

ORIGINAL

In the Supreme Court of Ohio

Provident Funding Associates

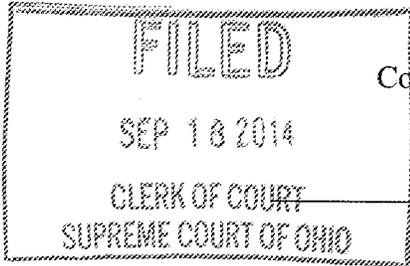
Plaintiff-Appellee

v.

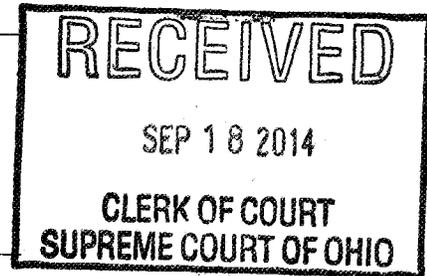
14-1609

Tamara K. Turner, et. al.

Defendants-Appellants.



On Appeal From the
Court of Appeals, Eighth Appellate District
Cuyahoga County, Ohio
Case No. 100153 and 100493



NOTICE OF APPEAL

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Notice of Appeal of Appellants Tamara & Phillip Turner

Now come Defendants/Appellants Tamara & Phillip Turner, by and through counsel, and hereby give notice of their appeal to the Supreme Court of Ohio from the judgment and order of the Cuyahoga County Court of Appeals, Eighth Appellate District

entered in Court of Appeals Case No. 100493 journalized May 22, 2014 and 100153 journalized June 12, 2014. Both cases had motions for reconsiderations filed which were denied on August 6, 2014.

This case raises a question of public or great general interest.

Respectfully submitted,



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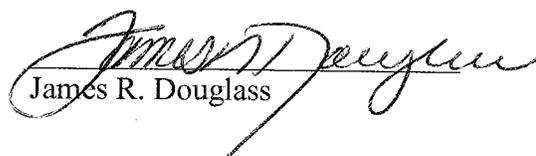
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CERTIFICATE OF SERVICE

A copy of the foregoing has been served by ordinary U. S. Mail on this 17 day of September 2014 upon the following:

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James R. Douglass

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

PROVIDENT FUNDING ASSOCIATES, LP

Appellee

COA NO. LOWER COURT NO.
100153 CV-10-742147

-vs-

COMMON PLEAS COURT

PHILLIP TURNER, ET AL.

Appellant

MOTION NO. 475063

Date 08/06/14

Journal Entry

Motion by appellants for reconsideration is denied.

RECEIVED FOR FILING

AUG X 6 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy



COA13100153

Presiding Judge SEAN C. GALLAGHER,
Dissents

Judge KATHLEEN ANN KEOUGH, Concurs

[Signature]
EILEEN T. GALLAGHER
Judge

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100493

PROVIDENT FUNDING ASSOCIATES, L.P.

PLAINTIFF-APPELLEE

vs.

TAMARA K. TURNER, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-742147

BEFORE: Keough, J., S. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: May 22, 2014

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 22 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

KATHLEEN ANN KEOUGH, J.:

{¶1} Defendants-appellants, Phillip and Tamara Turner (“Turner”), appeal from the trial court’s decision confirming the sheriff sale. For the reasons that follow, the appeal is dismissed as moot.

{¶2} In June 2011, plaintiff-appellee, Provident Funding Associates, L.P. (“Provident”), filed an amended complaint for foreclosure against Turner seeking judgment on a promissory note and foreclosure on a mortgage. In 2013, the trial court entered a judgment in favor of appellee. The property was subsequently sold by Sheriff’s Sale, and the decree of confirmation of sale was issued in September 2013.

{¶3} Turner now appeals the confirmation and raises as the sole assignment of error that the trial court erred when it issued an order of sale absent a final appealable decree in foreclosure.

{¶4} Turner contends in their brief that the order of stay was denied; however, after a thorough review of the record, we find no evidence of any stay requested by Turner. This issue is dispositive of this appeal.

{¶5} As this court recently reiterated,

Appellant never moved to stay the confirmation. The property has been sold and the deed has been recorded. The order of confirmation has been carried out to its fullest extent. If this court reversed the order of confirmation, there is no relief that can be afforded appellants. An appeal is moot if it is impossible for the appellate court to grant any effectual relief. *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910).

Wells Fargo Bank N.A. v. Cuevas, 8th Dist. Cuyahoga No. 99921, 2014-Ohio-498, ¶ 22, quoting *Equibanks v. Rivera*, 8th Dist. Cuyahoga No. 72224, 1998 Ohio App. LEXIS 185, *3 (Jan. 22, 1998); see also *Beneficial Ohio, Inc. v. LaQuatra*, 8th Dist. Cuyahoga No. 99860, 2014-Ohio-605.

{¶6} Much like in *Cuevas* and *LaQuatra*, the property in this case has been sold, the order of confirmation has been carried out, and there is no relief in this action that can be afforded Turner. Therefore, the appeal is moot and is dismissed.

{¶7} Even if this court considered the merits of the appeal, the order of sale was a proper final appealable order. See *Bank of New York Mellon v. Adams*, 8th Dist. Cuyahoga No. 99399, 2013-Ohio-5572, citing *LaSalle Bank, N.A. v. Smith*, 7th Dist. Mahoning No. 11 CA 85, 2012-Ohio-4040 (undetermined damages, such as property protection, in the decree of foreclosure can be determined at the time of the sheriff's sale, from which the homeowner can file a new appeal).¹

{¶8} Dismissed.

¹This issue is currently pending in the Ohio Supreme Court on the certified question of “whether a judgment decree in foreclosure is a final appealable order 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.” See *CitiMortgage, Inc. v. Roznowski*, 134 Ohio St.3d 1447, 2013-Ohio-347, 982 N.E.2d 726. The certified question arose from a conflict between districts — the Fifth District’s holding in *Citimortgage, Inc. v. Roznowski*, 5th Dist. Stark No. 2012-CA-93, 2012-Ohio-4901, and the Seventh District’s resolution in *LaSalle*.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR

JUN 12 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100153

PROVIDENT FUNDING ASSOCIATES, L.P.

PLAINTIFF-APPELLEE

vs.

PHILLIP TURNER, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-742147

BEFORE: E.T. Gallagher, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: June 12, 2014



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COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS PAID

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUN 12 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellants, Tamara and Phillip Turner (“the Turners”), appeal a judgment in foreclosure entered against them and in favor of plaintiff-appellee, Provident Funding Associates, L.P. (“Provident Funding”). For the following reasons, we dismiss the appeal as moot.

{¶2} In January 2007, Tamara Turner executed a promissory note in the amount of \$272,000, payable to Home Advantage Funding Corporation (“Home Advantage”). At the same time, the Turners granted a mortgage to Mortgage Electronic Systems, Inc. (“MERS”), as nominee for Home Advantage, to secure the note. The mortgage encumbers real property located at 20526 Byron Road, Shaker Heights, Ohio.

{¶3} In November 2010, Provident Funding, as holder of the note, filed a foreclosure complaint against the Turners. The case proceeded to trial, and the foreclosure magistrate ruled in favor of Provident Funding. The Turners filed timely objections to the magistrate’s decision. The trial court overruled the objections, adopted the magistrate’s decision, and entered a judgment in foreclosure against the Turners on June 26, 2013. The Turners filed a timely appeal from the judgement in foreclosure.

{¶4} While the appeal was pending, the foreclosed property was sold at a sheriff’s sale pursuant to court order, and the court entered a decree of confirmation of the sale on September 12, 2013. The Turners filed a timely

notice of appeal of the court's judgment confirming the sale. However, the Turners never filed a motion to stay the foreclosure proceedings when they appealed the judgment in foreclosure, nor did they file a motion to stay the distribution of the proceeds from the sale. Now the property has been sold, and the order of confirmation has been carried out.

{¶5} R.C. 2329.45, which governs the reversal of judgments in foreclosure cases, provides a remedy for appellants in foreclosure cases after the property has been sold, and the proceeds have been distributed. R.C. 2329.45 states, in its entirety:

If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

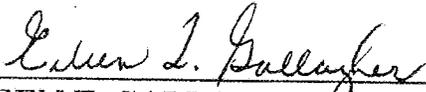
{¶6} Thus, even when the property is no longer recoverable, R.C. 2329.45 provides an alternative remedy in the form of restitution. However, R.C. 2329.45 only applies when the appealing party sought and obtained a stay of the distribution of the proceeds. *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. Summit No. 24329, 2009-Ohio-1333, ¶ 11. See also *Wells Fargo Bank N.A. v. Cuevas*, 8th Dist. Cuyahoga No. 99921, 2014-Ohio-498; *Beneficial Ohio, Inc. v. LaQuatra*, 8th Dist. Cuyahoga No. 99860, 2014-Ohio-605; *Bank of New York Mellon v. Adams*, 8th Dist. Cuyahoga No. 99399, 2013-Ohio-5572; and *Third Fed. S. & L. Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592,

2012-Ohio-5708, ¶ 13. Therefore, because the Turners failed to move for a stay at any time during the proceedings, we dismiss the appeal as moot.

{¶7} Appeal dismissed.

It is ordered that appellee recover from appellants costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



EILEEN T. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

The State of Ohio, }
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied

from the Journal entry dated on 6/12/14 CA 100153

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing

copy has been compared by me with the original entry on said Journal entry dated on 6/12/14

CA 100153 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 12 day of June A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By [Signature] Deputy Clerk

