

IN THE SUPREME COURT OF OHIO

WADE KAPSZUKIEWICZ,
AS TREASURER OF LUCAS
COUNTY, OHIO

Plaintiff-Appellee,

-vs-

KARL C. MAUNNZ, TRUSTEE, et al.,

Defendants-Appellants.

* S.C. No. 2008-1361

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* On Appeal from the
* Lucas County Court
* of Appeals, Sixth Appellate
* District

* Court of Appeals

* Case Nos. 007-1361 and 07-1247

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MEMORANDUM IN RESPONSE OF APPELLEE, WADE KAPSZUKIEWICZ AS
TREASURER OF LUCAS COUNTY, OHIO

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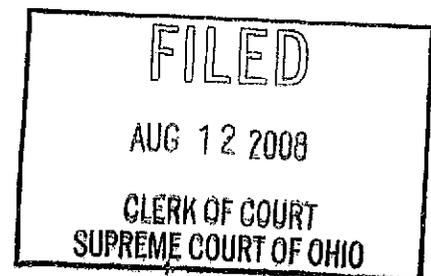


TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS CASE DOES NOT PRESENT ISSUES OF PUBLIC OR GREAT GENERAL INTEREST NOR DOES IT RAISE SUBSTANTIAL CONSTITUTIONAL ISSUES	1
ARGUMENT	3
Proposition Of Law No. 1:	3
To Pass Title To Real Property At Sheriff's Sale Upon Foreclosure, Strict Compliance With Foreclosure Statutes Is Required.	3
Proposition of Law No. 2:	4
The Foreclosure Statute, R.C. 5721.18 When Construing Division (A) (B) (C) And (D), Limits Division (A) To Application To Foreclosure Actions Initiated Less Than 2 Years Following The Certification Of The Tax Delinquency Unless The Prosecuting Attorney In The Complaint Sets Forth Grounds That Divisions (B) And (C) Which Apply To Actions Initiated More Than Two Years Following The Certification Of The Tax Delinquencies, Are Precluded By Law.	4
Proposition No. 3:	5
The Issue That A Complaint Fails To State A Claim May Be Raised For The First Time In The Reviewing Court.	5
CONCLUSION	8
CERTIFICATION	8

EXPLANATION OF WHY THIS CASE DOES NOT PRESENT ISSUES OF
PUBLIC OR GREAT GENERAL INTEREST NOR DOES IT RAISE
SUBSTANTIAL CONSTITUTIONAL ISSUES

This case does not present any issues worthy of the Court's consideration. It does not present any issues of public or great general interest and it certainly does not provide any substantial constitutional questions. Based on the long and tortured history of this matter, Appellee, Mr. Kapszukiewicz, Treasurer Of Lucas County, suspects this appeal was filed by Appellants, Karl C. Maunz, as Trustee and as an Individual, solely to further delay paying his delinquent real estate taxes.

Appellee waited four years from certification of the four parcels at issue as delinquent before finally filing this tax foreclosure case. Mr. Maunz has been treated with fairness and patience by the Treasurer and has had far more than ample time to redeem these parcels.

He has reciprocated by failing to pay his debt and by delaying this matter at every opportunity. Since he is unable, or unwilling, to redeem the parcels, the foreclosure process should be allowed to proceed.

Further, unlike those unfortunate people whose financial woes are largely due to the recent economic slump and/or related mortgage mess, Mr. Maunz's delinquency began mounting several years ago and he is primarily responsible for his own predicament.

It should also be stressed that Mr. Maunz is not desperately clinging to his home in this matter. Rather, the delinquent property is a business investment for him. While sympathetic to his plight, the Treasurer contends that Mr. Maunz

should not be allowed to continue owning these parcels without having to pay their property taxes. It is unfair to those, grappling with similar circumstances, who at least make an effort to resolve the matter.

Nothing compels the Court to review this matter. There is no dispute that Mr. Maunz is responsible for this ancient delinquency nor that he was properly served with the complaint. Further, having no credible defense for his delinquency, there is no valid reason for the Court to spend it's valuable time and resources indulging his irresponsibility.

Real estate taxes fund many important government functions such as our public schools, metro parks, libraries, zoos, emergency services as well as programs for our children and senior citizens. Mr. Maunz should not be allowed to continue shirking payment of the real property taxes owed for his investment parcels at the expense of the community.

Thus, it is obviously better for all concerned for the decisions of the trial court and an unanimous court of appeals to be left undisturbed.

ARGUMENT

Proposition Of Law No. 1:

To Pass Title To Real Property At Sheriff's Sale Upon Foreclosure, Strict Compliance With Foreclosure Statutes Is Required.

Mr. Maunz contends that all tax foreclosures are in rem, as opposed to in personam, proceedings. He cites two cases to bolster this contention. These cases, upon careful analysis of their holdings, however, provide it with little, if any, support.

In Hunter v. Grier, 173 Ohio St. 158, (1962), the Court held that in a tax foreclosure filed against the pending estate of a deceased owner, it probably suffices to name the executrix as a party defendant as opposed to each devisee named in the will. Further, quoting 3 Cooley's Law of Taxation (4 Ed.), 2775, Section 1405, it supports the naming of owners in tax foreclosures in consideration of "tenderness to their interests, and in order to make sure that the opportunity for a hearing is not lost to them." Hunter at 162.

Accordingly, based on this opinion, prudence dictates naming anyone with a legal property interest as a defendant in tax foreclosures.

Further, in James v. Devore, 8 Ohio St. 430(1858), cited by Mr. Maunz and referred to by the Court in Hunter, the Court held that tax foreclosures are "not merely" in personam procedures. Jones at 431. This indicates that the Court considered such foreclosures to be a mixture of in personam and in rem.

Both opinions warrant the naming of title owners as defendants in tax foreclosures.

This is consistent with the provisions of Ohio Revises Code 5721.18. Division (A), pursuant to which the Treasurer filed this case, and (B), both require that the owner be named and served as a defendant and that a title-search be completed as to all delinquent

parcels so that all entities with a legal property interest in them can be named and served as defendants.

Proposition of Law No. 2:

The Foreclosure Statute, R.C. 5721.18 When Construing Division (A) (B) (C) And (D), Limits Division (A) To Application To Foreclosure Actions Initiated Less Than 2 Years Following The Certification Of The Tax Delinquency Unless The Prosecuting Attorney In The Complaint Sets Forth Grounds That Divisions (B) And (C) Which Apply To Actions Initiated More Than Two Years Following The Certification Of The Tax Delinquencies, Are Precluded By Law.

The Treasurer, through the County Prosecutor, property taxes having been delinquent for many years, correctly filed the foreclosure suit under Ohio Revised Code 5721.18 (A). Mr. Maunz insists that since the taxes were certified delinquent more than two years before the filing of the complaint, the Treasurer was required to file under (B), providing for in rem foreclosures, unless precluded by law.

However, post-two years from certification, the Treasurer has the option of filing under (A) or (B). This is indicated by the text of (B), which reads:

Foreclosure proceedings constituting an action in rem may be commenced after the end of the second year from the date on which the delinquency was first certified by the Auditor.

The use of "may" indicates that the Prosecutor, post-two years from certification of delinquency, has the option of proceeding under (A) or (B).

Ohio Revised Code 5721.18's legislative history supports this interpretation. As previously noted, the current statute's use of "may" in (B) provides, after two years have passed since certification of delinquency, a choice between (A) or (B). Previous versions of the statute, however, only provided that foreclosures initiated after a specific amount of

time had elapsed from certification of delinquency constituted an in rem action. Am. Sub. H.B. No. 1327 and Am. Sub. H.B. No. 603.

Under these provisions, an in personam action could only be filed if the Treasurer could explain why he was precluded by law from filing an in rem foreclosure. The inclusion of this preclusion exception in the current Ohio Revised Code 5721.18, however, is an obvious legislative oversight. Considering the option now provided under (B), (D) does not apply and should be deleted.

Regardless if the Treasurer chooses to foreclose under (A) or (B), however, the consequences are the same for Mr. Maunz. There is no substantive difference in the consequences for Mr. Maunz between the two divisions. Both (A) and (B):

- 1.) Require the title owner to be named and served as a defendant;
- 2.) Require title-work to be obtained so that all parties with an interest in the delinquent parcel can be named and served;
- 3.) Provide for deficiency judgments against the title owner and
- 4.) Hurt a title-owner's credit-rating.

Thus, delay of the inevitable is the only advantage gained by Mr. Maunz in continuing to contest this tax foreclosure. Obviously, this selfish quest does not merit the Supreme Court's attention.

Proposition No. 3:

The Issue That A Complaint Fails To State A Claim May Be Raised For The First Time In The Reviewing Court.

Regardless of the merit of Mr. Maunz's argument, however, it may not be considered on appeal. He waived the right to assert this defense by failing to raise it in the trial court. The court of appeals held that "it is well-settled that a litigant's failure to raise issues for the trial court's determination in motions to dismiss, for summary judgment, or

responses thereto, waives those issues for purposes of appeal.” Court Of Appeals at Page 5.

Addressing this particular case, the court of appeals further held “that the issues regarding Ohio Revised Code 5721.18 were never raised for the trial court’s consideration.” Court Of Appeals at Page 6.

Appellant claims that failure to state a claim for which relief can be granted is an exception to the general rule that issues not raised in the trial court are waived for appeal. Finding a paucity of Ohio cases recognizing this exception, he resorts to citing some non-Ohio cases, of limited relevance in our state, supposedly supporting this argument.

He only cites a couple of Ohio cases in an attempt to bolster his contention. Youngstown v. Moore, 30 Ohio St. 133 (1876) was decided over 130 years ago and does little, if anything, to further his cause. The court held that a claim upon which relief cannot be granted, not raised in the trial court, “might on leave,” be raised later. Youngstown at Page 138. This timid assertion, presented in an opinion virtually disregarded, as to this issue, by the Court in the many years since being made, provides feeble support for Mr. Maunz’s argument.

He also cites two court of appeals decisions as supportive of his theory. These two respective holdings can be easily distinguished from the case sub judice, however.

In Droeder v. Minot, 1993 Ohio App. Lexis 3397, the Plaintiff, in a securities fraud cause of action, successfully sued for \$20,000 in municipal court. On appeal, the defendant, for the first time, argued that the plaintiff sued for monetary damages exceeding the court’s jurisdictional limit.

While the court, in ruling for the defendant-appellant, allowed him to argue failure to state a claim for which relief can be granted initially on appeal, it based its decision on the premise that the municipal court lacked subject-matter jurisdiction to decide the matter due to the amount of damages sought by the Plaintiff.

In the case sub judice, there is no doubt that the trial court had jurisdiction, subject-matter or otherwise, to hear and rule on this property-tax foreclosure matter.

In Flagship Management Services v. Grube, 1994 Ohio App. Lexis 4759, plaintiff, an apartment complex landlord, successfully sued three of its tenants for rent due. The tenants' appeals were consolidated by the court of appeals since each asserts that plaintiff was not the real party in interest as the grounds for their appeals.

The court dismissed the first appeal for lack of jurisdiction since the order appealed from in that case was not final and appealable.

The court denied the appeal in the second case because the tenant had not asserted the defense in the trial court.

The court denied the appeal in the third case because the tenant had not filed a transcript of the trial court proceedings with its appeal.

The court of appeals did not base its holding, in any of these matters, upon the issue of whether the defense of failure to state a claim for which relief can be granted may be initially raised upon appeal. Any mention of this issue by the court, since not germane to its decision, constitutes merely dicta and, thus is of little persuasive value in the case sub judice.

Mr. Maunz waived his right to assert the defense of failure to state a claim for which relief can be granted on appeal by failing to raise it in the trial court. This is consistent with long-standing Ohio Law and he has not proved otherwise.

CONCLUSION

For the preceding reasons, this case does not present either a substantial constitutional question or issues of public or great general interest. Therefore, the Lucas County Treasurer respectfully requests that this court deny jurisdiction over this case.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Joseph P. Boyle by B. Majors
Joseph P. Boyle, #0042440
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 12th day of August, 2008, to George C. Rogers, 6884 State Route 110, Napoleon, Ohio 43545, Attorney for Appellants Karl C. Maunz, Trustee and Karl C. Maunz as Individual.

Joseph P. Boyle by B. Majors
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