

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROVIDENT FUNDING ASSOCIATES *

CASE NO.

14-1609

Appellee,

*

-vs-

*

On Appeal from the Cuyahoga
County Court of Appeals, Eighth
District Court of Appeals

*

Case No. 100153

*

TAMARA K. TURNER, ET AL.

and

*

Case No. 100493

Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION

James R. Douglass (0022085)
Marc E. Dann (0039425)
4600 Prospect Avenue
Cleveland, Ohio 44103
(216) 991-7640
(216) 373-0536 Facsimile
Attorney for Defendant Appellants

Rick DeBlasis
120 East Fourth Street, 8th Floor
Cincinnati, Ohio 45202
(513) 419-4854
(513) 354-6952 Facsimile
Attorney for Plaintiff Appellee

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EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL ISSUE

A. This case is of great general interest

This case raises issues that are of public or great general interest for three distinct reasons. At its core, the case involves the abdication by the Court of its constitutional obligation to consider matters correctly before it. The Eighth District Court of Appeals dismissed the appeal relying upon the doctrine of mootness, a doctrine that has no application in cases such as the instant case, wherein an appellant asserts that the underlying judgment is void. When a defendant asserts a court lacks the authority to entertain a cause, and the trial court rules otherwise, due process demands that the holding of the trial court be subject to appellate review and is not mooted because the plaintiff executes upon the void judgment.

As is hereinafter more fully discussed, any application of the mootness doctrine presupposes that the jurisdiction of the trial court was properly invoked. When jurisdiction is lacking, the doctrine is wholly inapplicable. Under Ohio common law, if a judgment is void for lack of jurisdiction, all proceedings that flow from that judgment, including all executions, are also void. Thus, if the trial court's judgment is void, or even voidable, then the Sheriff's sale that supposedly divested the Defendant-Appellants' to title to their property was similarly void and the Defendant-Appellants are not divested of their property.

Even if the trial court had jurisdiction to render judgment, the mootness doctrine has no applicability to the case as the judgment was never satisfied and Defendant Tamara Turner remains liable on the deficiency balance; and satisfaction of a judgment, assuming the judgment is satisfied, through execution is *not* a voluntary payment. *Lynch v. Board of Education of City School District of Lakewood* 116 Ohio St. 36 (1927).

B. The case involves a substantial constitutional issue.

From a constitutional perspective, can the partial satisfaction of a judgment through a judicial sale of real estate moot a dispute if, in fact, the judgment was by a court without constitutional jurisdiction? A judgment entered by a court without jurisdiction is generally held to be void, a legal nullity. How can a void judgment be satisfied? How can a defendant's inability to stop a judicial execution convert a legal nullity into a *fait accompli*?

In *Federal Home Loan Mtg. Corp. v. Schwartwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-501, this Court traced the roots of a common pleas court's jurisdiction back to Art. IV, sec. 4(B) of Ohio's Constitution. That provision limits a court's jurisdiction is limited to justiciable matters. More specifically, this Court held that standing is a necessary part of a justiciable matter, and if it doesn't exist when suit is filed, the trial court's jurisdiction is not invoked.

The mootness doctrine, as adopted by this Court, addresses the flip side of the justiciability coin. Generally speaking, the doctrine divests a court of jurisdiction to review or modify a judgment that has been satisfied. It, too, looks at whether there is a current justiciable matter before the court.

The question becomes, then, which issue should first be examined by a reviewing court – whether there was a judgment in the first place or whether that judgment was later satisfied. In other words, can a court that never had constitutional jurisdiction lose that jurisdiction by application of the mootness doctrine? The Court of Appeals answered the latter question in the affirmative.

As a constitutionally created court, Ohio's common pleas courts possess only that power granted to them through the constitution. Yet the Court of Appeals decision strongly suggests that the jurisdiction of a common pleas court can be extended by the action or inaction of litigants. This suggestion challenges the very concept of jurisdiction.

For this reason, this case presents a substantial constitutional issue.

STATEMENT OF THE CASE AND THE FACTS

This cause was originally filed before the Cuyahoga County Court of Common Pleas on December 9, 2008, styled *Virtual Bank, a division of Lydian Private Bank v. Turner* and assigned Case No. 678456. (“Turner I”) During the pendency of the original cause, Provident Funding Associates, L.P. (“Provident Funding”) claimed to have acquired an interest in the note and requested that it be substituted as party plaintiff. The Motion to Substitute Party Plaintiff was denied based upon presence of conflicting endorsements on the subject instrument:

MOTION TO SUBSTITUTE PROVIDENT FUNDING AS THE PLAINTIFF IS DENIED. THERE IS AN ALLONGE TO THE NOTE INDICATING THE NOTE IS PAYABLE TO “VIRTUAL BANK, MORTGAGE” THE CURRENT SUBSTITUTED PLAINTIFF. THE NOTE ATTACHES AN ENDORSEMENT FROM “VIRTUAL BANK” TO PROVIDENT FUNDING ASSOCIATES, L.P. THERE ARE CONFLICTING ASSIGNMENTS OF THE PROMISSORY NOTE.

The case was subsequently dismissed by the original Plaintiff who at no time disputed or appealed the adjudication that the Note contained conflicting endorsements.

On October 16, 2009, Provident Funding filed a subsequent foreclosure action styled *Provident Funding Associates v. Turner* and assigned Case No. 706959 against Tamara and Phillip Turner that sought to enforce the very same note and obligation that Judge McCormick had previously found to contain “conflicting assignments of the promissory note”.

This second foreclosure case (“Turner II”) was dismissed by the court as follows:

MOTION OF THE DEFENDANTS PHILLIP TURNER AND TAMARA TURNER TO DISMISS FOR PLAINTIFF'S LACK OF STANDING TO FILE THE FORECLOSURE IS GRANTED. PLAINTIFF DID NOT PRESENT EVIDENCE TO THE COURT THAT IT OWNED THE SUBJECT PROMISSORY NOTE AS OF THE DATE OF THE FILING OF ITS COMPLAINT IN THIS CASE AND COULD NOT, THEREFORE, PROVE THAT IT HAD STANDING TO FILE THIS CASE. SEE WELLS FARGO BANK V. JORDAN, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009). MERS COULD NOT ASSIGN THE NOTE AS IT NEVER HELD THE PROMISSORY NOTE. THERE IS NO EVIDENCE THAT THE ALLONGE WAS EVER AFFIXED TO THE NOTE. VIRTUAL BANK PURPORTS TO INDORSE THE NOTE TO THE PLAINTIFF, BUT THERE IS NO EVIDENCE THAT VIRTUAL BANK HELD THE NOTE AT THE TIME OF THE INDORSEMENT. VIRTUAL

BANK IS ALSO NOT THE PAYEE ON THE NOTE. COMPLAINT DISMISSED WITHOUT PREJUDICE. AS PLAINTIFF DID NOT HAVE STANDING TO FILE THIS CASE, THE COUNTERCLAIM IS ALSO DISMISSED WITHOUT PREJUDICE. (FINAL) COURT COST ASSESSED TO THE PLAINTIFF(S). CLDLJ 11/09/2010 NOTICE ISSUED.

A dismissal based upon a failure to state a claim such as the dismissal of Case No. 706959 was a final order from no appeal was taken.

On November 24, 2010 Plaintiff-Appellee filed the instant case ("Turner III") that was assigned Case No. 742147 wherein it sought to enforce the same obligation that had previously been dismissed by the trial court in Case No. 706959 for a lack of standing (lack of subject matter jurisdiction). (Transcript 75-8) Upon the event of the Defendant-Appellants bringing to the Court's attention that the Note attached to the original Complaint in Turner III had been altered, Plaintiff-Appellee sought and obtained leave to file an Amended Complaint. The Amended Complaint contained the identical allegations present in the Complaint in Turner II. Conspicuously absent from the Amended Complaint in Turner III was any allegation(s) of intervening fact(s) as would be necessary to demonstrate the creation of a justiciable controversy after the dismissal in Turner II.

On January 19, 2011, the Defendant-Appellants filed a Motion to Dismiss and for Sanctions. That Motion was denied with the specific admonition that "...the plaintiff must demonstrate prior to judgment that it had standing to file this foreclosure. Failure to demonstrate standing will result in dismissal."(02/07/11)

Leave having first been requested and granted, on June 9, 2011, Plaintiff-Appellee filed an Amended Complaint that re-alleged the same facts as alleged in Turner II and attached thereto as Exhibit A was the same Note that had been previously presented and adjudicated in Turner I and Turner II. (Transcript 75-8)

After the appeals were dismissed, the Turners filed Applications for Reconsideration and for En Banc Consideration. The Applications for Reconsideration were denied and the Applications for En

Banc Consideration remain pending.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Mootness Doctrine has no application to judgment rendered by a court without jurisdiction

The Eighth District has held that the mootness doctrine applies even when the issue of appeal is whether or not the jurisdiction of the trial court has been properly invoked. The application of the mootness doctrine to a judgment that is void runs afoul of the constitutional restrictions placed upon trial courts by Art. 4 §4(B) of the Ohio Constitution. A claim that is absolutely barred is not justiciable and the court thereby lacks jurisdiction pursuant to Section IV Article 4(B) of the Ohio Constitution. *ProgressOhio v. JobsOhio* 139 Ohio St. 3d 520 (2014). By failing to consider the merits of this cause while hiding behind the mootness doctrine, the Eighth District has given effect to a judgment that was void, or at very least voidable.

One of the earliest pronouncements of the mootness doctrine by the Ohio Supreme Court was made in *Lynch v. Board Of Education Of City School District Of City Of Lakewood*, 116 Ohio St. 361, 156 N.E. 188 (1927):

Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is *voluntarily paid and satisfied*, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.

Id., syll ¶3 (emphasis added).

The doctrine itself presupposes both that the plaintiff's claim was not absolutely barred and that the judgment was voluntarily paid *and satisfied*. See also, *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245 (1990); *Rauch v. Noble*, 169 Ohio St. 314, 316 (1959). If jurisdiction is lacking, or the plaintiff's claims were otherwise barred, the underlying judgment is void and nothing, including satisfaction, can change that fact. *Wizards of Plastic Recycling, LLC v. R & M Plastic Recycling, LLC*, 2012-Ohio-3672, ¶4 (9th Dist. No. 25951).

Because the issues before the Court went directly to the trial court's jurisdiction, the Court should not have used the mootness doctrine to abdicate their constitutional responsibility and should have reached the merits of the appeal.

The reasoning that once real estate has been executed upon, there is no relief that a court can offer is precisely backwards and violative of any traditional notion of due process.

The Supreme Court has addressed this issue:

Where it is apparent on the face of the record that all the statutory steps have not been complied with in attempting a service by publication, and that there has been no entry of appearance, a court is without jurisdiction, a judgment based upon such faulty service is void ab initio, *and a sale of real property pursuant to such judgment is invalid and will be set aside even though such property is in the hands of a third person who is a purchaser in good faith.*

The Lincoln Tavern, Inc. v. Snader, 165 Ohio St. 61, syll ¶3, 133 N.E.2d 606 (1956) (emphasis added); *see also, Community First Bank & Trust, v. Dafoe*, 108 Ohio St.3d 472, 844 N.E.2d 825, 2006-Ohio-1503, ¶25 (2006).

The General Assembly has also recognized that not all judicial sales are valid. R.C. 2329.46 provides:

Upon the sale of property on execution, if the title of the purchaser is invalid by reason of a defect in the proceedings, he may be subrogated to the right of the creditor against the debtor to the extent of the money paid and applied to the debtor's benefit, and, to the same extent, may have a lien on the property sold, as against all persons, except bona fide purchasers without notice. This section does not require the creditor to refund the purchase money by reason of the invalidity of such sales.

This statute creates a system that protects the buyer at Sheriff's sale should there be some defect in the underlying proceedings. One could hardly think of a more obvious defect than a court exercising jurisdiction in a matter that is absolutely barred.

Proposition of Law No. 2: The mootness doctrine has no applicability to judgments that are only partially satisfied.

Proposition of Law No. 3 The mootness doctrine has no applicability to judgments that are not voluntarily satisfied

It is clear that the Turners have steadfastly maintained that the underlying claim is absolutely barred by the doctrine of issue preclusion. Both the trial court and the court of appeals have skirted this very fundamental challenge to the court's authority to consider issues that are absolutely barred. After the Magistrate issued his Recommendation, the Defendants, once again, timely raised the doctrine of issue preclusion in their Objections to Magistrate's Decision. After the trial court adopted the Magistrate's Decision, the matter was timely appealed. During the pendency of the appeal, the plaintiff sought to execute upon the judgment by Sheriff's Sale. The Sheriff's Sale was conducted and subsequently confirmed without notice, hearing or opportunity for hearing. The confirmation of the sale was appealed in a timely fashion and the two appellate cases were argued at the same time.

The focus of the Turners' defense has always been that the matter had been previously litigated and that Plaintiff's claim was absolutely barred by the doctrine of issue preclusion. It is beyond dispute that the foreclosure sale only partially satisfied the judgment and Tamara Turner remains liable for the balance. Nevertheless, the court applied the mootness doctrine to a dispute that all agree is not moot and failed to reach the merits of the appeal, including the authority of the trial court to address issues that are absolutely barred.

The Eighth District avoided the jurisdictional issue presented in holding the satisfaction of a judgment from the proceeds of a sheriff's sale constituted a voluntary payment on the judgment, thus mooting the case. It further found that R.C. 2329.45 did not provide a remedy to the Turners should the trial court decision be reversed. That holding greatly expands the applicability of the mootness doctrine to cases wherein the judgment has not been satisfied and remains the possible subject to further

execution.

The mootness doctrine, as adopted by the Ohio Supreme Court, is premised upon the *voluntary satisfaction of a judgment*. Therefore, two critical elements of the mootness doctrine are absent in the instant case. The judgment has not been satisfied, only partially satisfied and the partial satisfaction was not voluntary. Voluntariness of the payment is a critical prerequisite to the application of the doctrine. Under no reasonable definition of the term "voluntary" is the judicial execution upon a judgment, "voluntary". This is especially true, where, as in the instant case, the very confirmation of sale is under appellate review. In recent years, several courts of appeals, and now the Eighth District have introduced a new element, an element absent from the Ohio Supreme Court's decisional authority on the subject of voluntariness in the context of foreclosure cases - whether a stay of the execution was sought. The Seventh District, for instance, differentiates between cases in which a stay of sale was requested and those where there was no stay request. *Compare U.S. Bank National Association v. Marcino*, 2010-Ohio-6512 ¶15 (7th Dist. No.09 JE 29) (finding a case moot where no stay of the sale was requested); *LaSalle National Bank, NA v. Murray*, 179 Ohio App.3d 432, 902 N.E.2d 88, 2008-Ohio-6097 (7th Dist. No. 07-CO-27) (holding a case not moot if stay of sale was requested). Similarly, the Twelfth District has held that "a foreclosure action must be mooted where no stay has been requested." *Washington Mut. Bank, F.A. v. Wallace*, 957 N.E.2d 92, 194 Ohio App.3d 549, 2011-Ohio-4174, ¶23 (12th Dist. No. CA2010-10-103) (*rev'd on other grounds*, 982 N.E.2d 691, 134 Ohio St.3d 359, 2012-Ohio-5495) (citing *Marcino, supra*, and *Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225 as support for the proposition).

These decisions are based on the faulty premise that satisfaction of a judgment through an execution is a voluntary payment. The pronouncements of The Ohio Supreme Court indicate that such is not the case. In fact, in *Lynch v. Board Of Education Of City School District Of City Of Lakewood*,

116 Ohio St. 361, 156 N.E. 188 (1927), this Court stated that “[i]t has frequently been decided that, when a judgment is paid after issuance of an execution, it is not a voluntary payment.” *Id.* p. 372.

The basis for the requirement that payment be voluntary goes to the concept of abandonment of a particular claim or position. *Fed. Land Bank of Louisville v. Wilcox*, 599 N.E.2d 348, 74 Ohio App.3d 474, 477-478 (Ohio App. 4 Dist. 1991). In the instant case, wherein the Turners appealed both the judgment entry in foreclosure and the confirmation order, it can hardly be argued that they abandoned their claims or position. Fortunately, several courts continue to follow and adhere to the rule announced by the Ohio Supreme Court in *Lynch, supra*, that a satisfaction of judgment after execution has been issued, cannot constitute a voluntary payment. In *Favret Co. v. West*, 21 Ohio App.2d 39, 254 N.E.2d 709 (10th Dist. 1970), for instance, the Court followed *Lynch* and held that payment of a judgment after issuance of an execution is not a “voluntary” payment that would moot the dispute. *Id.* at syll. 1. The court went on to note that the rule is quite well-established in Ohio, dating back at least to the Ohio Supreme Court’s decision in *Knox Co. Bank of Mt. Vernon v. Doty*, (1859) 9 Ohio St. 505, 509; *see also, Rauch v. Noble* (1959), 169 Ohio St. 314, 8 O.O.2d 315, 159 N.E.2d 451; *MIF Realty L.P. v. The K.E.J. Corp.*, 95-WL-4015 (6th Dist. No. 94WD059).

CONCLUSION

WHEREFORE, Appellants Tamara and Phillip Turner, respectfully request an move the Supreme Court of Ohio to accept jurisdiction over this appeal because the issues present in this case are of public or great general interest and involve a substantial constitutional issue.

Respectfully submitted,



James R. Douglass (0022085)

James R. Douglass Co. LPA

4600 Prospect Ave.

Cleveland, Ohio 44103

(216) 991-7640

(216) 373-0536 (facsimile)

firedcoach@aol.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on Rick D. DeBlasis, Lerner, Sampson & Rothfuss, 120 East Fourth Street, Suite 800, Cincinnati, Ohio 45202 by regular U.S. Mail, postage

prepaid *this 17 day of September 2014.*



James R. Douglass

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

PROVIDENT FUNDING ASSOCIATES, L.P.

Appellee COA NO. LOWER COURT NO.
100493 CV-10-742147

-vs-

COMMON PLEAS COURT

TAMARA K. TURNER, ET AL.

Appellant MOTION NO. 475576

Date 08/06/14

Journal Entry

Motion by Appellants for reconsideration is denied.

RECEIVED FOR FILING

AUG 6 2014

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



Presiding Judge SEAN C. GALLAGHER,
Concurs

Judge EILEEN T. GALLAGHER, Concurs

[Signature]
KATHLEEN ANN KEOUGH
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

ATTORNEY FOR APPELLANTS

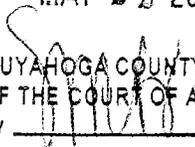
James R. Douglass
James R. Douglas Co., L.P.A.
4600 Prospect Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

Jennifer B. Madine
Lorelei C. Bolohan
Rick D. Deblasis
Pamela A. Fehring
Cynthia Fischer
Lerner, Sampson & Rothfuss
P.O. Box 5480
Cincinnati, Ohio 45201

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



ATTORNEY FOR APPELLANTS

James R. Douglass
James R. Douglass Co., L.P.A.
4600 Prospect Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

Cynthia Fischer
Lerner, Sampson & Rothfuss
P.O. Box 5480
Cincinnati, Ohio 45201

Rick D. DeBlasis
Lerner, Sampson & Rothfuss
120 East Fourth Street, Suite 800
Cincinnati, Ohio 45202

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ALL PARTIES - COSTS TAXED

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.

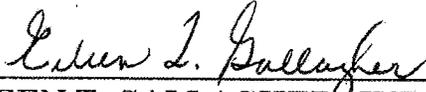
{¶6} Thus, even when the property is no longer recoverable, R.C. 2329.45 provides an alternative remedy in the form of restitution. However, R.C. 2329.45 only applies when the appealing party sought and obtained a stay of the distribution of the proceeds. *Bankers Trust Co. of California, N.A. v. Tutin*, 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

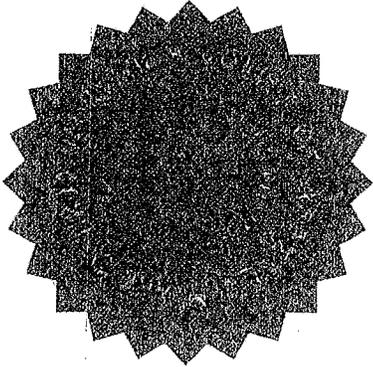
SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

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