

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-2072

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITIZENS BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

KEITH E. NELSON,

DEFENDANT-APPELLANT,

BARBARA A. NELSON AND ROGER KOEHLER,

DEFENDANTS.

APPEAL from orders of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Keith Nelson appeals from two circuit court orders involving two foreclosure sales of a home Nelson and his wife previously owned. In the first order, the circuit court denied a motion to confirm the first sale, where Nelson placed the winning bid for the home. In the second order, the circuit court confirmed the second sale of the home, where a third party placed the highest bid. Nelson argues that the circuit court erroneously exercised its discretion when it (1) refused to confirm the first sale; (2) confirmed the second sale; and (3) failed to conclude the second sale was invalid when the buyers did not provide a down payment immediately following the sale. Because we conclude that the circuit court reasonably exercised its discretion, we affirm the orders.

BACKGROUND

¶2 Nelson and his wife, Barbara, were in the process of divorcing when they defaulted on mortgage payments. A foreclosure judgment was entered, and the Shawano County Sheriff's Department held a foreclosure sale on March 9, 1999. Nelson, his wife and Citizens Bank were present. Only Nelson and the bank, which held the foreclosure judgment, bid on the property. Nelson's winning bid was \$168,907.50. At the time of the first sale, the outstanding judgment of foreclosure, with subsequent costs and accruals, was \$169,422.58.

¶3 The bank moved the circuit court to confirm the first sale, and a hearing was held on April 27. In its motion, the bank indicated that it was not seeking a deficiency judgment for the difference between the sale price and the foreclosure judgment. The circuit court denied the motion to confirm the sale after concluding that the bid price was inadequate and that the difference between the bid price and the value of the property shocked the court's conscience. The court ordered the sheriff to hold another sale.

¶4 A second sale was held on June 16; Nelson did not attend. Two parties offered bids: the bank and two men who jointly bid, Paul Santkuyl and Daniel Harrmann. Santkuyl's and Harrmann's winning bid was \$174,000. At the time of the second sale, the outstanding judgment of foreclosure, with subsequent costs and accruals, was \$172,934.77.

¶5 At the conclusion of the second sale, Santkuyl and Harrmann asked if they could deliver the required down payment to the sheriff's department later in the day, rather than immediately following the sale. They were told they could do so and delivered the required ten percent down payment that afternoon.

¶6 The bank moved the circuit court to confirm the second sale, and a hearing was held on June 24. The circuit court confirmed the sale. Nelson appeals the order denying confirmation of the first sale and the order confirming the second sale.¹

STANDARD OF REVIEW

¶7 The decision to confirm the results of a foreclosure sale is vested in the sound discretion of the circuit court. *See Verex Assur., Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 737, 436 N.W.2d 876 (Ct. App. 1989). Its order will not be reversed on appeal absent an erroneous exercise of discretion. *See id.*

¹ Although Barbara Nelson opposed both motions for confirmation, she did not appeal either order to this court.

DISCUSSION

A. Non-confirmation of the first sale

¶8 The circuit court refused to confirm the first sale and ordered another sale because it concluded that the bid price was inadequate and that the difference between the bid price and the value of the property shocked the court's conscience. Nelson argues that the court erroneously exercised its discretion because it (1) failed to apply the statutory presumption of fair value found in WIS. STAT. § 846.165(2)² where, as here, the bank waived its right to a deficiency judgment; (2) concluded that the sale price was so low that it shocked the court's conscience; and (3) erroneously considered the Nelsons' divorce proceeding and allegations that Nelson delayed completing the home to keep the price low. We address each argument in turn.

¶9 First, the circuit court considered the application of WIS. STAT. § 846.165(2), which provides:

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.

If there is no presumption of fair value, the court must, before confirming the sale, make a specific finding of the fair value of the premises and find that the value has been credited toward the mortgage debt. *See Verex*, 148 Wis. 2d at 737. Here, the

² All statutory references are to the 1997-98 version unless otherwise noted.

court concluded that the presumption did not apply and that fair value was something significantly greater than \$168,000.

¶10 Nelson argues that the circuit court should have applied the presumption of fair value, despite the clear language of WIS. STAT. § 846.165(2), because although the home sold for less than the amount due, the approximate \$515 difference between the bid and the mortgage judgment was slight, and the bank agreed to waive any deficiency. Nelson contends that the court’s literal reading of the statute ignores the fact that the statute was “designed to be a deficiency reducer or eliminator.” Nelson states, “It is somewhat ludicrous to think that a mere \$400 to \$500 shortage in a bid ... is the difference between getting [the presumption] and not getting it, especially when that deficiency is waived.”

¶11 We need not decide whether WIS. STAT. § 846.165(2) is applicable where the bank has agreed to waive the deficiency, because regardless of whether § 846.165(2) applies, a court still has the power to refuse to confirm a sale if it concludes that the bid is so inadequate that it shocks the conscience of the court. *See Verex*, 148 Wis. 2d at 737-38. In *Verex*, we explained:

[I]t is well-settled that the mere inadequacy of a bid price is not a sufficient reason for refusing to confirm a foreclosure sale. Instead, refusal to confirm a sale is warranted only when the inadequacy has resulted from mistake, misapprehension or inadvertence, or when the bid is so inadequate as to shock the conscience of the court.

Id. Thus, even if the circuit court had applied the fair value presumption, it had the discretion to refuse to confirm the sale if the bid was “so inadequate as to shock the conscience of the court.” *See id.* Moreover, the rule that mere inadequacy of price is insufficient to warrant refusal to confirm a sale is confined

to cases where there is absolutely no fact appearing except inadequacy. *See Anthony Grignano Co. v. Gooch*, 259 Wis. 138, 141, 47 N.W.2d 895 (1951). When other circumstances are present, “[t]he court may still consider the question: should the court, in justice to all parties, approve the sale?” *Id.*

¶12 Next, we turn to the circuit court’s conclusion that the bid was so inadequate that it shocked the court’s conscience. Our review of the record shows that the court based its conclusion in part on the testimony of two appraisers. Both appraisers offered extensive testimony of the factors they considered, including the need to complete some interior work on the house. Appraiser Dennis Cronic testified that the property’s fair value was \$255,000, adding that he had arrived at that figure by reducing his original estimate by five percent because the home was unfinished.

¶13 Another appraiser, Gerald Long, testified that the home’s fair market value was \$258,000. Long acknowledged that his estimate was based on the home’s value if completed, and testified that he thought the home was seven-eighths completed. He also indicated that the most likely prospective buyers would be people capable of doing much of the interior work themselves.

¶14 The circuit court also considered a written appraisal by Karen Tribby, who appraised the property in February 1996. Tribby estimated the home’s value to be \$243,000. Finally, the court heard testimony from a realtor, Jim Zierden, who attempted to sell the home before the foreclosure. Zierden testified that when he originally discussed the asking price with the Nelsons, he recommended \$225,000. Zierden also testified that in his opinion a more realistic price, given the house’s current condition, would be under \$200,000.

¶15 The circuit court considered these value estimates and even suggested that the higher estimates could not be accurate “because they haven’t been able to get an offer.” The court continued:

I don’t think it’s worth two hundred fifty-nine thousand. So I think it’s worth something less, but I’m not sure exactly what it is worth less. It’s certainly worth less, and [even if the value was \$224,000], we’re still fifty some thousand apart from what’s bid and what’s received.

¶16 The court concluded that the sale price was so inadequate that it shocked the court’s conscience. The record shows the court considered evidence relevant to the issue, *i.e.*, the opinions of appraisers and realtors who had examined the home. There is evidence to support the court’s finding that the home could be worth tens of thousands more than the sale price. In light of this evidence, it was reasonable for the court to conclude that the sale price was so inadequate that it shocked the court’s conscience. *See Walsch v. Deanovich*, 43 Wis. 2d 71, 168 N.W.2d 213 (1969) (refusing to confirm a sale for \$28,926 where appraisal indicated that market value was \$49,000 and neighbor offered to bid \$35,000). We are unconvinced that the circuit court erroneously exercised its discretion.

¶17 Nelson’s third argument is that the circuit court improperly considered irrelevant, unfounded allegations when it made its decision, thereby erroneously exercising its discretion. It does appear that the court considered facts concerning the Nelsons’ divorce in making its decision. The court stated:

And I guess when it comes right down to it, I got to be concerned about the fact that [Nelson] is an interested party I’m not pointing the fingers and saying anybody did anything wrong, but obviously it’s to his benefit to not complete the property But obviously it actually will become an issue in the divorce case, and I’m not really sure

how to handle that issue, and I don't think I have to handle that issue. But the fact is ... there have been ... allegations made that the bid price would benefit Mr. Nelson, and of course it takes care of the bank's problem. But is it fair to Mrs. Nelson to allow this property to be sold for, in some people's opinion, \$90,000 less than what it's worth. That is not fair. I don't know if it will do any good to reorder a sale But under all the circumstances I'm not going to approve the sale and I'm going to order it be re-bid.

¶18 It is legitimate for the circuit court to have considered the effect of a low sale price on the objecting owner, Barbara Nelson. Moreover, even if the court's consideration of the divorce and allegations made during argument was improper, we do not conclude that the court erroneously exercised its discretion. We will not reverse a circuit court decision even though the reason for that decision may have been erroneously or inadequately expressed. *See Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967). "Whether the ground assigned by the trial judge for its refusal to confirm the sale is correct is immaterial if, in fact, the ruling is correct and the record reveals a factual underpinning that would support the proper findings." *Id.* Here, there is evidence that the home was worth at least \$50,000 more than the sale price. Based on that evidence, the court could find the price sufficiently inadequate to deny confirmation and order a new sale.

B. Confirmation of the second sale

¶19 Nelson was in favor of the first sale when he was the bidder, but he opposed the second sale. He argues:

In reality, there really was no distinguishable difference between [Nelson's] disallowed bid at the first sale and the allowed bid at the second sale. The two bids were only \$5,100 apart, with the second one being made more than three months later. On a sale of this size, such a differential is meaningless.

... The fact that the Court approved the second one and disallowed the first ... is proof of the fact that the only real consideration in the eyes of the court in disallowing the first sale, was the identity of the bidder. This constitutes a clear abuse of discretion.

We disagree. Our standard of review of the second sale is the same as the first, and we conclude that the circuit court did not erroneously exercise its discretion.

¶20 At the second confirmation hearing, the circuit court heard testimony from realtor Terry Peterson-Reeves, who tried to sell the home for approximately one month before the second sheriff's sale. The home was advertised, and there was one showing of the home's exterior. In addition, when Peterson-Reeves prepared the home for sale, seven licensed real estate agents toured the home and offered their opinions as to a reasonable asking price; their average suggestion was \$186,824. Peterson-Reeves also testified that even though the real estate market was good, it may be difficult to sell the home because "it would take the particular kind of person who would be willing to do finishing work or could afford to have it done."

¶21 Ultimately, the circuit court concluded that the sale no longer shocked its conscience, in part because the court had before it evidence that the home was worth something less than the appraised value: testimony from Peterson-Reeves. The court also considered the fact that a second sale had not produced a dramatically higher sale price. It was reasonable for the circuit court to rely on these facts. Indeed, our supreme court has stated that if upon a resale no higher bids are made, that fact should be considered by the court when again called upon to confirm a sale. *See Welfare Bldg. & Loan Ass'n v. Gearhard*, 235 Wis. 229, 236, 293 N.W. 813 (1940). Similarly, the fact that the sale price did not

rise dramatically at the second sale suggests, as the circuit court concluded, that it is unrealistic to think the price would be higher if sold a third time.

¶22 In its oral decision, the court also indicated that the bid no longer shocked its conscience because the successful bidder was a third party not involved in the divorce. For the reasons noted with respect to the first sale, even if the circuit court improperly considered whether the bidder was a third party rather than the divorcing co-owner of the home, we will affirm the circuit court's decision because the record reveals a factual underpinning that supports the proper findings.

C. Lack of immediate down payment by the second buyer

¶23 Nelson argues that the circuit court should have refused to confirm the second sale because the buyers failed to immediately provide a ten percent down payment. The notice of sheriff's sale stated that the terms were "10% Down – Cash, Money Order or Certified Check. Balance due within ten (10) days of confirmation of sale." Harrmann testified that he did not bring cash or a certified check to the sale. However, he also stated that after the sale, he and Santkuyl asked if they could have until the end of the day to deliver the checks, and the sheriff's deputy agreed to this request.

¶24 The circuit court found that the sheriff's deputy exercised discretion when he communicated the buyers' request to the bank officer, who had no objection to waiting until the end of the day for the checks. The court concluded that the sheriff had the responsibility of running the sale and had the power to exercise some discretion. The court also considered the fact that Nelson did not attend the sale, that the checks were in fact delivered and that the clerk's office had subsequently reported that the checks were valid. In light of these facts, the

court concluded that the buyers' delay in delivering the checks did not justify denying the second sale's confirmation.

¶25 Nelson argues that it was statutory error for the sheriff's department "to not require the purchaser to comply with the clearly noticed requirements of the sale regarding the payment of a guaranteed 10% down payment as part of the sale." Nelson cites as authority *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 459, 572 N.W.2d 466 (1998), where our supreme court held that where the purchasers did not submit the balance of their deposit within ten days of the sale's confirmation, the court was required to order forfeiture of the deposit and resale of the premises. See *id.* at 479. We reject Nelson's argument because *GMAC* is distinguishable.

¶26 In *GMAC*, the court interpreted WIS. STAT. § 846.17, which provides that if the purchaser fails to pay any part of the purchase price remaining to be paid within ten days after the sale's confirmation, the deposited amount shall be forfeited and there shall be a resale of the property. The court held that § 846.17 is mandatory, not discretionary. See *GMAC*, 215 Wis. 2d at 479. We agree with Nelson that § 846.17 also requires mandatory compliance with the sheriff's terms of sale. We are unconvinced, however, that the sheriff's terms of sale were violated.

¶27 The terms established by the sheriff's department, and publicized in the notice of sale, indicated that a ten percent down payment would be required. The notice of sale, however, did not specify that the down payment had to be made within minutes of the sale. Even if that is the general practice, we conclude that the sheriff's department had the discretion to allow the party to deliver the down payment several hours after the sale.

¶28 Moreover, even if the sheriff's department should have refused to allow the buyer several extra hours to get the checks, Nelson has not alleged that he was prejudiced. Specifically, he has not shown how allowing the buyers several extra hours to deliver the checks to the sheriff affected the sale. Because we conclude that the circuit court did not erroneously exercise its discretion when it denied confirmation of the first sale and confirmed the second sale, we affirm both orders.

By the Court.—Orders affirmed.

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