ORIGINAL

In the Supreme Court of Ohio

FIFTH THIRD MORTGAGE COMPANY,	:	Case No. 14-0284
	:	
Plaintiff-Appellee,	:	ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT
vs.	:	
MAUREEN WIZZARD, *et al.*,	:	Court of Appeals Case No. CA 2012-11-226
Defendants-Appellants.	:	

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

WORRELL A. REID* (0059620)
**Counsel of Record*
6718 Loop, #2
Centerville, Ohio 45459
Phone: (937) 434-2880
Fax: (937) 434-2033
Worrell_reid@sbcglobal.net

Counsel for Appellant, Maureen Wizzard

JOHN C. GREINER* (0005551)
**Counsel of Record*
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Phone:(513) 629-2734
Fax: (513) 651-3836
jgreiner@graydon.com

Counsel for Appellee, Fifth Third Mortgage Company

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I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case is not one of public or great general interest, nor does it involve a substantial constitutional question. In fact, this court should not exercise its discretionary jurisdiction here because the case is moot.

By appellant's admission, the property subject to the underlying foreclosure action has been sold, and the sale has been confirmed. As such, the rights and obligations of the parties with respect to the judgment have been extinguished, and any judgment on appeal would have no effect on the issues raised on appeal. *See Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 255, 551 N.E.2d 1249; *Washington Mutual Bank, FA v. Wallace*, 12th Dist. 194 Ohio App.3d 549, 957 N.E.2d 92 (reversed on other grounds).

Putting aside mootness, however, appellant fails to articulate any issue that would justify this court invoking its jurisdiction.

Appellant first contends that a trial court lacks jurisdiction to confirm a judicial sale while an appeal of the decree of foreclosure is pending. But this proposition is simply false. A trial court retains jurisdiction over execution efforts. A sheriff's sale is such an effort. This law is well established, and appellant provides **no** support for why this court should revisit that issue.

Appellant also contends that requiring her to post a supersedeas bond violates her due process rights and is, therefore, unconstitutional. But she cites no legal support for her contention, nor does she explain why a creditor should be deprived of its right to have its property interest protected pending an appeal.

More importantly, although appellant makes an unsupported claim that she could not afford to post a bond, there is no evidence in the record to support her poverty plea, nor is there

any indication that she raised the issue with the trial court. Given these deficiencies, there is no issue for this court to consider.

Finally, the question whether the foreclosure appraiser must enter the premises in order to perform an "actual view" is not an issue of great general interest. Again, the record does not permit this court to reach that issue. Appellant failed to produce any evidence supporting her conclusory allegation that the appraisers failed to enter the residence. She also produced no evidence that she was prejudiced, even if the appraisers failed to inspect the interior of the residence. Given this state of the record, there is no issue for this court to consider.

II. STATEMENT OF THE CASE AND OF THE FACTS.

Solely for purposes of this proceeding, Fifth Third Mortgage Company ("Fifth Third") accepts the appellant's statement of the case and of the facts, except for those portions that are legal arguments.

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW.

PROPOSITION OF LAW NO. 1.

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.

In *Ohio Sav. Bank v. Ambrose*, this court stated "it has long been recognized that the trial court has discretion to grant or deny confirmation: 'Whether a judicial sale should be confirmed or set aside is within the sound discretion of the trial court.'" 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990), citing *Michigan Mortgage Corp. v. Oakley* (1980), 68 Ohio App.2d 83, ¶ 2, 426 N.E.2d 1195.

Because the trial court has discretion to grant or deny confirmation, its decision may only be overturned upon a showing that the trial court abused its discretion. *Howland v. Purdue*

Pharma L.P., 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶¶ 25-26. The Ohio Supreme Court has held "[a]n abuse of discretion is more than a mere error of law or judgment, instead [it requires] a finding that the trial court's decision is unreasonable, arbitrary, or unconscionable." *Id.* at ¶ 26, citing *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 30, citing others.

Here, the trial court in no way acted unreasonably, arbitrarily, or unconscionably in confirming the sale of the property through the Confirmation Entry of Sale and Distribution of Proceeds.

Appellant alleges that the trial court erred by confirming the sale of the property through the Confirmation Entry of Sale and Distribution of Proceeds, while her appeal in Case No. CA-12-11-0226 was pending. But this allegation lacks merit. In *Chase Manhattan Mortgage Corp. v. Urquhart* (12th Dist. 9-6-2005), Nos. CA2004-04-098, CA2004, 10-271, 2005-Ohio-4627, 2005 WL 2130095, the court held:

> In this assignment of error, appellant argues that the common pleas court could not confirm the sheriff's sale because it lost jurisdiction "to conduct further substantive proceedings" once appellant filed a notice of appeal of the foreclosure judgment....
>
> The filing of a notice of appeal does not completely divest a trial court of all jurisdiction over a case; rather "a trial court retains all jurisdiction which does not conflict with the jurisdiction of the appellate court." *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 784, 664 N.E.2d 1354. 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. Human Soc.* (1993), 90 Ohio App.3d 822, 836, 631 N.E.2d 165; *State ex rel. Klein v. Chorpening* (1983), 6 Ohio St.3d, 4, 450 N.E.2d 1161.

In the underlying trial court action here, appellant never obtained a stay. Accordingly, the trial court retained jurisdiction over the execution effort.

Appellant continues to assert that filing her notice of appeal entitled her to a stay of the proceedings. But Ohio law is clear that a stay of the trial court proceedings is conditioned on the

appellant posting a supersedeas bond. *See* R.C. §2505.09; App.R. 7(B); *see also Bibb v. Home Savings & Loan*, 63 Ohio App.3d 751, 752, 580 N.E.2d (6th Dist. 1989).

Appellant's constitutional argument is equally unavailing. She contends that the requirement that an appellant post a bond as security for the appellee's risk of loss in value to its property interest violates the due process rights of litigants who cannot afford to post the bond.

Putting aside the legal issue, appellant points to no evidence, aside from her conclusory statement, that she cannot afford the bond. Given her theory—that the bond requirement deprives indigent litigants of their due process rights—it is incumbent on appellant to produce evidence that she belongs in that category. She has failed to do so.

In addition, R.C. §2505.10 provides a procedure for how the court is to determine the amount of the bond. There is no indication that appellant ever requested a hearing, pursuant to R.C. §2505.10, to raise this issue.

Finally, as a matter of law, a litigant does not have an unconditional right to appeal a judgment at the peril of an unsecured judgment creditor. *See Steadman v. Nelson*, 155 Ohio App.3d 282, 800 N.E.2d 775, 2003-Ohio-6057, where the court rejected a similar argument in a forcible entry and detainer proceeding. That court noted that the constitution does not "require a legal system that allows [defendant] to remain in someone else's house while not paying rent ... as long as he can manufacture legal claims against the landlord." *Id.* The same is true here. Appellant does not have an unconditional right to expose Fifth Third to a loss of property value, while she pursues any available legal theory on appeal.

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 on value, confirmation of the sale results in an abuse of discretion.

Prior to even addressing the merits of appellant's second proposition of law, Fifth Third notes that appellant has failed to present sufficient independent evidence to support her claim that the property was **not** appraised upon actual view.

The 11th District Court of Appeals recently addressed an identical argument, where an appellant asserted as error that the trial court erred in confirming a sheriff's sale "because the appellee failed to comply with statutory mandates requiring appraisers to actually view the premises." *Wells Fargo Bank v. Messina*, 11th Dist. No. 2011-G-3041, 2012-Ohio-3019, ¶ 12. Similar to this case, the appellant in *Messina* made the assertion without producing any independent evidence. *Id.* In that case, the court also noted the appraisal at issue had been submitted by three disinterested appraisers who had taken an oath to appraise the property upon actual view. *Id.* After considering the totality of the evidence in the record, the court held:

> Appellant's argument merely states, in conclusory fashion, that the appraisers did not enter upon the property. Without additional independent evidence to substantiate [appellant's] allegation, the sworn documentation [of the appraisers] in the record suffices to meet the statutory mandate. *Id.* at ¶ 15.

This court should apply a similar rationale. Appellant has made only a self-serving conclusory assertion, claiming the appraisals were not made upon actual view. Appellant has provided no "independent evidence to substantiate [her] allegation." Given the lack of evidence supporting appellant's conclusory assertion, the trial court did not abuse its discretion in confirming the sale.

Even considering appellant's assertions as to the method and amount of the appraisal, the trial court did not abuse its discretion, where appellant failed to provide evidence of a different

valuation of the property, and where appellant failed to show she was prejudiced by the appraised value.

At least one Ohio court has held that the failure of the appraiser to enter the premises does not in itself require setting aside a sheriff's sale. *See Leader Mortg. Co. v. Logan* (10th Dist. 9-30-1998), No. 98AP-94, 1998 WL 680978, *see also St. Joseph Mortg. Co., Inc. v. Allison* (7th Dist. 12-13-1985), No. 85-C-10, 1985 WL 4457 (although inside of premises was not viewed, the court held it was not an abuse of discretion to confirm the sale, even despite the fact that the sheriff's appraisal was lower than appraisal figures submitted by appellant).

Rather, in addition to proving that the appraisal failed to comply with R.C. §2329.17, the complaining party must also prove that the appraisal was grossly inaccurate and that the inaccurate appraisal prejudiced the complaining party. These additional proof requirements are justified by the practical reality that "although the preferred method of appraisal under R.C. §2329.17 would have been for the three appraisers to enter the building to view the interior, such an opportunity is not always present." *Leader Mortg. Co., supra*, at *2.

In *Chase Manhattan Corp., supra*, the court addressed a similar situation where the appellant alleged that the trial court erred in confirming a sale, because the appraisal was not conducted in compliance with Ohio law. In that case, the property had been appraised at an amount greater than the price for which the property ultimately sold. Specifically, the property was appraised at $67,500, yet the appellant complained that the property should have been appraised for $85,000. The property actually sold at sheriff's sale for $55,000. The court overruled this assignment of error, holding that had the appraisal been for a greater amount, the property would not necessarily have sold for a higher amount. *Chase Manhattan Corp., supra* at

¶ 24 (recognizing that a higher appraisal does not ensure, nor even necessarily correlate with, a higher sale price).

Similarly, here the property was evaluated at an amount higher than what the property actually sold for at sheriff's sale. (The appraisal was for $240,000 while the property sold for $213,500 at sheriff's sale). Also similar to *Chase Manhattan Corp.*, appellant has failed to articulate how a higher appraisal would have resulted in a higher sale amount of the property. Absent such an articulation by appellant, this court should overrule her second assignment of error.

Even if this court considers appellant's conclusory statements concerning the condition of the house, those statements do not prove that the value of the property is anything other than the appraised value. Regardless of whether these representations are accurate, they do not constitute proof of a different value of the property. Rather these representations merely speak to the condition of the house. At no point did appellant ever submit any independent admissible evidence indicating that the house should have been appraised at a different value. Absent any actual independent proof that the property had a different value than reflected in the appraisals from the three disinterested appraisers, the trial court's Confirmation Entry of Sale and Distribution of Proceeds was clearly not an abuse of discretion.

Finally, appellant has failed to demonstrate she was prejudiced by the appraisal. First, as this court noted in *Chase Manhattan Corp.*, a higher or different appraisal would not have ensured a different sale price. Accordingly, even if appellant had presented independent proof of an inadequate appraisal, such proof standing alone would not demonstrate prejudice.

Additionally, appellant is incorrect in asserting that if the property had sold for more money she would have been entitled to the proceeds. In addition to the court costs, taxes, and

sums due Fifth Third, there was at least one other lien, by virtue of a second mortgage, in the amount of $140,000, held by Fifth Third, which had priority over appellant. That lien would have had to be satisfied prior to appellant potentially receiving any funds. As such, even had the property been appraised for a higher value, and had the property actually sold for more money, appellant still would not be entitled to proceeds until the second mortgage was satisfied.

Even though appellant contests the appraisal, she has failed to even allege, much less produce any evidence, that the house would have sold for more than $140,000 in addition to the value at which the house was appraised. Accordingly, in all instances appellant could not have been prejudiced by the appraisal, even if the appraisal was inadequate.

IV. CONCLUSION.

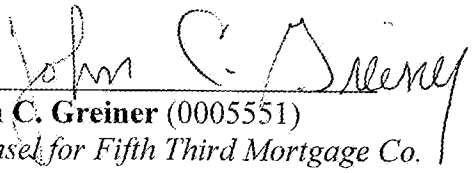
The trial court did not abuse its discretion in confirming the sheriff's sale of the property, where it entered the Confirmation Entry of Sale and Distribution of Proceeds.

Under Ohio law, the trial court clearly retained jurisdiction to enforce the final judgment by confirming the sale of the property.

Further, appellant has presented no independent evidence that the appraisal was not conducted "upon actual view" or that the appraisal was otherwise in violation of R.C. §2329.17. Moreover, appellant has failed to demonstrate that the appraisal of the three disinterested appraisers was inaccurate. Finally, appellant has failed to show that she was prejudiced by the alleged inadequate appraisal.

Given these facts, the trial court did not abuse its discretion in confirming the sale of the property by entering the Confirmation Entry of Sale and Distribution of Proceeds.

Respectfully submitted,



John C. Greiner (0005551)
Counsel for Fifth Third Mortgage Co.
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

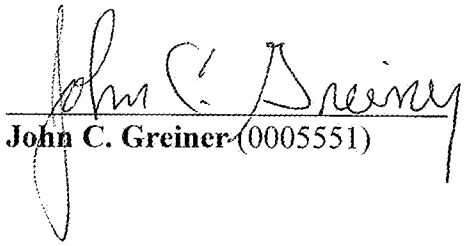
Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Memorandum in Opposition to Memorandum in Support of Jurisdiction of Appellant, Maureen Wizzard, Individually and as Trustee*** was served by regular U.S. Mail, postage prepaid, this 19th day of March, 2014, upon the following:

Worrell A. Reid, Esq.
6718 Loop, #2
Centerville, Ohio 45459



John C. Greiner (0005551)

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