

ORIGINAL

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,

Plaintiff-Appellant,

v.

BRIAN HORN, *et al.*,

Defendants-Appellees.

* Case No. 2013-1534
*
* On Appeal from the Lorain County
* Court of Appeals, Ninth Appellate
* District
*
* Court of Appeals
* Case No. 12CA010230
*
*
*

MEMORANDUM IN OPPOSITION TO MOTION OF APPELLEE BRIAN HORN TO SUPPLEMENT THE RECORD AND DISMISS APPEAL

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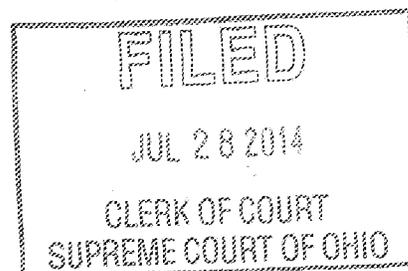
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I. INTRODUCTION

On July 21, 2014, Defendant-Appellee Brian Horn has filed a Motion to Supplement the Record and to Dismiss the Appeal of Plaintiff-Appellant Wells Fargo Bank, N.A. (“Wells Fargo”). The Motion should be overruled.

The Trial Court entered summary judgment in favor of Wells Fargo for the balance due under a promissory note executed by Horn, and ordered the foreclosure of the mortgage which secured its repayment. Ignoring Horn’s substantive arguments on appeal, the Ninth District Court of Appeals *sua sponte* decided that because Wells Fargo failed to attach to the Complaint evidence that it had merged with Wells Fargo Home Mortgage, Inc. (the original mortgagee), Wells Fargo lacked standing under *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, and ordered the Complaint be dismissed. *Wells Fargo Bank NA v. Horn*, 9th Dist. No. 12CA010230, 2013-Ohio-2374, ¶¶ 12-13 (the “Opinion”).

Wells Fargo timely appealed to this Court, which initially declined jurisdiction on January 22, 2014. *01/22/2014 Case Announcements*, 2014-Ohio-176. On January 31, 2014, Wells Fargo timely filed a Motion for Reconsideration, and on March 26, 2014, the Court granted that Motion in part and accepted jurisdiction over Proposition of Law No. I. *03/26/2014 Case Announcements*, 2014-Ohio-1182.

Even though this case was still pending in this Court, on February 10, 2014, the Lorain County Common Pleas Court entered an order dismissing the Complaint “without prejudice” because the court was “informed that the Ohio Supreme Court declined to accept jurisdiction of this case.” Motion to Supplement and to Dismiss, 6. Horn’s Motion contends that the record should be supplemented to reflect the dismissal entry, and now suggests that the case dismissed because it is moot.

The Motion is wrong as a matter of the law. Upon perfection of the notice of appeal, a trial court loses all jurisdiction except to aid in this Court's resolution of this appeal. Any order entered by a lower court inconsistent with this Court's jurisdiction is void.

Here, the Trial Court tried to implement the Ninth District's order while an appeal from it was pending in this Court. Dismissing the case while this Court considers the validity of the Ninth District's order is inconsistent with this Court's jurisdiction. Consequently, the Trial Court's order is void. The Motion should be denied.

II. LAW

An appellant perfects an appeal to this Court by filing a notice of appeal and a memorandum in support of jurisdiction. R.C. 2505.04; S.Ct.Prac.R. 7.01(A). Once that appeal is perfected, "the trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from." *In re S.J.*, 106 Ohio St. 3d 11, 2005-Ohio-3215, 829 N.E.2d 207, ¶ 9; citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 9 O.O.3d 88, 378 N.E.2d 162 (1978) and *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990). The converse is also true: lower courts lose jurisdiction to take action inconsistent with this Court's jurisdiction. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 8. As a result, acts by the lower courts which would vitiate the appeal are void. *Id.*

In *Washington*, the trial court imposed separate criminal sentences on two counts. The Ninth District Court of Appeals vacated the sentences, remanded the case to the Lorain County Common Pleas Court and ordered the defendant to be resentenced with both counts to be treated as a single merged offense. *Washington*, 2013-Ohio-4982 at ¶ 8. The state timely filed a notice

of appeal to this Court. *Id.* This Court accepted jurisdiction over the appeal to determine whether the criminal counts (and sentences) were required to be merged. *Id.*

Nonetheless, in response to the remand order, the trial court resentenced the defendant. *Id.* Washington then moved to dismiss the appeal before this Court, arguing that the trial court's resentencing in compliance with the Ninth District's mandate rendered the appeal moot.

The Court quickly rejected that theory: "an appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal." *Washington*, 2013-Ohio-4982, ¶ 8, quoting *In re S.J.*, 2005-Ohio-3215 at ¶ 9. *Washington* held that the trial court's order resentencing the defendant while the appeal to this Court was pending was void. *Id.* This Court then reversed the Ninth District's opinion, remanding the matter to the Ninth District for a proper evaluation of whether the counts should have been merged. *Washington*, 2013-Ohio-4982, ¶ 24.

In *In re S.J.*, the trial court was considering mandatory bindover hearings when it ruled that the state had failed to establish probable cause for two murder counts against a juvenile. 2005-Ohio-3215, ¶ 4. The state filed a notice of appeal to the Eighth District Court of Appeals. *Id.*, ¶ 5. Nonetheless, the trial court decided that its prior order was not a "final" order, reduced the charges, and accepted the juvenile's plea to the reduced charges. The juvenile then moved to dismiss the appeal from the bindover proceedings, holding that the state's appeal had been rendered moot. The Eighth District agreed, and dismissed the appeal. *Id.*, ¶ 6.

This Court reversed. The Court held that the "adjudication of a child during the pendency of an appeal interferes with and is inconsistent with the adjudication of the appellate court. Therefore, we hold that the trial court lacks jurisdiction to proceed...after a notice of

appeal has been filed...” *Id.*, ¶ 9. The Court declared the order reducing the charges to be void. *Id.*, ¶ 15.

Here, on June 10, 2013, the Ninth District entered its judgment instructing the Trial Court to dismiss this case (and on August 16, 2013, denied Wells Fargo’s Application for Reconsideration). On September 27, 2013, Wells Fargo perfected its appeal to this Court by filing a Notice of Appeal and a Memorandum in Support of Jurisdiction. R.C. 2505.04; S.Ct.Prac.R. 7.01(A).

While this Court initially declined jurisdiction, on January 31, 2014, Wells Fargo timely filed a Motion for Reconsideration. S.Ct.Prac.R. 18.02(A); S.Ct.Prac.R. 18.02(B)(1). The Court continued to have jurisdiction over this appeal to decide this Motion, and ultimately decided to accept and decide the appeal, which directly questions the validity of the Ninth District’s mandate of dismissal.¹

The Trial Court’s order vacating the judgment in favor of Wells Fargo and dismissing the Complaint was “inconsistent” with this Court’s jurisdiction to review the Ninth District’s opinion and order. *In re S.J.*, 2005-Ohio-3215, ¶ 9. The Ninth District’s order mandating dismissal is *precisely* the subject matter of this appeal. Because the Trial Court’s order vacating the judgment was “inconsistent” with this Court’s jurisdiction, it is void as a matter of law.

Horn’s contrary arguments have no merit. Horn argues that the Court’s original decision to not accept jurisdiction meant this appeal was over. It did not. Wells Fargo timely filed a Motion for Reconsideration. The Court continued to retain jurisdiction to decide that Motion, which it ultimately sustained. The Court never lost jurisdiction over this case.

¹ The Ninth District ordered dismissal because Wells Fargo failed to attach documentation of its merger with Wells Fargo Home Mortgage, Inc. to the Complaint. Opinion, ¶¶ 12-13. This Court accepted jurisdiction over Proposition of Law No. 1: “A plaintiff is not required to attach to the complaint all of the evidence upon which it will rely to show standing.”

The Motion cites a series of cases which Horn claims hold that an appellant is obligated to preserve appellate jurisdiction by seeking a stay while the appellate proceedings are pending. Motion, 3-4, citing *Howard v. Catholic Social Servs.*, 70 Ohio St.3d 141, 147, 637 N.E.2d 890 (1994); *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App.3d 758, 790, 2008-Ohio-2023, 889 N.E.2d 181 (10th Dist.); *Bank of New York v. Bartmas Family Trust*, 10th Dist. No. 04AP-1011, 2005-Ohio-6099, ¶ 14. The first problem with the argument is that those cases all involved an express remand by the appellate court to the lower court for the purposes of consideration of a post-judgment motion. See e.g. *Howard*, 70 Ohio St.3d at 147 (“We have expressly held that an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment...jurisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion.” [internal citations omitted]). No such remand order was given here.

The second problem is that Horn has the law backwards. Horn presupposes that a lower court *could* deprive an appellant of this Court’s review of an appeal by taking an act that would moot the matter being reviewed, even if the matter results in vacating a previously established judgment. The law is the opposite. *Washington*, 2013-Ohio-4982, ¶ 24; *In re S.J.*, 2005-Ohio-3215, ¶ 4. If what Horn said were the law, then trial courts could deprive this Court of discretionary jurisdiction in *every* case by rushing to implement a mandate of an appellate court, even after an appeal has been perfected seeking discretionary review.

The third problem is that (understandably) Horn points to **no cases** where a plaintiff prevailed before the trial court, the appeals court reversed and issued a mandate to the trial court to vacate the judgment and enter a dismissal on legal grounds, and after an appeal was perfected

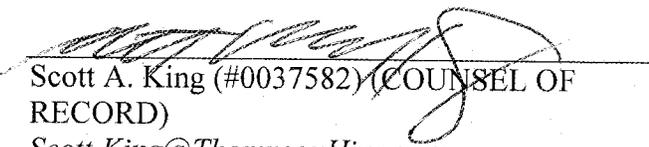
to this Court, the trial court retained jurisdiction to effectuate that order. That is because it is just not the law.

The Trial Court lacked jurisdiction to comply with the Ninth District's mandate while the Opinion was (and is) under review by this Court. The Motion should be overruled.

III. CONCLUSION

After Wells Fargo perfected its appeal to this Court, the Trial Court lacked the power to divest this Court of appellate jurisdiction. Its order purporting to do so was void. The Motion fails and should be denied.

Respectfully submitted,


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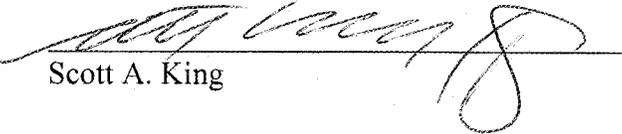
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S. ordinary mail, postage prepaid, this 25th day of July, 2014.

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