

IN THE SUPREME COURT OF OHIO

Bank of America, N.A.,

Plaintiff-Appellee,

v.

J & B Steel Erectors, Inc.,
SBF Asset Acquisition, LLC,
and Ford Development Corp.,

Defendants-Appellants.

Case No. 2013-0005

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

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 OPPOSITION TO JURISDICTION
OF APPELLEE BANK OF AMERICA, N.A.

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**STATEMENT AS TO WHY THIS CASE IS NOT OF
PUBLIC OR GREAT GENERAL INTEREST AND
DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL ISSUE**

This foreclosure case originally involved about 100 defendants. Twenty-seven of those defendants appealed the foreclosure judgment to the court of appeals. Only three of those defendants—a few of the subcontractors on the underlying construction project, who assert that their mechanic’s liens have priority over Bank of America, N.A.’s (“the Bank”) lien—now ask this Court to review the court of appeals’ unanimous decision to dismiss the appeals as moot because the underlying property was sold at a sheriff’s sale and the proceeds were distributed. The remaining defendants are no longer disputing the foreclosure judgment and the Bank’s lien priority. None of the three appellants in this Court filed a motion to stay the sale, nor did they object to confirmation of the sale or distribution of the sale proceeds. But now they argue that this Court should grant them rights they failed to assert below.

There is no reason for this Court to review the court of appeals’ ruling. First, the case does not involve a substantial (or even colorable) constitutional issue. The appellants argue that applying the mootness doctrine here violates due process, equal protection, and the right to appeal. Their position is frivolous. No court has ever held, or even suggested, that the mootness doctrine is unconstitutional, or that equal protection is violated when two appellate courts in a state have different approaches to the same issue (which, in any event, is not the case here, as explained below).

Second, this case is not of public or great general interest. The appellants attempt to satisfy this standard by citing inapposite cases to argue that the Ohio courts of appeals are divided on how to apply the mootness doctrine in foreclosure cases when the property is sold while the appeal is pending. There is no split on applying the mootness doctrine to this case. To begin with, the appellants rely entirely on cases between lenders and property owners. This is not

that type of case. This is a lien priority case—the trial court held that the lien held by Bank of America, which loaned almost \$80 million for the construction, was superior to the mechanic’s liens filed by the defendants. And in lien priority cases, Ohio cases hold uniformly that when there is no stay of the judgment setting priority and the property is sold, the appeal is moot. Moreover, in the non-mootness cases the appellants cite, the party appealing moved for a stay but could not afford to post a bond. Here, however, none of the three appellants in this Court filed a motion for a stay, either in the trial court or the court of appeals. And when an appellant does not move for a stay, the Ohio cases are, once again, fully consistent with the decision here: they hold that the appeal is moot when the property is sold and the proceeds distributed.

Ohio courts agree on applying the mootness doctrine in lien priority disputes in which the appellants did not file a stay motion, and the court of appeals’ decision here is completely consistent with existing Ohio cases. For this and other reasons explained below, there is no reason for this Court to review that decision.

STATEMENT OF THE CASE AND FACTS

A. Trial Court Proceedings. This case arises out of a failed construction project in which Bank of America, N.A. (“Bank”) loaned Kenwood Towne Place, LLC (“KTP”) nearly \$80 million in 2007 and 2008, none of which KTP repaid. When the Bank learned that KTP had fraudulently concealed tens of millions of dollars in cost overruns and that KTP’s loan was substantially out of balance, the Bank declared KTP in default of its note and mortgage and promptly filed this foreclosure action. T.d. 1411 at 207-09; T.d. 1412 at 388; No. 0905279 T.d. 2.¹ Many subcontractors working on the project filed mechanic’s liens against the KTP property

¹ Unless otherwise noted, record citations are to the Transcript of Docket (“T.d.”) in the principal consolidated case in the trial court, No. 0902785. When a filing in one of the other consolidated cases is cited, the pertinent number for the other case is listed. Trial court filings

and sued; eventually all of the cases were consolidated with the foreclosure case. Among other things, the mechanic's lien defendants argued that the notices of commencement ("NOCs") for the project filed by KTP were incomplete and therefore entirely invalid, which would have eliminated the Bank's priority.

After three years of contested litigation over a host of issues, the trial court (Judge Beth Myers) rejected the mechanic's lien defendants' arguments, granting summary judgment to the Bank and issuing two lengthy opinions (totaling 50 pages) explaining its decisions. In those opinions, Judge Myers held:

- KTP's original NOC substantially complied with the statutory requirements;
- KTP's amended NOC also substantially complied and related back to the original NOC;
- Even if the NOC and amended NOC had not substantially complied, the mechanic's lien defendants' sole remedy under the pertinent Ohio statute is a damages remedy against the property's owner (KTP), which filed the NOCs in the first place;
- The Bank had the right to foreclose on KTP's mortgaged property; and
- The Bank's mortgage had priority over all of the mechanic's lien defendants' liens.

T.d. 845; T.d. 1649. On November 4, 2011, the trial court signed and docketed an entry that confirmed the court's prior judgment in the Bank's favor. T.d. 1793. Twenty-seven of the approximately 100 defendants in the trial court appealed.

B. Post-Judgment Proceedings Concerning The Sale. For the next five-and-one-half months, the mechanic's lien defendants engaged in extensive litigation on every aspect of the Bank's efforts to effectuate the trial court's November 2011 entry. On April 16, 2012, the trial

without a T.d. number are cited by name and filing date. Citations to filings in the court of appeals include "Ct. App." before the filing date.

court ordered the KTP property sold at a sheriff's sale. None of the three appellants in this Court—J&B Steel Erectors; SBF Asset Acquisition, LLC²; and Ford Development Corp.—filed motions to stay the sale. Two other groups of defendants (referred to in the trial court as the Contractor Group and the Kraft Group) filed motions in the trial court on April 24, 2012 and May 8, 2012, respectively, to stay the sale pending appeal. The Contractor Group and the Kraft Group argued that Ohio law did not require them to post any bond or, alternatively, that any bond should be *de minimus*, but they did not argue that they could not afford to post a bond. *See* Baker Concrete Mot. for Stay (4/24/12); Kraft Group Mot. for Stay (5/8/12); Baker Concrete Reply (5/24/12); Kraft Group Reply (5/24/12). The Bank responded that because its foreclosure judgment totaled more than \$100 million (T.d. 1793), Ohio law required a bond of \$50 million (*see* R.C. 2505.09). The Bank also submitted evidence—which no one disputed—that the mechanic's lien defendants could afford the bond because one of the movants alone, Baker Concrete (part of the Contractor Group), had annual revenues of nearly \$600 million. Bank of America Opp. to Mots. for Stay (5/17/12). On June 6, the trial court granted a stay contingent on posting a bond of \$26 million. Tr. 6/6/12 at 61.

The three appellants in this Court did not move for a stay in the court of appeals or seek to overturn the trial court's bond ruling. Nor did the Kraft Group. The only appellants that did so were the Contractor Group, but once again they did not argue that they could not afford to post a bond. Baker Concrete Emergency Mot. (Ct. App. 6/15/12). On June 26, 2012, the court of appeals overruled the Contractor Group's motion. Entry (Ct. App. 6/26/12). No bond was posted, so the stay did not go into effect, and the sheriff's sale occurred on July 12, 2012. Order for Sale

² As its name suggests, SBF Asset Acquisition is not a subcontractor that did work on the KTP project; it is the single-asset assignee of a subcontractor, Structural Solutions. SBF acquired all of the interest in Structural Solutions' mechanic's liens in March 2010, about a year after this litigation began. T.d. 792.

Returned and Filed (7/13/12). The Bank purchased the property through a “credit bid”; it offset the purchase price with the amount of some of the debt owed to it. Entry Confirming Sale and Ordering Deed at 2 (8/17/12). After the sale, the trial court took two additional steps to effectuate the sheriff’s sale: first, it confirmed the sale on August 17, 2012, and second, it ordered the sale proceeds distributed on September 19, 2012. *Id.*; Order Distributing Proceeds (9/19/12). There were no objections to, or appeals from, either of those orders.

C. Appellate Court Proceedings. At the appellate argument on September 25, the court of appeals *sua sponte* raised the issues of mootness and standing. Per the court’s request, the parties filed supplemental briefs on both issues, Bank of America filing on October 5 and the appellants filing on October 12. After considering those briefs, the court unanimously dismissed the appeal as moot on November 21, 2012. As noted earlier, only three of the original 27 appellants in the court of appeals ask this Court to review that decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The mootness doctrine is constitutional.

The appellants’ lead argument is that the court of appeals’ decision is unconstitutional. According to the appellants, deciding that a case is moot violates due process, equal protection, and the right to appeal. J&B Mem. 2, 5, 7-9; Ford Mem. 2, 4-5. The purported equal protection violation occurs because the Ohio courts of appeals are supposedly divided in treating mootness issues in foreclosure cases. J&B Mem. 5. (As explained below at 6-11, the courts do not disagree on the issue actually presented in this case.)

The appellants’ constitutional arguments are frivolous. For many decades, this Court has been dismissing appeals because they are moot, as has the U.S. Supreme Court, without ever giving the slightest indication that the mootness doctrine might violate due process or unconstitutionally deny parties their right to appeal. *See, e.g., Blodgett v. Blodgett*, 49 Ohio St.3d

243, 246-47, 551 N.E.2d 1249 (1990); *Miner v. Witt*, 82 Ohio St. 237, 238-39, 92 N.E. 21 (1910); *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895). Nor does an equal protection violation occur whenever two appellate districts within a state, or two of the U.S. courts of appeals, decide the same issue differently. The U.S. Supreme Court has been resolving circuit splits ever since the federal courts of appeals were created near the end of the nineteenth century. It has never suggested, nor has any other court, that the existence of a circuit split creates an equal protection problem. Nor has this Court ever ruled or opined that there is an equal protection violation when different appellate districts in Ohio issue conflicting decisions.

It is telling that the appellants cite only general constitutional principles in support of their constitutional arguments; they do not cite a single case in which any court has ever held (or even hinted) that application of the mootness doctrine violates an appellant's constitutional rights. *See* J&B Mem. 5, 7-9; Ford Mem. 2, 4-5. That is because there are no such cases. Indeed, the appellants ask this Court to, in effect, reject more than a century of precedent on the mootness doctrine and create for the first time a constitutional right that not a single court in any jurisdiction has ever recognized. The appellants' novel constitutional theories do not provide any basis for this Court to accept this appeal.

Proposition of Law No. 2: Ohio's courts of appeals are not divided on applying the mootness doctrine here.

The appellants' other argument for review is that Ohio courts are supposedly split on how to apply the mootness doctrine in foreclosure cases when the property has been sold; according to the appellants, the case is not moot because other courts have held that R.C. 2329.45 provides a "restitution" remedy that is available after the sale. J&B Mem. 1, 9-11, 13-14; Ford Mem. 1, 5-7. The appellants attempt to portray this as a pure question of law, but in the court of appeals J&B conceded that Ohio mootness cases "agree that there is no one-size-fits-all answer, as each

case must be decided on its particular facts.” J&B Suppl. Br. 2 (Ct. App. 10/12/12).

There is no division in Ohio’s courts of appeals on applying the mootness doctrine here. *First*, in the specific factual context present in this case—a lien priority dispute—Ohio’s appellate courts have held uniformly that the case becomes moot when there is no stay and the property is sold while the appeal is pending. In addition to the First District’s decision here, the Twelfth District reached the same conclusion in *Villas at the Pointe v. Coffman Dev. Co.*, 12th Dist. No. CA2009-12-165, 2010-Ohio-2822, 2010 WL 2499651, which involved a lender and a competing lien claimant (the appellant). As here, the lender won summary judgment that its lien was superior, the trial court ordered the property sold, and the appellant never moved for a stay; the sale went forward and the sale proceeds were distributed. *Id.* ¶¶ 4-5. The Twelfth District held that in this circumstance the appeal was moot, and it distinguished cases in which a debtor sought to prevent a lender from foreclosing:

In the case at bar, however, a judgment lien holder is challenging the trial court’s order of lien priority. The decision regarding who has a superior lien is different from a debtor challenging whether the foreclosure was proper or other issues that may arise between a mortgagor and mortgagee.

Id. ¶ 17. In other cases involving similar priority issues, Ohio courts have held consistently that the case is moot when there is no stay and the property is sold or the money is disbursed. *See Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225, 923 N.E.2d 692, ¶¶ 14, 18-21 (11th Dist.) (a claim based on an unperfected judicial lien on property or a non-lien interest in property was moot when the property was sold at a foreclosure sale and the proceeds distributed); *Capitol Commc’ns v. GBS Corp.*, 10th Dist. No. 10AP-08, 2010-Ohio-5964, 2010 WL 4968634, ¶¶ 9, 12-14 (a case concerning priority to escrowed funds became moot when the appellant did not seek a stay and the funds were distributed).

The appellants ignore the lien priority mootness cases. Instead, they cite only cases

between a lender and a property owner who was fighting foreclosure and wanted to retain possession of the property. *See* cases cited at J&B Mem. 13-14; Ford Mem. 7. The appellants even admit that “most[.]” foreclosure cases in which mootness is raised involve the property owner and a lender. J&B Mem. 2. But those cases are inapposite because this appeal does not concern a dispute between a lender and a borrower. Here, the borrower (KTP) did not oppose foreclosure (T.d. 1649 at 1), and it voluntarily dismissed its appeal of the trial court’s January 2012 entry of summary judgment (T.d. 1896) in the Bank’s favor on KTP’s counterclaims. Entry of Voluntary Partial Dismissal (Ct. App. 5/29/12).

Thus, it is not true that “many” (J&B Mem. 1) cases involve the specific issue present in this case. Almost none do—and in cases involving, as here, lien (or other) priority issues, the Ohio courts are consistent: the case is moot when there is no stay and the property at issue is sold and the funds are distributed. And there is no case holding that the reference to restitution in R.C. 2329.45 applies to a competing lien holder. To the contrary, even the cases on which the appellants rely describe R.C. 2329.45 as “provid[ing] a remedy to debtors after their property is foreclosed and title passed.” *LaSalle Bank v. Murray*, 179 Ohio App.3d 432, 2008-Ohio-6097, 902 N.E.2d 88, ¶ 28 (7th Dist.) (emphasis added); *accord Chase Manhattan Mtge. v. Locker*, 2d Dist. No. 19904, 2003-Ohio-6665, 2003 WL 22927244, ¶ 45; *Ameriquist Mtge. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576, 2007 WL 1535242, ¶ 19; *Everhome Mtge. v. Baker*, 10th Dist. No. 10AP-534, 2011-Ohio-3303, 2011 WL 2586751, ¶ 13, *appeal not allowed*, 130 Ohio St.3d 1475, 2011-Ohio-6124, 957 N.E.2d 1168. Thus, R.C. 2329.45—even under the appellants’ cases—protects debtors whose land has been wrongfully sold. It does not protect competing lien holders, who have not lost their real estate. We are not aware of any Ohio case

that has extended R.C. 2329.45 to lien holders.³

Second, it is significant that the appellants in this Court did *not* file a stay motion, in either the trial court or the court of appeals. *See supra* at 3-4. As a result, the cases the appellants cite on the “non-mootness” side of the purported divide (J&B Mem. 13-14; Ford Mem. 7) are once again inapposite, because those appellants (unlike here) moved to stay the sale, but could not afford the bond. *See LaSalle Bank v. Murray*, 2008-Ohio-6097, ¶ 26; *Chase Manhattan Mtge. v. Locker*, 2003-Ohio-6665, ¶¶ 34, 37; *MIF Realty v. K.E.J. Corp.*, 6th Dist. No. 94WD059, 1995 WL 311365, *2 (May 19, 1995); *U.S. Bank v. Mobile Assocs. Nat’l Network Sys.*, 195 Ohio App.3d 699, 2011-Ohio-5284, 961 N.E.2d 715, ¶¶ 12, 20 (10th Dist.); *Ameriquist Mtge. v. Wilson*, 2007-Ohio-2576, ¶¶ 3, 8.⁴

But when, as here, the appellants in the case do not move for a stay, Ohio courts hold that the sale of the underlying property moots the case. Other cases in the appellate districts the appellants highlight make this clear. For example, two members of the *LaSalle Bank v. Murray* panel, including its author, joined a later opinion finding an appeal moot where the property was sold and the appellant never moved for a stay in the trial court or the court of appeals. *U.S. Bank*

³ Furthermore, imposing a restitution remedy in a case like this, where the bank obtained the property at the foreclosure sale through a credit bid, would destroy the long-standing, beneficial practice of permitting lenders to make credit bids, *i.e.*, “using the debt it is owed to offset the purchase price.” *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S.Ct. 2065, 2069, 182 L.Ed.2d 967 (2012). “The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan.” *Id.* at 2070 n.2. A restitution order against a bank that had made a successful credit bid would require the bank to pay cash to a competing lien holder when the bank had not received any money at the sheriff’s sale.

⁴ In the only other case the appellants cite, *Everhome Mtge. v. Baker*, 2011-Ohio-3303, the court was silent on whether a stay was sought, but it noted that “the present appeal is not mooted” because the defendants “declined to claim” a \$42,000 check from the clerk of court, the amount left after all of the liens were paid. *Id.* ¶ 6.

v. *Marcino*, 7th Dist. No. 09 JE 29, 2010-Ohio-6512, 2010 WL 5550678, ¶¶ 1, 6, 14-15. In another of the appellants' cases, *Chase Manhattan Mtge. v. Locker*, 2003-Ohio-6665, the court distinguished a case finding mootness, in part because in the other case "the appellant had sufficient time to seek a stay before the sheriff's sale took place, but failed to do so." *Id.* ¶ 48.

In cases the appellants do not cite, courts likewise hold that a case is moot when the appellants do not move for a stay and the property is then sold. *E.g.*, *Meadow Wind Health Care Center v. McInnes*, 5th Dist. No. 2002CA00319, 2003-Ohio-979, 2003 WL 733899, ¶ 6 (no stay requested in trial court or court of appeals); *Akron Dev. Fund I v. Advanced Coatings Int'l*, 9th Dist. No. 25375, 2011-Ohio-3277, 2011 WL 2571618, ¶¶ 16, 22, 27 (no objections filed, and therefore no stay requested, until after title to foreclosed assets had been transferred). *See also Villas at the Pointe*, 2010-Ohio-2822 ¶ 16 (the appealing lien claimant "did not request a stay and stood by idly as the property was sold and the proceeds distributed").

Here, the appellants failed—twice—to move for a stay. They did not file a motion to stay the sale in the trial court or in the court of appeals. And their inaction continued after the sheriff's sale: they did not object to, or appeal from, either the trial court's order confirming the sale or the order to distribute the sale's proceeds. *See supra* at 5.

The appellants' failure to move for a stay is important because mootness depends, in part, on whether the trial court's judgment was satisfied "voluntarily." *Blodgett*, 49 Ohio St.3d at 245. But "a party is considered to have acted voluntarily in satisfying a judgment when the party fails to seek a stay order while appealing the trial court's judgment." *Wiest v. Wiegele*, 170 Ohio App.3d 700, 2006-Ohio-5348, 868 N.E.2d 1040, ¶ 13 (1st Dist.) (dismissing a non-foreclosure case as moot where the appellant did not move for a stay). Satisfaction of a judgment "cannot be considered involuntary when the appellant has not taken advantage of a viable legal remedy," and has "fail[ed] to move for a stay." *Hagood v. Gail*, 105 Ohio App.3d 780, 787, 664 N.E.2d

1373 (11th Dist. 1995); *see id.* at 790 (holding that the case was moot and that “the lack of a timely stay order was caused by appellant’s inaction”—she did not move for a stay until the same day the appellee deposited funds with the court in order to obtain the property).

In short, the courts of appeals are not divided on whether a case is moot when, as here, the appellants do not move for a stay, the property is sold, and the proceeds are distributed. In that situation—the situation that exists here—Ohio courts agree that the case is moot.

Third, the defendants that did move for a stay—none of which have appealed to this Court—never argued that they could not afford to post a \$26 million bond,⁵ let alone submitted evidence of inability to pay, as required. *See Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710, 2004 WL 1563389, ¶ 16 (case moot where appellant failed to post a bond and “the record contains no evidence tending to demonstrate that Mrs. Robbins lacked the financial ability to post a supersedeas bond to obtain a stay of the proceedings pending appeal”). Those defendants undoubtedly did not argue inability to pay because of undisputed evidence that one of the movants, Baker Concrete Construction, had annual revenues of almost \$600 million; the bond amount was less than 5% of the annual revenues for Baker Concrete alone. *See supra* at 4. Thus, appellants’ unsupported assertion that a bond was not affordable (J&B Mem. 4, 7) is baseless: not only did they not file a stay motion in the trial court or the court of appeals, but they did not submit *any* evidence to show inability to pay. Their contention that the bond amount “was beyond the financial abilities of any of the litigants” (*id.* at 4) is not supported by *any* evidence in the record—in fact, it is contradicted by the undisputed evidence—and also has been waived, because it was not argued below. And when, as here, an appellant does not move for a stay, does not offer any evidence that it cannot afford to post a bond, and the property is sold,

⁵ The \$26 million bond set by the trial court is substantially less than the over \$100 million owed to the Bank, and the \$50 million statutory maximum that applied in this case.

Ohio courts are in agreement that the case is moot.

Fourth, this Court has long recognized only two exceptions to the mootness doctrine: (a) the issues are capable of repetition yet evading review; and (b) the case involves a matter of public or great general interest. *In re Suspension of Huffer*, 47 Ohio St.3d 12, 14, 546 N.E.2d 1308 (1989). The appellants ask the Court to create a third exception that would be squarely inconsistent with existing Ohio law, which uniformly holds that appeals are moot in the factual context present here.

Fifth, the court of appeals did nothing wrong in not certifying a purported conflict. J&B Mem. 1. To begin with, the appellants did not even ask the court of appeals to certify a conflict. What is more, even in the mootness cases the appellants cite, none of the courts certified a conflict—perhaps because, as J&B told the court of appeals here, “there is no one-size-fits-all answer, as each case must be decided on its particular facts.” J&B Suppl. Br. 2 (Ct. App. 10/12/12). Furthermore, as already explained, the ruling here is not in conflict with other decisions; to the contrary, it is fully consistent with other Ohio cases.

Finally, there is no merit to the appellants’ charge that the Bank attempted to “delay” the case and wanted the property to “languish,” remaining unsold and “unproductive.” J&B Mem. 4, 6, 11-12. Common sense dictates that the Bank had no interest in allowing its collateral, an unfinished commercial development that was exposed to the elements, to deteriorate and possibly decrease in value while the litigation dragged on year after year. Indeed, it is the appellants and the other mechanic’s lien defendants that caused this litigation to last for more than three years and take on a decidedly scorched-earth quality. The more-than 2000 entries on the various trial court docket sheets attest to the mechanic’s lien defendants’ extensive efforts to delay the foreclosure for as long as possible. If anyone “stall[ed] the cases endlessly to the brink

of ethical limits” (*id.* at 11), it was the mechanic’s lien defendants, not the Bank.⁶

On appeal, the extraordinarily voluminous record meant that the clerk needed additional time to prepare the record; as a result, the Kraft Group of appellants asked in January 2012 to push back the briefing schedule by two months, a request the court of appeals granted. *See* court of appeals’ orders entered 11/7/11 and 1/24/12. The Bank moved only for a one-month extension of its brief, so it would have sufficient time to respond to the eight appellate briefs filed by the various mechanic’s lien defendants. Procedural Mot. of Bank of America (Ct. App. 4/26/12).⁷

The tactics of the mechanic’s lien defendants on appeal confirmed that they were simply attempting to delay the inevitable—they did not even contest on appeal one of the independent grounds for the trial court’s judgment in the Bank’s favor. As noted earlier, the trial court provided alternative grounds for its entry of summary judgment in the Bank’s favor. One of those grounds was that even if the Notices of Commencement (NOCs) filed by KTP were incomplete or incorrect in some respect, that would not defeat the Bank’s right to foreclose. In particular, the trial court held twice that the mechanic’s lien defendants’ sole remedy for a deficient NOC “is provided in R.C. § 1311.04(C),” which makes KTP—not the Bank—liable to

⁶ For example, the trial court granted the Bank’s summary judgment motion on August 10, 2011, yet an entry to effectuate the decision was not entered into the docket until November 4, 2011. In those almost three months, the defendants, including the appellants before this Court, filed numerous challenges to a basic entry, which resulted in excessive motion practice and a lengthy delay. *See* T.d. 1657, 1663, 1664, 1665, 1668, 1695, 1701, 1704, 1767, 1791.

⁷ As for the other appellate items J&B refers to (J&B Mem. 6): (a) the Bank filed a single motion to vacate the scheduling order, remove the case from the accelerated calendar, and hold the appeal in abeyance (filed 10/11/11) because the first appeals in the case were filed *before* there was a final judgment—the trial court did not enter a journal entry reflecting the court’s decision until November 4, 2011 (T.d. 1793); (b) the Bank moved to dismiss the appeals in December 2011 because, at that point, KTP’s counterclaims were still pending, *see Marion Prod. Credit Ass’n v. Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325 (1988); (c) the motion to delay the appellate argument (filed 6/28/12) by one month occurred because the original August 22 argument date was when Bank of America was scheduled to be in the middle of a two-month trial in a related proceeding brought by the Kraft Group.

the mechanic's lien defendants for any harm caused by an incorrect NOC. T.d. 845 at 12; *accord* T.d. 1649 at 15; *see* R.C. 1311.04(C) ("If the notice of commencement...contains incorrect information, *the owner...is liable* for any loss of lien rights of a lien claimant...") (emphasis added). Yet although this was an alternative ground for the trial court's judgment, the appellants' briefs in the court of appeals did not even mention it, let alone argue that it was incorrect, thus waiving any challenge to this independent basis for the trial court's decision. *See Hawley v. Ritley*, 35 Ohio St.3d 157, 159, 519 N.E.2d 390 (1988) ("[e]rrors not treated in the brief will be regarded as having been abandoned by the party who gave them birth") (quoting *Uncapher v. Baltimore & O. R.R. Co.*, 127 Ohio St. 351, 356, 188 N.E. 553 (1933)). The appellants' failure to contest an alternative independent ground for the trial court's judgment is a tacit concession that the decision was correct and thus that their appeals were nothing more than a delay tactic.

For all of these reasons, this Court should deny review in this case. The few Ohio cases involving lien priority (or similar priority issues) are in full accord with the court of appeals' decision here: they hold uniformly that the appeal is moot when there is no stay, the property is sold, and the funds are distributed. And cases in which, as here, the particular appellants did not seek a stay are likewise consistent with the court of appeals' ruling: they hold that the appeal is moot when the appellants failed to request a stay and the property is then sold. There is no reason for this Court to grant review when the courts of appeals are not divided on the issue presented by the case.

CONCLUSION

Ohio law is uniform: a lien priority dispute is moot when the appellants still in the case did not move for a stay, the property is sold, and the proceeds are distributed while the appeal is pending. Because the court of appeals' decision is consistent with that case law, and the appellants' arguments that the mootness doctrine is unconstitutional are frivolous, Bank of

America respectfully requests that the Court deny jurisdiction in this case.

February 4, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Memorandum in Opposition to Jurisdiction of Appellee Bank of America, N.A.* has been served upon the following parties via U.S. Mail, pursuant to Civ.R. 5(B)(2)(c), and email, pursuant to Civ.R. 5(B)(2)(f), this 4th day of February, 2013:

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