COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3009 **Cir. Ct. No. 2008CV153**

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

WATERSTONE BANK SSB F/K/A WAUWATOSA SAVINGS BANK,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY A. PANENKA,

DEFENDANT-APPELLANT,

MERS AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC.,

DEFENDANT.

APPEAL from orders of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. This is Kimberly A. Panenka's second appeal arising from the judgment of foreclosure against her property. Here, she appeals from one order that confirmed the sheriff's sale to WaterStone Bank SSB, f/k/a Wauwatosa Savings Bank, and ordered a writ of assistance, and from another denying her motion to vacate or stay the writ of assistance. We affirm the orders because we conclude that WIS. STAT. § 846.16(1) (2007-08)[1] did not require the sheriff to serve Panenka with a report of confirmation of the sale; Panenka forfeited her right to challenge the assertedly inaccurate legal description; and the circuit court properly determined that the property was sold for fair value.

¶2 When the judgment of foreclosure was entered in April 2009, Panenka owed WaterStone $2,340,147. Defendant MERS held a second mortgage for over $771,000. WaterStone, the winning bidder, offered $2.2 million at the properly noticed sheriff's sale. The sheriff timely filed the Sheriff's Report of Sale on Foreclosure with the clerk of court and WaterStone filed its application for confirmation of the sale. The application requested approximately $118,513 in add-ons, mainly interest, bringing the total owed to $2,458,660. WaterStone waived its right to an action on any deficiency.

¶3 At the confirmation hearing, Panenka testified that, although not a licensed real estate appraiser, she has taught courses on appraisals and in her opinion the property was worth $3.2 million. She described renovations, repairs and landscaping recently done on the property and testified that an appraisal WaterStone ordered in December 2006 in preparation for a loan closing and an

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

appraisal she commissioned in 2008 each appraised the value at $3.2 million. She also testified that a nearby residence recently sold for $5.8 million.

¶4 WaterStone's appraiser, testified that he had seen the house two years earlier and now was commissioned to do a "drive-by" appraisal. He researched the market and talked to the assessor, which led him to assume that the house had been "rehabbed" in a manner "typical of other high[-]end houses in the area." One of the nine comparables he used sold for $1.1 million the same month as his appraisal. He also was aware of the $5.8 million sale. His report, provided to the court before the hearing, estimated the property's value to be between $1.7 and $1.95 million.

¶5 The circuit court found that the sheriff's sale was properly conducted under WIS. STAT. ch. 846 and resulted in fair value being paid for the property. It confirmed the sale and authorized a writ of assistance. Panenka appeals.

¶6 Whether to confirm a judicial sale following a foreclosure rests in the circuit court's broad discretion. ***Bank of New York v. Mills***, 2004 WI App 60, ¶8, 270 Wis. 2d 790, 678 N.W.2d 332. Absent a clear misuse of that discretion, we will not interfere with it on appeal. *See* ***Family Sav. & Loan Ass'n v. Barkwood Landscaping Co., Inc.***, 93 Wis. 2d 190, 202-03, 286 N.W.2d 581 (1980).

¶7 Panenka first contends that the confirmation of sale order should be vacated because she was not served with a copy of the sheriff's report of sale. This requires that we apply several statutes to the undisputed facts, presenting a question of law, which we independently review without deference to the circuit court. *See* ***Hobl v. Lord***, 162 Wis. 2d 226, 233, 470 N.W.2d 265 (1991).

¶8 WISCONSIN STAT. § 846.16(1) provides that the sheriff "who makes sale of mortgaged premises, under a judgment therefor … shall, within 10 days thereafter, file with the clerk of the court a report of the sale." This particular language nothwithstanding, Panenka argues that she was entitled to service of the report under the broader scope of WIS. STAT. § 801.14, which requires that every pleading, notice and "similar paper" be served on each of the parties. WIS. STAT. § 801.14(1). We disagree for several reasons.

¶9 First, traditional rules of statutory construction require us to apply the specific statute over the general. ***Liles v. Employers Mut. Ins.***, 126 Wis. 2d 492, 504, 377 N.W.2d 214 (Ct. App. 1985). Second, the portion of WIS. STAT. § 801.14(4) we have italicized provides guidance:

> The filing of any paper required to be served constitutes a certification *by the party or attorney effecting the filing* that a copy of such paper has been timely served on all parties required to be served, except as the person effecting the filing may otherwise stipulate in writing.

¶10 We must read these related sections of WIS. STAT. § 801.14 together. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The sheriff is not a "party or attorney." Section 801.14 therefore does not obligate the sheriff to serve the parties with the report filed under WIS. STAT. § 846.16(1).

¶11 Third, the language of WIS. STAT. § 846.16(1) is plain. Reasonably well-informed persons could not read it to mean that the sheriff's duty extends beyond filing a report of the sale with the clerk of court to providing a copy to the parties. We therefore do not expand its meaning. *See* ***JP Morgan Chase Bank, NA v. Green***, 2008 WI App 78, ¶24, 311 Wis. 2d 715, 753 N.W.2d 536.

¶12 Panenka next asserts that the property's legal description in the April 2009 judgment of foreclosure and the notice of sale was inaccurate because it incompletely described the property. The property comprised "parcel one" and "parcel two." The judgment of foreclosure and the notice of sale omitted the legal description of parcel two, which described an easement allowing access to parcel one. Panenka claims the omission made parcel one appear landlocked, thus reducing the perceived value of the property and so should render the sale void.

¶13 Panenka, who retained new counsel on November 19, 2009, did not raise the issue until November 23, the day of the confirmation hearing. The court declined to address the matter because it had not been contested.

¶14 Panenka contends that, as a threshold matter, WaterStone should be held to have conceded the issue under ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corporation***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), because it did not refute the claim when she raised it at the confirmation hearing. We reject this argument. While WaterStone did not address the substance of the claim, it did argue that Panenka had waived the issue by failing to appeal it in the judgment of foreclosure part of the action. Furthermore, ***Charolais Breeding Ranches*** applies to unrefuted arguments on appeal, not at the circuit court stage: "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***Id.*** at 109 (citation omitted).

¶15 We agree with WaterStone that Panenka's challenge to the legal description more properly goes with the judgment of foreclosure portion of the action than with the confirmation of the sale. A foreclosure action has two steps: the judgment of foreclosure and the proceedings after the judgment, including the sale and the confirmation of sale. *See* ***Shuput v. Lauer***, 109 Wis. 2d 164, 171, 325

N.W.2d 321 (1982). Panenka's and WaterStone's respective rights to the property were adjudicated in the proceedings leading to the judgment of foreclosure. The instant proceedings simply enforce those rights. *See* ***id.*** at 173.

¶16 The parties addressed the legal description issue before the judgment of foreclosure was entered. The final judgment of foreclosure provided that "the Property is described in Exhibit A to the Final Order and Judgment entered herewith." Exhibit A described only parcel one. Panenka did not challenge that ruling in her appellant's brief or her reply brief in the appeal taken from the judgment of foreclosure. Her counsel then withdrew. This court granted Panenka leave to file a new reply brief with the express caveat that she raise no new issues, explaining that we have no obligation to address matters raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508, 512 (1981). She nonetheless raised the issue in her pro se brief.

¶17 Panenka's second reply brief in her appeal from the judgment of foreclosure was not the time or the place to first launch an appellate challenge to the legal description. Accordingly, Panenka has forfeited the right to assert it now. *See* ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶35, 325 Wis. 2d 135, 785 N.W.2d 302 (stating that forfeiture is the failure to timely assert a right).

¶18 In this appeal from the order confirming the sale, Panenka is limited to challenging the regularity of the proceedings subsequent to the judgment of foreclosure and sale. *See* ***Shuput***, 109 Wis. 2d at 173. She does not assert that she should be relieved from the order under WIS. STAT. § 806.07(1). Nor does she contend she did not have notice of the sale, and we already have disposed of her claim regarding the sheriff's filing of the report. *See* WIS. STAT. § 846.16(1).

¶19 The remaining issue, then, is whether the property was sold for "fair value." Panenka contends that the $2.2 million sale price did not represent the property's fair value. Fair value is not the same as market value. ***Bank of New York***, 270 Wis. 2d 790, ¶10. Rather, it is a "reasonable value as does not shock the conscience of the court." ***Id.***, ¶11 (citation omitted). Where no deficiency judgment is being sought, the sale presumptively was for fair value. *See* ***id.***, ¶15.

¶20 The circuit court took into account Panenka's and the appraiser's testimony, the parties' filings and arguments at the hearing. It heard that the $2.2 million bid was seventy-seven percent of the equalized fair market value on the tax bill and sixty-eight percent of the equalized fair market value on the assessed value. The court reasonably could have concluded that the $3.2 million WaterStone appraisal a few years before in preparation for a loan closing does not render invalid the lower appraisal offered under distress conditions. The court stated that considering the circumstances of the sale, it found that fair value was paid. *See* ***id.***, ¶17 (stating that a sheriff's sale can be expected to reduce the selling price because it is a distress sale not conducted by a willing seller). We conclude the court properly exercised its discretion in confirming the sale.

By the Court.—Orders affirmed.

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