

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2591-FT

Cir. Ct. No. 2007CV85

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHASE HOME FINANCE, LLC,

PLAINTIFF-APPELLANT,

V.

RICHARD NELS PEARSON,

RESPONDENT,

SANDRA M. NETZ AND MICHAEL S. NETZ,

DEFENDANTS.

APPEAL from an order of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Chase Home Finance, LLC appeals an order distributing a deposit made following a sheriff’s sale of foreclosed property.¹ Chase argues it was entitled to a forfeiture of the entire deposit pursuant to WIS. STAT. § 846.17. We disagree and affirm the order.

BACKGROUND

¶2 Chase foreclosed on a property that was then sold at a sheriff’s sale. Richard Pearson outbid Chase with a \$265,000 offer. The notice of foreclosure sale required the buyer to pay ten percent of the successful bid to the sheriff, with the remaining balance to be paid no later than ten days after the court’s confirmation of sale, or the deposit would be forfeited. The notice further stated the property was being sold as-is.

¶3 At the confirmation of sale hearing, Pearson asked the court to not confirm the sale, order a resale, and refund the entire deposit, because he had discovered problems with the property after the sale. Pearson’s counsel asserted the home was poorly constructed and severely damaged. Among other things, he claimed there was an unprotected, two-foot-square opening in one of the exterior walls where an air conditioner had been removed. He also surmised the home “quite possibly could be a complete knockdown.” Finally, he argued the court should use its equitable powers to reject the sale, because Pearson estimated the property’s value at \$140,000.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Chase responded that the sale was an as-is purchase, sight unseen. It argued Pearson therefore bore the risk of purchasing at a sheriff's sale, and the cost of cancelling a sale was forfeiture of the deposit if the buyer did not pay the purchase price within ten days of confirmation, pursuant to WIS. STAT. § 846.17.

¶5 The court stated it could not decide the issue at that time and would order the deposit held with the clerk of court's office pending further order. The following exchange then took place:

THE COURT: ... I do order a resale since the bidder has declined to buy. And so I think no matter what we have to resell the property. Do you agree [Chase's counsel]?

[CHASE'S COUNSEL]: Uh-huh, I do, your honor.

THE COURT: So I'm going to order resale, and the status of the \$26,500 is up in the air.

The court then ordered the parties to submit written briefs, which they did.

¶6 The court subsequently signed an order stating the sheriff's sale "is not confirmed and is vacated and the subject property may again be sold."² Chase then moved for further proceedings, seeking clarification of the court's findings at the confirmation hearing. The court responded with a note stating "the property is to be re-sold ASAP" and it would equitably determine the deposit's distribution after the resale. At the resale confirmation hearing, the court awarded ten percent of the deposit to Chase in consideration of its resale costs and ordered a refund of the remainder of Pearson's deposit. It is from this order to return the deposit that Chase appeals.

² The order, dated April 7, also ordered briefing on the issue of apportioning the deposit, to be completed by March 31. The briefs had already been filed at the time of the order.

DISCUSSION

¶7 Chase contends the circuit court erroneously exercised its discretion in not confirming the first sheriff's sale, not determining the fate of the deposit until after the second sale, and returning ninety percent of the deposit.³ We agree with Pearson, however, that Chase waived the first two arguments.

¶8 Chase failed to press its argument for confirmation of the sale at the first hearing. Instead, when the court suggested a resale was necessary, Chase merely acquiesced and agreed to a resale and to brief the deposit issue. Chase's agreement to a resale necessarily meant the court would not confirm the sale. We will not review invited error. *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

¶9 Additionally, Chase did not object to the failure to confirm the sale, either at the hearing or after the court issued its order vacating the sale. Nor did Chase request a confirmation of sale in its brief in support of its motion for further proceedings. Further, when the court responded with its note ordering a resale "ASAP," Chase did not object to the court's decision to address the deposit issue after the resale. Instead, Chase waited until this appeal to raise these issues, after it was dissatisfied with the court's apportionment of the deposit at the subsequent confirmation hearing. This court has consistently held it will not consider issues raised for the first time on appeal. *Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). Therefore, Chase's failure to timely object constitutes a

³ Chase actually uses the disfavored phrase "abuse of discretion." The proper phraseology is "erroneous exercise of discretion." See *City of Brookfield v. Milwaukee Metro. Sewer. Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

waiver of its arguments that the court erroneously failed to confirm the sale and delayed its determination of the deposit matter. *See id.*

¶10 We next address Chase's argument that the circuit court erred by not ordering forfeiture of Pearson's entire deposit. WISCONSIN STAT. § 846.17 states if the purchaser fails to pay the remainder of the purchase price within ten days after the confirmation of sale, the deposit is forfeited. However, it also states if the sale is not confirmed, the deposit shall be returned to the purchaser. *Id.* Here, even though the sale was not confirmed, the circuit court ordered ten percent of the deposit forfeited to Chase as a matter of equity. Chase's argument therefore fails because it already received more than it was entitled to under the statute.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(5).

