

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC.,
successor by merger to
ABN AMRO Mortgage Group, Inc.,

Appellant,

v.

JAMES A. ROZNOWSKI, et al.,

Appellees.

Case No. 2012-2110

On Appeal from the Stark County
Court of Appeals, Fifth Appellate District
Court of Appeals Case No. 2012 CV 00093

MEMORANDUM IN OPPOSITION TO
APPELLEES' MOTION FOR RECONSIDERATION

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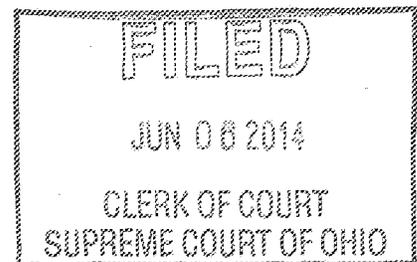
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Appellees' Motion for Reconsideration and the accompanying memorandum in support submitted by the amicus curiae simply reargue issues this Court already addressed. Neither the Appellees nor the amicus curiae point out any obvious error in the Court's decision on the two certified questions in this case. The Court should deny the motion for reconsideration.

ARGUMENT.

Although the Ohio Supreme Court has not established a specific standard for motions for reconsideration, the Court has explained in connection with former Rule 11, the predecessor to current Rule 18, that reconsideration is a mechanism to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 541, 697 N.E.2d 181, 183 (1998) (quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341 (1995)). It is clear, however, as stated in Rule 18.02(B) of the Rules of Practice of the Supreme Court of Ohio, "[a] motion for reconsideration *shall not constitute a re-argument of the case . . .*" S. Ct. Prac. R. 18.02(B) (emphasis added); *see also State ex rel. Gross v. Indus. Comm.*, 2007-Ohio-4916, 115 Ohio St. 3d 249, 265-66, 874 N.E.2d 1162, 1176. None of the issues raised in the Appellees' motion for reconsideration or the amicus curiae's memorandum in support establish that any aspect of the Court's decision was erroneous.

A. The Court Addressed and Rejected Appellee's Unreliability Argument.

Appellees already raised their unsubstantiated contention that CitiMortgage's records of property-related expenses are "unreliable." The Court directly addressed this point in its decision: "While the Roznowskis state that CitiMortgage has 'proven itself unreliable' in disclosing costs, the record does not support this assertion." *See CitiMortgage, Inc. v.*

Roznowski, 2014-Ohio-1984, at n.1. The Appellees' attempt to reargue this point on reconsideration is improper.

B. The Equity Of Redemption Is Not In Peril.

Both the Appellees and the amicus curiae raise the alarm that the Court's holding puts the equity of redemption in peril. There is no cause for concern, and certainly no reason to reconsider the answers to the certified questions.

First, nothing about the Court's decision bars a property owner from redeeming the property by exercising the equitable right of redemption, which expires upon the entry of the judgment decree in foreclosure. The Court simply concluded that a judgment decree in foreclosure is final and appealable if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment. The equitable right to redeem comes into effect when the mortgage goes into default (not, as the amicus curiae seems to think, when the judgment is entered). See *Levin v. Carney*, 161 Ohio St. 513, 517, 120 N.E.2d 92 (1954) ("The right of a mortgagee to recover the possession of the land upon condition being broken always existed at common law"); *Hendrickson v. JGR Properties, Inc.*, 12th Dist. No. CA2008-02-056, 2008-Ohio-6192, ¶ 13 (right of redemption comes into effect upon default). The equitable redemption right continues through entry of the judgment decree in foreclosure and the expiration of the judicially-allotted three-day grace period in which to exercise the right. See *Hausman v. Dayton*, 1995-Ohio-277, 73 Ohio St. 3d 671, 676, 653 N.E.2d 1190. A mortgagor seeking to redeem prior to judgment would need to obtain the redemption amount directly from the lender or through order of the trial court. Thus, the Court's decision does not in any way change the equitable right to redeem.

Second, the Court's decision does not preclude third parties who may have an interest in the property from exercising their equitable right of redemption. The Appellees and the amicus curiae argue that the Gramm-Leach-Bliley Act ("GLBA") prevents these parties from being able to discover the redemption amount. The Appellee and the amicus curiae, however, overstate the reach of the GLBA. The GLBA includes several exceptions to its nondisclosure provisions, including an exception for disclosure of otherwise private loan information in connection with litigation and in order to:

[C]omply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

15 U.S.C. § 6802(e)(8). These exceptions provide a safety valve for the disclosure of otherwise private information, overseen by the local trial courts. Thus, a trial court could approve or even order the disclosure of loan information to third parties like widows and heirs for redemption purposes. Again, the Court's decision does not change the GLBA.

C. Adding Up Property-Related Expenses Is Ministerial.

The amicus curiae argues that more than mathematics is involved in the determination of the amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance. The Court already fully addressed this argument in its decision, and the amicus curiae is simply rearguing this issue.

Moreover, the amicus curiae's statement that the Court's decision now renders all damages determinations ministerial is hyperbole. The calculation of the amounts incurred for property-related expenses is simple and straightforward. These expenses are already incurred,

and their amounts are determined by adding them up. The trial court hears no evidence and makes no fact findings to determine these amounts. This is a purely ministerial process.

In addition, the plugging in of already incurred expenses as reflected in the lender's account records is completely different from the examples cited by the amicus curiae. The determination of a party's entitlement to prejudgment interest is not ministerial because the trial court must hold a statutorily-mandated hearing and decide in the first instance whether the parties engaged in good faith settlement efforts and determine the amount of the award. *See Miller v. First Int'l Fidelity & Trust Bldg, Ltd.*, 2007-Ohio-2457, 113 Ohio St. 3d at 475, 866 N.E.2d at 1061; R.C. 1343.03(C). The same is true for the award of attorney's fees. This Court has explained that in determining whether to award attorney's fees, and the amount of the attorney's fees, invokes weighing multiple factors, such as "the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the results obtained." *Christe v. GMS Mgt. Co., Inc.*, 2000-Ohio-351, 88 Ohio St. 3d 376, 378, 726 N.E.2d 497 (quoting *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145-146, 569 N.E.2d 464, 467 (1991)). Again, this determination requires a trial court to hear evidence on all of these factors and make factual findings to establish the actual amount of attorney's fees.

All that remains for the trial court to do regarding the entry of the order confirming the sheriff's sale is plug in the numbers reflected on the loan account records. As the Court noted, "[l]iability is fully and finally established when the court issues the foreclosure decree and all that remains is mathematics, with the court plugging in final amounts due after the property has been sold at a sheriff's sale." *Roznowski*, 2014-Ohio-1984, at 12. The borrower's opportunity to contest the accuracy of the amounts expended and included in the order does not change the

ministerial nature of the mathematical calculation of the amounts. The Court's decision did not change Ohio law and was not incorrect.

D. There Is No Due Process Issue.

The amicus curiae also argues that the Court's decision denies borrowers due process. This is simply untrue. The Court specifically held that a borrower can challenge the amounts included in the confirmation order for property inspections, appraisal and property preservation during the confirmation portion of the foreclosure proceedings and can appeal the confirmation order if they disagree with the trial court's order and the amounts included in the disbursement amounts for inspections, appraisal and property preservation. The fact that a hearing is not statutorily required before confirmation does not mean a borrower cannot challenge the distribution in the confirmation order, or ask the trial court for a hearing, if appropriate. The Court's decision in *Union Bank Co. v. Brumbaugh*, 69 Ohio St.2d 202, 208, 431 N.E.2d 1020 (1982), simply recognized that due process did not require a hearing before confirmation because there were adequate procedural safeguards embedded in the process, including the opportunity to obtain judicial review of the confirmation order. The Court's decision in this case does not do away with these safeguards, does not preclude hearings, and confirms the right to appeal. The Court's decision does not in any way impede borrowers' due process rights.

E. An Alternate Foreclosure Process Is Not A Proper Basis for Reconsideration.

The amicus curiae proposes an alternate procedure for handling foreclosure actions in Ohio that supposedly addresses the concerns and interests of courts, mortgagors, and mortgagees. This alternate proposal for the prosecution of foreclosure actions is a solution in search of a problem, and has no place in a motion of reconsideration.

First, the proposed alternate approach to the foreclosure process does not illustrate an error in the Court's decision. As noted, the Court merely resolved a conflict among the courts of appeal on whether a judgment decree in foreclosure is final and appealable if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment, and whether a mortgagor may challenge those amounts as part of the proceedings to confirm the foreclosure sale and appeal the order of confirmation. The existence of another possible way to administer foreclosure actions does not indicate that the Court's answers to the certified questions were wrong as a matter of fact or law. The Court should simply ignore this portion of the amicus curiae's memorandum, as it is procedurally improper.

Second, the proposed alternate approach does not improve on the existing system that has worked in Ohio for over a hundred years. Aside from the fact that foreclosure is a statutory procedure, and wholesale changes are the province of the legislature, not the Court, the proposed procedure is not feasible. The proposed "solution" to the nonexistent "problem" would require this Court to mandate how mortgagees plead damages (there would be two damages claims, one for the amounts due under the note and one for advances allowed under the mortgage); how mortgagees would prosecute their cases (they would initially proceed to judgment only on the damages claim for the amounts due under the note and the foreclosure claim under the mortgage and later proceed to judgment on advances); how trial courts handle their cases (they would always include a "no just reason for delay" certification in this initial judgment to attempt to make it appealable); and how mortgagees would recover the advances allowed under the mortgage (they would have to wait until after confirmation to obtain a separate judgment on these advances). This scenario at a minimum creates issues as to whether the initial judgment on

the note and for foreclosure of the mortgage is a final appealable order because all “three” claims are not addressed, because “the phrase ‘no just reason for delay’ is not a mystical incantation which transforms a non-final order into a final appealable order,” and Ohio courts of appeal are not required to review judgments just because the trial court says there is “no just reason for delay” unless “judicial administration is best served by allowing an immediate appeal.”

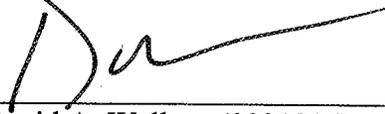
Wisintainer v. Elcen Power Strut Co., 1993-Ohio-120, 67 Ohio St.3d 352, 354, 617 N.E.2d 1136.

Of course, the appealability of foreclosure judgments was one of the issues the Court clarified in this case. It is also unclear how judicial administration or judicial economy would be served by a procedure that creates three potentially appealable orders in foreclosure cases. Finally, again at a minimum, the procedure is unfair to mortgagees and essentially rescinds the contracts between the parties by preventing mortgagees from recovering the amounts expended for taxes, insurance, inspections, appraisals, and property preservation out the sale proceeds, which they are entitled to do under the mortgage, and instead relegates these contractually recoverable amounts to a separate judgment against a likely uncollectable borrower. For these reasons, and others that will undoubtedly arise in the future, the amicus curiae’s proposal is not a basis for reconsidering the Court’s answers to the certified questions in this case.

CONCLUSION.

This Court answered the two certified questions presented and resolved the conflict among the courts of appeal on those issues. There was no error in the Court’s decision, and there is no basis for this Court to reconsider it. For these reasons, the Court should deny Appellee’s Motion for Reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Appellees' Motion for Reconsideration was served on June 6, 2014, by first class, U.S. Mail, postage prepaid, upon:

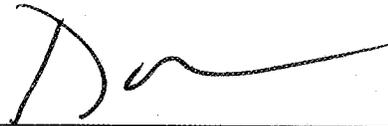
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