

ORIGINAL

No. 2011-1526

In the Supreme Court of Ohio

PHH MORTGAGE CORPORATION,

Plaintiff-Appellant,

V.

MICHAEL S. PRATER, ET AL

Defendants-Appellees,

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY, OHIO
CASE NO. CA2010-12-095

MERIT BRIEF OF DEFENDANT-APPELLEE SCOTT A. WOLF

| | |
|-----------------------------------|--|
| DAVID M. GAUNTNER, #0078417 | JOHN D. WOLIVER, ESQ. #0001188 |
| ANTONIO J. SCARLATO, #00073329 | COUNSEL OF RECORD |
| COUNSEL OF RECORD | Attorney for Defendant-Appellee Scott A. Wolf |
| Felty & Lembright Co., L.P.A. | 204 North Street |
| Attorneys for Plaintiff-Appellant | Batavia, Ohio 45103 |
| 1500 West Third Street, Suite 400 | PH: 513-732-1632 |
| Cleveland, Ohio 44113 | Fax: 513-732-1639 |
| | jwoliver@fuse.net |

LINDA COOK #0038743
COUNSEL OF RECORD
Ohio Poverty Law Center, LLC
555 Buttles Avenue
Columbus, Ohio 43215
PH: 614-221-7201
Fax: 614-221-7625
lcCook@ohiopoveritylaw.org
Counsel for Amicus Curiae
Ohio Poverty Law Center, LLC

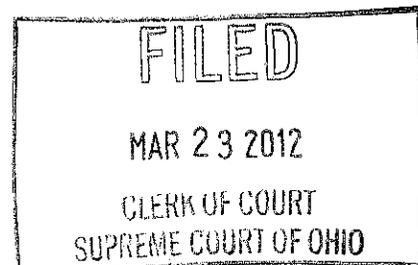
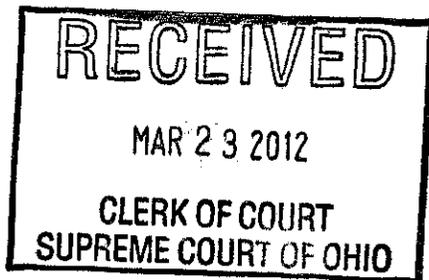


TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIESii

STATEMENT OF THE CASE1

STATEMENT OF THE FACTS2

LAW AND ARGUMENT5

 I. Proposition of Law No. 1:

 Under Principles Of Due Process, Constructive Notice By Publication To A Party With A Property Interest In A Foreclosure Proceeding Is Insufficient When That Party's Address Is Known Or Easily Ascertainable5, 6

 II. Proposition of Law No. 2:

 Merely Providing A Written Notification Directing An Interested Party To Monitor A Website For The Date, Time, And Location Of A Sheriff's Sale Constitutes Constructive Notice By Publication In Violation Of This Court's Holding In *Central Trust* And R.C.2329.26(A)(1).....6

 A. Directing Counsel Of Record In A Foreclosure Action To Obtain Foreclosure Sale Information From A Specified Internet Website Is Substantially Different From Newspaper Publication Notice.....6

 B. Appellant, Having Received Actual Notice Of The Foreclosure Sale, Cannot Challenge The Procedure By Which It Received Such Notice As Being Constitutionally Deficient.....7

 C. Notice Reasonably Calculated To Inform An Interested Party Of The Pendency Of A Proceeding Is The Standard Mandated By The Due Process Clause.....7

 D. R.C. 2329.26 Does Require Regular Mail Notice Of A Foreclosure Sale Be Given To Other Interested Parties, But That Statute Does Not Specify The Plaintiff's Counsel Receive The Same Information By Regular Mail Notice.....11

CONCLUSION.....13

CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

CASES

| | |
|--|-------|
| <i>Central Trust Co. v. Jensen</i> , 67 Ohio St.3d 140, 616 N.E.2d 873 (1993)..... | 9, 11 |
| <i>Dusenbery v. United States</i> , 534 U.S. 161, 166-168, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002)..... | 9 |
| <i>In re Tompkins</i> , 115 Ohio St. 3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶14..... | 9 |
| <i>Mennonite Bd. Of Missions v Adams</i> , 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983)..... | 8 |
| <i>Mullane v Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)..... | 8, 13 |
| <i>Palazzi v. Estate of Gardner</i> , 32 Ohio St.3d 169, 174, 512 N.E.2d 971 (1987)..... | 7 |

STATUTES

| | |
|---|---------------------------|
| R.C. 2329.26(A)(1)(a)(i)..... | 11 |
| United States Constitution, Fourteenth Amendment..... | 7, 8, 9, 10, 11, 12, & 13 |

STATEMENT OF THE CASE

Defendant-Appellee Scott A. Wolf (hereinafter Appellee Wolf) accepts the Statement of the Case provided by Plaintiff-Appellant PPH Mortgage Corporation (hereinafter PHH), with the following modifications and additions.

After PHH obtained its default judgment against the primary defendants on September 29, 2008, the subject property was set for sale by the Clermont County Sheriff's Office (hereinafter Sheriff's Office) first on January 6, 2009. However, PHH requested that the trial court withdraw the order of sale one day before its January 6, 2009, sale date. (T.p. 30). The property was rescheduled to be sold on June 9, 2009, but again PHH requested that the order of sale be withdrawn one day prior to that scheduled sale date. (T.p. 37). The sale was scheduled a third time on November 19, 2009. Once again, this order of sale was withdrawn upon the request of PHH. (App. Op. at ¶3 and T.p. 43). Only after a period of over eighteen months between the September 29, 2008, decree of foreclosure, did the actual Sheriff's Sale finally occur on the fourth try on April 6, 2010.

After the Order of Sale was returned to the Clerk's Office on April 12, 2010, on April 16, 2010, (and not April 12, 2010, as indicated by PHH), PHH filed a Motion to Set aside the Sheriff's Sale. (App. Op. at ¶5).

Appellant Scott, who purchased the real estate at the April 6, 2010, Sheriff's Sale, was granted intervener status by the trial court. (T.d. 68-69).

STATEMENT OF THE FACTS

The critical fact undermining PHH's claims in this appeal is that it received actual notice from the Sheriff's Office advising PHH's attorney that all the information of the date and location of the Sheriff's Sale would be found on its website.

Despite PHH's assertion that there "was considerable dispute amongst the parties as to whether counsel for PHH ever received a copy of said letter and thus notice of the sheriff's sale", both the trial court and the appellate court relied on the uncontroverted evidence that PHH's counsel not only received this notice in this case, but also in other foreclosure cases he was handling in Clermont County, Ohio. The appellate court discussed the evidence and the trial court's findings regarding PHH's counsel receipt of this notice.

"The trial court found that along with the mailed notice of the third sale date, the sheriff's office provided written notice to appellant that all future notices of the date, time, and location of a sale would be posted on the sheriff's office website. According to the testimony of an employee of the sheriff's office, a notation was made in the software program to indicate when this notice was sent to attorneys involved in foreclosure actions. An employee of appellant's counsel testified that she did not see the letter giving notice of this policy change. She also stated, however, that she would not have opened a letter that was addressed to a specific attorney of the firm. The attorney of record to whom the letters were addressed, Mr. Felty, never testified that he had not received the sheriff's notice of the change. Assuming mail is reliable for delivering notice, it is therefore uncontroverted that said notice was received. Being in the position best suited to consider all of the evidence before it, the trial court found that Mr. Felty did in fact receive notice of this policy change in relation to the present case as well as another. In addition, the court found that Mr. Felty's firm received this notification in relation to at least four other cases in which it was involved. There is no evidence that the website

malfunctioned, was inaccessible or otherwise did not contain the notice of the sale date.” (App. Op. at ¶17, Appx. p. 9)

As stated above, the evidence established and the trial found that PHH 's counsel's law firm had received this same notice in other cases, including another foreclosure cases in Clermont County, Ohio, in which that same law firm participated in a foreclosure sale on the same date (April 6, 2010) as the sale in this case.

The facts presented to the trial court address the procedure the Sheriff's Office implemented to notify plaintiff attorneys to use its website in foreclosure sales and its documented efforts to notify PHH's counsel of this information. Relevant is counsel's failure to act on this information.

PHH counsel's legal assistant Alice Begin testified. As found by the trial court, she testified that she does not open Mr. Felty's mail and thus cannot say whether he received the mailed notice of the policy change. (T.p. 2, p. 51, Supp. p. 56). Based upon the lower courts' findings and decisions, the essence of this appeal is whether the apparent oversight by Mr. Felty or his law firm rises to the level of a due process right to receive all of the necessary foreclosure sale information in one written letter.

The Court is being asked to decide that, regardless of whether Mr. Felty received the notification to get all the relevant information from the Sheriff's Office's website, is it unconstitutional for this Sheriff's Office, as well as other sheriff offices around Ohio, to post foreclosure sale information on their websites once plaintiffs' attorneys are advised of that fact. Ms. Begin, who testified that she is the law firm's legal assistant who handles foreclosure sales in over thirty Ohio counties, stated that other Ohio sheriffs use this same method. (T.p. 2, p. 47, Supp. p. 55). Therefore, appellants take the position

that this Court should hold that this widely used procedure of notification is unconstitutional in all cases. This would include cases in which plaintiffs' attorneys were advised of the website notification procedure.

It is not clear how PHH's counsel overlooked this critical notification. The handling of foreclosure cases by this law firm is fragmented in many ways. This case is illustrative of this. The case was commenced with a complaint filed by Christopher Kovach of Shapiro & Felty. Kriss Felty, of Felty & Lembright, entered his appearance as counsel on June 3, 2009. (T.d. 1 and 35). Ms. Begin testified that she is the legal assistant responsible for foreclosure sales in thirty-five Ohio counties, but not the legal assistant responsible for foreclosure sale cancellations on her cases. (T.p. 1, p. 26-27, 34).

Throughout PHH's brief, there is the suggestion that the notification in this case is the equivalent of what is traditionally known as "publication notice". No matter what verbiage is employed to describe this procedure, there are differences between the Sheriff's Office notification and newspaper "publication notice" as described below.

1. Unlike newspaper publication as it is traditionally used, counsel for the interested party in this case received a letter on various occasions advising counsel where to obtain all of the necessary sale information.

2. PHH's counsel in this case, once advised to obtain the Sheriff's Office sale information, need not find the local Clermont County newspaper to receive this information. While over 200 miles away in his Cleveland office, Mr. Felty can immediately access and print the website information from his computer.

3. Unlike print publication, the information of the Sheriff Office's sale remains on the website for the months prior to the actual sale. This makes this information continually accessible to the public at large and to defaulting homeowners who may have moved away from the area (as in this case) after vacating their home.

4. Publication notice by newspaper is traditionally employed to notify unrepresented non-parties of a proceeding unlike this case in which plaintiff's counsel is directly involved in the lawsuit and aware that a fourth foreclosure sale is being scheduled.

The benefits to Ohio's local communities and governments not to have abandoned foreclosed houses remain vacant for many months, or years in this case, is self evident. After PHH had requested on three consecutive occasions to vacate the established sale date, the sale did not occur until over one and a half years from the date of the judgment entry. PHH provided no evidence that this property, whose sale was advertised for many months, had any value over the amount bid by Scott Wolf. Presumably, if PHH had bid on the property up to the mortgage amount, more delay would have occurred before the property was disposed at its true fair market value and ultimately rehabilitated or removed.

LAW AND ARGUMENT

Propositions of Law Presented by Appellant

Proposition of Law: No. 1

UNDER PRINCIPLES OF DUE PROCESS, CONSTRUCTIVE NOTICE BY PUBLICATION TO A PARTY WITH A PROPERTY INTEREST IN A

FORECLOSURE PROCEEDING IS INSUFFICIENT WHEN THAT PARTY'S ADDRESS IS KNOWN OR EASILY ASCERTAINABLE.

Proposition of Law: No. 2

MERELY PROVIDING A WRITTEN NOTIFICATION DIRECTING AN INTERESTED PARTY TO MONITOR A WEBSITE FOR THE DATE, TIME AND LOCATION OF A SHERIFF'S SALE CONSTITUTES CONSTRUCTIVE NOTICE BY PUBLICATION IN VIOLATION OF THIS COURT'S HOLDING IN *CENTRAL TRUST* AND R.C. 2329.26(A)(1)

Appellee will argue below both Propositions of Law together since they both substantially address the same due process considerations.

A. Directing Counsel Of Record In A Foreclosure Action To Obtain Foreclosure Sale Information From A Specified Internet Website Is Substantially Different From Newspaper Publication Notice.

PHH wants this Court to declare that traditional notice by newspaper publication is factually indistinguishable from a circumstance in which a plaintiff's attorney in a foreclosure action, knowing that a foreclosure sale is being scheduled, is advised by letter on multiple occasions that the information as to the date, time, and location of the foreclosure sale is on a particular website. In support of its argument, PHH maintains that the action of Sheriff's Office constitutes "notice by publication"¹. It cites Black Law Dictionary in defining "publication".² Regardless of verbiage, the notice in this case is substantially different from newspaper publication notice.³ PHH's claim that such notices are indistinguishable ignores the realities of this century. Also, the naming of this procedure does not change the due process question, to wit: were the Sheriff Office's

¹ Appellant's Brief, at p. 5.

² Appellant's Brief, at p. 7.

³ See this discussion, *supra*, p. 4-5.

actions reasonably calculated to provide plaintiff's counsel with the necessary sale information.

B. Appellant, Having Received Actual Notice Of The Foreclosure Sale, Cannot Challenge The Procedure By Which It Received Such Notice As Being Constitutionally Deficient.

PHH has another significant problem asserting this due process claim. Contrary to every aggrieved party in every United States Supreme Court and Ohio decision cited by PHH or Amici, counsel for PHH did receive actual notice of this foreclosure sale. This fact was found by the trial court. Judge Ringland, in his concurring decision on appellate review, emphasized that the decision "is based solely on the facts and circumstances of this particular case." (App. Dec. at 11). Similarly, the majority opinion of that court reasoned that "because appellant was mailed written notice of the change in policy, it had the opportunity to obtain the April 6, 2010 sale date from the website." (App. Dec. at 11). Even if this Court were to determine that the procedure adopted by the Sheriff's Office to notify plaintiffs' counsel of foreclosure sales was deficient, because counsel for PHH did receive actual notice but failed to act on it, PHH is not injured by the alleged unconstitutional act. This Court has held that "a constitutional challenge to the notice provisions of a state statute cannot be sustained where the party claiming denial of due process possessed actual knowledge of the facts which form the basis of the notice." *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169, 174, 512 N.E.2d 971 (1987).

C. Notice Reasonably Calculated To Inform An Interested Party Of The Pendency Of A Proceeding Is The Standard Mandated By The Due Process Clause.

By affirming both lower courts' findings and decisions in this case, this Court will uphold the due process principles established by the United States Supreme Court and this Court over the past sixty years. As argued above, the facts in the "notice by publication" rulings of the past pre-internet era are distinguishable from this case. *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and *Mennonite Bd. Of Missions v Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In *Mullane*, the U.S. Supreme Court held that an action for settlement of a trust, beneficiaries whose addresses were known were entitled under due process considerations to receive actual notice of the action rather than newspaper publication notice. A little over thirty years later, the high court was asked to decide whether notice by newspaper publication is sufficient in a tax sale action for the sale of property on which appellant held a mortgage. Justice Marshall, in the majority opinion, cited *Mullane* and held "this Court recognized that prior to an action which will effect an interest in life, liberty, or property protected by the due process clause of the *Fourteenth Amendment*, a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" The *Mennonite* Court further upheld *Mullane* "[t]he Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice..." *Mennonite* at 795. Significant to this analysis of both decisions is the requirement that *due process* considerations require an interested party to be given notice reasonably calculated to actually inform the party of the proceeding. Neither holding

mandated one particular type of notice (i.e. regular mail service, certified mail service, personal service, etc.) must be employed.

The United States Supreme Court continues to employ the same due process analysis of these two decisions. *Dusenbery v. United States*, 534 U.S. 161, 166-168, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). Although the trial court found that PHH received actual notice of the foreclosure sale, the *Dusenberry* Court reaffirmed the principle that due process is met when the state establishes that it took procedures reasonably calculated of informing the interested party of the proceeding.

“We note that none of our cases cited by either party has required actual notice in proceedings such as this. Instead, we have allowed the Government to defend the ‘reasonableness and hence the constitutionally validity of any chosen method...on the ground that it is in itself reasonably certain to inform those affected.’” (citation omitted). *Dusenbery*, at 170.

This Court has followed these same principles in an action involving termination of parental rights by citing *Dusenbery* and stating that “due process does not require that an interested party receive *actual* notice.” *In re Tompkins*, 115 Ohio St. 3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶14.

PHH argues to this Court that due process mandates that it should have received nothing less than regular mail notice with all the details of the foreclosure sale contained in that letter. *Dusenbery* is very clear that such a requirement is precisely what the Court will not do, to wit: order that a particular type of service must be employed to satisfy due process principles.

In *Central Trust Co. v. Jensen*, 67 Ohio St.3d 140, 616 N.E.2d 873 (1993), this Court held that it is unreasonable to expect a party “constantly to pursue the back pages of

local newspapers for notices it could reasonably expect to receive in the mail.” Neither the trial court nor the appellate court decision ignores that holding.

In addition to overlooking the fact that the trial court and appellate court found and recognized that the evidence established its counsel received actual notice, PHH overlooks a critical distinguishing fact between its position and the many due process cases cited above. Unlike all the other case, PHH is the plaintiff below. It brought this action. It obtained the default judgment. On three occasions it requested that the foreclosure sale be stopped. It was represented by counsel who would know that, after the third scheduled sale was vacated at its request, a fourth sale would be scheduled. While counsel received the notice to find all relevant information on the Sheriff Office’s website, he apparently failed to do what both he and his law firm did in the other foreclosure sales conducted by the Sheriff’s Office in 2010, including one on the same sale date, April 6, 2010. He simply failed to appear and place a bid on the property.

Interestingly, if PHH is correct and actual notice received by counsel that all Sheriff’s Office foreclosure sales information is to be found on its website is constitutionally deficient, then every other foreclosure sale which occurred throughout Ohio in this manner would be subject to being set aside. The only difference between PHH’s circumstance and every other plaintiff who received the notice of the website is that the plaintiff in other cases acted on the notice.

PHH continually wants this Court to find there is no difference between newspaper publication notice and internet website notice. If the Sheriff Office had published the foreclosure sale notice on its website without informing plaintiffs’ attorneys of that fact, then the outcome below would be different. Once PHH’s counsel

receives a letter on more than one occasion advising him how to find the sale information, then the issue is whether that method is reasonably calculated to inform counsel. Overlooked in PHH's argument is the unmistakable fact that no method, even regular mail notice, is guaranteed to provide actual notice all the time. Mistakes occur.⁴

In order to frame the *Central Trust* facts to fit this appeal, this Court should consider the following. Assume that the appellant bank in *Central Trust* had provided the interested party with both (1) regular mail notice that the details of the foreclosure sale would be provided in a particular newspaper; and, (2) included a copy of the newspaper in this regular mail notice. In such a case, would the outcome be the same? In this hypothetical case, the party who missed the sale would have to argue that it is entitled, as a matter of constitutional law, to receive all the relevant information in one letter rather than having to take the additional step of finding the information in the attached newspaper. As set forth above, such an argument overlooks the fact that due process does not require only one type of procedure and would fail.

D. R.C. 2329.26 Does Require Regular Mail Notice Of A Foreclosure Sale Be Given To Other Interested Parties, But That Statute Does Not Specify The Plaintiff's Counsel Receive The Same Information By Regular Mail Notice.

The concerns expressed in the Amici Brief will not be impaired by a decision affirming of the appellate court's ruling. Lower income persons in Ohio who have more limited or no internet access will not be impacted by this case. Contrary to the contentions of the Amici, if a person is a non-defaulting judgment debtor in a foreclosure action, the law requires that written notice be provided "in accordance with divisions A) and (B) Civil Rule 5 upon the judgment debtor". **R.C. 2329.26(A)(1)(a)(i)**. In this case,

⁴ One need only to the cover page of Appellant's brief to understand this. Appellee's counsel's address and telephone number are completely wrong.

had the Praters filed an answer, they would have had a statutory right to receive written notice of the date, time and place of the sale. Since the Praters were in default and residing in California, the Sheriff's Office website was the only practical way they could learn of the sale.

This same statute does not mandate the precise manner in which plaintiff's counsel must be given of this information. The fact that plaintiff's counsel received the same information in a manner reasonably calculated to inform him is all that is necessary. Considering that plaintiff's counsel handles countless foreclosure actions throughout Ohio and received all the necessary information to protect his client in this case, it is certainly reasonable to expect he has more than a greater ability and level of sophistication to obtain the foreclosure information from a website than clients represented by Amici.

Appellant argues that this Sheriff's Office (and other sheriff offices across Ohio) usurped the power of the Ohio Legislature by implementing this notice policy.⁵ The Ohio Legislature has not set by statute an exact procedure a sheriff must employ in this area. Similarly, due process requirements do not specify a precise manner in which notice, reasonably calculated to inform, must be given. Finally, Appellant makes an argument made below but not raised on this appeal, to wit: the Sheriff disregarded the trial court's order in its Judgment Entry of September 29, 2008.⁶ This issue, properly addressed by the lower courts and not raised as a Proposition of Law herein, will not be discussed further.

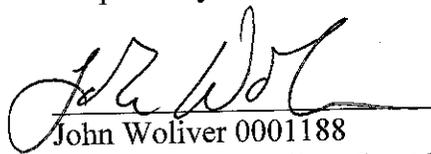
⁵ Appellant's Brief, p. 17-19.

⁶ Appellant's Brief, p. 14-15.

CONCLUSION

Commencing with the *Mullane* decision over sixty years ago, and extending into the present, courts have not mandated to governmental entities the precise manner in which notice of proceedings to interested parties be given. Nor is actual notice mandated. Due process requires that the procedural by which notice is provided be reasonably calculated to apprise the interested party. In this case, both the trial court and the appellate court found that counsel for PHH received actual notice of the date, time, and location of the Sheriff's Office sale. Furthermore, the courts found that the manner employed by the Sheriff's Office to inform counsel not only succeeded but was a method reasonably calculated to inform counsel. Therefore, appellee respectfully requests that this Court affirm the decision of the Twelfth District Court of Appeals denying plaintiff's motion to set aside the Sheriff's Sale.

Respectfully submitted,



John Woliver 0001188

Attorney for Appellee, Scott Wolf

204 North Street

Batavia, Ohio 45103

PH: 513-732-1632

Fax: 513-732-1639

jwoliver@fuse.net

Certificate of Service

I hereby certify that a copy of the foregoing Brief of Appellee was sent by regular U.S. Mail on the 22nd day of March, 2012 to the following parties:

Mr. James Nichols
123 N. Third Street
Batavia, Ohio 45103
Attorney for Defendant, Clermont County Treasurer

David M. Gauntner
Antonio J. Scarleto,
Felty & Lembright Co., L.P.A.
1500 W. Third Street, Suite 400
Cleveland, Ohio 44113

Michael S. Prater
9960 Kika Ct., Apt. 6028
San Diego, Ca. 92129

Jamie Grant-Prater
9960 Kika Ct., Apt. 6028
San Diego, Ca. 92129

Linda Cook
Ohio Poverty Law Center, LLC
555 Buttles Avenue
Columbus, Ohio 43215



John Woliver 0001188