ORIGINAL

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC., successor by merger to ABN AMRO Mortgage Group, Inc., Plaintiff/Appellee, v. JAMES A. ROZNOWSKI, et al., Defendants/Third-Party Plaintiffs/Appellants.	: : : : : : : : : : : : :	Supreme Court Case No. 12-2110 On Appeal from the Stark County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 2012 CV 00093

NOTICE OF CERTIFIED CONFLICT

David A. Wallace (0031356) Karen M. Cadieux (0079240) CARPENTER LIPPS & LELAND LLP 280 Plaza, Suite 1300 280 North High Street Columbus, Ohio 43215 (614) 365-4100 (Telephone) (614) 365-9145 (Facsimile) wallace@carpenterlipps.com cadieux@carpenterlipps.com Erin M. Laurito (0075531) Colette S. Carr (0075097) LAURITO & LAURITO, LLC 7550 Paragon Road Dayton, OH 45459 (937) 743-4878 Attorneys for Plaintiff/Appellants CitiMortgage, Inc. and Third-Party Defendant/ Appellee ABN AMRO Mortgage Group, Inc.	Peter D. Traska Traska Law Firm, LLC PO BOX 609306 Cleveland, Ohio 44109 (216) 282-4738 (Telephone) (216) 342-9145 (Facsimile) Attorneys for Defendants/Appellees James A. Roznowski and Steffanie M. Roznowski

FILED
DEC 18 2012
CLERK OF COURT
SUPREME COURT OF OHIO

CitiMortgage, Inc. and ABN AMRO Mortgage Group, Inc. respectfully give notice that the Fifth District Court of Appeals issued a Judgment Entry in Case No. 2012 CV 00093 certifying the following questions as a conflict pursuant to Rule 25 of the Ohio Rules of Appellate Procedure:

1. Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment.

2. Whether a mortgagor that contests amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance can challenge those amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation.

Pursuant to Rule 4.1 of the Rules of Practice of the Supreme Court of Ohio, a copy of the Court of Appeals Judgment Entry certifying the conflict is attached as Exhibit A. The Fifth District certified the conflict based on its decision in CitiMortgage, Inc. v. Roznowski, 2012-Ohio-4901, which conflicts with the Seventh District's decision in LaSalle Bank National Association v. Smith, 7th Dist. No. 11 MA 85, 2012-Ohio-4040.

Copies of those decisions are attached as Exhibits B and C, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Certified Conflict was served was served by first class, U.S. Mail, postage prepaid, on December 18, 2012, upon:

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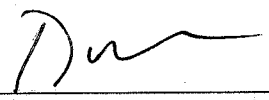

One of the Attorneys for Plaintiff/Appellant
CitiMortgage, Inc. and Third-Party Defendant/
Appellant ABN AMRO Mortgage Group, Inc.

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CLERK OF COURTS
STARK COUNTY, OHIO
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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC., Succdessor by merger to ABN AMRO Mortgage Group, Inc. Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES A. ROZNOWSKI, ET AL Defendant-Appellant	:	CASE NO. 2012-CA-00093

This cause comes before us on appellees' motion to certify a conflict to the Ohio Supreme Court between our opinion in the within, filed October 22, 2012 and *LaSalle Bank National Association, Trustee v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040.

Article IV, Section 3(B)(4) of the Ohio Constitution states:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

App R 25 governs Motions to Certify a Conflict:

(A) A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing before the judgment or order of

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EXHIBIT A

> the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal. A motion under this Rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

Pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, a court of appeals shall certify the case to the Supreme Court if it finds its judgment in conflict with a judgment of another court of appeals on the same question. At least three preconditions must be met before a conflict can be certified: "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis in original.) *Whitelock v. Gilbane Building. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellees' motion was timely filed. In it they propose two issues which they allege are appropriate for Certification:

"1. Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for

inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment.

"2. Whether a mortgagor that contests amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance can challenge those amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation."

Upon review, we find our opinion in the within is in direct conflict with *Smith*, supra on the same questions and on rules of law not facts, on both issues proposed by appellees. Accordingly we sustain appellees' motion and certify the record to the Ohio Supreme Court for final resolution.

IT IS SO ORDERED.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

12 OCT 22 PM 2:19
CLERK OF COURTS
STARK COUNTY, OHIO

CITIMORTGAGE, INC.	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J.
Plaintiff-Appellee	:	
-vs-	:	Case No. 2012-CA-93
JAMES A. ROZNOWSKI, ET AL	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2008CV00894

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY:

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By ..... Deputy
Date .....

APPEARANCES:

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EXHIBIT B

Gwin, P.J.

{¶1} Defendants-appellants James and Steffanie Roznowski appeal a judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiff-appellees CitiMortgage, Inc., the successor by merger to ABN AMRO Mortgage Group, Inc. For the reasons that follow, we find we have no jurisdiction over the matter.

{¶2} This case came before us on an earlier appeal, in which we determined there was no final appealable order. *CitiMortgage Inc v. Roznowski*, 5th Dist. No. 2011CA00124, 2012-Ohio-74. We found the earlier judgment did not set forth the dollar amount of the balance due on the mortgage and did not reference any documents in the record that did.

{¶3} In response, the trial court entered a judgment on February 1, 2012. The court set forth the principal sum due plus the interest. In addition, it awarded "costs of this action, those sums advanced by plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for property inspections, appraisal, preservation and maintenance." The court did not enter a dollar amount for any of those damages.

{¶4} Before addressing the merits of any appeal, we must first determine whether we have jurisdiction over the matter. If the parties to the appeal do not raise this jurisdictional issue, we may raise it sua sponte. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64, (1989), syllabus by the court. With few exceptions, the order under review must be a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *General Accident Insurance Co. v. Insurance Co. of North America*, 44 Ohio

St.3d 17, 20, 540 N.E.2d 266, (1989). An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. Ohio Constitution, Article IV, Section 3(B)(2) ; R.C. § 2505.02 .

{¶5} Ohio law recognizes an absolute right of redemption that is dual in nature, arising both from equity and statute. *Hausman v. Dayton,* 73 Ohio St.3d 671, 676, 1995–Ohio–277, 653 N.E.2d 1190. In *Hausman,* the Ohio Supreme Court explained that the mortgagor's equitable right of redemption is cut off by a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property. *Id.* After the decree of foreclosure has been entered, a mortgagor retains a statutory right of redemption under R.C. 2329.33 that may be exercised at any time prior to the confirmation of sale by depositing the "amount of the judgment" with all costs in the common pleas court.

{¶6} To redeem the property under R.C. 2329.33, "the mortgagor-debtor must deposit the amount of the judgment with all costs specified." *Women's Federal Savings Bank v. Pappadakes* 38 Ohio St.3d 143, 527 N.E.2d 792 (1988), paragraph one of the syllabus. The funds deposited must be available for use and division immediately. Id. at 146.

{¶7} In *Huntington National Bank v. Shanker,* Cuyahoga App. No. 72707, 1998 WL 269091, (May 21, 1998) , the court stated "It would be beyond reason to hold a trial court or magistrate to a standard that insists they state a definite sum of redemption," and that "[a]s long as the redemption value of a foreclosed property is ascertainable through normal diligence, the value, as stated by a finder of fact, will be upheld."

Likewise, courts have held it could be impractical to require the mortgagee to state with specificity the total amount due for additional charges because some of the damages would be accruing continuously through the date of the sheriff's sale. *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009–08–117, 2010-Ohio-847 ¶ 25.

{¶8} In *Roznowski I*, we said:

> "Generally, an order that determines liability but not damages is not a final, appealable order. *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009–Ohio–1221, 904 N.E.2d 863, at ¶ 31. There is an exception to this general rule, however, 'where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.' *State ex rel. White v. Cuyahoga Metro.Housing Auth.* (1997), 79 Ohio St.3d 543, 546, 684 N.E.2d 72. Thus, if 'only a ministerial task similar to executing a judgment or assessing costs remains' and there is a low possibility of disputes concerning the parties' claims, the order can be appealed without waiting for performance of that ministerial task. *Id.*

Roznowski I at ¶25, citations sic.

{¶9} The valuation of the damages "for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums" may be mechanical and ministerial, and ascertainable by normal diligence, and thus the court was not required to list them in the judgment entry of foreclosure. However, we find the computation of the dollar amount for "expenses incurred in property inspections, appraisal, preservation and maintenance" are not easily ascertainable. This matter has been pending for nearly

five years, and the accrued expenses appellee claims could represent a substantial sum. In order to exercise their right of redemption, appellants must know the amount of money they must produce. Nothing in the record gives appellants or this court notice of the amount.

{¶10} Appellants may dispute the necessity, frequency, and/or reasonableness of the expenses, and any challenges to these expenses may be likely to produce a second appeal before the sale. Further, these damages are not accruing continuously until the sheriff's sale. The final appraisals will be ordered by the sheriff, and appellee may or may not be required to expend funds for further inspections or maintenance. If there is a delay, occasioned, for example, by another appeal, the court can award subsequent damages.

{¶11} Appellee represented at oral argument all of the above can be challenged at the confirmation hearing. We do not agree. The proper time to challenge the existence and the extent of mortgage liens is in the foreclosure action, not upon confirmation of a judicial sale. *National Mortgage Association v. Day,* 158 Ohio App. 3d 349, 2004-Ohio-4514, 815 N.E. 2d 730. Confirmation involves only a determination of whether a sale has been conducted in accord with law, such as whether the public notice requirements were followed and whether the sale price was at least two-thirds of lands appraised value. *Ohio Savings Bank v. Ambrose,* 56 Ohio St. 3d 53, 55, 563 N.E. 2d 1318 (1990). It is for this reason that only damages whose computation are "mechanical and ministerial" can be addressed at a hearing on confirmation of the sheriff's sale.

{¶12} We find the judgment entry appealed from is not a final appealable order, and the appeal is dismissed for lack of jurisdiction.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 1010

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

CITIMORTGAGE, INC. Plaintiff-Appellee	
-vs-	JUDGMENT ENTRY
JAMES A. ROZNOWSKI, ET AL Defendant-Appellant	CASE NO. 2012-CA-93

For the reasons stated in our accompanying Memorandum-Opinion, the appeal is dismissed for lack jurisdiction. Costs to appellees.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

LaSALLE BANK NATIONAL ASSOCIATION, TRUSTEE, PLAINTIFF-APPELLEE VS. RONALD SMITH, et al., DEFENDANTS-APPELLANTS.

CASE NO. 11 MA 85

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

2012 Ohio 4040; 2012 Ohio App. LEXIS 3549

August 27, 2012, Decided

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 05CV3869.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff-Appellee: Attorney Anne Sferra, Attorney Nelson Reid, Attorney Justin Ristau, Columbus, Ohio.

For Defendant-Appellant: Attorney Bruce Broyles, Boardman, Ohio.

JUDGES: Hon. Joseph J. Vukovich, Hon. Cheryl L. Waite, Hon. Mary DeGenaro. Waite, P.J., concurs. DeGenaro, J., concurs.

OPINION BY: Joseph J. Vukovich

OPINION

EXHIBIT C

VUKOVICH, J.

[*P1] Defendants-appellants Ronald and Nancy Smith appeal the decisions of the Mahoning County Common Pleas Court that denied their motion for reconsideration and their Civ.R. 60(B) motion for relief from judgment. The Smiths contend that the January 12, 2007 judgment ordering foreclosure and sale of the real property and residence located at 1625 Gully Top Lane, Canfield Ohio, in Mahoning County was not a final order, and thus, the trial court could reconsider its order of foreclosure. In the alternative, they contend that even if the January 12, 2007 order was a final appealable order, the trial court erred when it denied their Civ.R. 60(B) motion. They assert that plaintiff-appellee LaSalle Bank National Association, As Trustee for Certificate Holders of Bear Stearns Asset-Backed Securities [**2] LLC Asset Back Certificates, Series 2004-HE5 (LaSalle) committed fraud on the court when it asserted in its complaint that it was a real party in interest, despite the fact that according to the Smiths, LaSalle is not the holder of the mortgage. The Smiths assert that this is a meritorious defense and that the motion was brought within a reasonable amount of time.

[*P2] For the reasons expressed more fully below, the decision of the trial court is hereby affirmed. The January 12, 2007 order is a final order of foreclosure. As such, the motion for reconsideration is a nullity and the trial court did not abuse its discretion in denying the motion. As to the Civ.R. 60(B) motion, the action was not timely.

STATEMENT OF THE CASE

[*P3] LaSalle filed a complaint and an amended complaint in foreclosure against the Smiths asserting that the Smiths defaulted on their mortgage for the real property and residence located at 1625 Gully Top Lane in Canfield, Ohio, and that LaSalle has the first lien on the property.

10/13/05 and 10/25/05 Complaints. LaSalle asserted that $525,023.67 plus interest was owed on the note.

[*P4] From the record it appears that in October 2004, when the Smiths were five payments behind [**3] in their mortgage, they executed a forbearance agreement. The Smiths defaulted on that agreement and in April 2005, when they were seven payments behind, and they executed a second forbearance agreement. They defaulted on this agreement too and in October 2005, they executed their third and final forbearance agreement. They only made one payment under that plan. On May 1, 2006, LaSalle accelerated the loan, called it due and initiated foreclosure proceedings.

[*P5] After the Smiths answered the complaint, LaSalle moved for summary judgment. 01/27/06 Motion. The Smiths filed motions in opposition to summary judgment approximately six months later. 07/19/06 Motions. LaSalle filed a response to the opposition motions in August 2006. Thereafter, in December 2006, LaSalle filed a detailed account of mortgage.

[*P6] In January 2007, the trial court granted summary judgment in favor of LaSalle ordering foreclosure and the sale of the property. No appeal was filed from this order.

[*P7] In July 2007, the property was set for sale. However, in August 2007, the case was stayed due to the Smiths filing bankruptcy. Thus, the order of sale was withdrawn. The bankruptcy stay was lifted in October 2007 after the bankruptcy [**4] case was dismissed.

[*P8] The property was ordered to sale and a notice of sale was issued in May 2008. However, prior to the sale, the Smiths requested another stay because of an action they had pending in Federal District Court against LaSalle. In that case, the Smiths asserted that LaSalle violated the Truth in Lending Act. The trial court granted the stay request. 06/20/08 J.E.

[*P9] In October 2009, the stay was lifted after the federal case had been dismissed. 10/19/09 J.E. One week later, the Smiths requested another stay. This request was based on a pending case in the Mahoning County Common Pleas Court that made claims against LaSalle that were similar in nature to the claims that were already asserted and dismissed by the federal court. 10/28/09 Motion. In March 2010, prior to the court ruling on the request, the Smiths asked the trial court to reconsider its October 2009 order lifting the stay. The magistrate stayed the case. 06/23/10 J.E. However, in February 2011 the trial court vacated the magistrate's stay.

[*P10] On March 16, 2011, approximately 51 months after the initial foreclosure order, the Smiths filed a motion for reconsideration of the trial court's January 12, 2007 order. That [**5] same day they also filed a Civ.R. 60(B) motion for relief from judgment. Both motions asserted that LaSalle is not the real party in interest, committed fraud on the court and violated the Pooling and Servicing Agreement (PSA) that governed how the mortgage was to be placed in the Bear Stearns Trust. LaSalle filed motions in opposition to both of the Smiths' motions. 04/15/11 and 04/26/11 Motions. On May 4, 2011, the trial court overruled the motions. It is from that order that the Smiths appeal.

[*P11] During the pendency of the appeal, the Smith sought a stay of the January 12, 2007 order. The trial court denied the stay. We granted the stay and ordered a bond in the amount of $750,000. 06/29/11 J.E. Even though the Smiths did not file the required bond to stay the proceedings, on July 7, 2011, LaSalle moved to withdraw the order of sale. The trial court granted the motion and the order of sale was withdrawn. 07/07/11 J.E.

JANUARY 12, 2007 JUDGMENT ENTRY

[*P12] The arguments presented in the assignments of error are alternatives to each other. The first assignment of error is premised on the position that the January 12, 2007 order is not a

final order since a trial court can only reconsider nonfinal [**6] orders. The second assignment of error is premised on the position that the January 12, 2007 order is a final order since Civ.R. 60(B) only applies to final orders. Thus, before addressing the assignments of error, the initial question this court must decide is whether the January 12, 2007 Judgment Entry that ordered foreclosure and sale of the property was a final appealable order.

[*P13] Our court has previously looked at the issue of what is needed in a foreclosure judgment to render that judgment final. *Second Nat. Bank of Warren v. Walling,* 7th Dist. No. 01CA62, 2002-Ohio-3852. We have stated that:

> [A] judgment entry ordering a foreclosure sale is not final and appealable unless it resolves *all* of the issues involved in the foreclosure, including the following: whether an order of sale is to be issued; what other liens must be marshaled before distribution is ordered; the priority of any such liens; and the amounts that are due the various claimants.

(Emphasis sic.) *Id.* ¶ 18.

[*P14] Within the past year we have favorably cited our decision in *Walling. PHH Mtge. Corp. v. Albus,* 7th Dist. No. 09MO9, 2011-Ohio-3370, ¶ 18. In *PHH* we found that the judgment was not final even though the judgment entry [**7] did state the exact amount due on the promissory note, it included a demand to marshal liens and it did provide that there was a right to redemption. *Id.* This was because the judgment entry stated that the final decree of foreclosure is "to be submitted" at some point in the future. *Id.* Furthermore, the entry did not include the description and amount of other liens, the priority of the liens, and how the funds should be distributed to the various claimants. *Id.,* citing *Walling,* ¶ 18.

[*P15] In the case at hand, the January 12, 2007 judgment entry that granted summary judgment in favor of LaSalle acknowledged that defendants McHutchinson LLC and Sky Bank Successor to Citizens Banking Company "disclaimed any right, title claim or interest in the premises described herein." The judgment then stated:

> The Court finds that there is due the Treasurer of Mahoning County, taxes, accrued taxes, assessments and penalties on the premises described herein, as shown on the County Treasurer's tax duplicate, the exact amount being unascertainable at the present time, but which amount will be ascertainable at the time of sale; which are a valid and subsisting first lien thereon for that amount so owing on [**8] the day of the timely transfer of deed.
>
> * * *
>
> The Court finds on the evidence adduced that there is due Plaintiff on the promissory note set forth in the First Count of the Complaint, the sum of $525,023.67, plus interest thereon at the rate of 8.25% per annum from February 1, 2005, plus all late charges due under the Note and Mortgage, all advances made for the payment of real estates taxes and assessments and insurance premiums, and all costs and expenses incurred for the enforcement of the Note and Mortgage, except to the extent the payment of one or more specific such items is prohibited by Ohio law, for which sum judgment is hereby rendered in favor of Plaintiff against the Defendants, Ronald J. Smith.
>
> * * *
>
> The Court finds that Plaintiff has and will from time to time advance sums for taxes, insurance and property protection. Plaintiff has the first and best lien for these

amounts in addition to the amount set forth above. The Court makes no finding as to the amounts of the advances and continues same until the confirmation of sale.

* * *

It is therefore ORDERED, ADJUDGED AND DECREED that unless the sums found due herein, together with the costs of this action be fully paid within [**9] three (3) days from the date of the entry of this decree, the equity of redemption and dower of all defendants in and to said premises shall be foreclosed and that an order of sale may be issued to the Mahoning County Sheriff, directing him to appraise, advertise in a paper of general circulation within the County and sell said premises as upon execution and according to law free and clear of the interest of all parties to this action.

1/12/07 J.E.

[*P16] The above clearly shows that any other lien holders have disclaimed their rights. Thus, here, we do not have the issue that we had in *Walling* where the number, priority and value of other outstanding liens was not determined. Likewise, the ability to redeem the property is also set forth.

[*P17] The Smiths' assertion that this judgment is not final is based on the fact that the judgment does not, in their opinion, determine the amounts due and leaves that determination for a later date.

[*P18] The judgment entry clearly indicates that certain fees are not ascertainable at the time of the judgment entry. For instance, the accrued taxes that will be owing to the Mahoning County Treasurer at the time of the sale is not ascertainable at the order of foreclosure [**10] because it is

unclear how long it will take to sell the property. Likewise, if LaSalle advances sums for taxes, insurance and property protection, that is also not ascertainable at the point that foreclosure is ordered. The court cannot compute those figures because their final amount is dependent on how quickly the property sells. However, what is clear from the judgment is that any money that is expended by LaSalle for those items constitutes a lien on the property. While the trial court did state that it is not making any "finding as to the amount of the advances and continues the same until the confirmation of the sale" that statement should not render the judgment nonfinal.

[*P19] Our decision in *PHH* that the foreclosure order was not final was partially based on the statement in the trial court's judgment of foreclosure that a final decree of foreclosure is "to be submitted" at some point in the future. *PHH Mtge. Corp. v. Albus,* 7th Dist. No. 09MO9, 2011-Ohio-3370, ¶ 18. The statement that the amount of the advances will be determined in the confirmation of the sale judgment is not the equivalent to the statement that a final decree of foreclosure is "to be submitted" at some point [**11] in the future. Thus, our case is distinguishable from *PHH.*

[*P20] At this point, it is important to recognize that there are two judgments that are appealable in foreclosure actions. *Emerson Tool, L.L.C. v. Emerson Family Ltd. P'ship,* 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13, citing *Citifinancial, Inc. v. Haller-Lynch,* 9th Dist. No. 06CA008893, 2006-Ohio-6908, ¶ 5-6. See, also, *Bankers Trust Co. of California, N.A. v. Tutin,* 9th Dist. No. 24329, 2009-Ohio-1333, ¶ 14; *Triple F. Invests., Inc. v. Pacific Fin. Servs., Inc.,* 11th Dist. No. 2000-P-0090, 2001 Ohio App. LEXIS 2484, 2001 WL 589343 (June 1, 2001). The first is the order of foreclosure and sale. The second is the confirmation of the sale.

[*P21] Thus, if the advances made for taxes, insurance and property protection are determined at the time of the confirmation of the sale, any amount in dispute is subject to an appeal of

the confirmation of the sale order. The order of foreclosure clearly indicates that those advances are the first and best lien for those amounts in addition to the amounts set forth above. This is especially the case when the advances are future costs that have not occurred and potentially may not occur. To find that the judgment entry is nonfinal [**12] because it is does not compute future costs would mean that no judgment of foreclosure and sale would ever be final.

[*P22] Consequently, after considering the entire January 12, 2007 judgment entry we find that it is a final appealable order.

FIRST ASSIGNMENT OF ERROR

[*P23] "THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION."

[*P24] It has been explained multiple times that motions for reconsideration of a final judgment in the trial court are a nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981). As explained above, the January 12, 2007 order of foreclosure is a final appealable order. Thus, considering *Pitts* and our holding regarding the finality of the January 12, 2007 order, this assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

[*P25] "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT."

[*P26] Civ.R. 60(B) states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding" when certain factors are met. Civ.R. 60(B) only applies to final orders. Therefore, since we have found that the

January 12, 2007 order is a final order, Civ.R. 60(B) [**13] can be used as means to have that order vacated.

[*P27] The standard of review used to evaluate the trial court's decision to grant or deny a Civ.R. 60(B) motion is an abuse of discretion. *State ex rel. Russo v. Deters,* 80 Ohio St.3d 152, 153, 1997 Ohio 351, 684 N.E.2d 1237 (1997). An abuse of discretion connotes conduct which is unreasonable, arbitrary, or unconscionable. *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.,* 72 Ohio St.3d 106, 107, 1995 Ohio 251, 647 N.E.2d 799 (1995).

[*P28] We have continuously explained that Civ.R. 60(B) cannot be used as a substitute for appeal. *John Soliday Fin. Group, L.L.C. v. Moncreace,* 7th Dist. No. 09 JE 11, 2011-Ohio-1471, ¶ 11, quoting *Doe v. Trumbull Cty. Children Servs. Bd.,* 28 Ohio St.3d 128, 28 Ohio B. 225, 502 N.E.2d 605 (1986). The movant's arguments cannot merely reiterate merit arguments that could have been raised on appeal. *Manigault v. Ford Motor Co.,* 134 Ohio App.3d 402, 412, 731 N.E.2d 236 (8th Dist. 1999).

[*P29] In order to prevail on a motion brought under Civ.R. 60(B), the movant must show that:

[*P30] "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); [**14] and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. Arc Industries, Inc.,* 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

[*P31] The grounds for relief under the second *GTE* element are:

> (1) [M]istake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

Civ.R. 60(B).

[*P32] Our analysis will begin with the second and third *GTE* factors, grounds for relief and timeliness of the Civ.R. 60(B) motion. The Smiths contend that the catchall provision in Civ.R. 60(B)(5) applies, [**15] i.e. any other reason justifying relief from the judgment. Specifically, they contend that when counsel for LaSalle filed the complaint asserting LaSalle was the holder of the note and mortgage, counsel was committing a fraud on the court because counsel knew LaSalle was not the holder of the note. Therefore, according to the Smiths Civ.R. 60(B)(5) is applicable and since the motion for vacation was filed within a reasonable time, it complied with the timeliness requirement.

[*P33] LaSalle disagrees and asserts that the allegation that LaSalle knew it was not the holder of the note is more akin to (B)(3), "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Thus, according to LaSalle, Civ.R. 60(B)'s one year filing requirement is applicable. Since the motion was filed approximately 4 years and 3 months after the foreclosure judgment, it was untimely.

[*P34] As can be seen by the arguments, the determination of whether the vacation motion is timely is partially dependent upon what ground for relief is being claimed. The comments to Civ.R. 60(B) clearly indicate that fraud upon the court differs from Rule 60(B)(3), fraud or misrepresentation [**16] by an adverse party. Civ.R. 60(B) (staff notes). "Fraud upon the court might include, for example, the bribing of a juror, not by the adverse party, but by some third person." Id.

[*P35] The Ohio Supreme Court has explained that "fraud on the court" occurs when an officer of the court (i.e. an attorney) actively participates in defrauding the court. *Coulson v. Coulson,* 5 Ohio St. 3d 12, 15, 5 Ohio B. 73, 448 N.E.2d 809 (1983). This type of fraud does not fall under Civ.R. 60(B)(3), but rather constitutes a ground for relief under Civ.R. 60(B)(5). *Id.*

[*P36] That said, our sister district has stated that the mere allegation that the party seeking foreclosure is not the holder of the note is not enough for it to constitute fraud on the court, rather in that case it merely falls under general fraud. *U.S. Bank Natl. Assn. v. Spicer,* 3d Dist. No. 9-11-01, 2011-Ohio-3128, ¶39, 41-42. However, in that case, there was not a clear allegation that counsel for the bank was involved in the fraud. Here, the Smiths take the allegation one step farther than Spicer did; the Smiths contend that the counsel for LaSalle was involved in the fraud and thus, it became fraud on the court.

[*P37] Here, the Smiths' allegation involves an officer [**17] of the court and thus, by mere definition the ground for relief is fraud on the court. Whether the Smiths can prove such allegation is a whole separate issue. However, it falls under Civ.R. 60(B)(5) and thus, in order to meet the timeliness requirement, the motion was required to be filed within a reasonable time.

[*P38] Thus, the issue before this court is whether the four year and three month delay was reasonable. It has been explained that the determination for Civ.R. 60(B) as to what is a reasonable

length of time is fact specific. *Frantz v. Martin,* 8th Dist. No. 92211, 2009-Ohio-2377, ¶14 (stating, "from a review of case law regarding timeliness of Civ.R. 60(B) motions, it is clear that each case must be decided upon its own facts as a delay of four years has been held to be reasonable, and a delay of four months has been held to be unreasonable").

[*P39] Given the facts of this case, we do not find that the length of the delay was reasonable. Admittedly, the Smiths have pursued multiple tactical maneuvers to stop the foreclosure, which included constant litigation that stayed the foreclosure action. However, stays do not prevent a party from filing a motion to vacate. While the trial court [**18] could not rule on the motion during the stays, the motion still could have been filed.

[*P40] Likewise, it also acknowledged that the Smiths had to obtain the voluminous Pooling and Servicing Agreement (PSA) and its supplement, the Prospectus Supplement, from the Securities and Exchange Commission to determine whether LaSalle complied with those requirements in those documents. The PSA and Prospectus Supplement were obtainable at the time the complaint was filed; the Prospectus Supplement is dated 2004. Thus, the alleged failure to follow the requirements could have been discovered shortly after filing of the 2005 complaint.

[*P41] The Smiths assert that it was not until the November 2010 Federal Congressional Oversight Panel Report came out that they could fully comprehend the legal consequences of LaSalle's failure to comply with the terms of the PSA. We disagree with the position that the failure to comply with the terms of the PSA could not be discovered until the congressional report was issued. The Federal Committee Report is merely a report, it is not law. Therefore, it does not indicate the legal consequences of the failure to comply with the terms of the PSA. Only through litigation can [**19] the consequences of failing to comply with the terms of the PSA be realized.

The Smiths did not need the committee report to realize legal consequences, but rather needed to pursue the issue through the courts.

[*P42] Furthermore, the congressional report does not indicate that there is a clear issue in the case at hand. The report indicates that mortgages may not have been properly conveyed to the trust that claims to own the note if the required documentation to transfer the note and mortgage to the trust was incomplete. Thus, the trust may not have the ability to enforce the lien through foreclosure because it may not be the owner of the note and mortgage. The report shows that for securitization of the mortgage there are multiple transfers. It shows the mortgage starting with the originator, who in this case would be Encore, then being transferred to a Securitization Sponsor and then to a Depositor and then to the Securitization Trust, which in this case would be LaSalle. In this case the middlemen were jumped and the mortgage was placed directly into the trust. Encore, the original lender assigned the note and mortgage to "LaSalle Bank National Association, as Trustee for certificateholders [**20] of Bear Stearns Asset Stacked Securities I LLC Asset Backed Certificates, Series 2004-HE5". The report does not suggest whether such an action was right or wrong.

[*P43] Consequently, considering all the above the motion for relief from judgment was not filed within a reasonable time. Thus, as the third *GTE* requirement was not met, the trial court did not abuse its discretion in denying the Civ.R. 60 motion. *Rose Chevrolet, Inc.,* 36 Ohio St.3d at 20, 520 N.E.2d 564 (1988) (stating that the trial court should overrule a Civ.R. 60(B) motion if the movant fails to meet any one of the foregoing three requirements). Therefore, this assignment of error lacks merit.

CONCLUSION

[*P44] The trial court's January 12, 2007 order of foreclosure is a final appealable order. The first assignment of error lacks merit because reconsideration of a final trial court order is a nullity. The second assignment of error also lacks merit because the Civ.R. 60(B) motion was not made within a reasonable time. Therefore, the trial court's decisions to deny the motion for reconsideration and Civ.R. 60(B) motion to vacate are hereby affirmed.

Waite, P.J., concurs.

DeGenaro, J., concurs.

APPROVED:

JOSEPH J. VUKOVICH, JUDGE

JUDGMENT [**21] ENTRY

For the reasons stated in the Opinion rendered herein, the assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, is affirmed. Costs taxed against appellants.