

A New Twist on Wisconsin Mortgage Foreclosures and Guaranties

Mar 20 2018

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A March 6, 2018 decision by the Wisconsin Supreme Court requires a new approach to mortgage foreclosures when guaranty liability is also involved.

In *Horizon Bank vs. Marshalls Point Retreat LLC and Marshall's Point Association, Inc. and Allen S. Musikantow*, the Court ruled that the determination by the trial court as to the "fair value" of the winning Sheriff's sale bid, which determination by law also establishes the amount of the credit against the *mortgage* debt, does not necessarily determine the credit against the guarantor's obligation.

The Court interpreted a section of the Wisconsin foreclosure statute (§846.165(2)) which states that:

...no sale shall be confirmed and judgment for deficiency rendered until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

Key to the Court's conclusion is the observation that this statute applies only to the relationship between the mortgage holder and the debt underlying the mortgage. Based on other case law, the Court distinguished guaranty liability from the "mortgage debt" referenced in the statute, stating "[a] guarantor's liability arises not from the debt itself, but from a separate guaranty contract."

The Court concluded that the determination of "fair value" for purposes of confirming the winning sheriff's sale bid is a separate question from the credit to be applied to the amount owed by the guarantor. Different standards may apply to the two determinations. The statutory "fair value" standard for confirmation of a sheriff's sale is recognized by case law to be less than "fair market value" because, among other reasons, a sheriff's sale is involuntary. Conversely, a guarantor's liability is a function of the specific terms of the written guaranty. Separate evidentiary hearings may therefore be necessary to determine the credit against the "mortgage debt" and the credit against the guarantor's liability, even if the claim against the guarantor is brought in the same lawsuit as the mortgage foreclosure.

This decision is unsettling as it disrupts what was considered the finality of sheriff's sale confirmation orders and raises multiple questions about how a credit to the guarantor's liability should be determined. Lenders may wish to re-visit their guaranty forms in light of this case, focusing on the effect of a foreclosure sale of real estate collateral on the guarantor's liability.

More consideration of the sheriff's sale strategy will be necessary, in addition to being prepared with appropriate evidence. First, more advertising than the statutorily required notice of the sheriff's sale may be prudent. Second, one option in foreclosure "fair value" hearings is for the court to not confirm the sheriff's sale and order another sheriff's sale. Whether the hearing is considered the mortgagor's "fair value" hearing or a hearing on the guarantor's credit, such a second sheriff's sale should be perceived as fair by the court in the face of guarantor complaints. This second sale may be less expensive and less time consuming than an evidentiary hearing on the guarantor's credit. The guarantor could do the marketing the guarantor desires in whatever markets the guarantor views as appropriate, at the guarantor's expense.

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