COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP127 **Cir. Ct. No. 2012CV900**

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

GREEN TREE SERVICING, LLC P/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,

PLAINTIFF-RESPONDENT,

V.

MARCIA M. LORANG AND JAMES A. LORANG,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

JOHN DOE LORANG, JANE DOE LORANG AND ANCHORBANK FSB,

DEFENDANTS,

V.

BANK OF AMERICA, NA,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

Before Sherman, Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Marcia and James Lorang appeal an order confirming the sale of their home pursuant to a judgment of foreclosure. The Lorangs argue that the circuit court erred in not staying the sale and in confirming the sale over their objections. We reject the Lorangs' arguments and affirm.

BACKGROUND

¶2 This appeal arises out of a foreclosure action filed in 2012 by Green Tree Servicing, LLC ("Green Tree") after the Lorangs defaulted on their home mortgage. By the time judgment was entered against them, the Lorangs owed Green Tree $387,321.77. Green Tree waived its right to pursue a deficiency judgment from the Lorangs, so the judgment permitted Green Tree to sell the property at a sheriff's auction after a six-month redemption period.

¶3 The Lorangs did not redeem the property within this period. They did, however, file a federal lawsuit against Green Tree.[1] The day before the sheriff's auction, the Lorangs filed a motion to stay enforcement of the circuit court judgment pending the outcome of the federal lawsuit. The circuit court

[1] By this time, Green Tree was operating as Ditech Financial LLC, and Ditech was the named defendant in the Lorangs' federal lawsuit.

denied this motion after a hearing, and the property was sold at auction for $306,500. Green Tree moved for confirmation of the sale, and the Lorangs objected, arguing that the sale price was too low. The Lorangs also asked the circuit court to reconsider its order denying the stay. The circuit court denied this motion and confirmed the sale over the Lorangs' objections. The Lorangs now appeal the order of confirmation.

DISCUSSION

¶4 The Lorangs argue that there are two reasons to reverse the order confirming the sale. First, they contend that the circuit court erred when it denied their motion to reconsider the denial of their motion to stay the sheriff's sale. Second, they contend that the circuit court erred when it determined that the sale price of $306,500 did not shock its conscience. We address each argument below.

A. Whether The Circuit Court Erred In Not Staying The Sheriff's Sale

¶5 The Lorangs argue that their motion to stay the sheriff's sale is akin to a motion to stay execution of judgment. A circuit court has "broad discretion" to stay execution of judgment. *See* ***Weber v. White***, 2004 WI 63, ¶34, 272 Wis. 2d 121, 681 N.W.2d 137. Here, the circuit court denied the Lorangs' initial motion for a stay in a brief order that referred to a hearing conducted on November 9, 2016. However, the transcripts of that hearing have not been included as part of the record for review. We assume in the absence of a transcript that the circuit court properly exercised its discretion. *See* ***Nielsen v. Waukesha Cty. Bd. of Supervisors***, 178 Wis. 2d 498, 523-24, 504 N.W.2d 621 (Ct. App. 1993).

¶6 We could affirm on that basis alone. We also do not see any merit in the Lorangs' contention that the circuit court should have granted a stay pending

resolution of their federal lawsuit against Green Tree. The Lorangs are correct that foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings. *See* ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). However, the stay requested by the Lorangs would have extended a redemption period that is set by statute. *See* WIS. STAT. § 846.101(2)(b) (2015-16)[2] (allowing sale 6 months after judgment of foreclosure when plaintiff has waived deficiency). Importantly, this shorter 6-month redemption period is available only to a mortgagee who has waived the right to pursue a deficiency judgment. *See* ***Harbor Credit Union v. Samp***, 2011 WI App 40, ¶¶25, 36, 332 Wis. 2d 214, 796 N.W.2d 813 (explaining that the option for an accelerated redemption period strikes a legislative balance between the interests of the mortgagee and protection of the mortgagor). The Lorangs have not cited authority that would suggest that the circuit court erroneously exercised its discretion when it declined to grant a stay that would, in essence, be an extension of this 6-month statutory redemption period.[3]

¶7 Our decision in ***M & I Marshall & Ilsley Bank v. Kazim Inv., Inc.***, 2004 WI App 13, 269 Wis. 2d 479, 678 N.W.2d 322, is instructive on this point. In that case, the circuit court set aside a sheriff's sale and authorized the defendant

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] The Lorangs argue that the circuit court should have applied "the *Moser* rule," which in their view stands for the proposition that their federal post-foreclosure claims are inextricably intertwined with the state court action. However, they draw this "rule" from an unpublished decision that they failed to include in their appendix. To the extent the cited decision has any bearing on the redemption period, and we doubt that it does, the circuit court did not err in failing to follow an unpublished decision.

to redeem the property via a "plan of redemption" that did not involve immediate payment in full. ***Id.***, ¶4. We reversed, explaining that the applicable foreclosure statute contained "a 'clear and valid' legislative command" that "remov[ed] a circuit court's discretion to alter the clear and unambiguous prerequisite of full payment for redemption before the sale." ***Id.***, ¶12 (citations omitted).

¶8 The Lorangs' request for a stay rests on even shakier ground than the payment plan in ***M & I Marshall & Ilsley Bank***. This is because their proposal to redeem the property after the expiration of the statutory redemption period is based on their speculative hope of a favorable decision from the federal court at some indeterminate time in the future. We therefore conclude that the circuit court did not erroneously exercise its discretion when it denied the Lorangs' motion to stay the sheriff's sale.

¶9 Likewise, we see no error in the circuit court's denial of the Lorangs' motion for reconsideration. A motion for reconsideration must present newly discovered evidence or demonstrate a manifest error of law or fact. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. The Lorangs' motion for reconsideration was based on their recently filed motion for summary judgment in the federal lawsuit against Green Tree. Even if we were to agree that this summary judgment motion constitutes "newly discovered evidence," the Lorangs were once again asking the circuit court to extend the statutory redemption period based on the speculative hope of a favorable federal judgment at some indeterminate point in the future. For the reasons explained above, the court did not erroneously exercise its discretion when it declined to grant the Lorangs an indefinite extension. We therefore conclude that the circuit court properly denied the Lorangs' motion for reconsideration.

B. Whether The Sale Price Shocks The Conscience

¶10 The circuit court has broad discretion to determine whether to confirm a judicial sale conducted pursuant to a judgment of foreclosure. ***Bank of New York v. Mills***, 2004 WI App 60, ¶8, 270 Wis. 2d 790, 678 N.W.2d 332. A court may refuse to confirm a sale "if there is an apparent inadequacy in the price which was caused by mistake, misapprehension or inadvertence on the part of the interested parties or possible bidders." ***Id.*** (citation omitted). In a foreclosure in which the mortgagee is not pursuing a deficiency judgment, the sale price is presumed to represent "fair value." ***JP Morgan Chase Bank, N.A. v. Green***, 2008 WI App 78, ¶33, 311 Wis. 2d 715, 753 N.W.2d 536. However, the circuit court may deny confirmation if it determines that "'the sale price is ... so grossly inadequate as to shock the conscience of the court.'" *See* ***id.*** (quoted source omitted).

¶11 The Lorangs argue that the sale price of $306,500 was too low. To support this argument, they submitted a realtor's analysis stating that the property should be marketed for between $525,000 and $559,000 and would likely sell for 95% of the asking price. The problem for the Lorangs is that market value is "based on a more favorable economic condition" than a foreclosure sale. *See* ***Mills***, 270 Wis. 2d 790, ¶19. Specifically, fair market value is "the amount of money that property will exchange for on the market at private sale between a prudent seller, ready and willing to sell, but not compelled to sell, and a prudent buyer, ready and able to buy, but not compelled to buy." ***Id.*** Accordingly, "mere inadequacy of the mortgagee's bid price is not a sufficient reason for the circuit court to refuse to confirm a foreclosure sale." ***First Fin. Sav. Ass'n v. Spranger***, 156 Wis. 2d 440, 445, 456 N.W.2d 897 (Ct. App. 1990).

¶12 Moreover, because Green Tree has waived its right to a deficiency judgment, we start with a presumption that the sale price represents fair value. *See* ***Green***, 311 Wis. 2d 715, ¶33. In order to overcome this presumption, the Lorangs must demonstrate that the price paid is so inadequate that it shocks the conscience. ***Id.*** Here, the circuit court concluded that the difference between the alleged market value and the price paid at the sheriff's sale did not shock its conscience, in part because the Lorangs had seven years in which they could have attempted to sell the property for market value. *See* ***Mills***, 270 Wis. 2d 790, ¶20 (the length of time the mortgagors could have sold the property on their own is relevant to whether fair value was paid at sheriff's sale).

¶13 The Lorangs argue that the circuit court erred in considering these facts, because their strategy was to try to keep the property and they acted within their rights in doing so. But regardless of the validity of this strategy, these facts are relevant in light of Green Tree's decision not to pursue a deficiency judgment. Green Tree's decision means that a second sale would not generate any equity for the Lorangs unless it resulted in a bid higher than $387,321.77—in other words, at least $80,000 more than the successful bid at the first sale. It is not reasonable to believe that a second sale would somehow result in a bid high enough to generate equity, or that a competing bidder would be willing to step forward if the credit bid were substantially *higher* than the credit bid in the first sale. Instead, the most likely benefit to the Lorangs from a second sale would be to allow them to stay in the property even longer.[4] We conclude that the circuit court did not

[4] The Lorangs' own briefs indicate that this was their motivation, because they argue that at the very least, Green Tree would have to place a higher credit bid at a second sheriff's sale in order to ensure confirmation. But a higher credit bid from Green Tree is of no monetary value to the Lorangs. Its value would be to allow them to remain in the property for the additional time it would take to conduct and confirm a second sheriff's sale.

erroneously exercise its discretion in considering all of these factors in its decision to confirm the sale.[5]

¶14 As a fall back, the Lorangs argue that there must have been some mistake or inadvertence that prevented other prospective buyers from taking advantage of the low opening bid at the sheriff's auction. *See* ***id.***, ¶8 (a court may deny confirmation "if there is an apparent inadequacy in the price which was caused by mistake, misapprehension or inadvertence on the part of the interested parties or possible bidders"). But this strikes us as another way to argue that a court should deny confirmation based on an inadequate bid price. We have already rejected this argument for the reasons explained above.

¶15 Relatedly, the Lorangs contend that the fact that Green Tree opted not to credit bid the full value of its judgment might have suppressed bidding, because potential buyers may have assumed that the low bid signaled that there was something wrong with the property. However, as the Lorangs admit, there is no evidence in the record to suggest that this occurred. The Lorangs argue that the circuit court could have scheduled an evidentiary hearing so that the parties could present evidence from prospective purchasers about why they opted not to bid. However, even assuming that such evidence exists, we see no indication that the

[5] The Lorangs also argue that the circuit court erred by considering a tax assessment submitted by Green Tree showing assessed value of $393,500 and a fair market value of $410,800. However, the error, if any, is harmless because the circuit court also considered the higher valuation offered by the Lorangs when it confirmed the sale. Because we affirm the court's decision that the sale price did not shock its conscience notwithstanding the Lorangs' higher valuation, we need not address whether there was a proper evidentiary basis for the tax assessed value. *See* ***Cholvin v. Wisconsin Dep't of Health and Family Servs.***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we typically will not decide other issues raised).

Lorangs made this argument as part of their objection to confirmation.[6] We will not blindside the circuit court by reversing based on a theory that was never presented to the circuit court. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155.

CONCLUSION

¶16 Because the Lorangs have not shown that the circuit court erred in confirming the sale, we affirm the circuit court's order.

By the Court.—Order affirmed.

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

[6] The Lorangs requested a hearing on the issue of fair value, but we see no suggestion that they intended to present evidence that prospective purchasers were deterred from bidding based on a mistake about the property's value. At the hearing on their objection to confirmation, the Lorangs again indicated that they wanted a "very brief" evidentiary hearing on fair value, at which they planned to present testimony from James Lorang or from a realtor. We see no suggestion that the Lorangs intended to present testimony from prospective buyers.