SUPREME COURT OF WISCONSIN

HORIZON BANK, NATIONAL ASSOCIATION

Plaintiff-Appellant,

Appeal No. 2016AP000832

vs.

MARSHALLS POINT RETREAT LLC and MARSHALL'S POINT ASSOCIATION, INC.

Defendants,

Circuit Court Case No. 15-CV-125

ALLEN S. MUSIKANTOW,

Defendants-Respondent-Petitioner.

BRIEF OF WISCONSIN BANKERS ASSOCIATION AS *AMICUS CURIAE*

Dated: July 10, 2017.

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INTRODUCTION

The Wisconsin Bankers Association ("WBA") appears in this appeal to urge the Supreme Court to uphold the decision of the Court of Appeals ("Decision"). The Decision holds that the circuit court erred by refusing to determine the amount of the credit to be applied against the money judgment against Allen Musikantow, the guarantor ("Guarantor"), and remanded with directions that the circuit court apply the amount of the confirmed winning bid at the sheriff's sale to judgment. The WBA agrees with the Decision, which supports the well-settled foreclosure process in Wisconsin, promotes judicial efficiency and is the appropriate interpretation of the Stipulation signed by the Guarantor, Marshalls Point Retreat LLC ("Borrower") and Horizon Bank ("Bank"), which should control the outcome in this case. The WBA agrees with the Court of Appeals and the Bank that the Stipulation governs, and that Guarantor's due process arguments and his arguments about what §846.165 requires, permits or prohibits are not applicable to the question of whether Guarantor should be allowed to re-litigate fair value. Further, the WBA agrees with the Bank that the guarantor had ample opportunity to assert his position on the value of the property, which is the essence of due process. It appears the guarantor does not like the fair value determined by the court, and does

not want to be held to the contract into which he freely entered, and now wants another bite at the apple.

The foreclosure process as it unfolded in this case is typical, and appropriately balances the interests of lenders, borrowers and guarantors. It provides for a fair process, yet promotes judicial efficiency and avoids unnecessary additional litigation. Changing the well-established rules in a case that is, in essence, a case of contract interpretation because a guarantor is unhappy with the contract he signed will create uncertainty for lenders. Uncertainty in loan administration and collection, and the specter of duplicative litigation on the issue of value, will increase the costs of lending. Further, these extra costs have not been built into the huge numbers of real estate loans that have already been underwritten, priced and made. The WBA urges this Court to uphold the Decision.

INTEREST OF THE *AMICUS CURIAE*

WBA is an organization of state and national banks, savings banks and savings and loan associations with offices in Wisconsin. WBA regularly represents the interests of its membership in significant judicial proceedings, including by appearing as *amicus curiae* in appeals before the Wisconsin Supreme Court. Real estate lending is a major part of banks' business and a major driver of the state's economy, and banks regularly make loans secured by real estate. These loans often include a guaranty of the borrower's debt by a third party. In this case, the guarantor was also the owner of the borrower. Foreclosing on real estate and seeking recovery under a guaranty when a borrower defaults takes place regularly throughout Wisconsin, and lenders follow a well-defined, well-settled process. Changing the process and the rules that govern it in the manner sought by the guarantor, solely because a guarantor has remorse over a contract he freely signed and a poor strategic litigation decision he freely made, would create unnecessary uncertainty and expense for loans already in place and those to be made in the future. Obviously this is of concern to Wisconsin lenders.

The issues raised in this appeal are highly relevant and of statewide concern to banking interests, and this Court's decision could significantly

affect those interests if the Court adopts the analysis and principles suggested by Guarantor. For the reasons stated below, however, the Court should reject that analysis and refuse to substantively change existing law.

The Court should uphold the Decision.

STATEMENT OF THE CASE

The situation here is common throughout Wisconsin. Bank made a loan to Borrower, secured by real estate. A third party, typically with a connection to Borrower (here, Guarantor, Borrower's owner) provides an unlimited guaranty of the debt. Borrower defaults on the debt, and Bank proceeds against Borrower to secure the collateral (the real estate), and against Guarantor under the separate guaranty. Bank joins its claims against both Borrower and Guarantor in the same lawsuit, as is its right, to avoid multiple lawsuits. Often, as happened here, the parties will stipulate to the entry of judgment on the lender's claims, particularly if there is no question that the borrower defaulted, and that the lender clearly has the right to recovery from the borrower and the guarantor. The written stipulation of judgment ("Stipulation") is in essence a contract between the parties to the litigation, see *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶13, 257 Wis. 2d 421, 651 N.W.2d 345 (2002), agreeing to the disposition of the lender's claims and thereby allowing everyone to avoid expensive and unnecessary litigation. Here, importantly, counsel for all three parties – Borrower, Bank and Guarantor – signed the Stipulation.

In this case, the Stipulation contained an Order for Judgment ("Order"), later signed by the circuit court, stating that Borrower owed

Bank approximately $4,000,000, and granting Bank a money judgment in that amount against Guarantor. The Stipulation also includes the language appearing throughout the briefs in this case, which is the crux of the Decision:

> The amount paid to Plaintiff from the proceeds of said sale of the Premises, remaining after deduction by Plaintiff of the amount of interest, fees, costs, expenses, disbursement and other charges paid or incurred by Plaintiff not included in the monetary judgment against [Guarantor] . . . shall be credited by Plaintiff on said monetary judgment.

In the Stipulation, Guarantor "reserve[s] all rights, objections and defenses available to [him] under Section 846.165 . . . in the event [Bank] applies to the Court for confirmation of a foreclosure sale of the Premises", thereby specifically reserving his right to contest "fair value" before the sale was confirmed.

Per the Order, the property was sold at a sheriff's sale. A sheriff's sale is a public auction of the property, notice of which is published in advance and at which anyone can bid on the property. A sheriff's sale therefore serves as a market check on the value of the property. Despite the public opportunity to bid, Bank was the only bidder with its bid of $2,250,000. Bank would thereafter take title to the property upon confirmation of the sale.

The Bank then moved to have the circuit court confirm the sale pursuant to §846.165. Bank asserted that its credit bid represented the property's "fair value", and submitted two valuation affidavits in support. It indicated that it would not seek a deficiency judgment, which would have been an unsecured money judgment against Borrower because the sheriff's sale did not produce sufficient funds to pay the underlying loan in full. Bank also asked the court to reduce the amount of the money judgment against Guarantor by the amount of Bank's credit bid, in accordance with the Stipulation.

Here, confirming the sale required two hearings, on December 2, 2015 and December 22, 2015. One explicit statutory purpose for the confirmation of sale (in a case, like this one, where the property sold for less than the amount of the debt) is to satisfy the court that "the fair value of the premises sold has been credited on the mortgage debt, interest and costs." Guarantor apparently disagreed that $2,250,000 was the property's fair value, and stated in the hearings that he brought witnesses to testify to its correct (and presumably higher) value. However, he chose not to put on the witnesses and challenge fair value. Had he done so, he perhaps could have prevented confirmation of the sale, which would have resulted in the property being put up for public auction again. This is the established,

appropriate process §846.165 provides to parties to help ensure the property has sold at fair value, and Guarantor unilaterally decided to eschew it. The circuit court determined "fair value" to be $2,250,000.

All that said, the question of how much should be credited to Guarantor's obligation to Bank is not expressly governed by the §846.165.[1] The question in this case is governed by the Stipulation and Order (together, the "Stipulated Judgment"), which require the net proceeds of the sheriff's sale to be credited to the monetary judgment against the Guarantor. As dictated by the Stipulated Judgment, Bank moved the circuit court to reduce the amount of the money judgment against Guarantor by the amount of Bank's winning credit bid. Guarantor, not liking the amount paid by the sole bidder in the public sheriff's sale and, consequently, the deal he struck in the Stipulation, asked the court to not rule on the credit to be applied to the money judgment against Guarantor. The circuit court chose not to rule. The Court of Appeals, based on the Stipulated Judgment, concluded that the circuit court should have applied a $2,250,000 credit to the money judgment against Guarantor. The WBA agrees with the Court of Appeals.

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[1] As discussed further below, there is a relationship between fair value under §846.165 and a guarantor's credit amount; one that dictates the <u>same</u> credit be applied.

ARGUMENT AND POLICY CONCERNS

WBA agrees with the Decision, and with the analysis of law provided by the Court of Appeals and Bank with respect to the facts of this case.

Guarantor's arguments about §846.165 and due process are red herrings. Section 846.165 was followed in this case. As required under the statute, the circuit court evaluated the evidence presented to it, and determined that $2,250,000 was the "fair value" of the property based on the results of the public sheriff's sale and Bank's supporting affidavits.

At its core, this is a contract interpretation case. Specifically, what did the language of the Stipulation quoted above require to be credited to reduce the money judgment against Guarantor? WBA agrees with Bank's analysis in its brief to this Court and conclusion that the language of the Stipulation means the amount of the winning credit bid should be credited against the Guarantor's obligation. It also agrees, for the reasons articulated by Bank, that even absent the Stipulation, the credit bid, once determined to be fair value, is the appropriate amount to be credited against Guarantor's obligation and should have been applied in the same, unified proceeding in which the sheriff's sale was confirmed. WBA agrees with Bank's interpretation and application in this case of *McFarland State Bank*

v. Sherry, 2012 WI App 4, 338 Wis. 2d 462, 809 N.W.2d 58 (2011), and *Crown Life Ins. Co. v. LaBonte,* 111 Wis. 2d 26, 330 N.W.2d 201 (1983), as explained in detail in Bank's brief. Further, the fact that the Stipulation reserves Guarantor's right to contest "fair value" under §846.165 before the sale was confirmed demonstrates the meaning of the "credit" language quoted above. This reservation of rights only has legal significance if "fair value," as confirmed by the court, is intended to be the amount credited against Guarantor's obligation under the guaranty. If not intended to establish the amount of the credit, Guarantor would have no interest in contesting the "fair value."

If the property was really worth much more than $2,250,000, as Guarantor claims, Guarantor had substantial practical options to prevent the Bank from taking the property at a sheriff's sale. As Borrower's owner, he could have infused capital into Borrower to pay Bank and Borrower could have avoided default. After default, he could also have offered more than Bank's allegedly low bid at the sheriff's sale and taken the property for himself.

More importantly, Guarantor could have paid off Borrower's debt even after default, up until the point of the confirmation of sale, and personally subrogated to the rights of the Bank. *Cunningham v.*

Metropolitan Life Ins. Co., 121 Wis. 2d 437, 443-44, 360 N.W.2d 33, 36 (1985) ("Subrogation is an equitable remedy which operates when a victim of loss is entitled to recover from two sources, one of whom bears a primary legal responsibility. If the secondary source pays the obligation, it succeeds to the rights of the party it has paid, against the third party, who was the primarily responsible party.") He could have assigned this right of subrogation to a third party interested in taking property worth, allegedly, more than $10,000,000 in exchange for a $4,000,000 loan payoff. All of these would have made sense if the property was truly worth as much as Guarantor alleges.

Importantly, given Guarantor's due process claims, not only was he the owner of Borrower, he was also an actual party to the confirmation of sale proceeding. He could have brought forth his evidence that $2,250,000 was below fair value, and tried to convince the court to put the property out again for bid (potentially increasing the price). But he chose not to. As Bank argues, the *results* of legal process do not determine whether Guarantor received "due process". Guarantor had not one, but two opportunities to present to the circuit court his evidence that $2,250,000 was not the fair value (despite having been the result of an open market, publicly announced sheriff's sale, and supported by Bank's affidavits). He

voluntarily chose not to present the evidence or challenge the value determination in either of the confirmation hearings.

Similarly, he voluntarily chose to sign a Stipulation that, consistent with Wisconsin case law, required Bank's winning bid at the sheriff's sale to be the amount credited to his obligation. Guarantor made a strategic decision to enter into the Stipulation, and another to accept the "fair value" finding without challenge in the proceeding where it could have been challenged. He should not now get an opportunity to force Bank to re-litigate fair value because he did not like how all of his strategic choices turned out.

As for Guarantor's apparent assertion that he should have a chance to re-litigate value because Bank was the winning bidder (as opposed to a third party), this distinction is irrelevant both under *McFarland* and the Stipulation for the reasons explained by Bank in its brief, and makes no sense. No purpose is served in treating the judicial sale results differently based on who enters the highest bid. The winning bidder is the winning bidder. If the winning bid is less than the amount of the debt, oversight is provided through the court's review and confirmation (or rejection) that the bid represents "fair value," regardless of who submits the winning bid.

WBA agrees wholeheartedly with Bank's description of the policy implications of changing the law as requested by Guarantor. Lenders want to get repaid. They are not waiting in the wings to take real property. Neither they nor their regulators want them to be in the real estate business. The banking statutes and regulations impose strict restrictions on the power of national and state banks' power to invest in and hold real property. *E.g.* 12 USC 29; 12 C.F.R. §§362.1-362.5. Lenders also want in place clear, certain rules and procedures which allow them to better price and administer their loans. The mortgage foreclosure and sale confirmation process is long-standing, balanced, and well-established. This process gives lenders established mechanisms to attempt to recoup their money when a borrower defaults, yet includes protections designed to help preserve the value ascribed to the collateral. Lenders, borrowers and, when joined, guarantors have a statutorily protected opportunity to argue fair value. Once the court rules, all parties have certainty that the value is settled. The possibility of different credits for borrowers and guarantors, as proposed by Guarantor, will create uncertainty and make it difficult for lenders to price loans.

Further, because an unlimited guaranty is an independent obligation to pay the full amount of the debt upon default, a lender does not have to

proceed against the borrower or the collateral before seeking payment directly from the guarantor. The fact that Bank chose to join its claims against the Guarantor with its claims against the Borrower, resulting in efficiency for all parties, in fact gave Guarantor an opportunity to challenge "fair value" as a party to the sale confirmation that he otherwise would not have. To say that a guarantor made party to the confirmation of sale, who is given (but rejects) an opportunity to challenge "fair value", can toss out both the Stipulation he freely agreed to and the court's "fair value" determination because the lender happened to be the highest bidder at the sheriff's sale disrupts the certainty provided by the current system. A bank often will want to join guarantors and borrowers. All parties often will want to enter into a Stipulated Judgment to avoid unnecessary litigation. A bank cannot predict whether it will be the highest bidder at the sheriff's sale. Under the Guarantor's approach, a bank, particularly one that takes or agrees to steps designed to reduce the cost of loan collection, would face the possibility of having to litigate the same issue – value – more than once. Uncertainty raises the costs of lending, and ultimately hurts borrowers and the economy.

CONCLUSION

For the reasons provided herein, WBA respectfully urges this Court to uphold the decision of the Court of Appeals.

Dated this 10th day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font: proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quote and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,844 words.

Dated: July 10, 2017.

Kirsten E. Spira, State Bar No. 1023803

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: July 10, 2017

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