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## Foreclosing on Abandoned Properties After Carson

For Wisconsin mortgage lenders, it has long been the rule that a foreclosure judgment gives the mortgagee the right to sell the subject property at a Sheriff's sale. Foreclosing lenders, however, were not required to actually bring the property to sale. A recent Wisconsin Court of Appeals decision—*The Bank of New York v. Carson*<sup>1</sup>—may have just turned this lender remedy on its head.

The *Carson* decision sets forth an unprecedented interpretation of Wisconsin's abandoned premises statute, Wis. Stat. § 846.102. In this recent decision, the Wisconsin Court of Appeals held that *either* the foreclosing lender *or* the defaulting homeowner can force the sale of an abandoned residential property in the context of a foreclosure action. Never before has an appellate court held that a homeowner is entitled to invoke this statute and force a lender to pursue a Sheriff's sale.

### The Statute

When foreclosing on an abandoned property, a lender may elect to proceed under the abandoned premises statute, Wis. Stat. § 846.102, which provides a shortened redemption period upon the entry of a foreclosure judgment. The statute provides in relevant part:

In an action for enforcement of a mortgage lien if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns, judgment shall be entered as provided in s. 846.10 except that the sale of such mortgaged premises *shall be made* upon the expiration of 5 weeks from the date when such judgment is entered.... In this section "abandoned" means the relinquishment of possession or control of the premises whether or not the mortgagor or the mortgagor's assigns have relinquished equity and title.

Wis. Stat. § 846.102(1) (emphasis added).

Until recently, Wis. Stat. § 846.102 was understood to be an exclusive right, held by the foreclosing lender, for a shortened redemption. While there is little case law interpreting the statute, there are no published decisions stating that Wis. Stat. § 846.102 obligates a foreclosing lender to bring a property to Sheriff's sale upon expiration of the redemption period. After all, Wisconsin law does not require a foreclosing lender to complete a foreclosure. The *Carson* decision changes this, at least in the context of abandoned residential properties.

### Background

On January 25, 2011, the Bank of New York (BoNY) initiated an action seeking to foreclose upon Carson's Milwaukee home. Carson had already vacated the property, and

<sup>1</sup>*The Bank of New York v. Shirley T. Carson*, Appeal No. 2013AP544 (Wis. Ct. App., Dist. 1, Nov. 26, 2013).

on April 26, 2011, BoNY registered the property as abandoned with the City of Milwaukee. On June 13, 2011, the trial court granted BoNY's motion for default judgment and ordered the property to be sold at any time after three months from the entry of judgment.

Three months passed, but BoNY did not schedule a Sheriff's sale. Neither Carson nor BoNY maintained the property and it fell into disrepair. The City of Milwaukee began issuing Carson fines for building code violations.

Almost a year and a half after entry of the foreclosure judgment, Carson sought to amend the judgment to (i) find that the property was abandoned pursuant to Wis. Stat. § 846.102, and (ii) require the property be brought to sale five weeks from the date of the amended judgment. The trial court denied Carson's motion, holding that it did not have the authority to order the sale of the property. The court further construed Wis. Stat. § 846.102 to mean that only BoNY, not Carson, could elect the five-week redemption period provided by the statute.

The Court of Appeals reversed, holding that the trial court was required to order a sale of the foreclosed abandoned property. First, the court determined that the plain language of Wis. Stat. § 846.102 allowed any party to prove abandonment and to elect the five-week redemption period. Absent statutory language limiting the redemption period election to a particular party, "the statute plainly provides that any party to a foreclosure action ... [is] permitted to present evidence of abandonment." *Carson*, ¶ 12.

Second, the court determined that the plain language of the statute required the abandoned property to be sold. In other words, a lender cannot obtain a judgment of foreclosure and later choose not to enforce its right to a Sheriff's sale. The court reasoned that "[t]he statute declares

that judgment 'shall' be entered, and later states that sale of the mortgaged premises 'shall' be made upon the expiration of five weeks from the date of entry of judgment." *Id.*, ¶ 13. As such, the court concluded that the statutory language was mandatory, requiring "the court to ensure that an abandoned property is sold without delay." *Id.*

## Impact

If the *Carson* case stands, it has the potential to significantly alter Wisconsin's foreclosure laws and the way lenders do business in Wisconsin. Never before has an appellate court required a lender to bring a foreclosed property to sale. Rather, *if* a lender chose to hold a Sheriff's sale, then the sale had to proceed in a certain manner at *any time* after the redemption period expired.

Now under *Carson*, a foreclosing lender of an abandoned residential property *shall* hold a Sheriff's sale of the abandoned property upon the expiration of five weeks from entry of the foreclosure judgment. The Court's proclaimed reliance on the mandatory nature of the statute poses serious questions for foreclosing lenders going forward.

### 1. How soon after the redemption period expires "shall" the property be sold?

The *Carson* decision provides little guidance as to when a Sheriff's sale must occur. The Court only makes clear that a lender may be held in contempt for failing to bring the property to sale in a timely manner. *Id.*, ¶ 13.

However, under the Court's own reading, a sale would have to occur upon the expiration of the five-week redemption period. As a practical matter, a lender's ability to bring a property to a Sheriff's sale inevitably depends on the Sheriff's calendar, and the days or weeks after the redemption period expires may not

be available. In that case, is the lender allowed to schedule the Sheriff's sale for the next available date? How much time can elapse between expiration of the redemption period and a sale before the lender runs afoul of the court's mandate that the property be sold "without delay"? Must lenders incur the costs of scheduling a Sheriff's sale, and of providing notice, during the redemption period?

Despite all this ambiguity, one thing is clear: a lender cannot make the business decision to walk away from a foreclosed property once it is proven to be abandoned.

### 2. Is the lender required to bid on the property at Sheriff's sale?

Under the Court's formulation of the statute's plain language, the *sale* of the property must occur upon the expiration of the shortened redemption period. But what happens if there are no bids for the property at Sheriff's sale? Under such a scenario, the mortgagor would remain the property owner because there would be no confirmation of sale to transfer ownership. Must the lender credit bid at the sale or could the mortgagor force the lender to schedule yet another sale?

Although it would seem extraordinary to require a lender to bid on a property at the Sheriff's sale, under *Carson*, a lender may be found in contempt if the court perceives that the lender has delayed completion of the foreclosure.

### 3. Will the *Carson* decision stand?

The *Carson* decision is, ultimately, a public policy decision. Throughout, the Court expresses concern over "lender walkaways," noting that such properties may be "in limbo for years." *See id.*, ¶ 14. In allowing the defaulting homeowner to invoke the abandoned premises statute, the Court found a way to curtail this practice: by placing lenders on the hook for the property.

Most debtors still seek to delay foreclosure and stay in the property as long as possible—mortgage and rent free. However, until *Carson* is overruled or clarified, lenders will need to carefully evaluate the decision to initiate foreclosure actions, particularly in blighted areas. As a result of *Carson*, municipalities facing an epidemic of abandoned properties may themselves be more inclined to intervene in foreclosure actions to prove abandonment and now force lenders to sell—and potentially purchase—abandoned properties.

BoNY has indicated it will appeal the Court of Appeals' decision to the Wisconsin Supreme Court. Mortgage lenders in Wisconsin should be encouraged to explore participating in the appeal, or at least to contact their representatives about amending the abandoned property statute.

*Attorneys Jonathan Ingrisano, Erin (Maggie) Cook and Nina Beck devote a significant portion of their practice to representing mortgage lenders and servicers in complex foreclosure litigation. This includes loan repurchasing disputes, standing challenges, Home Affordable Modification Program (HAMP) claims, Truth-in-Lending issues, and other attempts by debtors to delay or defeat the foreclosure process.*

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