Advising Mortgage Lenders and Servicers Through Long-term Effects of Carson decision

posted on: Monday, September 21, 2015

The dust appears to have settled since the Supreme Court of Wisconsin's decision earlier this spring in Bank of New York Mellon v. Carson, 2015 WI 15, 361 Wis. 2d 23, 859 N.W.2d 422 – a decision that seemingly reshaped Wisconsin's real estate foreclosure process. The Carson court's interpretation of Wisconsin's abandoned premises statute expands the duties imposed on lenders and servicers foreclosing a mortgage in default. At least one fact is undoubtedly clear: the decision to file a foreclosure action poses significant risks for plaintiffs, particularly when the foreclosed property is later abandoned by its owner.

As a result of the Carson decision, the current law in Wisconsin now requires a foreclosure plaintiff to hold a sheriff's sale for an abandoned property within a “reasonable” time after the expiration of the statute's five-week redemption period. Before Carson, however, foreclosure plaintiffs were under no obligation to hold a sheriff's sale, regardless of the property's condition. Moreover, for lenders and servicers with regional or national real estate practices, the Carson decision may represent a trend among courts, legislatures and local municipalities attempting to reduce the number of abandoned properties sitting idly in many communities. Nevertheless, there are options available to reduce the uncertainty and risks associated with foreclosing properties that might later be abandoned by their owners.

The Carson decision

In Carson, the bank—serving as trustee for the investor of a pool of mortgage-backed securities—foreclosed Shirley Carson’s mortgage pursuant to Wisconsin’s residential foreclosure statute. While attempting to serve Carson with its summons and complaint, the bank’s process server concluded that the home had been abandoned, noting in the affidavit of service that the garage was boarded and the property unkempt, among other defects. The circuit court entered default judgment of foreclosure in favor of the bank. However, because she still held legal title to the property, Carson remained liable for numerous fines issued by the City of Milwaukee and for damages resulting from vandalism and burglary. Finally, after 16 months of no action, Carson moved to amend the judgment of foreclosure pursuant to the abandoned premises statute, seeking an order by the court to find that the property had been abandoned and to compel a sheriff’s sale after the five-week statutory redemption period. The circuit court—concluding that it lacked authority to order the bank to sell the property at a specific time—denied Carson’s motion. The Wisconsin Court of Appeals reversed the circuit court’s order, and the lender appealed the case to the Wisconsin Supreme Court.

The Wisconsin Supreme Court affirmed the court of appeals’ reversal on two grounds. First, the Court, citing to the legislative history of the abandoned premises statute, concluded that the legislature intended to treat abandoned properties differently from other properties in foreclosure. In addition to the legislative history, the Court noted that the plain language of the abandoned premises statute mandates a sheriff’s sale if sufficient evidence is presented to the circuit court that the property had been abandoned; whereas, in contrast, the residential foreclosure statute merely vests a plaintiff with the right to sell the property following the entry of judgment.
Therefore, according to the Court, the key inquiry under the abandoned premises statute is the condition of the property, as opposed to the plaintiff’s desire to protect its equity in the property.

Second, the Court held that the abandoned premises statute authorized the circuit court to specify the precise date of the sheriff’s sale. However, the ultimate determination of when to hold the sheriff’s sale is left largely to the circuit court’s analysis of the totality of circumstances. According to the Wisconsin Supreme Court, this interpretation of the abandoned premises statute achieves the legislature’s goal of ensuring that abandoned properties are sold quickly, rather than becoming a source of crime and blight in local communities.

The principal takeaway from the Carson decision is that, if a property is abandoned by its owner, Wisconsin courts are now required to order a sheriff’s sale within what may otherwise be a relatively short time for selling any type of real estate – much less an abandoned property. By accelerating the time needed not only to secure the property, but also to advertise the sheriff’s sale, identify prospective buyers and ensure the property is up to code, the likelihood is all but certain that an abandoned property will be purchased by the foreclosing plaintiff at the sheriff’s sale. Toward this end, the Carson decision may actually compound the very problem the Supreme Court of Wisconsin sought to address because it transfers an abandoned property to yet another owner with no intention of living there.

Carson also raises the question whether a foreclosing plaintiff must actually bid at the sheriff’s sale. Notably, neither Carson nor the abandoned premises statute explicitly requires a plaintiff to actually bid at the sheriff’s sale. With no sale for the circuit court to confirm, foreclosures of abandoned properties could remain in limbo indefinitely with long-vacated homeowners remaining liable for taxes and fines because title to the property never passes.

Options for lender and servicers

While it may not be possible to prevent an owner in default from abandoning the property, there are options available to lenders and servicers to help avoid a judicial finding of abandonment, while increasing the time needed to assess the equities and timing of a sheriff’s sale.

Pre-foreclosure audit. As a preliminary matter, lenders and servicers contemplating a foreclosure should conduct an exhaustive pre-foreclosure audit to gauge the likelihood that a property in default might be abandoned by its owner. The pre-foreclosure audit should address indicators of actual abandonment, which, in turn, may mitigate the negative effects that often occur between the time of the owner’s abandonment and the lender’s eventual efforts to secure the property. Further, the pre-foreclosure audit should take into account property- and neighborhood-specific conditions that indicate a greater likelihood the property might be abandoned. These conditions might include (i) delinquent property taxes; (ii) whether the property is secured by a non-prime loan; (iii) the occurrence of any prior vacancies; (iv) the extent of any external or internal property damage; (v) potential environmental hazards; and (vi) any existing code violations.

By completing an exhaustive pre-foreclosure audit—and, by extension, obtaining the most up-to-date information on the property and the neighborhood—lenders and servicers are better equipped to assess whether a property is a likely candidate for abandonment and mitigate the risks and uncertainty accordingly.

Property Receiver. Another option available to lenders and servicers is to petition the court to appoint a receiver for the property pursuant to Wisconsin’s property receiver statute.³ While the lender or servicer must still initiate a foreclosure action, moving the court for a property receiver at the onset of the foreclosure process enables a lender to, at a minimum, secure the property and protect it from waste and crime, while avoiding liability for being in actual possession of the property. Under the most favorable circumstances, however, a property receiver may be able to help increase the value of the property until the sheriff’s sale is held.

To obtain a court-appointed property receiver, a lender or servicer is required to show that the property is in danger of being “impaired” – a hurdle which is overcome by proof that the owner abandoned the property and can no longer be found after a reasonable inquiry by the plaintiff.⁴ After being appointed, the receiver is authorized to collect mortgage payments and any rent, make repairs, pay the real estate taxes and obtain insurance, among other things. In addition, the lender is authorized to request a receiver of its own choosing. Therefore, once it is evident the home is in danger of being abandoned, it may be extremely worthwhile to seek the appointment of a property
receiver and avoid the uncertainty of having to sell the property after the five-week redemption period has expired.

One way to maximize the powers of a court-appointed property receiver is to work with experienced counsel in drafting a comprehensive court order for filing with the foreclosure complaint, setting forth in considerable detail the lender’s need for the receiver, along with the receiver’s specific powers over the property. The court order should encompass both current and future property that is subject to the receiver’s powers, and thus secured by the mortgage on the property, including funds borrowed by the receiver for maintenance purposes. Hence, a well-drafted court order can provide a lender or servicer with the flexibility needed to preserve its equity in the property and avoid a judicial finding of abandonment, while at the same time, shifting the risks of possessing the property to the court-appointed receiver. Nevertheless, plaintiffs will have to obtain title to the property through a court-entered judgment of foreclosure to ultimately sell the property to a subsequent owner.

Conclusion

Potential pitfalls still remain for lenders navigating the post-Carson foreclosure landscape. The best way to avoid these pitfalls is to consult an expert about conducting a pre-foreclosure audit and exploring the availability of a court-appointed receiver for the property.

1 See Wis. Stat. § 846.102.
3 See Wis. Stat. § 813.16.
4 See Wis. Stat. § 813.23.

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