

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1132

HSBC MORTGAGE SERVICES, INC

Plaintiff – Appellee,

Vs.

CAROL M. BALLARD, et al.,

Defendants – Appellants,

On Appeal from the  
Butler County  
Court of Appeals  
12<sup>th</sup> Appellate District

Case No: CA2011 – 05 – 088

Motion to Stay

Carol M. Ballard  
681 Magie Avenue  
Fairfield, Ohio 45014 – 1717  
(513) 889 – 2416  
Pro se Defendant – Appellant

Katherine M. Klingelhafer (# 0084901)  
10 West Broad Street, Suite 2300  
Columbus, Ohio 43215 – 3484  
(614) 464 – 1211  
(614) 464 – 1737 Facsimile  
Counsel for Plaintiff – Appellee,  
HSBC Mortgage Services, Inc

FILED  
JUL 05 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

Carol M. Ballard  
- Pro Se -  
Defendant/Appellant  
681 Magie Avenue  
Fairfield, Oh 45014

**IN THE SUPREME COURT OF OHIO**

**HSBC MORTGAGE SERVICES INC.,**

Plaintiff – Appellee,

Case No: CA2011 – 05 – 088

Date of Entry: May 21, 2012

- Vs -

**CAROL M. BALLARD, et al.,**

Defendant – Appellant,

**MOTION FOR IMMEDIATE STAY**

A motion for immediate stay from a judgment entry filed from the 12<sup>th</sup> District Court of Appeals should be granted on multiple grounds. Ground one, the lower court has granted a motion of stay. Secondly, the Defendant/Appellant, Carol M. Ballard, to this day has never received any documentation pertaining to a summons of foreclosure from neither the lower court nor the appellate court and the Defendant/Appellant has never received any judgment entries from neither the lower court nor the appellate court yet had obtained the appellate court's entry from the Butler County Clerk of Court's office in person. In this case, there has been newly discovered evidence that clearly violates the constitutional rights of the Defendant/Appellant that has never been presented to said Defendant/Appellant in the mentioned case. Therefore, an immediate motion of stay should be granted on behalf of the Defendant/Appellant, Carol M. Ballard, based upon multiple errors from both the lower court and the appellate court, and upon the discovery of new evidence that the courts are aware of and yet had failed to supply this information to the Defendant/Appellant. Said Defendant/Appellant had to investigate this new evidence on her own accord. Furthermore, in the lower courts, Magistrate Ogg had granted a

motion to stay. This honorable court should uphold Magistrate Ogg's ruling and grant the motion to stay.

Respectfully Submitted,



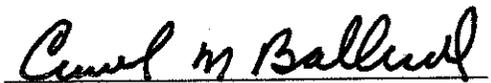
**Carol M. Ballard**  
681 Magie Avenue  
Fairfield, Ohio 45014 - 1717  
(513) 889 - 2416  
*Defendant/Appellant pro se*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Motion to Stay was served upon the following persons by U.S. Mail, this 2<sup>nd</sup> day of July, 2012.

**Katherine M. Klingelhafer** ( # 0084901 )  
**Erika J. Schoenberger** ( # 0077808 )  
Frost Brown Todd LLC  
10 West Broad Street, Suite 2300  
Columbus, Ohio 43215 - 3484  
(614) 464 - 1211  
Counsel for Plaintiff/Appellee,  
HSBC Mortgage Services Icc.

**Carol M. Ballard**  
681 Magie Avenue  
Fairfield, Ohio 45014 - 1717  
(513) 889 - 2416



**Carol M. Ballard**  
*Defendant/Appellant pro se*

FILED  
MAY 21 PM 2:39  
MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
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

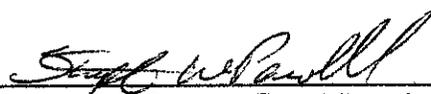
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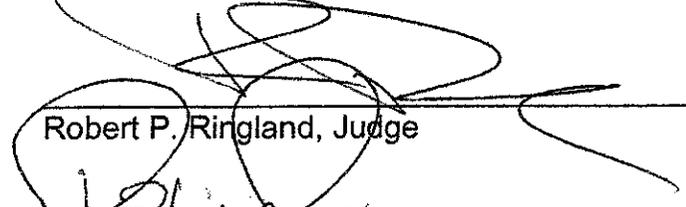
MARY L. SWAIN  
CLERK OF COURTS

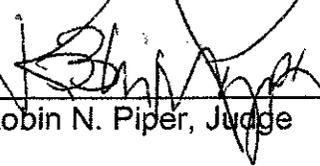
Upon consideration, it is the order of this court that this appeal should be and hereby is dismissed because the order appealed is not a final appealable order. This court is therefore without jurisdiction to consider the present matter for lack of a timely filed notice of appeal pursuant to App.R. 4(A).

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, : CASE NO. CA2011-05-088  
: OPINION  
- vs - : 5/21/2012  
:   
CAROL M. BALLARD, et al., :  
Defendants-Appellants. :

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>