COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP123 **Cir. Ct. No. 2003CV448**

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

PEOPLES STATE BANK,

PLAINTIFF-RESPONDENT,

V.

DEBRA K. REGAN, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF RANDALL S. SOBJECK,

DEFENDANT-APPELLANT,

CYNTHIA J. DAVIDSON, WISCONSIN PUBLIC SERVICE CORPORATION AND HOWARD J. PITTS,

DEFENDANTS.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Randall Sobjeck[1] appeals an amended order reaffirming a sale of mortgaged property, granting a petition for a deficiency judgment, and establishing a deficiency amount after applying funds from a deposit account at Peoples State Bank toward the deficiency.[2] Sobjeck argues Peoples Bank was not entitled to a deficiency judgment, which was filed nearly two years after the order confirming the sheriff's sale. Sobjeck also argues the funds in the deposit account were exempt from the claims of creditors. We disagree and affirm the amended order.

¶2 Peoples Bank filed a foreclosure action against Sobjeck on May 29, 2003. A default judgment, together with findings of fact and conclusions of law, was granted on October 28. That document did not mention the mortgaged property. An amended judgment, together with findings and conclusions, was filed on December 3, which ordered that the mortgaged property be sold at public auction by the sheriff and provided for a money judgment of $172,665.79. A second amended judgment was filed on January 28, 2004, providing the right to dispose of personal property left in the mortgaged premises. Amended findings of fact and conclusions of law stated, among other things, that in the event the premises were sold and the proceeds were insufficient to pay the amount due, Peoples Bank "may apply to this Court for Judgment and Execution for the deficiency unpaid."

[1] By order dated January 10, 2008, Debra K. Regan, special administrator of the estate of Randall S. Sobjeck, was substituted for Sobjeck as the defendant-appellant. We will refer to the defendant-appellant as "Sobjeck."

[2] In his notice of appeal, Sobjeck purports to appeal from "the final decision entered on October 13, 2006." The court filed an amended order on November 17, 2006. On November 20, 2006, Sobjeck filed a motion for reconsideration, which was not ruled on.

¶3 The property was sold to a third-party purchaser for $138,500 at a sheriff's sale on May 25, 2004, and a notice of hearing to confirm the sheriff's sale was filed on June 15, 2004. The notice did not state that a deficiency judgment was requested against Sobjeck. The court issued an order on July 1, 2004, confirming the sale and discharging a lis pendens. On June 26, 2006, Peoples Bank filed a petition to apply toward the deficiency certain funds frozen in Sobjeck's demand deposit account at Peoples Bank. An order entitled "Deficiency Judgment Authorizing Application of Demand Deposit Account Proceeds Toward Deficiency" was subsequently issued. This order found a deficiency of $34,165.79, resulting from the sheriff's sale price of $138,500 subtracted from the amended judgment amount of $172,665.79. The court also concluded Peoples Bank had a contractual and common law right to apply the balance of $7,122.40 in the demand deposit account toward the deficiency.

¶4 Sobjeck first appeared, by counsel, on July 5, 2006. A notice of appearance was filed, together with a motion to vacate the order authorizing the set-off of the demand deposit proceeds. The court vacated the order and scheduled a hearing on Sobjeck's motion. The court subsequently issued a decision and an amended order reaffirming the confirmation of the sale and its previous finding that the mortgage note and account agreement permitted Peoples Bank to apply the demand deposit proceeds toward the deficiency. Sobjeck filed a motion for reconsideration claiming the procedural requirements for a confirmation of the sheriff's sale were not met and the petition for deficiency was untimely. Sobjeck also claimed for the first time in an affidavit that the demand deposit account proceeds were traceable to a retirement account, which was exempt from execution from creditors' claims. The court did not issue a decision on the reconsideration motion and this appeal followed.

¶5 Sobjeck first argues the notice regarding the July 1, 2004 confirmation of sale improperly failed to indicate a deficiency would be sought. However, WIS. STAT. § 846.165[3] provides, "no sale on a judgment of mortgage foreclosure shall be confirmed unless five days notice is given to *all parties who have appeared in the action*." (Emphasis added). It is undisputed Sobjeck never appeared in the action until after the circuit court issued its decision authorizing the application of the demand deposit amounts toward the deficiency. In his reply brief, Sobjeck concedes his default would have relieved Peoples Bank of the requirement to comply with the statutory notice requirements "if they had chosen not to provide notice of the confirmation of the sheriff's sale to the parties in the case." However, Sobjeck insists that, because the notice was sent, "at best the notice was misleading." Sobjeck's argument in this regard is unsupported by citation to legal authority and therefore will not be considered. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. Sobjeck has not shown that he may now collaterally attack the confirmation of sale.

¶6 Sobjeck next argues there was no factual basis for the court's determination of the property's fair value, in contravention of WIS. STAT. § 846.165(2). The circuit court concluded in its written decision:

> Any defect arising from a lack of proof concerning the fair market value of the property has now been cured by the plaintiff's submission of the February 2004 appraisal showing an appraised value of $129,000.00 – well below the $138,500.00 price at which the property sold.

[3] References to Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶7 Sobjeck insists the defect was not cured, but Sobjeck again fails to provide citation to legal authority in support of his position and his argument will therefore not be considered. *See* ***Kruczek***, 278 Wis. 2d 563, ¶32. Sobjeck also insists the sale price was inadequate because it was purchased by the brother-in-law of a vice president of Peoples Bank who resold the property one year later for $180,000. However, the "fair value" of a property is not the same as "market value." ***Bank of New York v. Mills***, 2004 WI App 60, ¶10, 270 Wis. 2d 790, 678 N.W.2d 332. A sheriff's sale is a distressed sale; it is not conducted by a willing seller. ***Id.***, ¶17. The buyer bids at a sheriff's sale knowing that he or she is bidding on a piece of real estate at less than its market value because it is being sold to pay off a debt. The distressed nature of the sale automatically reduces the price. ***Id.*** Here, the sheriff's sale brought more than the appraised value and it is not dispositive that the property may have had a higher value in the future under more favorable conditions. *See* ***id.***, ¶10.

¶8 Sobjeck next argues the order confirming the sale was a final, appealable order and the request for deficiency judgment and application for set-off required Peoples Bank to seek relief from judgment under WIS. STAT. § 806.07. Because the order confirming sale did not provide for a deficiency, and Peoples Bank did not petition for a deficiency for almost two years after the order confirming sale was entered, Sobjeck contends the requirements of § 806.07 could not be met. In support of his argument, Sobjeck relies upon ***Anchor S&L Ass'n v. Coyle***, 148 Wis. 2d 94, 435 N.W.2d 727 (1989).

¶9 We are unpersuaded. In ***Anchor Savings***, the circuit court contemplated the order to be a final order at the time it was entered; the order granted a deficiency judgment, confirmed the sheriff's sale and calculated a deficiency amount. ***Id.*** at 103. Conversely, in the present case the court stated in

the amended findings of fact and conclusions of law that Peoples Bank "may apply to this Court for Judgment and Execution for the deficiency unpaid" in the event the premises were sold and the proceeds were insufficient to pay the amount due. Therefore, the amended conclusions of law contained a specific indication of Peoples Bank's right to apply for a deficiency and the court thus contemplated a further document which would dispose of the case. *Cf.* ***id.*** at 101-02. That the order confirming sale was silent as to the request for a deficiency does not as a matter of law have the effect of overturning the court's specific indication that Peoples Bank had the right to apply for the deficiency. ***Anchor Savings*** does not support Sobjeck's position that Peoples Bank was prohibited from pursuing the deficiency two years after the confirmation. Under the circumstances of this case, Peoples Bank was not required to seek relief from judgment under WIS. STAT. § 806.07.

¶10 Sobjeck next argues the proceeds from the demand deposit account were traceable to his retirement account and thus exempt from the claims of creditors. Peoples Bank responds that Sobjeck waived any claim of exemption by failing to timely follow the procedures for claiming an exemption under WIS. STAT. § 815.18(6). As the circuit court noted in its decision authorizing the set-off, "The court finds the mortgage note and account agreement permit the requested set-off, and that, in any event, the defendant has admitted the propriety of the set-off by failing to argue against it." In his reply brief, Sobjeck does not refute that he failed to raise the issue until his motion for reconsideration. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The circuit court correctly concluded the argument was waived.

¶11 Sobjeck does not explain how his exemption claim, even if properly and timely made, could trump Peoples Bank's security interest in the accounts at the bank. At the time Peoples Bank froze the assets, they were in the demand deposit account subject to the account agreement between the parties; the assets were not in a retirement account. WISCONSIN STAT. § 815.18(4) provides: "Property traceable to property that would be exempt under this section in the form of cash proceeds or otherwise is not exempt unless expressly provided for in this section." Sobjeck offers no authority that would permit tracing the proceeds in the demand deposit account back to a retirement account.

¶12 Finally, Sobjeck insists that it would be inequitable to allow Peoples Bank to enforce the deficiency judgment in this case. Sobjeck claims the delay in asserting the claim for a deficiency "induced him to maintain his account with Peoples State Bank, and to deposit the proceeds from his retirement account at the bank at a time when Randall Sobjeck needed access to the funds to pay necessary living expenses." However, this argument ignores the equities of leaving Peoples Bank with a substantial deficiency and also Sobjeck's failure to argue against the set-off until his motion for reconsideration. It was not inequitable for the circuit court to conclude that the mortgage note and account agreement permitted the requested set-off, especially where Sobjeck admitted the propriety of the set-off by failing to contest it.

By the Court.—Order affirmed.

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