

ORIGINAL

IN THE SUPREME COURT OF OHIO

CORPOREX REALTY) Supreme Court Case No. 2014-1479
ACQUISITIONS, LLC)
) On Appeal from the Hamilton County
Appellee,) Court of Appeals, First Appellate District
) Court of Appeals
-v-) Case No. C1300782
))
CORD REAL ESTATE, LLC, *et al.*)
))
Appellant.)

**MEMORANDUM OF APPELLEE CORPOREX REALTY
ACQUISITIONS, LLC IN RESPONSE TO THE MEMORANDUM
IN SUPPORT OF JURISDICTION OF APPELLANT CORD REAL ESTATE, LLC**

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**STATEMENT OF APPELLEE'S POSITION THAT
THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST
AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Cord Real Estate, LLC (“Appellant” or “Cord”) has instituted this appeal pursuant to Supreme Court Rule of Practice 7.01, alleging that this case is one of public or great general interest and involves a substantial constitutional question. This case has not been instituted in accordance with Supreme Court Rule of Practice 8.01, as a conflict has not been certified by a Court of Appeals pursuant to Article IV, Section 3(B)(4) of the State Constitution. Therefore, whether the Court should take jurisdiction (and hear this appeal) turns on the questions whether this case is of public or great general interest or involves a substantial constitutional question.

It is not of public or great general interest that the Court of Appeals dismissed Cord’s appeal as moot because Cord allowed title to the foreclosed property that was the subject of its appeal to transfer to the purchaser at the sheriff’s sale rather than post the bond ordered by the trial court to obtain a stay of execution. Rather, the dismissal was in accord with settled Ohio law. Nor is there any constitutional question raised by Cord’s appeal.

Cord’s filing in this Court is nothing more than the latest in a string of attempts by Cord to avoid the straightforward, inevitable result of its own inaction, *i.e.* dismissal of its appeal because it refused to post an appeal bond. Cord does not identify a single constitutional right that is implicated in this appeal, and does little to argue why the dismissal of its appeal for mootness is of public or great general interest. Instead, it prematurely argues the merits of what it alleges are errors committed by both the trial court and the appellate court below on a potpourri of issues. The *only* issue that may properly be raised before this Court is whether the First District Court of Appeals erred by dismissing Cord’s appeal as moot due to Cord’s failure to post the bond required by the trial court to stay the Order Confirming Sheriff’s Sale and the ensuing transfer of legal title to the foreclosed property to Corporex.

None of the other issues raised by Cord were reached by the Court of Appeals. Nor were they even briefed by Corporex Realty Acquisitions, LLC (“Appellee” or “Corporex”) in the Court of Appeals. Therefore, they are not properly before this Court. Hence, the only proposition of law that could possibly be presented to this Court by this appeal is whether a Court of Appeals errors when it dismisses as moot the appeal of an order confirming a foreclosure sale when title to the foreclosed property that is the subject of the appeal has been transferred, in the absence of a valid order staying the transfer. The First District Court of Appeals’ dismissal of Cord’s appeal was straightforward and consistent with existing precedent. No public or great general interest is implicated in this case.

Cord was given ample opportunity to prevent its appeal from becoming moot. Despite never having appeared in the foreclosure case below until after the subject property was sold at sheriff’s sale, never having deposited a single dollar toward exercising its alleged right to redeem the subject property from that sale, and having its objections to confirmation of that sale heard and overruled by the trial court, Cord was granted a stay by the trial court, over Corporex’s objection, while Cord’s appeal was pending. The stay was conditioned upon Cord posting a bond in an amount that was less than the amount Cord would have been required to pay to redeem the subject property. Instead of posting the bond, Cord moved the Court of Appeals for a stay without a bond, which motion was denied.

Consequently, Cord was given a simple choice: post a bond to stay execution of the Order Confirming Sheriff’s Sale, or allow title to the property to transfer, rendering its appeal moot. Cord chose the latter course. The trial court proceeded to order the distribution of the sale proceeds and the issuance of a sheriff’s deed to Corporex. The deed was delivered and was

promptly recorded. The Court of Appeals then properly granted Corporex's motion to dismiss Cord's appeal as moot.

The result created by Cord's own inaction is not of public or great general interest, nor does Cord cite in its brief any proposition of law that requires a contrary result. The dismissal of Cord's appeal below involved the application of a settled legal principle by the Court of Appeals: satisfaction of a judgment renders an appeal from that judgment moot. This case does not raise an issue of general or great public interest, and this Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

I. THE FORECLOSURE SALE

Corporex, the holder of a note and mortgage given by Cord and encumbering the subject property at 11790 and 11820 Snider Road, Hamilton County, Ohio, filed its Complaint for Foreclosure on April 19, 2013. Cord was served with the Summons and Complaint on April 24, 2013. Cord failed to appear or defend, and Corporex moved for a default judgment. After a hearing, the trial court entered its Judgment Entry and Decree in Foreclosure on July 18, 2013. An Order for Sale was issued on July 30, 2013. A sheriff's sale of the subject Property was held on September 26, 2013. Corporex was the successful bidder, with a credit bid of \$800,000 against its judgment. Corporex moved to confirm the Sheriff's sale on October 1, 2013.

Cord made its first appearance in this matter on October 2, 2013 when it filed a motion to stay confirmation of the sale. This appearance came only after Cord Real Estate's sole owner and namesake, Cameron Cord, sold his 100% membership interest in the company to an investment group looking to acquire the property at what it perceived as a discount based upon Corporex's bid at the sheriff's sale. Cord asked the trial court to delay confirmation of the sale for *14 days* because "negotiations and preliminary agreements to transfer the controlling interest of Cord Real Estate, LLC to new ownership" were underway, and because additional time was

needed to review the “redemption payoff” and to negotiate with the holders of junior liens on the property. The Magistrate heard and denied Cord’s motion to stay confirmation. Cord then simultaneously filed objections to the Magistrate’s decision and, in the alternative, a motion to vacate the Magistrate’s decision.

On October 23, 2013 (*21 days* after Cord had requested that the confirmation be stayed for *14 days* so that it could redeem the property), the trial court entered three Orders that rejected each of Cord’s objections to the confirmation of the sale: (1) an Order Denying Motion to Stay Confirmation; (2) an Entry Denying Defendant’s Motion to Set Aside Magistrate’s Entry Denying Defendant’s Motion to Stay Confirmation of Sale;¹ and (3) an Order Confirming Sheriff’s Sale.²

The new owners of Cord immediately caused Cord to file a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Ohio. This filing triggered an automatic stay of Corporex’s ability to obtain the sheriff’s deed to the property, and Cord so advised the trial court by filing a Suggestion of Stay within minutes of the entry of the October 23, 2013 Orders. Cord also filed a Notice of Appeal of those Orders to the Court of Appeals.

¹ By this same Entry, the trial court denied Cord’s request for a determination of the payoff amount due for redemption made in Cord’s reply to Corporex’s memorandum in opposition to Cord’s motion to stay confirmation.

² Cord suggests in its memorandum in support of jurisdiction that the trial court “rubber stamped” these Orders adopting the decision of the Magistrate, without explanation or analysis. (Memorandum in Support of Jurisdiction, p. 9). However, Cord fails to disclose that the trial court entered these Orders only after it allowed briefing on Cord’s motion to set aside the Magistrate’s Entry Denying Cord’s Motion to Stay Confirmation and its memorandum in opposition to confirmation of the sale. All of Cord’s objections and arguments were considered and rejected by the trial court, and the trial court thereafter rendered its decisions on October 23, 2013. All of these facts have been conveniently omitted from Cord’s brief.

On January 10, 2014, the United States Bankruptcy Court ruled that Cord had filed its bankruptcy petition in bad faith, and granted Corporex relief from the automatic stay to execute on the confirmation order.³

II. THE CONDITIONAL STAY ORDERS

After the Bankruptcy Court granted Corporex relief from the stay, Cord immediately moved the trial court for a stay pending appeal pursuant to Appellate Rule 7. The Magistrate conducted another hearing on Cord's motion to stay, on February 5, 2014. Cord argued that it should be granted a stay without being required to post any supersedeas bond whatsoever, contrary to the express language of Civil Rule 62(B). Corporex argued that the requested stay should be denied. On February 6, 2014, the Magistrate entered an Order Granting Stay and Requiring Bond, which granted Cord's request for a stay pending its appeal of the trial court's October 23, 2013 Orders, but expressly conditioned the stay upon the posting of a supersedeas bond in an amount not less than \$841,414.51, plus interest of \$41,137.41, plus per diem interest at the rate of \$116.86 from and after March 19, 2013.⁴

Instead of simply posting the required bond, Cord filed a motion to set the Magistrate's Order aside, pursuant to Rule 53(D)(2)(b). On April 3, 2014, the trial court denied this request in an Entry Denying Defendant's Motion to Set Aside Magistrate's Order Granting Stay and Requiring Bond or in the Alternative Objections to Magistrate's Decision. The trial court expressly found "that the Magistrate properly determined the factual and legal issues before him.

³ When Cord took no steps to advance the Chapter 11 case, the U.S. Trustee moved to dismiss the case, and the Bankruptcy Court granted that motion on March 10, 2014.

⁴ The bond amount was less than the amount Cord would be required to pay to redeem the subject property, which Cord represents it was capable of doing.

Rule 62(B) and § 2505.09 clearly require that Defendant post a supersedeas bond before a stay of execution may be granted.”⁵

Again, instead of posting a bond to preserve its issues for appeal, Cord moved the Court of Appeals to issue a stay without requirement of a bond. The Court of Appeals denied Cord’s motion by Order dated April 24, 2014. Cord did not appeal the Court of Appeals’s denial of its motion for stay without bond to this Court. *See* S.Ct.Prac.R. 4.01. Nor did Cord seek a stay of the Court of Appeals’ decision.

III. CORD’S APPEAL IS DISMISSED AS MOOT

Because Cord elected not to post a bond to stay the effect of the confirmation order, the trial court proceeded to enter an Order Distributing Proceeds, Ordering Deed and Discharging Liens on April 28, 2014. The Sheriff’s Deed from the Sheriff to Corporex evidencing the Sheriff’s Sale was recorded with the Hamilton County, Ohio Recorder on or about May 13, 2014.

On May 13, 2014, Corporex filed a motion to dismiss Cord’s appeal as moot based upon Cord’s failure to post a bond and stay execution. The Court of Appeals granted Corporex’s motion on June 4, 2014 by Entry Granting Motion to Dismiss the Appeal. The Court of Appeals denied Cord’s motion for reconsideration on July 9, 2014. Cord filed its Notice of Appeal to this Court seeking to have this Court review that decision by the Court of Appeals.

⁵ Cord had also filed a motion to remand to the trial court on limited issues in the Court of Appeals, which the Court of Appeals denied on April 10, 2014.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED CORD'S APPEAL AS MOOT BASED UPON SETTLED OHIO LAW TO WHICH CORD ADVANCES NO CONTRARY PROPOSITION OF LAW.

Cord's brief is replete with issues and arguments that are neither relevant to the Court of Appeals' decision that is presently before this Court nor properly preserved for consideration in this appeal. The only Order from which Cord appealed to the Court of Appeals is the Order Confirming Sheriff's Sale.⁶ Consequently, the *only* issue that is presented to this Court by this appeal is whether the Court of Appeals erred by dismissing Cord's appeal of that Order for mootness due to Cord failing to post an appeal bond to effectuate a stay. Cord advances no proposition of law that suggests that the Court of Appeals acted improperly. Cord's brief focuses least upon this issue – the only issue that is arguably properly before this Court.

As to the real issue before the Court, Cord advances no discernible reason why the Court of Appeals' dismissal of its appeal, which was the inevitable result of Cord's repeated failure to take the steps necessary to preserve its rights for appellate review, is of public or great general interest.⁷ Cord advances no proposition of law contrary to the principle relied upon by the Court of Appeals that, where a party fails to post a bond required by the trial court to stay satisfaction

⁶ There are two appealable judgments in a foreclosure action: the order of foreclosure and the confirmation of sale. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 39. Cord did not appeal the trial court's Judgment Entry and Decree in Foreclosure. Indeed, Cord's new owners never caused Cord even to appear in the foreclosure case below until after the subject property was sold at sheriff's sale.

Cord also purportedly appealed the trial court's related Order Denying Cord's Motion to Stay Confirmation of the Sale and the Entry Denying Defendant's Motion to Set Aside Magistrate's Entry Denying Defendant's Motion to Stay Confirmation of Sale, which were supplemental to the Order Confirming Sheriff's Sale and expressly adopted the Magistrate's confirmation of sale.

⁷ As noted above, Cord also baldly asserts that this appeal involves a substantial constitutional question, but then fails to cite a single constitutional provision, right or principle that is allegedly impacted by this appeal.

of a judgment, satisfaction of the judgment will render an appeal of such judgment moot. (*See* Memorandum in Support of Jurisdiction at p. 17). Although the trial court agreed, over Corporex's objection, to stay execution if Cord tendered a bond in the specified amount, Cord elected not to do so. Accordingly, the trial court entered its distribution order on April 28, 2014, and the Sheriff proceeded to convey the subject property to Corporex by Sheriff's Deed and to distribute the proceeds of the sale, thereby consummating the trial court's Order Confirming Sheriff's Sale. The First District Court of Appeals held that Cord's appeal from that Order had been rendered moot by Cord's failure to stay its execution, relying upon its own reasoning in *Art's Rental Equip., Inc. v. Bank of America, N.A.*, 1st Dist. No. C-110544 (consol.) 2012-Ohio-5371, *P13.

In *Art's Rental Equip.*, the trial court granted summary judgment in favor of the note and mortgage holder on the issue of the debtor's default, but ordered that the sale of the subject property be stayed conditioned upon the posting of a bond prior to sale. The debtor failed to post a bond, and the property was sold and the proceeds distributed. The Court of Appeals dismissed the debtor's appeal of the summary judgment order as moot, holding that, "[s]atisfaction of a judgment renders an appeal from that judgment moot." *Id.* at *P7 (citing *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1249 (1990)). The Court of Appeals concluded as follows:

[i]n this case, the property was sold at sheriff's sale, the trial court confirmed the sale, and the proceeds have been distributed. The defendants-appellants failed to obtain a stay of the trial court's judgment, and they did not post an appeal bond. The judgment has been satisfied, and the proceeds of the sale are no longer under the jurisdiction and control of the court. Therefore, the appeals must be dismissed as moot.

2012-Ohio-5371, *P13. *See also Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, *P16 (quoted in *Art's Rental Equipment*) ("[i]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the

judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action.”⁸

Here, as in *Art’s Rental Equipment*, the Sheriff’s Sale has been confirmed and the proceeds have been distributed. Although the trial court allowed Cord an opportunity to obtain a stay by posting a bond, Cord elected not to do so. Nor did Cord alternatively seek a stay from this Court. The judgment from which Cord appealed to the Court of Appeals – the Order Confirming Sheriff’s Sale – has been fully executed and satisfied. Title to the subject property has transferred and the proceeds of the sale are no longer under the jurisdiction and control of the Court. Cord’s appeal was therefore properly dismissed as moot. Again, Cord makes no attempt whatsoever to demonstrate otherwise, instead making only the bare, unsupported assertion that “[t]he issues in this Appeal are not moot and this Court can grant Cord Real Estate relief.” (Memorandum in Support of Jurisdiction at p. 17).

Cord apparently would have this Court hold that the defendant in a foreclosure case has the unconditional right to appeal the confirmation of the sheriff’s sale, without obtaining a stay of execution on the terms required by the court, simply because it disagrees with the confirmation order. If this proposition were to be adopted by the Court, then the foreclosure process in Ohio will come to a grinding halt. Purchasers cannot obtain title insurance for property sold at sheriff’s sale until the confirmation order is final and unappealable. Consequently the purchaser would not be able to take title to the purchased property, and the lender would not receive the proceeds of the sale, until after the debtor has exhausted its appeal

⁸ The *Tutin* and *Art’s Rental Equipment* courts rejected an argument that R.C. § 2329.45 constitutes a statutory exception to this rule of mootness. 2009-Ohio-1333, *P11; 2012-Ohio-5371, *P 11-12. Notably, even if R.C. § 2329.45 applies, that statute does not give Cord the relief it ultimately seeks in this case – the right to redeem the subject property – as the statute prohibits defeating or affecting title of the purchaser even if the confirmation is reversed on appeal.

rights – without ever being required to obtain a valid stay of execution. Respectfully, this is not the law in Ohio.

II. ALL OTHER ISSUES ADVANCED BY CORD HAVE NEVER BEEN REACHED BY THE COURT OF APPEALS AND ARE THEREFORE NOT PROPERLY BEFORE THIS COURT.

Rather than directly address the only issue properly before this Court, Cord attempts to misdirect the Court's attention to other issues it claims this Court should review. (*See* Memorandum, in Support of Jurisdiction at p. 12-17.) Indeed, Cord's entire brief is substantially dedicated to various issues that have nothing whatsoever to do with the Court of Appeals' dismissal of Cord's appeal as moot, such as Cord's attempt to place on trial the entire process and procedure employed in the Hamilton County Court of Common Pleas in foreclosure cases. None of these issues have been considered by the Court of Appeals in the first instance, and they therefore are not properly before this Court. *See State v. McNeill*, 83 Ohio St.3d 457, 459 (1998). Corporex has never even briefed these issues in the Court of Appeals because Cord's appeal was properly dismissed as moot before the issues could be reached.

The *only* issue before this Court is whether the Court of Appeals properly dismissed Cord's appeal as moot due to Cord's failure to post the bond required to stay satisfaction of the trial court's Order Confirming Sheriff's Sale. This dismissal was the proper, inevitable result of Cord's refusal to comply with the trial court's Order granting a stay and requiring a bond. Cord may not raise in this Court matters that have never been heard in the first instance by the Court of Appeals. Cord's appeal should be denied.

CONCLUSION

Because this case is not of public or great general interest, and because the case was correctly decided by the First District Court of Appeals, this Court should decline to exercise discretionary review of Cord Real Estate, LLC's appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 23rd day of September, 2014:

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