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# ATTACK OF THE ZOMBIE PROPERTY

On February 17, 2015, the Wisconsin Supreme Court, in *The Bank of New York Mellon v. Carson,* 2015 WI 15, decided that, under Section 846.102 of the Wisconsin Statutes, banks and others who file mortgage foreclosure cases may be legally compelled to hold judicial sales of abandoned properties within a reasonable time after the borrower's redemption period expires. This decision flies in the face of the foreclosure practices of many lenders and, therefore, is worthy of careful consideration.

To avoid the problems highlighted by this case, it may be wise for lenders and others who foreclose mortgages to consider taking advantage of the receivership process to liquidate and dispose of abandoned or "zombie" properties, rather than using conventional mortgage foreclosure proceedings.

The facts of *BoNY v. Carson* are straightforward. In 2007, Countrywide loaned $52,000 to Carson, who signed a note and mortgage, pledging her Milwaukee home as collateral. Carson later defaulted on her loan payments and, BoNY, acting as the trustee for Countrywide, filed a foreclosure lawsuit. BoNY was unable to serve Carson with the foreclosure pleadings, but in the process of attempting service, BoNY's process server noted that Carson's house appeared vacant because the garage was boarded, the snow was not shoveled, and there were no footprints around the house.

Given its inability to serve Carson personally, BoNY published notice of the foreclosure action in a local newspaper and Countrywide's servicer filed a Registration of Abandoned Property with the City of Milwaukee. Carson did not respond and, in July 2011, a judgment for foreclosure and ordering sale of the property was entered in favor of BoNY. The circuit court declared Carson's indebtedness and directed that the property be sold at a sheriff's auction at any time after three months had passed based on Section 846.102.

Sixteen months later, BoNY still had not sold the mortgaged property via a sheriff's sale and had no plans to do so. Thus, the case involved what is sometimes called an "abandoned foreclosure," "bank walkaway," "zombie title/property," or "limbo loan." Moreover, despite obtaining a judgment of foreclosure, BoNY took no steps to secure the property. It was repeatedly burglarized and vandalized and, at one point, a fire started in the garage. The Department of Neighborhood Services ordered that the property be maintained, but neither BoNY nor Carson did so. As a result, Carson received notices of accumulated trash and

overgrown vegetation and was fined $1,800 by the City of Milwaukee.

In an effort to force BoNY to sell the property, Carson filed a motion seeking to amend the judgment to include a finding that the property was abandoned, along with an order requiring that the property be sold after five weeks had passed from the date of the amended judgment, relying on Section 846.102. The circuit court denied the motion, concluding that the statute did not grant it any authority to order BoNY to sell the property *at a specific time*.

On appeal, Carson argued that the trial court had the authority to order a sale of the property promptly upon expiration of the redemption period. The Court of Appeals agreed, deciding that "the plain language of the statute directs the court to ensure that an abandoned property is sold without delay, and it logically follows that if a party to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so." BoNY sought review by the Wisconsin Supreme Court, which granted BoNY's request and identified two issues: (1) whether the statute authorizes a court to order a mortgagee to bring a property to sale; and (2) whether a court can require a mortgagee to bring a property to sale at a certain point in time.

After considering the plain language of Section 846.102 and related statutes, the Wisconsin Supreme Court rejected BoNY's argument that a mortgagee could not be ordered to sell a property within a particular time. Rather, the plain meaning of the statute gave the circuit court authority to order a sheriff's sale of abandoned property. But, the Supreme Court did not stop there. It went on to interpret Section 846.102 as *mandating* that a circuit court order the sale of abandoned property if certain conditions are met: "Those conditions do not depend on action by the mortgagee alone and are not dependent on its acquiescence or consent."

Having determined that a circuit court may (or sometimes must) compel a bank to sell an abandoned property, the Supreme Court next turned to the question of whether a circuit court has authority to order *when* the property must be sold. After again considering the plain language of Section 846.102, along with legislative history showing an intent to alleviate the problem of abandoned homes in Milwaukee's inner-city through prompt sales, the Supreme Court held that circuit courts indeed have authority to order a sale within a reasonable time after expiration of the statutory redemption period. Accordingly, *BoNY v. Carson* holds that a circuit court not only has the legal authority to order a prompt sale of abandoned property, but also that, if a circuit court issues such an order, it may require that such a sale take place within a reasonable time based on a totality of the circumstances of the case.

When abandoned properties are the subject of lien foreclosure actions, lenders should consider the benefits of appointing a receiver for such properties. A receivership not only prevents a finding of abandonment, but also is a way to liquidate property without going

through the judicial foreclosure process.

For further information, please contact John Schreiber, Seth Dizard, or any of the attorneys in OCHD&L's Banking and Creditors' Rights Practice Group.