

ORIGINAL

IN THE SUPREME COURT OF OHIO

Fifth Third Mortgage Company,

Plaintiff-Appellee,

vs.

Maureen Wizzard,
et al.,

Defendants-Appellants.

* On Appeal from the Butler County

* Court Of Appeals,

* Twelfth Appellate District

* 14-0284

* Court of Appeals

* Case No. CA 2012-11-226

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, MAUREEN
WIZZARD, INDIVIDUALLY AND AS TRUSTEE

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Cases of public or great general interest typically involve novel questions of law or procedure that significantly impacts the legal profession, and to the Court's "collective interest in jurisprudence." Noble v. Colwell, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989). The case at bar involves the foreclosure and sale of the Appellant's home. While this is a common occurrence, the issues presented herein are not. In the matter at bar, while the appeal of the decree of foreclosure was pending, the trial court confirmed the sale. Precedents of this Court state that a trial court has no jurisdiction to proceed with the case while the appeal of a final appealable order is pending. Also, the court of appeal's requirement that a supersedeas bond be posted as a condition precedent to a stay of the proceedings in the trial court while the court of appeals is reviewing a previously issued final appealable order, denies poor litigants of access to justice, and violates the Ohio and the United States Constitution.

Furthermore the Court of Appeals stated that actual view does not necessitate that the appraisers enter the premises. This is contrary to the very definition of "actual view," and to controlling precedents issued by this Honorable Court. Given the tremendous amount of foreclosures in Ohio, this is a case of great general interest, and involves a substantial constitutional question, these being the jurisdiction of the trial court to confirm the sale while an appeal is pending, and the meaning of "actual view."

It is very important to note that, while the appeal of the confirmation entry was pending, the Appellee attempted to get the same dismissed as moot. See, Appendix "C" attached. However,

the motion was denied in part on account of the fact that the **Appellant had attempted** to get a stay of the proceedings pending the appeal, but was unable to do so. Id. at App. p. 10. The Opinion attached hereto as Appendix "A" stating that the trial court retained jurisdiction to confirm the sale is contrary to the Entry Denying Motion To Dismiss Appeal On Grounds Of Mootness, attached hereto as Appendix "C." The said Opinion is further conflicting with the decisions of other courts of appeal, and to controlling precedents issued by this Court. As such, the Judgment Entry issued by the Butler County Court of Appeals greatly impacts the legal profession, and the Court's "collective interest in jurisprudence."

STATEMENT OF THE CASE AND OF THE FACTS

On December 7, 2011, Appellee filed a complaint in foreclosure, seeking to enforce the note and mortgage signed by the Appellee. After the note and mortgage were signed, Maureen Wizzard, transferred the premises to herself as Trustee of the Reid-Wizzard Family Trust. The transfer was done for estate planning purposes only. Defendant Wizzard, Individually and as Trustee, was duly served with a copy of the complaint and summons. She raised several affirmative defenses in her answer, and stated that the mortgage sought to be foreclosed was defectively acknowledged. Appellee moved for summary judgment, and presented affidavits to support their position that the mortgage was properly executed. The Defendant presented memoranda in opposition, and affidavits as well. The Decree of Foreclosure was filed on 7/19/12. An Order of Sale was issued shortly thereafter. Appellant was not notified of the filing of the Decree of Foreclosure, however, and was able to file a timely notice of appeal on 11/14/12.

Subsequent to the decree of foreclosure, an order of sale was issued to the Sheriff of Butler County, Ohio. The appraisers did not enter the premises as they were sworn to do by law. The

Return of Appraisal was filed on 9/11/12 , as proven by the "drive-by" appraisal filed in the proceedings. The same was returned in the amount of \$ 240,000.00. On January 4, 2013, Appellant filed her Affidavit stating that the premises were not appraised upon actual view, that the appraisers did not enter the premises, that the purchase price was listed at \$ 385,000.00, that the basement was finished, and other facts which would significantly affect the value of her home. On January 10, 2013, the premises were sold for \$ 213, 500.00.

Appellant filed a timely Notice of Appeal raising the issue of the defectively executed mortgage. The court of appeals disagreed with Appellant and affirmed the trial court's decision. Subsequently, this Court declined to grant jurisdiction to hear the case. While the appeal of the summary judgment was pending on 11/14/12, the trial court proceeded to confirm the sale on February 25, 2013. The confirmation entry was also appealed, and the argument was made that the trial court had no jurisdiction to issue the same in light of the pending decree of foreclosure. The court of appeals disagreed, and stated that a trial court retained jurisdiction to confirm the sale while the appeal of the decree of foreclosure is pending on account of the fact that no supersedeas bond was posted. This ruling discriminates against all mortgagors, and deny their constitutional right to due process pursuant to the Fourteenth Amendment of the United States Constitution, and the Ohio Constitution, Art. 1, § 1, and § 16. This is the case because it is common knowledge that a mortgagor whose home is being foreclosed on does not have good credit and is unable to post a supersedeas bond. As such these individuals have no right to seek the type of redress called for by the United States and Ohio Constitution.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: When a Decree of Foreclosure is appealed, the trial court has no jurisdiction to confirm the sale, and the requirement that a supersedeas bond be posted as a condition precedent for staying the proceedings below so that the Court of Appeals may decide the matter appealed, is unconstitutional.

The court of appeals was of the view that the mere filing of a notice of appeal in regards to the decree of foreclosure did not operate as a stay, and that "the trial court retained jurisdiction to enforce the final judgment through the Confirmation Entry of Sale." Opinion p. 4. This statement ignores the fact that a decree of foreclosure is a final appealable order, and the entry confirming sale is a second, separate, appealable order. Smith v. Najjar, 163 Ohio App.3d 208 (2005). There is quite a bit of disagreement among lawyers regarding the separate nature of the decree of foreclosure and the subsequent confirmation, which makes is very difficult to properly counsel clients. Therefore, clarification of this issue by this Honorable Court would give better directions to those in the legal profession, and would increase the Court's "collective interest in jurisprudence." See. Noble v. Colwell, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989).

Also, the requirement that a supersedeas bond be posted while a decree of foreclosure is pending as a condition precedent to staying the confirmation of sale (and the subsequent eviction of a homeowner), works a hardship on poor homeowners. The learned Judge Stephen A.

Yarbrough had this to say in regards to a similar issue:

Moreover, we reject the argument that the judgment debtor could seek a stay on the transfer of the assets to prevent the appeal from becoming moot. If this were the rule, it would render the right to appeal from the order of confirmation of sale meaningless in many instances. A person who has had his or her assets sold to satisfy a judgment is unlikely to have the financial wherewithal to post an adequate supersedeas bond. Thus, he or she would be unable to ensure through a

reviewing court that the sale process approved by the trial court adequately protected his or her interests, and realized an appropriate sale for the property. Therefore, we find no merit in the receiver's and TP Food's argument that the completion of sale and transfer of assets moots an appeal from the order confirming sale. Horvath v. Packo, 2012 Ohio 56, 2013 Ohio App. Lexis 37, Court of Appeals No. L-11-1318, Court of Appeals Of Ohio, Sixth Appellate District, Lucas County.

Though Judge Yarbrough was speaking in regards to the issue of mootness, is logic is equally applicable to the posting of a supersedeas bond as a condition precedent to the staying of a proceeding to confirm sale: A person who is behind on their mortgage, and against whom a decree of foreclosure has been issued, will not have the "financial wherewithal" to post a supersedeas bond. This requirement clearly discriminates against the poor, and prevents them from accessing the courts. These individuals are therefore denied their constitutional right to due process pursuant to the Fourteenth Amendment of the United States Constitution, and the Ohio Constitution, Art. 1, § 1, and § 16. Individuals have a general right of unimpeded access to civil courts, including a right to a waiver of court costs. NAACP V. Button, 371 U.S. 415 (1963). This being the case the Judgment Entry issued by the court of appeals is unconstitutional, and should be reversed. The Ohio Constitution reads in part as follows:

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 shall have justice administered without denial or delay. Art. 1, § 16.

The requirement that a bond be posted as a condition precedent to stay a separate, subsequent proceeding, pending review of a final appealable order in the first proceeding, violates the Ohio Constitution, and discriminates against those who can not afford to post such a bond.

Proposition of Law No. 2: In a foreclosure case, where there is clear

evidence that the appraisal was not upon actual view, and that entering the home may have an effect of value, confirmation of the sale results in an abuse of discretion.

Another issue of confusion in regards to jurisprudence regarding foreclosures in Ohio, is the meaning of "actual view." Ohio courts are not at all in agreement regarding this issued. The court of appeals held that although R.C. 2329.17 requires that an appraisal upon actual view is a condition precedent to confirmation of a sheriff's sale, "it does not state whether 'actual view' necessitates that the appraiser enter the premises." Opinion at p. 6. This is clearly erroneous, and contrary to Ohio law.

Where appraisers of improved real estate do not enter the building and make an examination of its interior, but inspect it from the outside only, a proper view of the property has not been made. The reason for this ruling, which has never been distinctly made in this state before, is that the character of the interior finish, fixtures, plumbing, etc., differ so widely that it is impossible to judge accurately what a building is worth by looking at the exterior only. In re Slane, 9 Ohio Dec. 830, 1899 Ohio Misc. LEXIS 150.

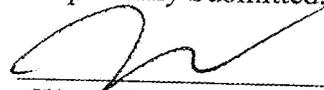
The Appellant produced her affidavit stating that the home was immaculate, that the lot was more than an acre (this is was not visible from the street due to the shape of the lot), that the basement was finished, and that the fair market value was closer to \$ 385,000.00. The "drive-by" appraisal resulted in an appraisal for only \$ 240,000.00, more than \$ 100,000.00 less than the actual value. Furthermore, on 8/20/13 the Appellee filed a Notice Of Availability Of Excess Funds. See, Appendix D, App. p. 12, for a copy of the said Notice. An appraisal upon actual view would have returned a fair market value closer to \$ 385,000.00, and would have attracted a better level of prospective buyers. In fact, the home was sold to an investor looking to make a quick profit.

It is very interesting to note that the court of appeals was quick to state that an appraisal upon "actual view" was a condition precedent to confirmation, but affirmed the trial court's ruling, absent an appraisal upon actual view, while at the same time, requiring that the a supersedeas bond be posted as a condition precedent to staying the proceedings to confirm the sale. In any event, this Honorable Court should grant jurisdiction, and clarify the meaning of "actual view" in the context of a foreclosure case.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accepts jurisdiction to this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,



Worrell A. Reid,
Counsel for Appellant,
Maureen Wizzard, Individually
and as Trustee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons by U.S. Mail, postage prepaid, on this 2/28 day of February, 2014:

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Worrell A. Reid, Esq.,
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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

FIFTH THIRD MORTGAGE COMPANY, :

Plaintiff-Appellee, :

- vs -

MAUREEN WIZZARD, et al., :

Defendants-Appellants. :

CASE NO. CA2013-03-046

OPINION
1/13/2014

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2011-12-4264

✓
Nicholas M. Smith, P. O. Box 165028, Columbus, Ohio 43216, for Plaintiff-Appellee

✓
Worrell A. Reid, 6718 Loop, #2, Centerville, Ohio 45459, for Defendant-Appellant, Maureen Wizzard, Individually and as Trustee

.....

DONOVAN, J.

{¶ 1} Defendant-appellant, Maureen Wizzard, appeals the trial court's February 25, 2013 Confirmation Entry of Sale and Distribution of Proceeds in a foreclosure action initiated by plaintiff-appellee, Fifth Third Mortgage Company. Wizzard filed a timely notice of appeal on March 25, 2013.

{¶ 2} The issue before us on appeal is whether the trial court erred in confirming the sheriff's sale of Wizzard's property commonly known as 7310 Ridge Meadow Court, West

Chester, Ohio, 45069 (the "Property"). Because the trial court had jurisdiction to confirm the sale and because Wizzard failed to demonstrate that her property was not appraised upon actual view, this court finds that the lower court did not abuse its discretion, and accordingly, we affirm the sale of the Property.

{¶ 3} On February 7, 2005, Wizzard executed a promissory note in favor of Fifth Third in the principal amount of \$185,000. Wizzard executed a mortgage that secured the note and purchased the Property. On December 15, 2006, Wizzard transferred title to herself, as the trustee of the Reid-Wizzard Family Trust. On December 7, 2011, Fifth Third filed a complaint in foreclosure, alleging it was the holder of the note secured by the mortgage on the Property and that the note was in default in the amount of \$171,584.16, with interest at a rate of six percent per annum from December 1, 2010. Following the trial court's Judgment Entry and Decree in Foreclosure, but prior to the actual sale of the Property, the sheriff called upon three disinterested parties to appraise the Property who took an oath to appraise the Property upon actual view. Based on the recommendations of the three parties, the Property was valued at \$240,000.

{¶ 4} Wizzard filed her answer to Fifth Third's complaint on January 3, 2012. Fifth Third moved for summary judgment against Wizzard on April 10, 2012. On April 26, 2012, Wizzard filed her memorandum in opposition to Fifth Third's motion for summary judgment. Ultimately, on July 19, 2012, the trial court granted a Judgment Entry and Decree in Foreclosure in favor of Fifth Third, whereupon the Property was appraised, advertised, and sold on January 10, 2013 to a disinterested third party at a sheriff's sale for \$213,500 (approximately 89 percent of the appraised value). On February 25, 2013 the trial court filed its Confirmation Entry of Sale and Distribution of Proceeds.

{¶ 5} Earlier on November, 14, 2012, Wizzard had filed a notice of appeal in Case

No. CA2012-11-226, resulting from the same controversy, but arguing separate claims than the assignments of error in the instant appeal. At no time, however, did Wizzard post a supersedeas bond which would have acted to stay a sale of the Property. On February 15, 2013, Wizzard filed a Notice Regarding Lack of Jurisdiction to Confirm Sale, asserting that her appeal operated as a stay of execution of the judgment, and further alleging that the trial court did not have jurisdiction to confirm the sale. On March 25, 2013, Wizzard filed a Motion to Stay Execution and Eviction Pending Appeal with the Butler County Common Pleas Court. The motion was denied. On March 28, 2013, the Twelfth District Court of Appeals granted Wizzard a stay of execution contingent upon her posting a supersedeas bond in the amount of \$345,000. The record establishes that Wizzard did not post a supersedeas bond.

{¶ 6} Wizzard's first assignment of error is as follows:

{¶ 7} THE TRIAL COURT'S SUA SPONTE CONFIRMATION ENTRY OF SALE AND DISTRIBUTION OF PROCEEDS DURING THE PENDENCY OF THE APPEAL OF THE PREVIOUSLY ISSUED JUDGMENT ENTRY AND DECREE IN FORECLOSURE WAS THE PRODUCT OF A SEPARATE PROCEEDING NOT IN THE AID OF EXECUTION, AND IS VOID AS JURISDICTION WAS IN THE COURT OF APPEALS [SIC].

{¶ 8} In her first assignment, Wizzard contends that the trial court erred by confirming the sale of the Property while her appeal in Case No. CA2012-11-226 was still pending. R.C. 2505.09 states that an appeal does not operate as a stay of execution until a supersedeas bond has been posted. The Twelfth District and the Ohio Supreme Court have ruled that an appeal from the order of a trial court cannot function as a stay of proceedings absent a bond. It is well-established that unless a stay has been obtained, a trial court retains jurisdiction to enforce a final judgment and to initiate any proceedings in support of that judgment. *Strah v. Lake Cty. Humane Soc.*, 90 Ohio App.3d 822, 836, 631 N.E.2d 165 (11th Dist.1993), citing

State ex rel. Klein v. Chorpening, 6 Ohio St.3d 3, 450 N.E.2d 1161 (1983). 4

{¶ 9} For example, in *Chase Manhattan Mortgage Corp. v. Urquhart*, 12th Dist. Butler Nos. CA2004-04-098, CA2004-10-271, 2005-Ohio-4627, ¶ 27, the appellant argued that the common pleas court could not confirm the sheriff's sale for lack of jurisdiction "to conduct further substantive proceedings" once appellant filed a notice of appeal of the foreclosure judgment. The Twelfth District concluded that the trial court retained jurisdiction even though the appellant had a pending appeal because she failed to properly obtain a stay of execution. *Id.*, at ¶ 28-29.

{¶ 10} In the instant case, the trial court possessed the requisite jurisdiction to confirm the sale of the Property. There is nothing in the record that indicates a stay of execution was obtained in either the trial court or the Twelfth District Court of Appeals.

{¶ 11} Wizzard, however, asserts that merely filing a notice of appeal operates as a stay of execution. Wizzard is incorrect. Upon review, we conclude that because no supersedeas bond has been posted, Wizzard's notice of appeal, standing alone, does not operate as a stay. Accordingly, pursuant to R.C. 2505.09 and the Twelfth District's Entry granting her stay *contingent upon* the bond being posted, a notice of appeal is not sufficient for a stay of proceedings. Thus, the trial court retained jurisdiction to enforce the final judgment through the Confirmation Entry of Sale.

{¶ 12} Wizzard's first assignment of error is overruled.

{¶ 13} Wizzard's second and final assignment of error is as follows:

{¶ 14} THE TRIAL COURT'S SUA SPONTE CONFIRMATION ENTRY OF SALE AND DISTRIBUTION OF PROCEEDS WAS AN ABUSE OF DISCRETION AND CONTRARY TO LAW, INCLUDING APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

{¶ 15} In her final assignment of error, Wizzard argues that the appraisal of the

Property was not upon "actual view," resulting in the appraisal of \$240,000 being too low. In foreclosure proceedings, appraisals are to comply with standards pursuant to R.C. 2329.17, which states in pertinent part:

When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders . . . and administer to them an oath impartially to appraise the property so levied upon, upon *actual view*. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money. (Emphasis added.)

Although the statute provides that appraisers value the property "upon actual view," appraisals are often made without actually entering the premises. Courts have held that an appraiser's failure to enter the premises does not require a sheriff's sale to be set aside. In *National Union Fire Insurance Co. v. Hall*, 2d Dist. Montgomery No. 19331, 2003-Ohio-462, the defendant argued that a confirmation and distribution of sale should not have been confirmed since the property was not appraised "upon actual view." The court held that the defendant failed to show how he was prejudiced by the appraiser's failure to enter the house and view the interior of the home prior to assigning a value to the property. *Id.*

{¶ 16} Similarly, other Ohio courts have agreed that a defendant who claims that an appraiser failed to comply with the "upon actual view" requirement of R.C. 2329.17 must also establish they were prejudiced by the value that the appraiser placed on the property. Specifically, a defendant must adduce evidence that the appraisal was grossly inaccurate and that the home would have sold for more if the appraisal value had been higher. The Tenth District has found that the failure of an appraiser to enter the premises does not per se require the sheriff's sale to be set aside. See *Leader Mortg. Co. v. Logan*, 10th Dist. Franklin No. 98AP-94, 1998 WL 680978 (Sept. 30, 1998).

{¶ 17} Likewise, in *Chase Manhattan Mortgage Corp., supra*, the property, which was

not appraised upon actual view, was appraised at \$67,500. Urquhart, however, argued that it should have been appraised for \$85,000. The property was sold at sheriff's sale for \$55,000, and the Twelfth District found that even if the property had been appraised at a higher price, it would not have necessarily sold at a higher amount. The court found that Urquhart failed to provide evidence of a different valuation of the property and failed to show how she was prejudiced by the value offered by the appraiser. *Chase Manhattan Mortgage Corp.* at ¶ 21-24.

{¶ 18} However, the Second District has also found that where the condition of a house may have an impact on the value of the real property on which it stands, the house should be entered by the appraisers who, under R.C. 2329.17, are required to conduct their appraisal upon actual view. *Glendale Fed. Bank v. Brown*, 2d Dist. Montgomery No. 13976, 1994 WL 12475, * 3 (Jan. 21, 1994).

{¶ 19} Nevertheless, similar to the mortgagors in *National Union* and *Chase Manhattan*, Wizzard has failed to provide any evidence establishing that she was prejudiced by the appraisal performed without an "actual view" of the interior. Wizzard asserts that "an appraisal upon actual view is a condition precedent to confirmation [of sale]." Although R.C. 2329.17 dictates that appraisal must be "upon actual view," it does not state whether "actual view" necessitates that the appraiser enter the premises. Many defaulting mortgagors, such as Wizzard, seek to construe the statute to mean that if the appraisers do not enter the premises, the appraisal may be inaccurate, and they will be prejudiced as a result. Because the statute contains the phrase "actual view" rather than any language requiring the appraiser to enter the premises, we conclude that it is reasonable to put an additional burden on mortgagors to demonstrate prejudice when they deem the appraisal value to be too low.

{¶ 20} In the instant case, Wizzard has failed to adduce any evidence that the

Property should have been appraised at a higher value. Wizzard asserts that the ⁷Property was in good condition, but does not attempt to counter the appraisal. Wizzard, simply and without any further explanation, contends that the appraisal of \$240,000 is "grossly inadequate." Similar to the defendant in *Chase Manhattan Corp.*, Wizzard also failed to establish that a higher appraisal would have resulted in a higher sale amount of the Property. Accordingly, Wizzard has failed to establish that the appraisers did not comply with R.C. 2329.17, and the trial court did not abuse its discretion when it confirmed the sheriff's sale of the property at issue.

{¶ 21} Wizzard's second assignment of error is overruled.

{¶ 22} All of Wizzard's assignments of error having been overruled, the judgment of the trial court is affirmed.

FAIN, J. and FROELICH, J., concur.

(Hon. Mike Fain, Hon. Mary E. Donovan, Hon. Jeffrey E. Froelich, Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio pursuant to Section 5(A)(3) Article IV of the Ohio Constitution).

FILED IN THE COURT OF APPEALS

2014 JAN 13 TWELFTH APPELLATE DISTRICT OF OHIO

MARY L. SWAIN BUTLER COUNTY CLERK OF COURTS

FIFTH THIRD MORTGAGE COMPANY

Plaintiff-Appellee

v.

MAUREEN WIZZARD, et al.

Defendants-Appellants

CASE NO. CA2013-03-0046

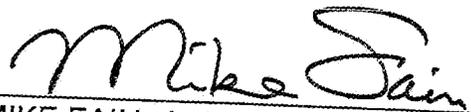
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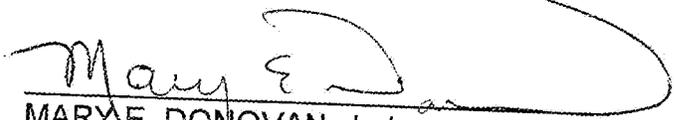
JUDGMENT ENTRY

.....
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


MIKE FAIN, Judge


MARY E. DONOVAN, Judge


JEFFREY E. FROELICH, Judge

(Hon. Mike Fain, Hon. Mary E. Donovan, Hon. Jeffrey E. Froelich, Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio pursuant to Section 5(A)(3) Article IV of the Ohio Constitution).

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IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FIFTH THIRD MORTGAGE CO., : CASE NO. CA2012-11-226

Appellee, : ENTRY DENYING MOTION TO
vs. : DISMISS APPEAL ON GROUNDS
: OF MOOTNESS

MAUREEN WIZZARD, et al.,

Appellants.

FILED BUTLER CO.
COURT OF APPEALS

MAY 17 2013

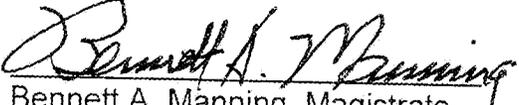
MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to dismiss on grounds of mootness filed by counsel for appellee, Fifth Third Mortgage Company, on April 17, 2013, and a memorandum in opposition filed by counsel for counsel for appellants, Maureen Wizzard, et al., on April 26, 2013. The basis for the motion to dismiss is that the property subject to this foreclosure action has been sold at sheriff's sale and the sale has been confirmed by the trial court. Appellee therefore argues that the present appeal is moot.

In response, appellants assert that this matter is not moot because it is capable of repetition yet evading review, and involves important constitutional issues. The brief filed by appellants raises two assignments of error, contending that the entry confirming sale is void because it was issued while the foreclosure decision was on appeal, and that issuing the entry confirming sale was an abuse of discretion and a violation of appellants' right to due process. Appellants sought a stay of the foreclosure decision pending appeal and were granted a stay contingent upon posting a supersedeas bond. To the court's knowledge, such bond has not been posted.

Upon consideration of the foregoing, the court finds that, based upon the facts of this case, there is some question whether the present appeal is moot. The court has yet to consider appellants' argument that this matter is capable of repetition yet evading review, and there is some authority suggesting that a foreclosure may not be moot even after it is concluded, particularly if the appellant seeks to stay proceedings pending appeal. See *Washington Mut. Bank, F.A. v. Wallace*, 194 Ohio App.3d 549 (2011) (reversed on other grounds, *Federal Home Loan Mort. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017.)

Based upon the foregoing, the motion to dismiss the present appeal is DENIED.
IT IS SO ORDERED.


Bennett A. Manning, Magistrate

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Fifth Third Mortgage Company

Plaintiff,

vs.

Maureen Wizzard, et al.

Defendants.

Case No. CV 2011 12 4264

Judge Keith Spaeth

NOTICE OF AVAILABILITY OF
EXCESS FUNDS

Plaintiff hereby notifies the Court and all parties that it has deposited with the Clerk of Courts excess funds from the sale of the property in the amount of \$2,490.27.

Respectfully submitted,



Nicholas M. Smith (0076848) ✓
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Availability of Excess Funds was sent to the following by ordinary U.S. Mail, postage prepaid, on the date indicated below:

Maureen Wizzard
7310 Ridge Meadow Court
West Chester, OH 45069

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Lynn A. Busch-Heyman
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July 15, 2013

Dated