WISCONSIN LANDLORD SUBJECTED TO TENANCY IN JAIL

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In a published opinion, the Wisconsin Court of Appeals confirmed that landlords who fail to provide timely statements explaining the basis for withholding funds from a residential tenant's security deposit may be subject to criminal prosecution and potential jail time.

In *State of Wisconsin v. Lasecki,* 2020 WI App 36, the Wisconsin Court of Appeals affirmed a circuit court judgment convicting Lasecki, a landlord, of two misdemeanor counts of engaging in unfair trade practices for failing to either return his tenants' security deposits in full or provide statements to the tenants explaining why he was authorized to withhold funds.

Generally, the Wisconsin Statutes allow a landlord to withhold from a tenant's security deposit amounts reasonably necessary to pay for certain authorized categories of costs or damages. A landlord that withholds such amounts from a security deposit is required to deliver to the tenant any remaining balance in the security deposit within 21 days.

Although the Wisconsin Statutes make no mention of any further requirement on the part of a landlord who elects to withhold amounts from a security deposit, the Wisconsin Administrative Code applicable to residential tenancies requires landlords that withhold any portion of a security deposit to deliver to the tenant a written statement accounting for all amounts withheld.

Lasecki's troubles began when his tenants filed a complaint with the Wisconsin Department of Agriculture, Trade and Consumer Protection (ATCP) alleging that Lasecki withheld their security deposits but failed to provide them with a statement accounting for the withholding. After Lasecki failed to cooperate with ATCP's investigation into the tenants' complaint, the local district attorney's office became involved, eventually charging Lasecki for his failure to comply with the provisions of the Wisconsin Statutes and Administrative Code pertaining to the return of tenant security deposits.

A jury eventually found Lasecki guilty of the criminal charges brought by the district attorney. The circuit court thereafter awarded the tenants double their respective security deposits (as allowed by statute) and ordered Lasecki to a stayed sentence of 60 days in the county jail—14 days of which Lasecki served.

Lasecki appealed the jury verdict and order of the circuit court claiming that the circuit court lacked jurisdiction because the crimes of which Lasecki was convicted were "not known to law" and that no ordinary person would have sufficient notice that such conduct was criminal.

The Wisconsin Court of Appeals rejected Lasecki's arguments and instead affirmed his conviction, finding that the following framework within the Wisconsin Statutes and Administrative Code does provide notice that would enable an individual like Lasecki to know that his conduct was criminal in nature:

- Section 704.28 of the Wisconsin Statutes allows a landlord to withhold from a tenant's security deposit amounts reasonably necessary to pay for certain categories of authorized costs. This same section instructs landlords to deliver the full amount of any security deposit paid by tenant, less any authorized withholdings, within 21 days.
- While section 704.28 of the Wisconsin Statutes makes no mention of any requirement that a landlord provide a withholding statement to tenants, section ATCP 134.06(4)(a) of the Wisconsin Administrative Code provides that "[i]f any portion of a security deposit is withheld by a landlord, the landlord shall . . . deliver or mail to the tenant a written statement accounting for all amounts withheld."
- Section ATCP 134.01 of the Wisconsin Administration Code, entitled "Scope and Application," provides that chapter ATCP 134 "is adopted under authority of [Wis. Stat. §] 100.20.
- Accordingly, pursuant to section 100.26(3) of the Wisconsin Statutes, any person who intentionally refuses, neglects or fails to obey a regulation or order made or issued under section 100.20, shall, for each offense, be fined not more than $5,000 and imprisoned in the county jail for not more than one year.

After providing the above roadmap of how a landlord arrives at criminal liability for failing to provide a residential tenant with a security deposit withholding statement, the court of appeals' decision opines that an ordinary and reasonably prudent landlord would commonly consult with Chapter 704 of the Wisconsin Statutes (the landlord/tenant law chapter) and would also appreciate the need to understand landlord/tenant regulations set forth by the Wisconsin Administrative Code. The statutory and regulatory framework contained therein is, as the court put it, not beyond the comprehension of an ordinary landlord. As such, Lasecki had sufficient notice that his conduct could constitute a crime under Wisconsin law and the circuit court's verdict and order was affirmed.

The author of this article knows of no other instance in which a Wisconsin residential landlord has been criminally charged for failing to provide a security deposit withholding statement to a tenant. While most violations of this administrative code requirement are dealt with in civil proceedings, the court of appeals confirmed that such violations may also lead to criminal charges. Here, charges may ultimately have been brought against Lasecki in response to his failure to cooperate with the state's investigation into the consumer complaint filed by his tenants; however, the court's decision should impress upon all residential landlords in Wisconsin the importance of providing tenants with a statement of all amounts withheld from

their security deposit.

SMALL BUSINESS ADMINISTRATION LOAN RELIEF OPPORTUNITIES IN RESPONSE TO THE CORONAVIRUS PANDEMIC

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On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the coronavirus pandemic.

The CARES Act directs $349 billion towards job retention and business operating expenses by allowing small businesses to obtain forgivable loans of up to $10 million to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses (referred to as the Paycheck Protection Program).

Click here for an article authored by attorney Jason Scoby of OCHDL which summarizes the key provisions relating to the Paycheck Protection Program, including requirements as to eligibility, use, and forgiveness of loans obtained thereunder.

You will soon be able to apply for a Paycheck Protection Program Loan at any lending institution that is approved to participate in the program through the existing SBA 7(a) lending program as well as additional lenders approved by the Department of Treasury. Businesses are eligible to apply for loans under this program through June 30, 2020.

As an alternative to or prior to obtaining a loan under the Paycheck Protection Program, the SBA offers small businesses an opportunity to apply for other economic relief in light of the coronavirus pandemic:

Economic Injury Disaster Loans and Loan Advance

The SBA's Economic Injury Disaster Loan program provides small businesses the ability to obtain working capital loans of up to $2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

Small business owners may immediately apply for an Economic Injury Disaster Loan advance of up to $10,000. Funds will be made available within three days of a successful application and will not have to be repaid.

If you receive an Economic Injury Disaster Loan related to coronavirus prior to the date which the Paycheck Protection Program becomes available, you may be able to refinance the Economic Injury Disaster Loan into the Paycheck Protection Program Loan for loan forgiveness purposes. However, you may not take out an Economic Injury Disaster Loan and a Paycheck Protection Program Loan for the same purposes. Remaining portions of the Economic Injury Disaster Loan, for purposes other than those laid out in loan forgiveness terms for a Paycheck Protection Program Loan, would remain a loan.

To apply for a COVID-19 Economic Injury Disaster Loan, click here.

SBA Debt Relief

The SBA Debt Relief program provides a reprieve to small businesses as they overcome the challenges created by the coronavirus crisis.

Under this program:

- The SBA will pay the principal, interest and fees of **new 7(a) loans** issued prior to September 27, 2020 for a period of six months.
- The SBA will pay the principal, interest and fees of **current 7(a) loans** for a period of six months.

SBA Express Bridge Loans

The SBA's Express Bridge Loan Pilot Program allows small businesses who currently have a business relationship with an SBA Express Lender to access up to $25,000 with less paperwork. These loans can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing as a result of the coronavirus and can be a term loan or used to bridge the gap while applying for an Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement on an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan. Find an Express Bridge Loan Lender by connecting with your local SBA District Office.

O'Neil, Cannon, Hollman, DeJong & Laing remains open and ready to help you. For questions or further information relating to SBA loan relief, please speak to your regular OCHDL contact, or the author of this article, attorney John Schreiber.

GIVE A GUARANTOR SOME CREDIT!

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Before extending commercial loans, lenders will regularly require an owner or principal of a borrowing entity to personally guaranty payment of the entity's loan obligations. It is well-settled under Wisconsin law that a personal guaranty contract is separate and distinct from the borrower's loan contract with its lender. For this reason, lenders are entitled to enforce a personal guaranty as either a stand-alone obligation or in conjunction with an enforcement action against its borrower on the loan debt.

Often, lenders will elect to enforce the obligations of a borrower and guarantor in a single court action. Such an action may also seek to foreclose collateral pledged to secure the borrower's indebtedness such as mortgaged real property. This was exactly how Horizon Bank proceeded to collect a personally guaranteed loan obligation.

Horizon Bank loaned $5 million to its customer, Marshalls Point, secured by a mortgage upon real property in Sister Bay, Wisconsin. Musikantow, a member of Marshalls Point, executed a personal guaranty of payment of the $5 million loan. Upon Marshalls Point's loan default, Horizon Bank commenced a foreclosure action of the real property and, in the same action, brought a claim for a money judgment against Musikantow per the terms of his guaranty.

The parties to the lawsuit stipulated to the entry of both a judgment of foreclosure of the Sister Bay property as well as a $4 million judgment against Musikantow as the guarantor of the loan. The stipulation provided that the Sister Bay property be sold at a sheriff's sale and that proceeds realized by Horizon from the sale be credited to reduce the money judgment against Musikantow.

Horizon Bank purchased the Sister Bay property with a sheriff's sale credit bid of $2.25 million. Horizon then moved the circuit court for confirmation of its credit bid as being fair value for the property per the requirements of section 846.165 of the Wisconsin Statutes. In its confirmation motion to the court, Horizon also indicated that it would not seek a deficiency judgment against its borrower, Marshalls Point, but requested an order applying the amount of its credit bid to offset the $4 million judgment against Musikantow on his guaranty.

Musikantow and Marshalls Point did not oppose confirmation of Horizon Bank's $2.25 million credit bid as being "fair value" for the Sister Bay property, but objected to Horizon Bank's

request to apply only this credit bid amount toward Musikantow's guarantor judgment. Musikantow argued that "fair value" is not the same as "fair market value." Accordingly, he argued he should be entitled to a credit against his guaranty obligation in an amount greater than the $2.25 million credit bid since, in Musikantow's opinion, the Sister Bay property was worth far more.

The circuit court entered an order confirming the sheriff's sale, but left the calculation of Musikantow's credit for another day. Horizon Bank appealed the circuit court's order and argued that Musikantow's guaranty obligation should be credited to the extent of the amount of proceeds received by the bank from the sheriff's sale. The court of appeals agreed with Horizon Bank and reversed the circuit court, remanding the case to Door County with a direction to amend the money judgment against Musikantow by applying a credit of $2.25 million.

The court of appeals was ultimately reversed. The Supreme Court of Wisconsin determined that the stipulation executed among Horizon Bank and Musikantow was ambiguous as to the credit to be provided against Musikantow's judgment obligations. Moreover, the court held that, under Wisconsin law, the credit to be provided toward a guarantor's obligation is not a function of the "fair value" required to confirm a foreclosure sale under section 846.165 of the Wisconsin Statutes. Accordingly, the Supreme Court remanded the case to the circuit court to determine the fair market value of the Sister Bay property so that such amount may be credited toward Musikantow's guarantor judgment.

As a result of the Supreme Court's decision in Musikantow, lenders have some interesting decisions to make when determining how best to enforce a loan obligation, particularly when the payment of such a loan obligation is guaranteed by a liquid and collectible guarantor. Why should a lender commence an action to liquidate collateral pledged by its borrower when there exists a guarantor having the ability to satisfy the loan obligation? Proceeding against a wealthy guarantor would seem less risky than a lender credit bidding and taking title to property through a sheriff's sale, while having to afford a credit to its guarantor for the full market value of the property (an amount which is subject to litigation and uncertain until ordered by a court). Especially troubling is the fact that it is not uncommon for lenders to fall short in obtaining net proceeds equivalent to the amount credit bid when property obtained at sheriff's sale is ultimately sold by the lender to a third-party. This dilemma faced by lenders does not seem to be in the best interest of some guarantors who may now be the prime collection target of a loan obligation, as opposed to pledged collateral. Moreover, it would seem that personal guarantees of payment may no longer be afforded the value traditionally provided by lenders in underwriting a commercial loan following Musikantow. This has the potential of driving up the costs of lending which may ultimately be passed on to borrowers.

As a practical effect of Musikantow, it is imperative that lenders have a level of certainty and

evidence of the fair market value of pledged collateral before choosing to proceed down the dual path of foreclosing collateral and enforcing a personal guaranty. A failure to undertake such an analysis may effectively result in an unexpected credit to a guarantor whom a lender expected to look to for recovery.

For more information on this topic or assistance in the enforcement of a commercial loan obligation, contact John Schreiber at 414-276-5000 or John.Schreiber@wilaw.com.

DO YOUR DUE DILIGENCE

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Most attorneys during their career have the opportunity or obligation to effectuate service of process of a legal document pursuant to a rule or statute. It can be in any area of the law. My practice area of creditors' rights litigation requires me to serve process of a lawsuit under a statute that, at first glance, is complex, but over time has become engrained in my mind.

For a Wisconsin court to have jurisdiction over an individual defendant in a civil action, a summons must be served personally upon the defendant or, if with reasonable diligence the defendant cannot be served personally, by leaving a summons with a competent family member at the defendant's home. If with reasonable diligence the defendant cannot be served by the above methods, then service may be made by publication and mailing.

I recently represented a client who, two years earlier, had obtained a large money judgment against a defendant/guarantor. Prior to obtaining a judgment in the case, the process server attempted to personally serve the guarantor 4 times – once at his parents' house and, upon learning that the guarantor no longer resided there, 3 more times at his place of business. While attempting to serve at the guarantor's place of business, the process server left his business card asking that he be contacted. The server testified to the court that the guarantor eventually called him, told the server that he would not make himself available for service, and instructed the server to publish. Based on the guarantor's statements, service by publication was initiated. A default judgment was eventually entered against the guarantor after he failed to timely respond to the publication summons. Thereafter, the client initiated and continued to attempt to enforce and collect upon the judgment using supplementary collection procedures.

Twenty months after the judgment was entered, the guarantor filed a motion to reopen the case, asking the court to void its own judgment on the basis that the court lacked personal jurisdiction over him. The guarantor claimed that the creditor did not exercise due diligence in trying to find and serve him personally, thus rendering service by publication ineffective to establish jurisdiction.

Under Wisconsin law, there is no time limitation in bringing such a motion since ineffective service of process renders a court without jurisdiction over a defendant. It matters not whether the judgment is aged nor whether a client has spent thousands of dollars trying to enforce and collect upon the judgment. To make matters more difficult, a defendant's actual knowledge of a lawsuit is not a factor in a court's determination of whether a plaintiff has undertaken due diligence in attempting to serve a defendant.

Needless to say, my client was alarmed when it received the guarantor's motion. So what does a plaintiff like mine need to do to avoid such a situation? How may a plaintiff find comfort that it exercised due diligence in attempting to personally serve a defendant prior to publishing a summons as a means of service of the lawsuit? Does a plaintiff need to hire an expensive investigator to perform a search of the individual? Should a costly asset/information database search be ordered?

Due diligence is not defined by statute, but Wisconsin is not without judicial authority. A Wisconsin court of appeals has described reasonable diligence as the diligence to be pursued that is reasonable under the circumstances, but not all diligence which may be conceived. Nor is it that diligence which stops just short of the place where, if it were continued, might reasonably be expected to uncover an address of the person on whom service is being attempted. See *Loppnow v. Bielik*, 2010 WI App 66, ¶ 10, 324 Wis.2d 803.

While this judicial statement is somewhat amorphous, in my practice, I have gleaned that judges generally seem to require at least 3 attempts at personal service before service may be made by publication. Such attempts at service, however, may be viewed as futile if a server stops short in making a proper inquiry into the defendant's whereabouts before attempting service. See *Heaston v. Austin*, 47 Wis. 2d 67 (1970); *West v. West*, 82 Wis. 2d 158 (1972) (Due diligence was not established when a husband could have ascertained his wife's address by contacting any one of several relatives or in-laws). Courts may also take into consideration a defendant's statements as to his whereabouts or evasive actions on the part of a defendant in determining whether the due diligence standard was met. See *Welty v. Heggy*, 124 Wis. 2d 318 (Ct. App. 1985); *Emery v. Emery*, 124 Wis. 2d 613 (1985).

In my case, the court's determination ultimately boiled down to the existence of evasive actions on the part of the guarantor. An evidentiary hearing was held and, although the guarantor denied ever speaking to the process server, the court found the process server more credible than the guarantor in regard to the guarantor's evasive maneuvers and

statements to the process server. Vital to the court's ruling was the existence of the process server's notes on the face of his affidavit stating that the defendant indicated he would not make himself available and advised the process server to publish.

From this experience, it is clear that meticulous notes, records and other documentary evidence must be kept in regard to a process server's communication with a defendant along with the server's attempts to serve a defendant if publication is the method in which a plaintiff chooses to rely upon to effectuate service of process. Moreover, before choosing a process server it is a good idea to check the server's licensure history, including any reprimands or suspensions that may have been handed down by governing regulatory bodies. This will ensure no negative history exists that could render due diligence testimony from the server incredible.

For more information on this topic contact John Schreiber at 414-276-5000 or John.Schreiber@wilaw.com.

SECURED CREDITORS MUST FILE BANKRUPTCY PROOFS OF CLAIM IN THE SEVENTH CIRCUIT

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In a reversal of a decision of the U.S. Bankruptcy Court for the Northern District of Illinois, the United States Seventh Circuit Court of Appeals in *In re Pajian* rejected a common bankruptcy court practice of not requiring secured creditors to file proofs of claim in order to receive distributions toward pre-petition secured arrearages as part of a debtor's chapter 13 plan of reorganization.

Pajian involved a chapter 13 bankruptcy debtor indebted to Lisle Savings Bank, a secured creditor. Lisle filed a late proof of its secured claim and the debtor objected to the claim based upon its untimeliness. Formerly, courts would allow a secured creditor such as Lisle Savings Bank to abstain from filing a proof of claim and, instead, wait to object to a proposed plan of reorganization that failed to include payments toward the creditor's secured pre-petition arrearage claim.

In opining that Rule 3002(c) of the bankruptcy code requires all (not only unsecured)

creditors to file proofs of claim within 90 days of a Section 341 meeting of creditors, the Court of Appeals effectively barred Lisle Savings Bank from receiving distributions on its pre-petition secured arrearage claim as part of the debtor's plan of reorganization. While the Court of Appeals acknowledged that a secured creditor's lien (and right to foreclose the same) remains unaffected by its failure to timely file a proof of claim, the court's decision means that a debtor need not make plan payments to its tardy secured lender during its plan of reorganization (presumably 5 years), but is only required to make loan payments to its lender coming due during the plan in order to avoid a foreclosure of the bank's lien.

As a result, the debtor in *Pajian* was not required to make plan payments of loan arrearages during the course of its entire plan of reorganization. Because Lisle's lien was not avoided, however, the bank remained entitled to realize upon its pre-petition secured arrearage to the extent of the value of its security, but only after completion of the debtor's plan of reorganization or default under the terms thereof.

Many deadlines are very short under the bankruptcy rules. If you are a creditor, whether secured or unsecured, it is of utmost importance to contact bankruptcy counsel immediately upon receiving a notice of bankruptcy. Failure to comply with bankruptcy deadlines, including the filing of a timely proof of claim, may prejudice the rights of a secured creditor as displayed by *Pajian*.

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

LEGISLATIVE ALERT: NEW RULES AND PROCEDURES REGARDING MORTGAGE FORECLOSURES

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Wisconsin recently enacted Act 376 modifying certain aspects of mortgage foreclosure proceedings, most notably a reduction to the period of time that owner-occupied, non-commercial property may be redeemed and the process of declaring a property abandoned.

Under current law, a judgment of foreclosure must specify a length of time, called a

redemption period, during which a mortgagor may redeem the mortgaged property by paying the entire amount of the mortgage debt. Upon redemption, the judgment of foreclosure and the underlying mortgage are discharged, and the mortgagor retains the property. Act 376 reduces the foreclosure redemption periods applicable to mortgages upon owner-occupied, non-commercial property that are executed on or after April 26, 2016:

- The period of redemption is reduced from 12 months to 6 months after entry of judgment. This new 6-month redemption period may be extended to 8 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.
- If a mortgagee, however, waives its right to a judgment for any deficiency that may remain following sale, the newly enacted 6-month redemption period is cut in half to 3 months. Similarly, the redemption period in such a case may be extended to 5 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.

Act 376 also provides that only a foreclosing plaintiff or the city, town, village or county where the mortgaged property is located may petition the presiding court for a finding that the mortgaged property has been abandoned by the mortgagor and its assigns.

If the court makes a finding of abandonment, Act 376 requires immediate entry of a foreclosure judgment and requires the foreclosing plaintiff, within 12 months of such entry of judgment, to hold a sale of the mortgaged premises and have the sale confirmed or release or satisfy its mortgage lien and vacate the judgment of foreclosure with prejudice. If a foreclosing plaintiff fails to complete either of the above requirements within 12 months of entry of judgment, any party to the foreclosure action or the city, town, village, or county where the mortgaged property is located may petition the court for an order compelling a sale of the property.

If you have any questions, please contact attorney John R. Schreiber at john.schreiber@wilaw.com or 414-276-5000.

ATTACK OF THE ZOMBIE PROPERTY

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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 & Creditors' Rights Practice Group.

UNITED STATES SUPREME COURT CLARIFIES THAT NOTICE, AS OPPOSED TO FILING A LAWSUIT, IS A PROPER METHOD OF EXERCISING TILA RESCISSION RIGHTS

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In an opinion dated January 13, 2015, the Supreme Court of the United States reversed a decision of the Eighth Circuit Court of Appeals, unanimously holding that borrowers may exercise their three-year right of rescission under the Truth in Lending Act (TILA) simply by providing written notice to their lender.

The Court in *Jesinoski v. Countrywide Home Loans, Inc.* held that the petitioners' written notice to Countrywide of their election to exercise the right to rescind their loan was sufficient, resolving conflicting authority among federal circuit and district courts that interpret TILA as requiring a borrower to file a lawsuit within three years of loan consummation in order to exercise such rescission rights.

According to the Court's opinion delivered by Justice Scalia, TILA explains in unequivocal terms that a borrower shall have the right to rescind a loan by notifying the creditor of his intention to do so. According to Justice Scalia, "[this] language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. … The statute does not also require him to sue within three years."

Interestingly, the Court's opinion goes on to provide that, unlike the elements of common-law rescission which require a party to tender back what it received in order to be entitled to such relief, a borrower does not necessarily need to tender to a creditor funds received under the loan in order to effectuate its election to exercise its rescission rights under TILA. In the words of the Court, "[t]o the extent [TILA] alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice."

The full opinion of the Supreme Court of the United States in *Jesinoski v. Countrywide Home Loans, Inc.* can be found at: http://www.supremecourt.gov/opinions/14pdf/13-684_ba7d.pdf.

A PRE-CLOSING PROFESSIONAL INSPECTION IS ESSENTIAL TO PRESERVE REMEDIES FOR HOME DEFECTS

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A recent Wisconsin Court of Appeals decision, *Malzewski v. Rapkin*, 2006 WI App 183, demonstrates the importance of obtaining a professional inspection prior to closing on a residential home transaction. Failure to do so may, under certain circumstances, prohibit a buyer from asserting otherwise available remedies against a home seller if a defect is discovered after the sale.

In Malzewski, prospective buyers of a home received a Real Estate Condition Report from sellers disclosing a defect in the basement/foundation. Sellers explained that "[d]uring heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened."

Buyers' Offer to Purchase incorporated the language from the Real Estate Condition Report listed above, contained a home inspection contingency and further conditioned their purchase of the home upon the right to do a walk-through within three working days of acceptance. Sellers accepted Buyers' Offer to Purchase. Immediately prior to the closing, Buyers exercised their right to do a walk-through of the home. Upon noticing no visible defects, Buyers waived their right to conduct a home inspection despite having knowledge of foundation seepage and closed on the sale.

The following summer, Buyers noticed that paint had begun to peel on the basement walls and pre-existing cracks on the basement walls opened. An engineer was hired to investigate the foundation and concluded that the cracks had been present for many years, were failing and needed to be fixed. The cost to repair the foundation walls was estimated to be $25,600.

Buyers sued Sellers under contract, tort and statutory theories, seeking money damages or, alternatively, rescission of the sale and restitution. During the discovery process, Sellers admitted to their awareness of multiple 12-foot long, three-eighths inch wide cracks that they had filled with masonry caulk 10 to 20 times during their ownership of the home. Sellers also admitted to painting the walls 5 times and touching them up after they had filled-in the cracks with caulk from time-to-time. Sellers never, however, had a professional inspect the

home’s basement to provide an opinion or to get a repair estimate.

Buyers’ claims were dismissed on summary judgment by the trial court. The trial court decided as a matter of law that it would not allow Buyers’ claims to continue where there was no showing that Sellers had any subjective knowledge as to the significance of the basement cracks and where Buyers waived their right of inspection despite being informed of foundation seepage merely to save a few hundred dollars on a home inspection.

The Court of Appeals held that the trial court was correct in dismissing most of Buyers’ claims since, in order to recover damages under breach of contract, breach of warranty, misrepresentation or theft-by-fraud theories, Buyers were required to show that they reasonably relied to their detriment upon an affirmation of fact from the Sellers.

The court added that Buyers acted unreasonably as a matter of law when they waived their right to have the home inspected prior to closing on the property. The Court of Appeals deemed that the language in Sellers’ Real Estate Condition Report concerning seepage in the walls and floors of the basement was enough to put Buyers on notice, at least to the extent that they should have conducted further investigation by hiring a registered home inspector.

The court did, however, think one of Buyers’ claims raised a factual issue that should have been reserved for determination by a jury. Specifically, Buyers’ deceptive advertising claim under section 100.18, Wis. Stats., was returned to the trial court for a trial on the issue of whether Sellers’ representation that the only problem with the basement was slight seepage was a violation of Wisconsin’s deceptive advertising statute where Buyers waived their right to have the property inspected.

Despite the survival of Buyers’ deceptive advertising claim, Malzewski stresses the importance, both in the eyes of a court and potentially a jury, of conducting a professional home inspection prior to purchasing a home. To ignore one’s right to conduct such an inspection may be deemed unreasonable in the eyes of a court or jury and may foreclose remedies that would otherwise be available to buyers with claims relating to unknown home defects.
For further information on Malzewski and other cases and issues relating to home defect claims and defenses, contact John R. Schreiber of O’Neil, Cannon, Hollman, DeJong S.C.