

REMEDIES IN LENDER WALKAWAYS

Lou Jones Breakfast Club

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A. Description of Lender Walkaways

- There is a troubling trend of “lender walkaways” where lenders initiate foreclosure proceedings only to later abandon them, causing substantial injury not just to the borrower and the property at issue but to entire neighborhoods and the City.¹ Homeowners are often left holding the bag on property the lender sought to foreclose on. The City of Milwaukee imposes responsibility for property maintenance on lenders during the pendency of a foreclosure action. After obtaining judgment of foreclosure, it is not uncommon that lender takes no further action to conduct the sheriff’s sale and confirmation of sale, often releasing the lis pendens without notice to homeowner which improperly suggests that this foreclosure action had terminated and gets the lender off the hook with the City.²
- A homeowner often discovers that she/he still holds title to the property through the City of Milwaukee’s Department of Neighborhood Services when orders are issued on the home that the homeowner thought had been turned over to the lender. Sometimes, the homeowner’s first notice of the problem is a traffic stop, when it is discovered that there is a warrant for the homeowner’s arrest due to her/his failure to respond to code compliance actions.
- It is estimated that there are thousands of homes in Milwaukee County where the lender, after having sought foreclosure, has simply walked away. The homes become a blight on our neighborhoods, contributing to a decline in property values and neighborhood decay.

¹ See, e.g., Cary Spivak, *Lenders Abandoning Foreclosed Properties: “Walkaway” Properties Quickly Deteriorate, Dragging Down Borrowers and Neighborhoods*, Milwaukee Journal-Sentinel (July 11, 2009); U.S. Government Accountability Office, *Mortgage Foreclosures: Additional Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures* 29-39, 42-44 (Nov. 2010); *Left Behind: Troubled Foreclosed Properties and Servicer Accountability in Chicago* (Woodstock Institute Jan. 2011).

² See, *Zweber v. Melar, Ltd.*, 2004 WI App 185, ¶15, 276 Wis. 2d 156. (“A lis pendens under Wis. Stat. §840.10(1) must be maintained as long as there are pending proceedings in an action, including appellate proceedings. . . . Once all proceedings are concluded, the court may order the lis pendens discharged consistent with Wis. Stat. §840.10(3).”)

B. Contempt Motions - Foreclosure judgment orders that the property be sold at a sheriff's sale. Any action inconsistent with such an order can be considered contempt.

- Motions for remedial contempt and imposition of sanctions pursuant to Wis. Stat. §785.04(1) and §815.02 to require the lender to comply with the judgment it sought and remedy losses lender has caused. Homeowners may ask the Court to require lender to schedule sheriff's sale and confirmation hearing and for other sanctions to compensate the homeowner for damages caused by failure to proceed with sale and/or confirmation of sale.
- The law is clear that a party is obligated to follow a Court's judgment if it has not obtained relief from the judgment and that violating such a judgment can subject a party to contempt proceedings. See, e.g. *Rensfeldt v. Haberman*, 2009 WI 77, ¶ 37, 319 Wis. 2d 329 (requiring compliance even if a judgment was entered in error if it has not been modified.). An order or judgment that requires specific conduct (e.g. sale of property) can be enforced by contempt. See, e.g. *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶17, 305 Wis. 2d 443 and Wis. Stat. § 815.02.

C. Court's Inherent and Statutory Power to Impose Sanctions Including Dismissal with Prejudice for Failure to Prosecute and Failure to Comply with the Court's Order.

- In addition to its contempt power, the Court has both statutory and inherent authority to sanction parties for failure to prosecute and/or failure to comply with Court orders. Wis. Stat. § 805.03 and §804.12(2)(a)2; *Schaefer v. Northern Assurance Co. of Am.*, 182 Wis. 2d 148, 162-163, 513 N.W. 2d 615 (Ct. App. 1994).
- Foreclosure in Wisconsin is equitable in nature. *Mutual Federal Savings & Loan Assoc. v. American Medical Services*, 66 Wis. 2d 210 (1974). See also: *GMAC v. Mortg. Corp. v. Gisvold*, 215 Wis. 2d 469, 480, 572 N.W. 2d 466 (1998). Foreclosure, therefore, are subject to equitable defenses. *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 383, 254 N.W. 2d 463 (1977). The equitable doctrine of unclean hands prevents a party from benefiting from any inequitable or wrongful conduct. *S & M Rotogravure Ser., Inc., v. Baer*, 77 Wis. 2d 454, 466, 252 N.W. 2d 913 (1977).

D. Other Possible Claims

- Imposition of a "reasonableness" standard into the time frame for conduct of sheriff's sale. The order for judgment, reads, in part, something similar

to: "That. . . unless sooner redeemed, said premises shall be sold at public auction under the direction of the sheriff, at any time after three months from the date of entry of judgment." Lenders argue that the sale can be conducted *at any time* after the redemption period expires. We argue that "at any time" does not mean into perpetuity, but rather that the lender is free to sell without any further limitations. We also argue that a foreclosure judgment is unlike a standard judgment, which allows ten years to collect, but more like a writ of restitution, which must be exercised within a short time period.

- Negligence - Two Milwaukee County Judges have encouraged the borrower to bring tort actions against Lenders for damages.
- Committing Waste – Early notice to homeowner of intent to walk away to prevent waste and personal service of notice on homeowner.
- Property Tax Defense - If property was foreclosed on years ago, but never sold at a sheriff's sale, it is possible to join the Lender as a third-party defendant for indemnification/contribution and to assert tort claims. I also think slander of title is viable, albeit requiring a broad reading of the statute.

Two Foreclosure cases that help explain some of the unique procedural issues involved.

Shuput v Lauer, 325 N.W.2d 321, 325-326.

Bank Mutual v SJ Boyer Construction, 2010 WI 74, ¶¶ 30, 68-72