

ORIGINAL

IN THE SUPREME COURT OF OHIO

HSBC MORTGAGE SERVICES, INC

Plaintiff – Appellee,

Vs.

CAROL M. BALLARD, et al.,

Defendants – Appellants,

12 - 1132

On Appeal from the
Butler County
Court of Appeals
12th Appellate District

Case No: CA2011 – 05 – 088

Memorandum in Support

FILED
JUL 05 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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HISTORY OF THE CASE

The history surrounding this case is the fact that the Defendant/Appellant, Carol M. Ballard, has never been served any legal documentation pertaining to a summons to Foreclosure in the process of both the trial court and the appellate court. As a matter of fact, according to the online docket, when the Plaintiff/Appellee had filed their initial complaint of foreclosure, the said Defendant/Appellant was receiving a billing statement from the Plaintiff/Appellee on a monthly basis, like there had never been a complaint filed in the first place. On April 30, 2010, the Plaintiff/Appellee had filed their complaint for foreclosure and for approximately four calendar months after initially filing their summons of foreclosure, the Plaintiff/Appellee had been sending monthly billing statements to the Defendant/Appellant and the Defendant/Appellant had been sending monies to the Plaintiff/Appellee in the form of a certified cashier's check. This is a clear violation of fraud on the part of the Plaintiff/Appellee. The Defendant/Appellant has to base everything off the online docket. To this day, July 2, 2012, the Defendant/Appellant has not received any documentation from neither the trial court nor the appellate court and this included judgment entries, rulings, etc. The said Defendant/Appellant did not become aware of said case until March 30, 2011 when multiple motions were filed by the Defendant/Appellant, Carol M. Ballard. When said Defendant/Appellant had become aware of who the counsel was for the Plaintiff/Appellee, that was when the Defendant/Appellant had discovered said counsel had committed perjury. One of the motions that the Defendant/Appellant had filed besides the notice of appeal, motion of stay, objections, etc., was an emergency motion. In this emergency motion, which is still pending, was presided by

Magistrate Ogg and in this hearing, which is the only hearing heard in this case, which was on May 19, 2011, that the Magistrate had jumped all over the counsel of the Plaintiff/Appellee for lying in the courtroom. She had stated the appeal stands and the motion of stay is granted and she would be pushing the appeal forward on to the 12th District Court of Appeals and that she could not make a ruling on the motion that she had on hand due to the appeal being filed and it would be set aside until the appellate process was completed. The counsel for the Plaintiff/Appellee had filed a motion to dismiss the appeal, stating that it was not filed in a timely matter, yet both Magistrate Ogg and Magistrate Manning from the 12th District Court of Appeals, had both ruled in favor of the Defendant/Appellant in this said case, in stating that the appeal does stand and it was filed in a timely matter. Magistrate Manning had clearly stated that *Moldovan v. Cuyahoga Welfare Department (1986), 25 Ohio State 3d 293*, because there is no indication on the docket that the Defendant/Appellant had been served with the judgment and decree of foreclosure, the court cannot presume that appellant was timely notified and that the thirty day appeal period has expired upon the appellant by the clerk. Magistrate Manning had upheld the appeal and sided with the Defendant/Appellant. One can clearly see on the docket that nothing was mailed to neither party or any party of any ruling, judgment, entry, decree, etc. in this case by the lower court. By law, it is crucial for all parties to receive any rulings for one can know the status of a case and prepare accordingly for objections, appeals, etc. This is a clear violation of the civil rights of said Defendant/Appellant. After Magistrate Manning's ruling, almost one year later, the 12th District Court of Appeals made a ruling, stating that they have no jurisdiction in this case. In the ruling, newly discovered evidence came into light. This is a violation on disclosure that in which anything in a case must be disclosed to both sides. There has been an objection filed against

The appellate court on June 4, 2012. The Plaintiff/Appellee files a response on June 14, 2012, stating that this is not an objection but rather a reconsideration and they are fine with a reconsideration. The Defendant/Appellant did not file a reconsideration. It was filed as an objection and therefore, the Plaintiff/Appellee does not have the right to reword the document To what they see as fit. So, basically, if the Plaintiff/Appellee's response is a reconsideration, it is their wording and it is another violation of the Defendant/Appellant's civil rights. Upon newly discovered evidence, the Defendant/Appellant had filed a motion with the appellate court as well as a 60 (B) motion. The appellate court had stated that if the Defendant/Appellant had not been served any documentation, they would vacate the entry and dismiss the Plaintiff/Appellee's case. This new evidence is crucial to this case and is in favor of the Defendant/Appellant and does interfere with the ruling of the appellate court.

MEMORANDUM OF SUPPORT

This court does have jurisdiction over all courts in the State of Ohio, including the 12th District Court of Appeals. The only court that is higher than this court is the United States Supreme Court, which has jurisdiction over all the courts of the land. This court does indeed have jurisdiction due to the fact that both the lower court and the appellate court has made numerous errors in this case. First and foremost, there is a clear violation of not sending any documents of foreclosure to Mrs. Ballard. After looking at the online docket from the Butler County Clerk of Court's website, the Defendant/Appellant had noticed that the 12th District Court of Appeals, after nearly five calendar months had filed an entry. In this entry, they clearly stated several things that are newly discovered evidence to the Defendant/Appellant. This clearly falls under

A violation of disclosure. One of these key items was stated by the appellate court mentioning an amend to the original complaint. The Defendant/Appellant has not received any such complaint. The appellate court had also mentioned that it was fine to have an amended complaint yet it has to be accompanied by the original summons of complaint. According to the clerk's office, the original was not accompanied with the amended complaint and that the only thing there was the amended complaint. This is newly discovered evidence about an amended complaint for according to the docket, the original complaint, the process server and the certified mail methods were not successful and the Plaintiff/Appellee did not even attempt ordinary mail. The only ordinary mail that was attempted, according to recent discovery on the docket, was the amended complaint and it does show that it was returned to sender by the post office as misplaced and damaged, so the post office had refused to deliver damaged and lost articles and had mentioned to the Defendant/Appellant that they will not deliver mail that is damaged and will return such articles to the sender. To this day, the Defendant/Appellant has not seen a process server, certified mail nor even ordinary mail. In Civil Rule 15 (D), this rule states that one has to be properly served any summons of complaint to said Defendants in any case. See *Plumb v. River City Erectors, Inc. (2000), 136 Ohio App. 3d 684 and Kramer v. Installations Unlimited, Inc. 01 CA 73*. In these cases, any amended complaint must be accompanied by the original summons. In this case, the amended complaint was not accompanied with the original complaint. like the 12th District had stated that it was included, the clerk's office stated otherwise, the original summons was not included with the amend. The 12th District Court of Appeals does indeed have jurisdiction as well as this honorable court. The appellate court had also stated that one does not have to be served any order, decree, entry, etc. This is not so. This is a clear violation

of the Defendant/Appellant, Carol M. Ballard's civil rights. According to Magistrate Ogg and Magistrate Manning, one does have to be served because that gives a timeframe for the thirty calendar days in order to properly prepare their cases accordingly. During the entire process, the Defendant/Appellant was not aware of any foreclosure proceedings filed against her for the Plaintiff/Appellee had kept sending monthly billing statements and receiving certified cashier's checks from the Defendant/Appellant. The previous counsel in this said proceedings for the Plaintiff/Appellee, Mr. Stephen Miles, Esq., had never sent any correspondence to the Defendant/Appellant. Instead, he committed violation of Civil Rule 2921.11, which is perjury, fraud, etc. During the entire case, the Defendant/Appellant had been left in the dark. She had not seen a process server, had not received any notification from anyone on the Plaintiff/Appellee's part. There were no status hearings in this case. The purpose of a status hearing is for the court to see the status of the case and where it stands. Were the parties served, what was any deals, if any, made, etc. In this case, there was never a status hearing. The Plaintiff/Appellee just pushed for a default judgment without a status hearing. When said Defendant/Appellant, Carol M. Ballard, had finally become aware of this case at the end of March, 2011, two calendar days before filing an appeal, a motion of stay, etc., at that time and only at that time did the Defendant/Appellant become aware of any case against her. This is why the previous counsel, Mr. Miles, had withdrawn as counsel for the Plaintiff/Appellee two calendar days before the reply briefing for the appeal was due. The current counsel is clearly not aware of the case and is not mentioning anything, including the payments Mrs. Ballard had made to the Plaintiff/Appellee, the monthly statements received, the application for government endorsed "Making Home Affordable" program, the Defendant/Appellant paying the property tax and insurance on the property, etc.

Did the previous counsel fail to mention this to the new counsel or has the Plaintiff/Appellee fail to mention this to their counsel or are they committing fraud. After discovering the new evidence from the docket, which is a violation of the civil rights and the constitutional rights of the Defendant/Appellant and the clerk's office not sending the items to the Defendant/Appellant. Upon investigation into the matter, when asked to the post office, which is a branch of the federal government, it was told to the Defendant/Appellant that the post office cannot guarantee service of delivery unless the article is accompanied with an additional service, like certified mail, and they cannot deliver articles that are lost, misplaced or damaged and that they have the right to refuse delivery and return the article to the sender. In this case, nothing has been mailed to the Defendant/Appellant. Therefore, a 60 (B) motion had been filed on June 27, 2012, as well as an emergency motion dismissing the Plaintiff/Appellee's case. In the emergency motion that was filed in the lower court with Magistrate Ogg was to dismiss the Plaintiff/Appellee's case with prejudice and it has yet to be ruled on since it is still tied up with the appellate court. The appellate court does have the jurisdiction to dismiss the case, as they have mentioned, yet they also want to violate the rights of the Defendant/Appellant. Once again, to this date, there has never been anything served upon the said Defendant/Appellant in this case via process server, certified mail, nor even ordinary mail. The current counsel for the Plaintiff/Appellee had clearly failed to mention to the courts that the Plaintiff/Appellee had taken advantage of an elderly gentleman who was terminally ill and his illiterate widow by frauding them about a refinance, where there had been insurance so that if anything had happened to one of the Defendant/Appellants, the mortgage would have been paid in full. The Plaintiff/Appellee had failed to mention that they were aware of the passing of the Defendant/Appellant's spouse as of late

2006. This is a clear use of fraud' on the part of the Plaintiff/Appellee and there is sufficient evidence to support this and then some.

CONCLUSION

The Defendant/Appellant respectfully requests that this honorable court uphold jurisdiction, vacating the judgment entry and dismissing the Plaintiff/Appellee's case with prejudice and award any and all relief that is just under the circumstances to the Defendant/Appellant.

Respectfully Submitted,



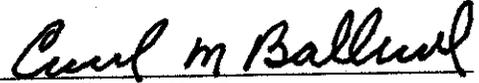
Carol M. Ballard
Carol M. Ballard
681 Magie Avenue
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(513) 889 - 2416
Defendant/Appellant pro se

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support was served upon the following persons by U.S. Mail, this 2nd day of July, 2012.

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Carol M. Ballard
Defendant/Appellant pro se

FILED

IN THE COURT OF APPEALS

2012 MAY 21 PM 2:39

TWELFTH APPELLATE DISTRICT OF OHIO

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

BUTLER COUNTY

HSBC MORTGAGE SERVICES, INC., :

Plaintiff-Appellee, :

CASE NO. CA2011-05-088

JUDGMENT ENTRY

- VS -

CAROL M. BALLARD, et al.,

Defendants-Appellants.

FILED BUTLER CO.
COURT OF APPEALS

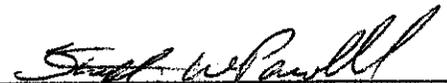
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MARY L. SWAIN
CLERK OF COURTS

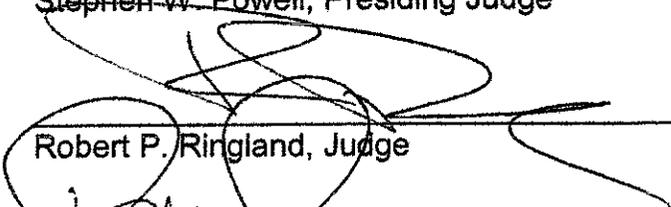
Upon consideration, it is the order of this court that this appeal should be and hereby is dismissed because the order appealed is not a final appealable order. This court is therefore without jurisdiction to consider the present matter for lack of a timely filed notice of appeal pursuant to App.R. 4(A).

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

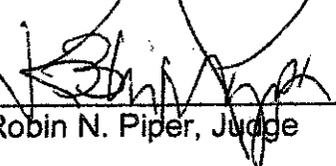
Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



Robert P. Ringland, Judge



Robin N. Piper, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

HSBC MORTGAGE SERVICES, INC., :

Plaintiff-Appellee, :

- vs -

CAROL M. BALLARD, et al., :

Defendants-Appellants. :

CASE NO. CA2011-05-088

OPINION
5/21/2012

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-04-1918

- ✓ Frost Brown Todd LLC, Erika J. Schoenberger and Katherine M. Klingelhafer, 10 West Broad Street, Suite 2300, Columbus, Ohio 43215, for plaintiff-appellee
- ✓ Carol M. Ballard, 681 Magie Avenue, Fairfield, Ohio 45014, defendant-appellant, pro se
- ✓ Discover Bank, 6500 New Albany Road, New Albany, Ohio 43054, defendant
- ✓ Michael T. Gmoser, Butler County Prosecuting Attorney, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for defendant, Butler County Treasurer

POWELL, P.J.

{¶ 1} Defendant-appellant, Carol M. Ballard, who is one of several named defendants, appeals a decision of the Butler County Court of Common Pleas granting default judgment in favor of plaintiff-appellee, HSBC Mortgage Services, Inc., in a foreclosure action.

{¶ 2} Appellant and her now deceased husband refinanced their home located at 681 Magie Avenue, Fairfield, Ohio 45014. In 2005, HSBC became the holder of a note and a mortgage securing the Magie Avenue property. Appellant and her husband allegedly defaulted on the note. On April 30, 2010, HSBC initiated a foreclosure action against appellant and her husband seeking judgment in the amount of \$175,915.72, plus interest, fees, and costs. However, upon learning of the death of appellant's husband, HSBC filed an amended complaint on May 28, 2010, naming the estate of appellant's husband, rather than appellant's husband personally, as a defendant. Appellant never responded to either the original or amended complaint.

{¶ 3} As a result of appellant's failure to respond, HSBC filed for default judgment, which was granted by the trial court on September 29, 2010. Following an order of sale, publication, and notice of sheriff's sale, appellant filed a motion to stay and a notice of appeal on March 30, 2011. Despite her filings, the property sold at the sheriff's sale the following day.

{¶ 4} Appellant now appeals, but fails to argue separate assignments of error as required by App.R. 16(A) and Loc.R. 11. While in the interest of justice we may construe appellant's arguments as assignments of error, before addressing those arguments we must first determine whether appellant filed a timely appeal in order for this court to have jurisdiction.

{¶ 5} App.R. 4(A) requires a notice of appeal to be filed within 30 days of the later of "(1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B)." *Murdock v. Hyde*, 12th Dist. No. CA2007-11-289, 2008-Ohio-4313, ¶ 3. In essence, the 30-day time frame to file an appeal allotted by App.R. 4(A) begins to run from the date of the

entry of the judgment unless notice is not effectuated on a party in accordance with Civ.R. 58(B) within three days of the judgment. See *id.* Civ.R. 58(B) only requires the court to "endorse thereon a direction to the clerk to serve upon all parties *not in default for failure to appear* notice of the judgment and its date of entry upon the journal." (Emphasis added.) Furthermore, "[t]he failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A)." Civ.R. 58(B).

{¶ 6} In this case, the entry of the judgment and decree of foreclosure was entered on September 29, 2010. While there is no notation in the record that the clerk was instructed to serve or did in fact serve appellant with the judgment and decree in foreclosure, such was not required by Civ.R. 58(B) as appellant was in default for failure to appear. *Aguirre v. Sandoval*, 5th Dist. No. 2010CA00001, 2010-Ohio-6006; *W. Publishing Co. v. McCrae*, 4th Dist. No. 91CA1971, 1991 WL 260826, *3 (Nov. 21, 1991). Consequently, the 30-day time frame to file a notice of appeal began to run with the entry of the judgment and decree of foreclosure on September 29, 2010, well before appellant's filing of her notice of appeal on March 30, 2011. Accordingly, appellant failed to file a timely notice of appeal under App.R. 4(A), thereby divesting this court of jurisdiction. *Aguirre* at ¶ 30; *McCrae* at *3. However, one of appellant's arguments on appeal is that she has "never been served any foreclosure proceedings by either a process server or certified mail or had received any documentation from the counsel of the Plaintiff/Appellee." [sic]

{¶ 7} If we construe this argument to mean that appellant was not properly served with the amended complaint, then the default judgment against appellant is void, and we have authority to vacate the judgment. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64 (1956); *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 368 (2000). While the record in this case indicates a copy of the original complaint and

summons was personally served on appellant, there is no indication of personal service or completed certified mail service of the amended complaint and summons. Completed service by a process server or certified mail is not required by due process or Civ.R. 4. *Everbank Mtge. Co. v. Sparks*, 12th Dist. No. CA2011-03-021, ¶ 10.

{¶ 8} Service of process is consistent with due process standards where it is reasonably calculated, under the circumstances, to give interested parties notice of a pending action and an opportunity to appear. *Samson Sales, Inc. v. Honeywell, Inc.*, 66 Ohio St.2d 290, 293 (1981), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950). Civ.R. 4.6(D) permits service to be made by ordinary mail if the attempted service by certified mail is returned unclaimed, and provides that "[s]ervice shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." *Lipton v. Castanias*, 12th Dist. No. CA2009-11-152, 2010-Ohio-4300, ¶ 9, quoting Civ.R. 4.6(D). If the ordinary mail envelope is not returned, there is a rebuttable presumption that service has been perfected. *Hamilton v. Digonno*, 12th Dist. No. CA2005-03-075, 2005-Ohio-6552, ¶ 10. When the facts of a case establish such a rebuttable presumption, then generally a party's unsupported argument that notice was not received is insufficient to rebut the presumption that service was perfected. *Lipton* at ¶ 11.

{¶ 9} In this case, the record indicates that on May 28, 2010, HSBC's counsel requested "Personal and/or Residential Service" of the amended complaint on appellant. In addition, a copy of the amended complaint and summons was sent to appellant at the Magie Avenue address by certified mail on June 7, 2010. However, on June 25, 2010, the process server indicated on the return that appellant was "avoiding service," and the attempted service by certified mail returned unclaimed on June 28, 2010. As a result, and upon the request of HSBC's counsel, a copy of the amended complaint and summons was sent to

appellant at the Magie Avenue address via ordinary mail on June 30, 2010. There is no evidence in the record that the ordinary mail envelope was returned by the postal authorities with an endorsement showing failure of delivery. Thus, there is a rebuttable presumption that service was perfected.

{¶ 10} Appellant does not dispute that 681 Magie Avenue, Fairfield, Ohio 45014 is her address. In fact, appellant used the Magie Avenue address in her pleadings at the trial court level. We find that serving appellant at the Magie Avenue address was reasonably calculated to apprise her of the pending action and to provide her with an opportunity to appear. Furthermore, we find that appellant's unsupported argument that she was not properly served fails to rebut the presumption that service of HSBC's amended complaint was perfected by ordinary mail on June 30, 2010.

{¶ 11} Because appellant was properly served with the amended complaint and summons, appellant's notice of appeal is untimely pursuant to App.R. 4(A), and we lack jurisdiction to consider this appeal.

{¶ 12} Accordingly, appellant's appeal is dismissed.

RINGLAND and PIPER, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>