum bid is fair and reasonable and represents fair value of the property. Accordingly, I once again reconfirm the sheriff's sale by incorporating by reference all of my previous findings, and I direct the deed be delivered to the successful bidder or bidder's counsel.

Abbett now appeals.

ANALYSIS

The decision to confirm the results of a foreclosure sale is vested within the sound discretion of the trial court. Its order will not be reversed on review except for an erroneous use of discretion. *See Baumgarten v. Bubolz*, 104 Wis.2d 210, 218, 311 N.W.2d 230, 234 (Ct. App. 1981).

Abbett contends that the trial court failed to make the necessary findings as required by §§ 846.10 and 846.165, STATS.¹ He reasons that the

¹ Sections 846.10 and 846.165, STATS., respectively, provide:

846.10 Foreclosure. (1) If the plaintiff recovers the judgment shall describe the mortgaged premises and fix the amount of the mortgage debt then due and also the amount of each installment thereafter to become due, and the time when it will become due, and whether the mortgaged premises can be sold in parcels and whether any part thereof is a homestead, and shall adjudge that the mortgaged premises be sold for the payment of the amount then due and of all installments which shall become due before the sale, or so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay such principal, interest and costs; and when demanded in the complaint, direct that judgment shall be rendered for any deficiency against the parties personally liable and, if the sale is to be by referee, the referee must be named therein.

(continued)

(2) Any party may become a purchaser. No sale involving a one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action, a farm, a church or a tax-exempt nonprofit charitable organization may be held until the expiration of 12 months from the date when judgment is entered, except a sale under s. 846.101 or 846.102. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and may be given within the 12-month period except that the first printing of the notice shall not be made less than 10 months after the date when judgment is entered, except that the sale of a farm shall not be made or advertised until the expiration of one year from the date when such judgment is entered. In all cases the parties may, by stipulation, filed with the clerk, consent to an earlier sale. Sales under foreclosure of mortgages given by any railroad corporation may be made immediately after the rendition of the judgment.

(3) The proceeds of every sale shall be applied to the discharge of the debt adjudged to be due and the costs awarded; and if there shall be any surplus it shall be subject to the order of the court. If any surplus remains in the court for 3 months, without being applied for, the court shall direct the same to be put out at interest for the benefit of the party entitled thereto to be paid to the party upon the order of such court.

(4) The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof.

846.165 Application for confirmation of sale and for deficiency judgment. (1) No 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. Such notice shall be given either personally or by registered mail directed to the last-known post-office address, mailed at least 5 days prior to the date when the motion for confirmation is to be heard, if any post-office address is known; if not known, mailing may be dispensed with but an affidavit shall be filed with the court stating that the address is not known, and the notice shall state, in addition to other matter required by law, the amount of the judgment, the amount realized upon the sale, the amount for which personal judgment will be sought against the several parties naming them, and the time and place of hearing.

(continued)

deficiency is due to the first confirmation being void as a result of an automatic stay invoked by the bankruptcy court. *See Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982); *Dorr, Keller, Bentley & Pecha v. Dorrr, Bentley & Pecha*, 841 P.2d 811, 817 (Wyo. 1992). We are not convinced.

First, it is evident from a reading of the record that the trial court again reviewed the documents of foreclosure and the report of the sheriff's sale before it found facts from which it concluded that the "sum bid is fair and reasonable and represents fair value of the property."

Second, the mere fact that the trial court uttered words of "incorporation" from its previous findings and conclusions of February 23, 1998, has no adverse impact on the validity of similar independent findings and conclusions made on July 13, 1998. Abbett presents us with no Wisconsin authority to support his view, and we are not obligated to follow, nor persuaded to follow, unsettled federal circuit court case law. *See State v. Mechtel*, 176 Wis.2d 87, 94-95, 499 N.W.2d 662, 666 (1993).

Last, Abbett made no objections at the confirmation of sale hearing on July 13, 1998, offered no alternative findings of fact or conclusions of law and, in fact, did not even make an appearance either in person or by counsel to offer the view he now makes to the court. *See* § 805.11, STATS.

(2) In case the mortgaged premises sell for less than the amount due and to become due on the mortgage debt and costs of sale, there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

In summary, Abbett has presented no valid reasons for us to conclude that the trial court erroneously exercised its discretion in confirming the sheriff's sale on July 13, 1998. Therefore, we affirm the trial court.

By the Court.—Order affirmed.

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

