

ORIGINAL

IN THE SUPREME COURT OF OHIO

Art's Rental Equipment, Inc., et al., Plaintiffs, :
 and Bank of America, N.A., :
 Plaintiff-Appellee, :
 v. :
 Bear Creek Construction, LLC, et al., Defendants, :
 and Riverbend Commercial Title Agency, L.P., and :
 Port of Greater Cincinnati Development Authority, :
 Appellees, and Kraft Electrical Contracting, Inc., :
 Hicon, Inc., Central Insulation Systems, Inc., :
 Laforce, Inc., MJB Consultants, Inc., The Mark :
 Madison Company, Tepe Environmental Services, :
 Ltd, Universal Cleaning, Security Fence Group, :
 Inc., The Painting Contractor, LLC, Triumph Signs :
 and Consulting, Inc., Spohn Associates, Inc., :
 Kelley Bros. Roofing, Inc., Jarvis Mechanical :
 Constructors, Inc., Architectural Glass & Metal :
 Co., Inc., Baker Concrete Construction, Inc., Sofco :
 Erectors, Inc., Kenwood Towne Place, LLC, :
 J&B Steel Erectors, Inc., SBF Asset Acquisition, :
 LLC, Specialty Interiors of Ohio, Inc., Jostin :
 Concrete Construction, Ford Development Corp., :
 Alt & Witzig Engineering, Inc., OK Interiors :
 Corp., Barrett Paving Materials, and Smith & :
 Jolly Landscape and Design, Inc., :
 Defendants-Appellants. :

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

13-0005

Court of Appeals
Case Nos. C-110544, C-110555,
C-110558, C-110559, C-110564,
C-110785, C-110792, C-110797,
C-110798, C-110799, C-110800,
C-110801, C-110808, C-120309

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANTS J&B STEEL ERECTORS, INC.
 AND SBF ASSET ACQUISITION, LLC

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APPELLANTS' EXPLANATION OF WHY THIS CASE IS OF GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL ISSUE

This case is of great public interest and involves a substantial Constitutional issue. The legal issues involved in this case are present in many of the recent flood of residential and commercial mortgage foreclosure cases, the most in Ohio history and around the nation.¹ In this case, after millions of dollars of litigation costs were expended by the competing lienholders to bring the dispute over competing liens to the point of summary judgment, and hundreds of hours of courtroom time and judicial effort were expended by the trial court, the appellate court below, in a breathtaking exercise of judicial economy, dismissed the entire case as moot because the underlying property had been sold and the proceeds distributed to one of the competing lienholders. The First District Court of Appeals (sometimes hereinafter "the court below") thereby created a rule of law in the First District that is most unjust and denies the litigants their right of appeal.

Further, the failure of the court below to certify the decision as a conflict given the obvious different result in the First District when contrasted with at least five other Ohio appellate districts, leaves potential future litigants in a situation such that the appellate district in Ohio where a foreclosure case is venued will likely determine if one will have any right of appeal from a dispute between competing lienholders. Although the decision of the court below achieves great judicial economy in that the court below did not have to conduct the tedious review of the voluminous and

¹The year in which this foreclosure was filed (2009) represented a 20-year high in foreclosure filings, with dramatic increases predicted into the future as set forth in this Court's statistical report found at www.sconet.state.oh.us/Publications/annrep/09OCS. And, most importantly, the decision by the court below runs directly contrary to the Supreme Court of Ohio's stated goal to expeditiously dispose of foreclosure cases because, since the First District's decision rewards delay and recalcitrance by the litigants.

conflicting evidence on which the trial court's erroneous summary judgment was based, by dismissing the appeal, the court below denied equal protection under the law and the opportunity for an appeal as assured by the Ohio Constitution and the case law of this Court.

A. This case is of great general public interest.

Why should there be a race to have an appellate court decide a dispute between competing lienholders so that the occurrence of a sheriff's foreclosure sale and the distribution of the proceeds of sale to one of the competing lienholders (even during the pendency of the appeal) becomes the bright line to avoid mootness? Or, stated differently, why should the right to a civil appeal from a decision about lien priority require the delay of a foreclosure sale and the distribution of proceeds? This question is vexing to the litigants in this case, and the answer is of broad public interest, and may determine the future conduct of foreclosure litigants and their attorneys.²

The historical cases on which the decision of the court below was based were mostly related to the conflict between an owner/mortgagor and his mortgagee/lender, or between owners of property and a receiver, or similar circumstances wherein the reason for the dispute was the desire, on the part of the owner, not to lose the property to foreclosure. The case law on which the court below based its decision involved residential foreclosure cases wherein the goal of the owner/mortgagor/borrower was to retain his home. Only one reported case in the body of law on this subject was a commercial foreclosure case. (See Appellants' Summary of Conflicting Cases in Ohio's Appellate Districts, p.

² The decision of the court below creates an extremely powerful incentive for creditors and their counsel to delay or expedite a foreclosure, as the case may be, in order to obtain for themselves or divest the opposing litigant the right of appeal. There are many procedural steps in a foreclosure case which should proceed without contention. The decision of the court below rewards contention on every procedural step.

pp.13-14). Application of case law dealing with owners/mortgagors/borrowers who seek to retain their homes to the facts of this complex commercial case is both dangerous and unjust.

The competing lienholders in this case, Bank of America, N.A. (“BOA”), J&B Steel Erectors, Inc. (“J&B”) and SBF Asset Acquisition, LLC (“SBF”) had no interest in owning or retaining the subject property. Their dispute was purely one of priority of liens and the right to share in the monetary proceeds of sale. In fact, most of the litigants and the trial court believed it to be in the best public interest to see the property sold and returned to a productive use. The public was involved as well. Endless articles appeared in the local press covering every trial court hearing and decision, bemoaning the uncompleted construction. A rusting, skeletal hulk of a building with a construction tower crane looming overhead, sat, uncompleted, in disuse, in one of the best, most exclusive commercial areas in Cincinnati, Ohio. Returning the property to productive use was not only in the best public interest, but became a cause celebre in the local press.

The decision of the court below would serve to reward future delays in the foreclosure process to avoid mootness of the appeal of a trial court’s decision on lien priority. Yet, disposition of the property and its return to public use, including the distribution of proceeds, bears no reasonable relation to the dispute between the competing lienholders. The trial court could have easily fashioned a remedy of restitution after the distribution of proceeds but for the decision of the court below finding the dispute moot. The doctrine of mootness employed by the court below has no place in a dispute between two commercial lien claimants, in this case a mortgagee, BOA, and mechanics lienors, J&B and SBF, where the property itself is not sought by either party, and the only issue of interest is the priority of the competing lienors’ liens and their respective right to share in the proceeds of sale. For it is utterly irrelevant as to whether the property is sold or is not sold or the

proceeds distributed or not distributed in the determination of lien priority. In fact, in this case, there was virtual unanimity that the best, most productive course was to see the property sold and returned to productive use as opposed to wasting away during a protracted litigation.

The decision of the court below creates an extremely powerful incentive for creditors to delay or expedite a foreclosure, as the case may be, in order to obtain for itself, or divest another of, the right of a meaningful appeal. Obtaining a stay of the foreclosure as a precondition to have the right to an appeal is highly wasteful and unproductive and, and it is often impossible to obtain a bond. Having the subject property sitting empty, decaying, rusting, and non-productive was not any litigant's desire. Only the attempt to avoid a mootness decision result caused some lien claimants to apply for a stay, but the supersedeas bond requirement set by the trial court (\$26,000,000.00) was beyond the financial abilities of any of the litigants. Perhaps that was for the best because if a stay was granted, it would have been wasteful and non-productive for the property to sit, wasting away, for another year or more. But that is the import of the decision of the court below: to achieve an appeal of right, between two competing lienors: either the property must waste away or, if sold, the proceeds must be held from return to productive use. Undeniably, it is in the best public interest to see issues of lien priority between competing lienholders proceed to final determination notwithstanding the sale of the subject property and distribution of the proceeds of sale.

Finally, this Court has issued its Statistical Reporting Information and Forms (including instruction for preparation), Forms and Instructions for Preparation: Common Pleas Courts, Instructions for Preparation Common Pleas Courts³ making mandatory the disposition of Foreclosure cases within 12 months (recommended 9 months), making it virtually impossible for an appealable

³<http://www.supremecourtofohio.gov/JCS/casemng/default.asp>

issue to be disposed of by a court of appeals within the mandatory case termination deadline, hence mooted the appeal in the Districts following the *Tutin* case. *Bankers Trust Co. of Calif, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333. Compliance with this Court's case management directive prevents an appeal from being heard in a number of Ohio Appellate Districts (*See, e.g., 7th, 8th, 9th, 12th*, Appellants' Summary of Conflicting Appellate Decisions, pp. 13-14), for if a case is terminated within 12 months, no appeal will have been heard, the appeals court will declare mootness, and the appeal will fail.

B. This case involves a substantial constitutional issue.

In *Atkinson v. Grumman*, this Court stated: "[T]he right to appeal is a property interest that cannot be denied without due process of law." 37 Ohio St.3d 80, 84 (1988). While the United States Supreme Court has long held that a "right" to appeal is not found in the Constitution (*McKane v. Durston*, 153 U.S. 684(1894)), the court has also held that where a state provides a process of appellate review, the procedures used must comply with constitutional dictates of due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The right of appeal in this case is of Constitutional magnitude. And, in addition to preserving the right of appeal, the appellants have been denied equal protection under the law and deprived of due process, by the taking of a valid lien on property, granting others priority, and denying the right of appeal when a valid remedy exists. And, although mysteriously not certified by the court below as a conflict, the decision in this case was, in fact, in conflict with a number of appellate districts and was aligned with others, creating an equal protection issue. Should the venue of the foreclosure case determine whether the litigants' right to a civil appeal exists? Do litigants arguing about the priority of liens on property in Columbus, Ohio have the right to an appeal they would not have if the property was located in Akron? Certainly

differences in local law are tolerable, but not when the fundamental issue such as the very right of an appeal is what is at variance.

STATEMENT OF THE CASE AND THE FACTS

A. Statement of the Case

Appellants appealed to the First District Court of Appeals from the trial court's granting of summary judgment in favor of BOA on the issues of validity of BOA's mortgage and the priority of liens. Following the appeal, tactics were employed in the case by the Appellee BOA that slowed the progress of the appeal, including Appellee's motions to vacate the scheduling order (granted in part), remove the case from the accelerated calendar (denied), dismiss the appeal (denied), hold the appeal in abeyance (denied), extend the time to file Appellee's brief (granted), and extend the time for merit hearing (granted), even while the foreclosure sale and distribution of proceeds proceeded expeditiously in the trial court, with the order of distribution of proceeds entered on September 19, 2012. Although the parties did not raise the issue of mootness, the court below did, sua sponte, six days after the order of distribution was entered in the trial court. The issue of mootness was briefed post-oral argument by way of supplemental briefs, and the court below dismissed the appeal for mootness by its order entered November 21, 2012, just 62 days after the order for distribution was entered. The Appellants appealed to this Court from that decision.

B. Statement of the Facts

BOA, as lender, filed a Complaint in foreclosure on May 28, 2009 against Kenwood Towne Place, LLC ("KTP"), the owner and developer of a mixed-use, retail project known as Kenwood Towne Place ("Project"). On the date when BOA filed suit, there were already seven mechanic's lien foreclosure/breach of contract suits pending on the Project by unpaid subcontractors, including J&B and Structural Solutions, Inc. predecessor and assignor to SBF. The trial court entered an order consolidating the cases on June 18, 2009. After very substantial discovery and motion practice, the

trial court entered a non-final Decision on May 25, 2010 granting partial summary judgment in favor of BOA finding that the multiple notices of commencement filed on the Project were valid and a Decision on August 10, 2011 granting summary judgment in favor of BOA on the validity of its mortgage, the priority of its mortgage over all mechanic's lien claimants, and its entitlement to foreclosure of its mortgage lien. Some months later, on November 4, 2011, an Entry Granting Summary Judgment in Favor of BOA and Decree of Foreclosure was entered, which adopted the August 10, 2011 Decision. Applications for stay were filed by various of the affected parties (competing lienholders identically situated with Appellants, both in the trial court and the Court of Appeals). On June 19, 2012 a stay was granted, conditioned upon the posting of a bond in the amount of \$26,000,000.00, which bond could not be obtained and, thereafter, the foreclosure case proceeded to appraisal, notice, sale, confirmation of sale and distribution of proceeds, all in the ordinary course. Meanwhile, and coextensively, the appeal proceeded before the First District Court of Appeals. The case was delayed in the appeals court by multiple filings by BOA, but eventually became fully briefed and was argued to the court below on September 25, 2012. At the oral argument, the court below raised the issue of mootness and instructed the parties to brief the issue. The issue was briefed by the parties, post-hearing, and the court below subsequently dismissed the appeal as moot.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The (Constitutional) right to a meaningful appeal is wrongly denied if a controversy between competing lienholders is declared moot when the subject property is sold in foreclosure and the proceeds of sale distributed to one of the competing lienholders.

In *Atkinson v. Grumman Ohio Corp.*, this Court stated that while the United States Supreme Court has long held that a right to appeal is not found in the Constitution, where a state provides a

process of appellate review, the procedures used must comply with constitutional dictates of due process and equal protection. 37 Ohio St.3d 80, 84 523 N.E.2d 851 (1988); citing *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894); *Griffin v. Illinois*, 351 U.S. 12, 18, 100 L. Ed. 891, 76 S. Ct. 585 (1956). Ohio has adopted appellate rules that make every litigant entitled to an appeal as of right by filing a notice of appeal within the time allowed. *Atkinson* at 84-85, citing *App.R. 3(A)*; See, also, *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St. 3d 293, 294, 496 N.E.2d 466 (1986). In *Moldovan*, this Court cited Ohio Constitution Article I, Section 16 and stated it was well-established that every injured party shall have remedy by due course of law and shall have justice administered without denial or delay. *Moldovan* at 295.

Hence, the rights protected in Ohio Constitution, Article I, Section 16 extend to the right to appeal. This Court noted that the "due course of law" provision in Article I, Section 16 is the equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422-423, 633 N.E.2d 504 (1994), citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941).

Due Process - Article I, Section 16

Section 16. All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law; and justice administered without denial or delay.
Ohio Constitution, Article I, Section 16.

As for the specific constitutional provision at issue herein, Ohio Constitution, Article I, Section 16 (due process), this Court has stated that when the Ohio Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted at a meaningful time and a meaningful manner. *Burgess v. Eli Lilly & Co.*, 66 Ohio St. 3d 59, 62, 609 N.E.2d 140 (1993), citing

Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 60, 514 N.E.2d 709 (1987).

Further, Equal Protection is granted under Ohio Constitution Article I, Section 2:

Section 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges of immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Constitution, Article I, Section 2.

The appellate court system in Ohio was established to assure this right. Ohio Constitution, Article IV, Section 3(B)(1)(f), provides for the establishment of an appellate court system with jurisdiction in any cause on review as may be necessary to its complete determination.

Proposition of Law No. 2: R.C. 2329.45 provides the remedy of restitution from a creditor who has received the proceeds of a foreclosure sale if and when a competing lienholder's claims are finally determined to be superior.

In finding mootness, the court below relied almost entirely upon the case of *Bankers Trust Co. of Calif., N.A. v. Tutin*, wherein a stay was requested and obtained, residential property was sold, and proceeds were distributed. 9th Dist. No. 24329, 2009-Ohio-1333. The *Tutin* Court found the case to be moot upon appeal, stating that R.C. 2329.45 cannot reasonably be construed to create an exception to the mootness doctrine in foreclosure cases. The *Tutin* Court reasoned that after the matter has been extinguished through satisfaction of the judgment,⁴ the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action. There, the *Tutin* Court confidently stated that a statute means what it says. Citing *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 1993-Ohio-222, 618 N.E.2d 138, the *Tutin* Court stated:

⁴Of course, satisfaction of the judgment did not occur in this case as there was not only a substantial deficiency unpaid to all creditors, including the prevailing creditor, BOA, and a satisfaction, even if it had it occurred, would not have determined the respective rights between the competing lien creditors.

It is a basic rule of statutory construction that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." *R.C. 1.42*. Moreover, the court cannot ignore the plain language of the statute, nor can it insert operative provisions that are not there.

(*Tutin* at * p.12).

But in making its emphatic pronouncement about how R.C. 2329.45 is to be interpreted, the *Tutin* Court utterly ignored the fact that the statute specifically states that the remedy is restitution (meaning restoration) from the prevailing judgment creditor, which would require that the prevailing lien creditor has already received a distribution of the proceeds of sale to that creditor or there would be nothing to restore. Did the *Tutin* Court think that the trial court would have the proceeds of sale held by the sheriff or the clerk, but order restitution of the funds from the prevailing judgment creditor that had not yet received a distribution? The statute plainly states that the restitution must be made by the judgment creditor, and does not mention the sheriff or the court clerk:

If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale. R.C. 2329.45. (Emphasis added)

So, it would be quite impossible for the judgment creditor to restore funds in restitution that it had not yet received. And, since when does the sheriff or the clerk holding proceeds of a foreclosure sale not yet distributed (as the *Tutin* Court and the court below require) have the obligation or even the right to pay interest on the funds held by it as is required by the statute? The *Tutin* Court's decision makes nonsense of the statute. It is therefore incontrovertible that the *Tutin* Court misconstrued R.C. 2329.45. And, the court below followed the *Tutin* Court into the intellectual ditch by adopting its fallacious reasoning without independent consideration of the

equities of this case.

After Tutin was wrongly decided in 1994, chaos has ensued bringing us to the absurd state of the law today where competing lien creditors are highly incentivized to do the exact opposite of what is in the public interest, i.e., it is in the best interest of these competing creditors to stall the cases endlessly to the brink of ethical limits, interposing delays and creating obstacles to getting distressed property back to work in the stream of commerce, filing challenges to minor matters, preventing sales and distributions, or conversely accelerating the process. And, the Supreme Court's directive of completing foreclosure cases within a year,⁵ although laudable in resolving the backlog of foreclosure cases, greatly increases the difficulties in prosecuting an appeal before the foreclosed property is sold, proceeds distributed, and the case terminated in accordance with the Supreme Court's directive.

Further to the unequal treatment of litigants, it is now the law of this State that if lien priority litigation is venued in any of the five "mootness" appellate districts, one will not have a meaningful right of an appeal other than with a wasteful stay of the foreclosure processes which usually cannot be obtained, but, to the contrary, if the priority litigation proceeds in one of the five "non-mootness" districts, an appeal will be allowed without a stay. The Appellants believe that the count by appellate district is five to five counting the case sub justice, leaving three districts in limbo.⁶ A summary of the status of these cases is found at pages 13-14, together with the Appellants' casual commentary as to the basic holdings of the cases.

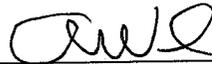
⁵ See footnote 3.

⁶ The Seventh District has ruled on both sides of the issue.

CONCLUSION

The issue of priority of liens in foreclosure cases is being litigated throughout Ohio. The obstacles to a meaningful right of appeal referred to above cause litigants to be denied a meaningful right of appeal and create an uncertainty of the law, as shown by the conflict among Ohio's appellate districts, which should not be permitted to continue. The law applicable to any given case should not be dictated by the county in which a suit is filed. And, for all practicable purposes, the case management directives of this Court⁷ do not permit an appeal to be prosecuted before termination of a case in compliance with the directive, in the absence of a stay. A stay is often impossible and almost always undesirable in lien priority cases (because it causes the property to languish in foreclosure when all the priority litigants are really arguing about is money). For these reasons, this case presents an issue of great general interest. Moreover, the denial of a meaningful right of appeal makes the issues presented in this case of substantial Constitutional significance. For these reasons, the Appellants respectfully request that the Court accept jurisdiction over this case.

Respectfully,



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⁷ See footnote 3.

**APPELLANTS' SUMMARY OF CONFLICTING CASES
IN OHIO'S APPELLATE DISTRICTS RE: R.C. 2329.45**

CASES FOUND TO BE MOOT (Districts 7th, 8th, 9th, 12th)

- 1.* ***U.S. Bank Natl. Assn. v. Marcino*, 7th Dist. No. 09-JE-29, 2010-Ohio-6512; 2010 Ohio App. LEXIS 5447.**
No stay requested, residential property sold and proceeds distributed, court found moot because no stay was requested.
2. ***Equibank v. Rivera*, 8th Dist. No. 72224, 1998 Ohio App. LEXIS 185 (Jan. 22, 1998).**
Bankruptcy stay vacated. Appellant only appealed the sheriff's sale, did not appeal the foreclosure. Did not move for stay of confirmation order. Residential property sold and proceeds distributed. Court found case moot because it was impossible for the appellate court to grant any effectual relief.
3. ***Huntington Natl. Bank, FKA Sky Bank v. Calvert*, 9th Dist. No. 25684, 2012-Ohio-2883; 2012 Ohio App. LEXIS 2519.**
No stay requested, residential property and proceeds distributed, property transferred to third party. Found to be moot.
4. ***Bankers Trust Co. of Calif., N.A. v. Tutin*, 9th Dist. No. C. A. No. 24329, 2009-Ohio-1333; 2009 Ohio App. LEXIS 1136.**
Stay requested and obtained, residential property sold and proceeds distributed, Court found moot. Court said R.C. 2329.45 cannot reasonably be construed to create an exception to the mootness doctrine in foreclosure cases. The court's rationale was that after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action.
5. ***Wash. Mut. Bank, FA v. Wallace*, 194 Ohio App. 3d 549; 2011-Ohio-4174; 957 N.E.2d 92 (12th Dist.), *discretionary appeal accepted, cause consolidated with* No. CA2011-1694, 130 Ohio St.3d 1493, 2011-Ohio-6556, 958 N.E.2d 956.**
No stay was requested, residential property sold and proceeds distributed. Court said the case was arguably moot but seems to have been decided on other grounds.

CASES FOUND NOT TO BE MOOT (Districts 2nd, 6th, 7th, 10th, 11th)

1. ***Chase Manhattan Mtge. Corp. v. Locker*, 2nd Dist. No. 19904, 2003-Ohio-6665, 2003 Ohio App. LEXIS 5959.**
Stay granted (conditional) but appellants could not afford to post bond, residential

property sold and proceeds distributed. Court says not moot because even though the property had been sold, the appellants could still potentially obtain a remedy from the bank.

2. ***MIF Realty LP v. K.E.J. Corp.*, 6th Dist. No. 94WD059, 1995 Ohio App. LEXIS 2082 (May 19, 1995).**

Stay granted but appellant couldn't afford to post the bond. Court found that appeal was not moot and case should be decided on the merits since reversal of the judgment could afford relief to the appellant in the form of restitution from the judgment creditor under R.C. 2329.45.

- 3.* ***LaSalle Bank Natl. Assoc. v. Murray*, 179 Ohio App. 3d 432; 2008 Ohio 6097; 902 N.E.2d 88 (7th Dist.).**

Stay was requested but appellants couldn't afford the bond that was set, residential property sold and proceeds distributed. Court says not moot because even though property sold, remedy could still be obtained.

4. ***U.S. Bank Natl. Assoc., as Trustee v. Mobile Assoc. Natl. Network Sys., Inc.*, 195 Ohio App. 3d 699; 2011-Ohio-5284; 961 N.E.2d 715; 2011 Ohio App. LEXIS 4353 (10th Dist.).**

Stay requested, company could not afford to post the bond amount set, commercial property sold, proceeds distributed. Court held not moot because restitution remained a viable remedy, particularly in light of the fact that the purchasers of the properties were straw purchasers created and controlled by the Bank.

5. ***Everhome Mtge. Co. v. Baker*, 10th Dist. No. 10AP-534, 2011-Ohio-3303, 2011 Ohio App. LEXIS 2764, appeal not accepted, 130 Ohio St.3d 1475, 2011-Ohio-5605, 957 N.E.2d 1168.**

Court made no mention of any request for stay, residential property sold and proceeds distributed. Court said case was not moot since the court could still fashion a remedy.

6. ***Ameriquist Mtge. Co. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576; 2007 Ohio App. LEXIS 2395.**

Case stayed three times due to bankruptcy. Residential property sold and proceeds distributed, court said case is not moot because court can still offer a remedy. Court also considered additional factor that confusion had arisen surrounding what constituted the final decree of foreclosure.

** The Seventh District has made the deciding factor whether or not the appellant requested a stay. In a 2010 case, the 7th Dist. found an appeal to be moot because the appellant did not request a stay; in a 2008 case, the 7th Dist. found the appeal was *not* moot where the appellant requested a stay, but never obtained the stay because he could not afford the bond.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Memorandum in Support of Jurisdiction was served by e-mail on this 2nd day of January 2013 upon the following:

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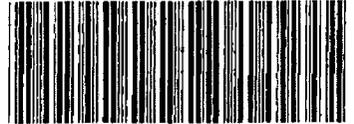
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Gregory R. Wilson

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



D100003691

ART'S RENTAL EQUIPMENT, INC., et al.,

Plaintiffs,

and

BANK OF AMERICA, N.A.,

Plaintiff-Appellee,

vs.

BEAR CREEK CONSTRUCTION, LLC, et al.,

Defendants,

and

RIVERBEND COMMERCIAL TITLE AGENCY, L.P.,

and

PORT OF GREATER CINCINNATI DEVELOPMENT AUTHORITY,

Appellees,

and

KRAFT ELECTRICAL CONTRACTING, INC.,
HICON, INC.,
CENTRAL INSULATION SYSTEMS, INC.,
LAFORCE, INC.,
MBJ CONSULTANTS, INC.,
THE MARK MADISON COMPANY,
TEPE ENVIRONMENTAL SERVICES,

APPEAL NOS. C-110544¹
C-110555
C-110558
C-110559
C-110564
C-110785
C-110792
C-110797
C-110798²
C-110799
C-110800
C-110801
C-110808
C-120309³

TRIAL NOS. A-0902785
A-0903274
A-0903471
A-0904339
A-0904645
A-0904910
A-0905279
A-0905709

SD
OH

ENTERED
NOV 21 2012

JUDGMENT ENTRY.

¹ Defendants-appellants Kraft Electrical Contracting, Inc., Hicon, Inc., Central Insulation Systems, Inc., LaForce, Inc., MBJ Consultants, Inc., The Mark Madison Company, Tepe Environmental Services, LTD, Universal Cleaning, LLC, d.b.a. Universal Cleaning, Security Fence Group, Inc., The Painting Contractor, LLC, Triumph Signs and Consulting, Inc., Spohn Associates, Inc., Kelley Bros. Roofing, Inc., and Jarvis Mechanical Constructors, Inc., dismissed their appeal in the case numbered C-110544.

² Defendant-appellant Smith and Jolly Landscape and Design, Inc., dismissed its appeal in the case numbered C-110798.

³ Defendant-appellant Kenwood Towne Place, LLC, dismissed its appeal in the case numbered C-120309.

LTD,
 UNIVERSAL CLEANING, :
 SECURITY FENCE GROUP, INC., :
 THE PAINTING CONTRACTOR, LLC, :
 TRIUMPH SIGNS AND :
 CONSULTING, INC., :
 SPOHN ASSOCIATES, INC., :
 KELLEY BROS. ROOFING, INC., :
 JARVIS MECHANICAL :
 CONSTRUCTORS, INC., :
 ARCHITECTURAL GLASS & METAL :
 CO., INC., :
 BAKER CONCRETE CONSTRUCTION, :
 INC., :
 SOFCO ERECTORS, INC., :
 KENWOOD TOWNE PLACE, LLC, :
 J&B STEEL ERECTORS, INC., :
 SBF ASSET ACQUISITION, LLC, :
 SPECIALTY INTERIORS OF OHIO, :
 INC., :
 JOSTIN CONCRETE :
 CONSTRUCTION, :
 FORD DEVELOPMENT CORP., :
 ALT & WITZIG ENGINEERING, INC., :
 OK INTERIORS CORP., :
 BARRETT PAVING MATERIALS, :

and :

SMITH & JOLLY LANDSCAPE AND :
 DESIGN, INC., :

Defendants-Appellants.

<p>ENTERED NOV 21 2012</p>
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This cause was heard upon the appeal, the record, the briefs, and arguments.

The appeals are dismissed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on November 21, 2012 per order of the court.

By: _____

[Handwritten Signature]
 Presiding Judge

KRAFT ELECTRICAL CONTRACTING, :
INC., :
HICON, INC., :
CENTRAL INSULATION SYSTEMS, :
INC., :
LAFORCE, INC., :
MBJ CONSULTANTS, INC., :
THE MARK MADISON COMPANY, :
TEPE ENVIRONMENTAL SERVICES, :
LTD, :
UNIVERSAL CLEANING, :
SECURITY FENCE GROUP, INC., :
THE PAINTING CONTRACTOR, LLC, :
TRIUMPH SIGNS AND :
CONSULTING, INC., :
SPOHN ASSOCIATES, INC., :
KELLEY BROS. ROOFING, INC., :
JARVIS MECHANICAL :
CONSTRUCTORS, INC., :
ARCHITECTURAL GLASS & METAL :
CO., INC., :
BAKER CONCRETE CONSTRUCTION, :
INC., :
SOFCO ERECTORS, INC., :
KENWOOD TOWNE PLACE, LLC, :
J&B STEEL ERECTORS, INC., :
SBF ASSET ACQUISITION, LLC, :
SPECIALTY INTERIORS OF OHIO, :
INC., :
JUSTIN CONCRETE :
CONSTRUCTION, :
FORD DEVELOPMENT CORP., :
ALT & WITZIG ENGINEERING, INC., :
OK INTERIORS CORP., :
BARRETT PAVING MATERIALS, :

and :

SMITH & JOLLY LANDSCAPE AND :
DESIGN, INC., :

Defendants-Appellants.

Civil Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Appeals Dismissed

Date of Judgment Entry on Appeal: November 21, 2012

Roetzel & Andress, LPA, and David G. Kern, Mayer Brown LLP, Lori E. Lightfoot and Chad M. Clamage, for Plaintiff-Appellee Bank of America, N.A.,

James E. Arnold & Associates, LPA, James E. Arnold, Gerhardt A. Gosnell II and Scott J. Stitt, for Defendant-Appellee Riverbend Commercial Title Agency, LP,

Squire Sanders (US) LLP, Scott A. Kane and Colter L. Paulson, Plunkett Cooney and Amelia A. Bower, for Defendant-Appellee The Port of Greater Cincinnati Development Authority,

Benjamin, Yocum & Heather, LLC, Thomas R. Yocum and Patrick M. O'Neill, for Defendants-Appellants Kraft Electrical Contracting, Inc., Hicon, Inc., Central Insulation Systems, Inc., LaForce, Inc., MJB Consultants, Inc., The Mark Madison Company, Tepe Environmental Services, Ltd., Universal Cleaning, Security Fence Group, Inc., The Painting Contractor, LLC, Triumph Signs and Consulting, Inc., Spohn Associates, Inc., Jarvis Mechanical Contractors, Inc., and Kelley Bros. Roofing, Inc.,

Frost Brown Todd LLC, John S. Higgins and Shannah J. Morris, for Defendants-Appellants Baker Concrete Construction, Inc., SOFCO Erectors, Inc., and Architectural Glass & Metal Company, Inc.,

The Drew Law Firm Co., LPA, Anthony G. Covatta, Stephen A. Bailey, Robert M. Smyth and Joel M. Frederic, for Defendant-Appellant Kenwood Towne Place, LLC,

Gregory R. Wilson Co., L.P.A., and Gregory R. Wilson, for Defendants-Appellants J&B Steel Erectors, Inc., and SBF Asset Acquisition, LLC.,

Kohnen & Patton, LLP, Kimberly A. Pramaggiore and Malinda L. Langston for Defendant-Appellant Specialty Interiors of Ohio, Inc.,

Graydon Head & Ritchey LLP, and Michael C. Surrey, for Defendant-Appellant Jostin Concrete Construction,

Robert W. Burns, Katzman, Logan, Halper & Bennett, LPA, and Kenneth B. Flacks, for Defendants-Appellants Ford Development Corp., and Ford Development Corp., assignee of Barrett Paving Materials, Inc.,

Finney, Stagnaro, Saba & Patterson, LPA, and Sean P. Donovan, for Defendant-Appellant Alt & Witzig Engineering, Inc.,

Michael J. Bergmann, LLC, and Michael J. Bergmann, for Defendant-Appellant OK Interiors, Corp.,

Morgan Smith and Tracy A. Smith, for Defendant-Appellant Smith & Jolly Landscape and Design, Inc.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendants-appellants, holders of liens against property owned by Kenwood Towne Place, LLC (“KTP”), appeal the trial court’s judgment in favor of plaintiff-appellee Bank of America (“the Bank”) on its foreclosure and priority lien claims. Because the judgment has been satisfied, we dismiss the appeals as moot.

{¶2} On December 10, 2007, LaSalle Bank National Association, the predecessor in interest to the Bank, entered into a construction loan agreement with KTP to provide construction financing of up to \$96,525,000 for a large, multi-use project consisting of prime retail and office space in Sycamore Township. KTP’s obligations under the loan were secured by a first priority mortgage lien and security interest in the property owned by KTP that comprised the project.

{¶3} Construction began on the project, and the Bank provided funding of more than \$79 million. By late 2008, the Bank discovered that KTP had concealed millions of dollars in cost overruns and that the loan was out of balance. Mechanic’s liens were filed against the KTP property, primarily by subcontractors and material suppliers on the project. The Bank declared KTP in default of its note and mortgage, and filed this foreclosure action.

{¶4} The Bank filed a motion for summary judgment on its foreclosure and priority lien claims, and the trial court granted the motion. The court found that the Bank was the holder of a valid note and mortgage from KTP, and that KTP was in default of payment on the note and mortgage.

{¶5} The defendants-appellants appealed. Some of them filed a motion for a stay pending appeal. The trial court ordered that the sale of the property be stayed conditioned

upon the posting of a bond prior to the sale. No bond was posted. The property was sold and the proceeds of the sale distributed.

{¶6} Following oral argument, this court ordered the parties to submit supplemental briefs addressing the issues of mootness and standing of the defendants-appellants to challenge the validity of the mortgage.

Mootness

{¶7} Satisfaction of a judgment renders an appeal from that judgment moot. See *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1249 (1990); see also *Fifth Third Bank v. The Wallace Group*, 1st Dist. No. C-930699, 1994 Ohio App. LEXIS 4915 (Nov. 3, 1994); *Alexander v. MHL Ltd.*, 1st Dist. No. C-120063, 2012-Ohio-4046. The Ohio Supreme Court has explained:

Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.

Blodgett at 245, quoting *Rauch v. Noble*, 169 Ohio St. 314, 316, 159 N.E.2d 451 (1959).

{¶8} A party has acted voluntarily in satisfying a judgment when the party fails to obtain a stay of the trial court's judgment pending appeal. See *Wiest v. Weigele*, 170 Ohio App.3d 700, 2006-Ohio-5348, 868 N.E.2d 1040 (1st Dist.), citing *Hagood v. Gail*, 105 Ohio App.3d 780, 664 N.E.2d 1373 (11th Dist.1995). If the appellant fails to obtain a stay of the judgment, the nonappealing party has the right to attempt to satisfy its judgment, even

though the appeal is pending. See *Wiest* at ¶ 12. If the judgment is satisfied, the appeal must be dismissed because the issues in the case have become moot. *Id.*, citing *Hagood*.

{¶9} In *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, the Ninth Appellate District held that “[i]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action.” *Id.* at ¶ 16; see also *Villas at the Pointe of Settlers Walk Condominium Assn., Inc. v. Coffman Dev. Co., Inc.*, 12th Dist. No. CA2009-12-165, 2010-Ohio-2822, ¶ 11; *Capitol Communications, Inc. v. GBS Corp.*, 10th Dist. Nos. 10AP-08 and 10AP-09, 2010-Ohio-5964, ¶ 13; *Akron Dev. Fund I, Ltd. v. Advanced Coatings Internatl., Inc.*, 9th Dist. No. 25375, 2011-Ohio-3277, ¶ 29; *Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225, 923 N.E.2d 692, ¶ 21 (11th Dist.); *Aurora Loan Servs. v. Kahook*, 9th Dist. No. 24415, 2009-Ohio-2997, ¶ 7; *Bank One, N.A. v. Lent*, 5th Dist. No. 06CA000008, 2007-Ohio-1753, ¶ 11-12; *Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710, ¶ 17-18; *Meadow Wind Health Care Ctr., Inc. v. McInnes*, 5th Dist. No. 2002CA00319, 2003-Ohio-979, ¶ 6-8.

{¶10} The defendants-appellants contend that this matter is not moot because R.C. 2329.45 provides restitution as a remedy even after the foreclosed property is sold at a sheriff's sale. R.C. 2329.45 states:

If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

{¶11} In support of their argument, the defendants-appellants cite several cases where courts have refused to dismiss as moot an appeal of a foreclosure action where the judgment had already been satisfied by sale of the property and distribution of the proceeds. *See, e.g., Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. No. 19904, 2003-Ohio-6665; *LaSalle Bank Natl. Assn. v. Murray*, 179 Ohio App.3d 432, 2008-Ohio-6097, 902 N.E.2d 88; *Ameriquest Mtge. Co. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576; *but see Dietl, supra*, (a lienholder's interest in foreclosed property had been "extinguished and mooted" where the proceeds of the sale had been distributed.) But as the Ninth District pointed out in *Tutin*, "[t]hese courts have essentially interpreted R.C. 2329.45 as creating an exception to the mootness doctrine in foreclosure cases." *Tutin* at ¶ 11. We are not persuaded that the statute provides such an exception.

{¶12} The plain language of R.C. 2329.45 clearly contemplates its application to situations where the property has been sold and title has been transferred to a purchaser. *Id.* at ¶ 15. Nowhere does R.C. 2329.45 suggest that an appealing party has a remedy after the proceeds of the foreclosure sale have been distributed. Rather, the statute

can only be construed to address appeals that have been taken from the confirmation of sale and the appealing party sought and obtained a stay of the distribution of proceeds pursuant to Civ.R. 62(B) and App.R. 7(A). In those situations, although the property has been sold and the sale confirmed, a successful appellant will have the remedy of restitution because the proceeds of the sale are still held under the jurisdiction and control of the court.

Id.

{¶13} In this case, the property was sold at sheriff's sale, the trial court confirmed the sale, and the proceeds have been distributed. The defendants-appellants failed to obtain

a stay of the trial court's judgment, and they did not post an appeal bond. The judgment has been satisfied, and the proceeds of the sale are no longer under the jurisdiction and control of the court. Therefore, the appeals must be dismissed as moot.

{¶14} We sua sponte dismiss the appeals in the cases numbered C-110558 and C-110800 pursuant to App.R. 18(C) as no briefs have been filed.

Appeals dismissed.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.

Please note:

The court has recorded its own entry on the date of the release of this opinion.