

IN THE OHIO SUPREME COURT

CITIMORTGAGE, INC.

Plaintiff/Appellee

-vs-

JAMES ROZNOWSKI, et al.

Defendant/Appellant.

* **CASE NO. 2012-2110**
* **On Appeal from the Stark**
* **County Court of Appeals, Fifth**
* **Appellate District**

* **Court of Appeals Case No.**
* **2012-CV-093**

MERIT BRIEF OF AMICUS CURIAE TERRY SMITH IN SUPPORT OF APPELLEES

Andrew M. Engel (0047371)
ANDREW M. ENGEL CO., L.P.A.
7071 Corporate Way, Suite 201
Centerville, OH 45459
(937) 938-9412
Fax: (937) 938-9411
amengel@sbcglobal.net

Attorney for Amicus Curiae Terry Smith

Peter D. Traska (0079036)
TRASKA LAW FIRM, LLC
PO BOX 609306
Cleveland, Ohio 44109
(216) 282-4738 (Telephone)
(216) 342-9145 (Facsimile)

Attorneys for Appellees
James A. Roznowski and
Steffanie M. Roznowski

David A. Wallace (0031356)
Karen M. Cadieux (0079240)
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
(614) 365-4100 (Telephone)
(614) 365-9145 (Facsimile)
wallace@carpenterlipps.com
cadieux@carpenterlipps.com

Erin M. Laurito (007553 1)
Colette S. Carr (0075097)
LAURITO & LAURITO, LLC
7550 Paragon Road
Dayton, OH 45459
(937) 743-4878

Attorneys for Chase Home Finance, LLC

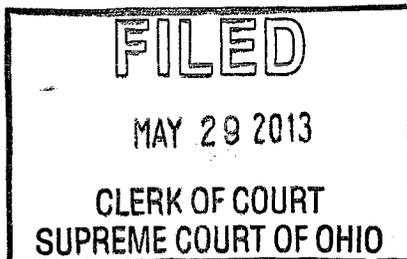


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I. INTRODUCTION

This case presents the Court with something of a conundrum. How can a court grant complete relief to a foreclosing plaintiff if damages continue to accrue after judgment and potentially, even after the property is sold at Sheriff's sale. Understandably, lenders want to recover every penny they are owed. But that desire must be tempered by the long-standing requirements of Ohio law.

II. STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amicus Curiae Terry Smith is like thousands of Ohioans – embroiled in a foreclosure. She is currently an appellant in a case pending in the Eleventh District Court of Appeals in which the primary issue is the same as that now presented to this Court. Ms. Smith believes that her perspective on the issues presented in the case will assist the Court in understanding not only the precise issue presented in this appeal, but also how the resolution of that issue will impact other areas of law.

III. STATEMENT OF FACTS

Amicus accepts the facts as presented by the parties.

IV. ARGUMENT

CitiMortgage, Inc.'s Proposition of Law No. 1 -- A Judgment Decree in Foreclosure is a Final Appealable Order if it Includes as a Part of The Recoverable Damages The Amounts Advanced For Inspections, Appraisals, Property Protection and Maintenance, But Does Not Include a Specific Itemization of Those Amounts in The Judgment.

Citimortgage's proposition of law, if adopted by this Court, would reverse long-established principles of Ohio jurisprudence. It seeks to carve out a niche for foreclosure cases. It asks for special treatment for foreclosing lenders so that they might be relieved of the rules of statutory and procedural by which all other Ohio litigants are bound.

A. A Final Judgment for Damages Must Specify the Amount Due.

When a court grants judgment for liability, but does not specify the amount of damages for that liability, the judgment is not final. *Walburn v. Dunlap*, 121 Ohio St.3d 373, ¶32, 2009-Ohio-1221.

“It is well-established that an order must be final Before it can be reviewed by an

appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d at 20, 540 N.E.2d 266. "An appellate court, when determining whether a judgment is final, must engage in a two-step analysis. First, it must determine if the order is final within the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ.R. 54(B) language is required." *Id.* at 21, 540 N.E.2d 266.

Id. ¶13. And if the judgment is not a final order under R.C. 2505.02, then Civ. R. 54(B) language of "no just reason for delay" has no effect. *Id.* at ¶31.

The Eleventh District Court of Appeals embraced this rule in *Novastar Mortgage, Inc. v. Akins*, 2008-Ohio-6055 (11th Dist. No. 2007-T-0111), the Court considered this very issue. The Court noted:

"[T]he trial court must *** enter its own independent judgment disposing of the matters at issue between the parties, such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined. In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court." *Burns v. Morgan*, 165 Ohio App.3d 694, 2006-Ohio-1213, at ¶10, (quoting *Yahraus v. Circleville* (Dec. 15, 2000), 4th Dist. No. 00CA04, 2000 Ohio App. LEXIS 6315, at *9, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist. No. 90-T-4396, 1991 Ohio App. LEXIS 1063, at *7 (Ford, J., concurring)).

Id. ¶47.

Other of Ohio's Courts of Appeal have reached the same conclusion in foreclosure cases in which the Plaintiff seeks damages for advances made during pendency of the foreclosure action. Recently, in *German American Capital Corp. v. FLG Properties Dayton, LLC*, Montgomery County Court of Appeals Case No. CA 25656 (Decision and Final Judgment Entry, May 1, 2013)(attached hereto), the Court dismissed an appeal in such a situation.

But other Courts have decided that such vagueness in a judgment entry of foreclosure is acceptable. In *First Horizon Home Loans v. Sims*, Warren App. No. CA2009-08-117, 2010-Ohio-847, the Twelfth District noted that items such as advances for taxes, insurance and property preservation continue to accrue even after judgment is entered. The Court concluded that "it would be impractical to require appellee to state with specificity the total amount due for the additional charges in its affidavit in support of summary judgment." *Id.* at ¶25.

But the reasoning of cases like *Sims*, and the reasoning that Citimortgage asks the Court to adopt is contrary to long-standing precedent in Ohio. In *Brown v. Brown*, 917 N.E.2d 301, 183 Ohio App.3d 384, 2009-Ohio-3589 (Ohio App. 4 Dist. 2009) the Court noted the important of having a complete judgment:

" [T]he content of the judgment must be definite enough to be susceptible to further enforcement and provide sufficient information to enable the parties to understand the outcome of the case. If the judgment fails to speak to an area which was disputed, uses ambiguous or confusing language, or is otherwise indefinite, the parties and subsequent courts will be unable to determine how the parties' rights and obligations were fixed by the trial court." *Harkai*, 136 Ohio App.3d at 216, 736 N.E.2d 101, quoting *Walker v. Walker* (Aug. 5, 1987), Summit App. No. 12978, 1987 WL 15591.

Id. at ¶18.

The issue of advances made by the lender is much like the issue of attorney's fees. And several court have held that an order that grants attorney's fees, but does not make a finding of the amount owed for those fees, is not a final appealable order. *Commonwealth Land Title Ins. Co. v. Choice Title Agency, Inc.*, 2011-Ohio-396, (9th Dist. No. 10CA009848) ¶ 11-12; *FirstMerit Bank, N.A. v. Moore*, 183 Ohio App.3d 550, 2009-Ohio-3928, ¶ 14-15 (9th Dist.). Further, if a trial court makes an award of attorney fees, the exact amount of the fees due at the time of final judgment must be clear from the judgment entry. *Falls Motor City, Inc. v. Darovich*, 2010-Ohio-2432 (9th Dist. No. 25015), ¶ 8-9; see also, *The Dayton Women's Health Center v. Enix*, (1993) 86 Ohio App.3d 777, 779-780 (2nd Dist. No. 13541) (holding that "The mere finding that a party is entitled to attorney's fees from another party is not a final appealable order for purposes of review until the amount of attorney's fees is actually ordered, and citing *Hoblit v. Hoblit* (March 30, 1992), Miami App. No. 91 CA 30, unreported).

.B. A Specific Damages Figure Is Needed to Preserve The Right of Redemption.

But finality of judgment is especially important in foreclosure cases. This is because 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. As the Court of

Appeals noted in this case:

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.

CitiMortgage, Inc. v. Roznowski, 2012-Ohio-4901, ¶11 (5th Dist. No. 2012-CA-93) at ¶5; see also *Hembree v. Mid-America Federal Savings & Loan Assn.*, 580 N.E.2d 1103, 64 Ohio App.3d 144, 156 (2nd Dist. 1989) ("An equity of redemption is a right incident to a mortgage. It is a right, retained by the mortgagor, to perform the mortgage obligation after default and to thereby "redeem" his title from the mortgage conveyance. It is an absolute right and may be exercised until confirmation of sale").

In this case, Citimortgage offered no evidence whatsoever as to the monies it claims to be due for advances for taxes, insurance, and property preservation. These issues were left open. The trial court found the Roznowskis liable for these categories of damages, but did not hear any evidence as to the amounts due for them. Rather, Citimortgage was given a blank check, to be filled in only after Roznowskis are deprived of their property. Without knowing the precise amount due under the judgment, a property owner cannot exercise the right of redemption, rendering the "right" a nullity.

C. Without A Determination of All Damages, No Execution Can Be Taken From a Judgment.

This Court recently held that the Sheriff's sale of foreclosed property is an execution on a judgment. *Countrywide Home Loans Servicing v. Nichpor*, Slip Opinion No. 2013-Ohio-2083, ¶6.

This second phase of the proceedings is viewed as a separate and distinct action seeking enforcement of an order of sale and decree of foreclosure. *Ohio Dept. of Taxation* at 447. The appraisal of the foreclosed property, the sheriff's sale, and the confirmation of that sale have been described as special proceedings to enforce an order of sale and decree of foreclosure. *Citizens Loan & Savings Co. v. Stone* (1965), 1 Ohio App.2d 551, 552; *Shumay v. Lake Chateau, Inc.* (Apr. 22, 1981), Medina App. Nos. 1013 and 1034, unreported, at 6.

Id. (quoting *Triple F Invests. v. Pacific Fin. Serv., Inc.*, 11th Dist. No. 2000-P-0090, 2001 WL 589343, *3 (June 2, 2001)).

Revised Code 2329.09 allows for sale of the real and personal property of a judgment debtor:

The writ of execution against the property of a judgment debtor issuing from a court of record shall command the officer to whom it is directed to levy on the goods and chattels of the debtor. If no goods or chattels can be found, the officer shall levy on the lands and tenements of the debtor. If the court rendering the judgment or decree so orders, real estate may be sold under execution as follows: one third cash on the day of sale, one third in one year, the third in two years thereafter, with interest on deferred payments, to be secured by mortgage on the premises so sold. An execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. *The exact amount of the debt, damages, and costs, for which the judgment is entered, shall be indorsed on the execution.*

R.C. 2329.09 (emphasis added).

This Court has considered the issue and held:

It is a general rule that there must be a specification in the judgment of the amount to be recovered before execution can issue thereon. *Bank of America National Trust & Savings Ass'n v. Standard Oil Co. of California*, 10 Cal.2d 90, 73 P.2d 903. In order to have a judgment lien, there must be a final judgment for the payment of a definite and certain amount of money which may be collected by execution on property of the judgment debtor. A judgment for periodic installments for an indefinite time can not create a lien on real property, in the absence of a provision in the judgment itself for a lien. *Olin v. Hungerford*, 10 Ohio 268; *Yager v. Yager* (periodic payments of alimony), 7 Cal.2d 213, 60 P.2d 422, 106 A.L.R. 664; *Bird v. Murphy*, 82 Cal.App. 691, 256 P. 258, certiorari denied 275 U.S. 487, 48 S.Ct. 38, 72 L.Ed. 387; see annotation, 79 A.L.R. 252.

It follows that if a judgment is so indefinite as to its amount that it can not create a lien on real property within the jurisdiction of the court granting it, no execution may be issued thereon which will create a lien on real estate in a foreign jurisdiction.

Roach v. Roach, 164 Ohio St. 587, 132 N.E.2d 742 (1956); see also, *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 1994-Ohio-509, 627 N.E.2d 532, 533 (1994); *American Life & Accident Ins. Co. v. Jones* (1949), 152 Ohio St. 287, 89 N.E.2d 301 (“... any judgment rendered must before execution be for a specific amount of money and specify the amount to be recovered”).

CitiMortgage, Inc.'s Proposition of Law No. II -- A Mortgagor May Contest The Amounts Expended by a Mortgagee For Inspections, Appraisals, Property Protection and Maintenance as Part of The Proceedings to Confirm The Foreclosure Sale, and Appeal Any Adverse Ruling in an Appeal of The Order of Confirmation.

Citimortgage's second proposition of law is nonsense. It proposes, in essence, to force a homeowner to wait to challenge a claim for unspecified advances until after they lose title to their home. This highlights the problem with Citimortgage's first proposition of law – by failing to specify the amount of all recoverable damages, the property owner's right of redemption is rendered a nullity.

But it also proposes to turn the confirmation process into something it is not. An order confirming a sheriff's sale is a final appealable order. *Sky Bank v. Mamone*, 182 Ohio App.3d 323, 2009-Ohio-2265, ¶ 25 (8th Dist.) (citing *Smith v. Najjar*, 163 Ohio App.3d 208, 2005-Ohio-4720 (5th Dist.)). But the issues presented on confirmation are limited. An order of confirmation is dispositive as to the propriety of the sale and the confirmation procedures. *Fifth Third Mortgage Co. v. Rankin*, 2012-Ohio-2804, 11CA18, ¶12. R.C. 2329.31 provides that "on careful examination of the proceedings of the officer making the sale, if the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code" then the court shall issue an order confirming the sale. There is nothing in the statute that anticipates a court entering a supplemental damages award at the confirmation stage of the proceedings.

On the other hand, under Citimortgage's approach the court would have to entertain two rounds of fact-finding: the first on the initial judgment and the second on the amount owed for advances. This framework is the opposite of efficient. It asks this Court to modify the statutory confirmation process for its convenience. Put another way, Citimortgage doesn't like the rules, and it wants them changed just to accommodate its desires.

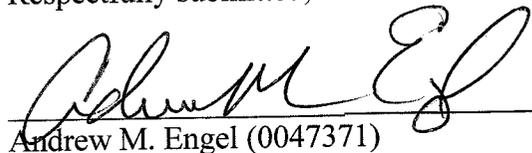
CONCLUSION

The Court should answer both certified questions in the negative. To be final, a judgment granting damages must specify an amount for the damages awarded. And the confirmation process is

not the time to address a second round of damages issues.

For these reasons, Amicus Curiae Terry Smith asks that the Court affirm the Fifth District Court of Appeals's decision.

Respectfully submitted,



Andrew M. Engel (0047371)

ANDREW M. ENGEL CO., L.P.A.

7071 Corporate Way, Suite 201

Centerville, OH 45459

(937) 938-9412

Fax: (937) 938-9411

amengel@sbcglobal.net

Attorney for Amicus Curiae Terry Smith

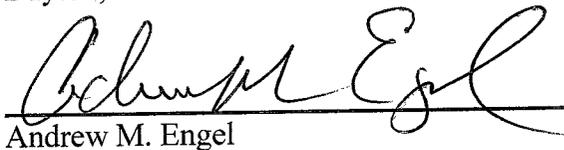
CERTIFICATE OF SERVICE

I certify that the foregoing was served via ordinary mail this 29th day of May 2013 upon the following:

David A. Wallace (0031356)
Karen M. Cadieux (0079240)
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215

Peter D. Traska (0079036)
TRASKA LAW FIRM, LLC
PO BOX 609306
Cleveland, Ohio 44109

Erin M. Laurito (007553 1)
Colette S. Carr (0075097)
LAURITO & LAURITO, LLC
7550 Paragon Road
Dayton, OH 45459



Andrew M. Engel

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LESLIE A. JOSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GERMAN AMERICAN CAPITAL
CORPORATION

Plaintiff-Appellee

v.

FLG PROPERTIES DAYTON LLC, et
al.

Defendants-Appellants

: Appellate Case No. 25656

: Trial Court Case No. 11-CV-8230

DECISION AND FINAL JUDGMENT ENTRY
May 1, 2013

PER CURIAM:

Appellant FLG Properties Dayton, LLC ("FLG"), has moved this Court to determine whether the February 6, 2013 Judgment Entry and Decree in Foreclosure issued by the Montgomery County Common Pleas Court in case no. 11-CV-8230 is a final appealable order.

In relevant part, the common pleas court granted judgment in favor of Appellee, German American Capital Corporation ("GACC"), on its claim for default under a promissory note and foreclosure of the related mortgage. Specifically, the court granted a money judgment in the amount of the principal sum of \$7,225,930.28, with accrued and

unpaid interest of \$984,180.32 through September 5, 2010, accrued and unpaid default interest of \$465,223.27 from September 6, 2010 through September 14, 2012, accrued and unpaid forbearance extension fees of \$90,000, for a total amount owing of \$8,765,333.87, plus interest and late charges accruing after September 14, 2012. In addition, and the subject of the issue currently before this Court, the trial court awarded GACC "amounts that [GACC] may advance for the preservation and security of the Real Property * * * , interest on such advances from the dates made, and attorneys' fees and costs expended." Such amounts may also include sums advanced for payment of fees and expenses for the appointed receiver and his counsel, real estate taxes, and insurance.

FLG suggests that the judgment entry and decree in foreclosure described above is not a final appealable order because the trial court, although entering judgment for liability, failed to specify all amounts of damages for that liability. Specifically, FLG points to the trial court's failure to determine the amount due for attorneys' fees and advances under the mortgage.

This Court is persuaded by FLG's argument and the cases cited in support thereof. First, where attorneys' fees are awarded, such as here, but the amount is not specified, the order is not final and appealable. *Dayton Women's Health Ctr., Inc. v. Enix*, 86 Ohio App.3d 777, 621 N.E.2d 1262 (2d Dist.1993); *FirstMerit Bank, N.A. v. Moore*, 183 Ohio App.3d 550, 2009-Ohio-3928, 917 N.E.2d 864, ¶ 14 (9th Dist).

In addition, while the valuation of costs for insurance and real estate taxes may be mechanical and ministerial, and thus not likely to produce a second appeal, the computation of amounts for the preservation and security of the property may be disputed as to the necessity, frequency, and reasonableness of the expense. *CitiMortgage, Inc. v.*

Roznowski, 5th Dist. Stark No. 2012-CA-93, 2012-Ohio-4901, ¶ 9-10; *but see LaSalle Bank Natl. Assn. v. Smith*, 7th Dist. Mahoning No. 11 MA 85, 2012-Ohio-4040, certified conflict accepted, 2013-Ohio-347, 982 N.E.2d 726 (Table). The proper time to raise such challenges is in the foreclosure action. *Id.* at ¶ 11.

Having concluded that the February 6, 2013 Judgment Entry and Decree in Foreclosure is not final and appealable, this matter is DISMISSED.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.


MARY E. DONOVAN, Judge


JEFFREY E. FROELICH, Judge


MICHAEL T. HALL, Judge

Copies to:

Andrew Engel
Attorney for Appellant
7071 Corporate Way, Suite 201
Dayton, Ohio 45459

Jack Pigman
Attorney for Appellee
41 S. High Street, Suite 3100
Columbus, Ohio 43215

Tami Kirby
Attorney for Appellee
One S. Main Street, Suite 1600
Dayton, Ohio 45402

Douglas Trout
Attorney for Appellee
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

CA3/JN