

OVER 50% OF O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ATTORNEYS RECOGNIZED ON SUPER LAWYERS 2010 LIST

Fifteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2010 list.

Super Lawyers is a peer-nominated award that recognizes the top 5% of outstanding attorneys across the state of Wisconsin. The *Super Lawyers* are selected using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third party research, and each candidate is evaluated based on 12 indicators of peer recognition and professional achievement.

Super Lawyers:

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing*
- Gregory W. Lyons
- Patrick G. McBride
- Steven J. Slawinski

Rising Stars:

- Timothy C. Caprez
- Gregory S. Mager
- Chad J. Richter
- John R. Schreiber
- Robert J. Tess

**Top 50 Super Lawyers Recipient*

SIXTEEN OCHD ATTORNEYS AWARDED WITH SUPER LAWYERS DESIGNATION

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**Top 50 Super Lawyers Recipient*

SUPER LAWYERS RECOGNIZES OCHD ATTORNEYS AMONG WISCONSIN'S TOP 5%

Milwaukee, WI (November) – Several attorneys from the law firm of O’Neil Cannon have been selected for inclusion in the 2008 Wisconsin *Super Lawyers* and *Rising Stars* lists. Attorneys recognized by *Law and Politics* include Jim DeJong, Dean Laing, Peter Faust, Patrick McBride and Randy Nash. Rising Star honors go to Seth Dizard, Chad Richter, John Schreiber and Bob Tess.

Only 5 percent of the licensed active attorneys in each state are named to the *Super Lawyers*

list. In states where Rising Stars is published, no more than 2.5 percent are named. As part of the rigorous multi-step selection process, each candidate is evaluated based on 12 indicators of peer recognition and professional achievement. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel.

A MOMENTARY SIGH OF RELIEF FOR LAND CONTRACT VENDORS IN WISCONSIN

The Wisconsin Court of Appeals, in *Jakubow v. Lichosyt*, 2007 WI App 150, recently addressed the interplay of competing interests to real property where a land contract is involved: Namely, that of a third-party attempting to execute on a judgment lien against a land contract vendee's equitable interest in real property and that of a land contract vendor who has brought an action for strict foreclosure on the same real property. The Court of Appeals' analysis and determination of the parties' respective rights should be comforting to land contract vendors in Wisconsin ... at least for the time being.

The facts in *Jakubow* are relatively straightforward:

- In 2002, Lichosyt entered into a land contract with Jakubow to purchase real property in Sauk County, Wisconsin (the "Property"). The purchase price was \$4,350,000, with \$350,000 to be paid upon execution of the land contract. At the time of the Court of Appeals' decision, the value of the Property was \$6,668,000.
- In 2004, Republic Bank of Chicago (the "Bank") filed and docketed with the Sauk County Circuit Court a money judgment taken against Lichosyt in an Illinois court proceeding. The Bank then attempted to execute on the Property, requesting a judgment of foreclosure and sheriff's sale of the Property and distribution of proceeds to creditors.
- Asserting that its land contract vendor's lien was superior to the Bank's judgment lien, Jakubow filed a complaint for strict foreclosure naming both Lichosyt and the Bank as defendants.
- Subsequent to the filing of the strict foreclosure action, Lichosyt and Jakubow stipulated that Jakubow was entitled to strict foreclosure and, at the same time, Lichosyt executed a quitclaim deed of the Property to Jakubow releasing his right, title, and interest in and to the Property arising from the land contract. Lichosyt also waived any redemption period during which he would have had the opportunity to pay Jakubow what was owed in full or lose his interest in the Property.
- Following execution of the stipulation and quitclaim deed, Jakubow moved for summary judgment in her strict foreclosure action. The Bank opposed the motion, arguing that the Bank itself had a right to redeem the Property since substantial equity existed in the

land above that which was owed to Jakubow. The Bank also argued that Jakubow's acceptance of a quitclaim deed from Lichosyt required dismissal of her strict foreclosure action.

- The trial court disagreed with the Bank and granted Jakubow's motion for summary judgment, ordering that all interests of the Bank in the Property be foreclosed with title vesting in the name of Jakubow. The Bank appealed the trial court's order, asserting, in part, that Jakubow's acceptance of the quitclaim deed from Lichosyt should have effectively terminated the strict foreclosure action, thereby preserving the judgment lien recorded against the Property.

The Court of Appeals began its review of the trial court's decision by identifying the respective rights that each party held. Lichosyt, as a land contract vendee, acquired equitable title to the Property while Jakubow, a land contract vendor, retained legal title as security for the unpaid balance of the land contract. Unless the land contract would have stated otherwise, equitable title effectively gave Lichosyt full rights of ownership, including the ability to sell, lease or encumber the real estate subject to the rights of the legal titleholder, Jakubow.

The Court noted that, following Lichosyt's default under the terms of a land contract, Jakubow could have sued for the unpaid purchase price of the land contract, for specific performance, or asserted the most common vendor remedy - an action for strict foreclosure. In a strict foreclosure action, a land contract vendor foregoes its right to collect the amount remaining on the debt and instead recovers the real property. Typically, the court sets a redemption period in which the vendee must pay up or lose its interest in the land.

The Bank, with a properly docketed judgment against Lichosyt, held a judgment lien on all real property of Lichosyt. As a judgment lienholder, the Bank was entitled to collect by executing on real property of Lichosyt, a process which includes a sheriff's sale upon notice with a right of redemption thereafter for Lichosyt and other prescribed persons. A judgment lien, however, creates no estate, interest or right of property in the land which may be bound for its satisfaction.

The Bank correctly stated that its judgment lien attached to the real property in which Lichosyt, through his land contract, had equitable title. The Bank, however, attempted to further contend that, by accepting a quitclaim deed of Lichosyt's equitable interest, Jakubow's strict foreclosure action immediately terminated and, thus, the Bank's judgment lien could not have been foreclosed. Moreover, the Bank argued that Jakubow's legal title merged with Lichosyt's equitable title upon execution of the quitclaim deed.

According to the Wisconsin precedent, if the equitable title of a vendee and the legal title of a vendor merge into one interest of the vendor, then lienholders may reach all of a vendor's interest in real property. The Court of Appeals recognized such precedent but also made clear that a claim to such equity is cut off by a judgment for strict foreclosure. The Court of Appeals

rejected the Bank's argument that Jakubow forfeited her right to obtain a strict foreclosure judgment by accepting Lichosyt's quitclaim deed.

As noteworthy as the majority opinion in Jakubow was a dissent that, more or less, informally certified a much broader issue for consideration should this case proceed to the Supreme Court of Wisconsin. Particularly, the dissent identifies widespread inequity in the longstanding traditions of Wisconsin and other states in the way that land contract foreclosures are distinguished from traditional mortgage foreclosures (where, unlike strict foreclosure actions, junior lienholders and mortgagees routinely share in proceeds from foreclosure sales.)

The dissent views Jakubow's sole, unencumbered entitlement to the Property valued at \$6,668,000 as evidence of the inequitable nature of strict foreclosures in Wisconsin. The Property was sold to Lichosyt in 2002 for \$4,350,000 with a down payment of \$350,000, leaving \$4,000,000 to be paid pursuant to the land contract over the course of seven years. The Bank's judgment lien totaled about \$2,000,000. According to the dissent, there should have been more than enough equity in the Property to satisfy the interests of both Jakubow and the Bank.

The dissent provides ample authority from which the Supreme Court of Wisconsin could be swayed to change the way Wisconsin views rights of various parties relative to strict foreclosure actions, including citation to a United States Bankruptcy Court opinion from the Western District of Wisconsin that is squarely at odds with the Court of Appeals' opinion in Jakubow. See *Berge v. Sweet*, 33 B.R. 642 (Bankr. W.D. Wis. 1983) (addressing a factual situation identical to the one in Jakubow but concluding that a land contract vendee's substantial equity in a farm could not be cut off from the grasp of creditors by a judgment of strict foreclosure.)

While, for the time being, Jakubow safeguards a land contract vendor's right to receive property following a strict foreclosure unencumbered by liens against the former vendee, as the title of this article warns, Jakubow may be a momentary victory for land contract vendors. The rationale of the dissent and its potential effect on the way Wisconsin courts handle strict foreclosure actions warrants further monitoring.

For further information on Jakubow and other cases or issues relating to land contracts or foreclosure actions, contact John R. Schreiber of O'Neil, Cannon, Hollman, DeJong, S.C.'s Real Estate and Construction Practice Group.

REAL PROPERTY TAX ASSESSMENT REVERSED BY COURT OF APPEALS

OCHD's Real Estate and Construction Practice Group found recent success in obtaining a reversal from the Court of Appeals relative to a real property tax assessed by the Village of Menomonee Falls against an 80-plus unit apartment complex owned by a client.

In an opinion released on May 2, 2007, the Court of Appeals District II reversed the decision of the Circuit Court for Waukesha County holding, among other things, that the Board of Review for the Village of Menomonee Falls failed to exercise proper judgment and failed to accept evidence of valuation submitted by the property owner as the "best information" available. See [Opinion of Court of Appeals](#).

For further information or a consultation regarding your legal rights to object to and/or appeal a real property assessment on your residential or commercial property, please contact either Claude J. Krawczyk or John R. Schreiber of OCHD's Real Estate and Construction Practice Group.

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

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