

Wisconsin Supreme Court
Tuesday, November 7, 2017
10:45 a.m.

2016AP832 Horizon Bank, National Association v. Marshalls Point Retreat LLC

Supreme Court case type: Petition for Review

Court of Appeals: District III

Circuit Court: Door County, Judge D.T. Ehlers, reversed and cause remanded with directions

Long caption: Horizon Bank, National Association, plaintiff-appellant, v. Marshalls Point Retreat LLC and Marshall's Point Association, Inc., defendants, Allen S. Musikantow, defendant-respondent-petitioner

Issues presented:

- Where a foreclosure on mortgaged premises involves a guarantor, does Wis. Stat. § 846.165 require the trial court to determine the amount to be credited against the guarantor's obligation before confirming a sheriff's sale, or does the trial court have discretion to reach that issue later?
- If the trial court must determine the amount to be credited against a guarantor's obligation in connection with confirming a sheriff's sale, does the guarantor have a due process right to present evidence on the question of fair value?

Some background: In May of 2010, Horizon Bank loaned \$5,000,000 to Marshalls Point Retreat LLC. The loan was secured by a mortgage on property in Sister Bay. Allen S. Musikantow provided a continuing guaranty of payment for the loan.

In 2015, Marshalls Point defaulted on the loan by failing to pay the balance due at maturity. The bank filed a foreclosure action asserting a claim to foreclose the mortgage on the property and a claim against Musikantow seeking a money judgment for the outstanding balance of the loan, pursuant to the terms of his guaranty.

The parties entered into a stipulation and order for judgment for foreclosure. The circuit court entered judgment on the stipulation on Sept. 10, 2015. The judgment stated that Marshalls Point owed Horizon Bank \$4,045,555.55, and it granted the bank a money judgment against Musikantow in that amount.

The judgment further provided the Sister Bay property would be sold at a sheriff's sale, and “[t]he amount paid to [Horizon Bank] from the proceeds of said sale of the Premises, remaining after deduction by [Horizon Bank] of the amount of interest, fees, costs, expenses, disbursements and other charges paid or incurred by [Horizon Bank] not included in the monetary judgment against [Musikantow] (set forth below) shall be credited by [Horizon Bank] as payment on said monetary judgment.”

Horizon Bank was the successful (and only) bidder at the sheriff's sale with a bid of \$2,250,000. Horizon Bank moved to confirm the sale, asserting that its bid represented the “fair value” of the property. The bank asked the circuit court to reduce the amount of the money judgment against Musikantow by the amount of the bank's winning bid.

In response, the defendants indicated they had no objection to either a statutory fair value finding or final confirmation of the sale provided those actions have no preclusive effect on a future determination of the amount of Musikantow's credit.

Before moving to confirm the sale, the bank had filed a federal action against Musikantow in U.S. District Court for the Middle District of Florida, where he lives.

At the close of the hearing, the circuit court granted the bank's motion for confirmation of the sheriff's sale, finding that the bid price of \$2,250,000 represented the "fair and reasonable value for the property." The court also granted Musikantow's oral motion and declined to rule on the credit to be applied to the money judgment against him. Musikantow indicated he had a witness who was prepared to testify that the property had a "market value" in excess of \$10,000,000.

The court said it would not address the credit to be applied to the money judgment because the guaranty clearly indicated it was to be governed by federal law. Counsel argued the amount of the credit to be applied against the money judgment was "more likely to be litigated in the State of Florida."

The circuit court entered an "Order Confirming Sheriff's Sale," confirming the sale of the property to Horizon Bank and stating that the amount bid by the bank represented the fair value of the premises. The court crossed out the final paragraph of the order, which stated the amount due under the judgment entered against Musikantow.

The court also entered an order stating that in light of the language in the guaranty document indicating it was to be governed by federal law, granting Musikantow's motion to decline to make a finding of the amount to be credited against the bank's judgment against him. The order said the court "will, if requested by a Federal Court, make a determination as to such amount to be credited against the judgment."

The bank appealed that order. The Court of Appeals reversed and remanded. The Court of Appeals concluded the circuit court misinterpreted the governing law provision. It said there was no reason why the circuit court could not apply whatever law was appropriate, whether it be Wisconsin law, federal law, or Indiana law, in order to determine the appropriate credit to apply to the money judgment against Musikantow. The appellate court concluded that the circuit court erred in refusing to determine the amount of the credit and should have applied a \$2,250,000 credit toward the money judgment against Musikantow.

Musikantow argues that § 846.165, Stats., does not require the credit determination mandated by the Court of Appeals. He says there is nothing in ch. 846 to prohibit trial courts from doing exactly what the trial court did here. He says the "credit" referenced in § 846.165(2) is a credit "on the mortgage debt," not on any judgment obtained against a third-party guarantor.

Musikantow argues, among other things, that tying guarantors' credit amounts to lenders' credit bids violates the common law rule against double recovery. He says he was prepared to prove that the value of the property is several times the amount of the bank's bid and in light of that fact the Court of Appeals' interpretation of the parties' stipulation should have been guided by the common law rule against double recovery.

The bank says this claim ignores the fact that Musikantow appeared with his attorney for a confirmation hearing scheduled to last three hours so he could present his valuation evidence, but then he affirmatively chose not to present it. The bank says the Court of Appeals enforced the terms of the judgment stipulated to by Musikantow.

The bank argues if a guarantor thinks a lender's bid at a sheriff's sale was too low, then the guarantor should bid the price up to take the opportunity to acquire a valued property at a discount or the guarantor should challenge the fair value finding and force a resale if the amount bid shocks the conscience of the court. The bank says Musikantow did neither.