

ORIGINAL

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IN THE SUPREME COURT OF OHIO

PROVIDENT FUNDING ASSOCIATES, L.P.,

Plaintiff-Appellee,

-vs-

TAMARA K. TURNER, *et al.*,

Defendants-Appellants.

Case No. 2014-1609

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

PLAINTIFF-APPELLEE PROVIDENT FUNDING ASSOCIATES, L.P.'S
RESPONSE IN OPPOSITION TO MEMORANDUM IN SUPPORT OF
JURISDICTION OF APPELLANTS

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MEMORANDUM

I. FACTS AND PROCEDURAL POSTURE

On January 30, 2007, Tamara Turner executed a note in the amount of \$272,000.00, to Home Advantage Funding Group Inc. [T.d. 118, *Trial Transcript*, p. 11; *Plaintiff's Trial Exhibit 1.*] On the same date, Tamara and Phillip Turner ("Appellants") granted a mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Home Advantage Funding Group Inc., to secure the note. [*Id.*, p. 22; *Plaintiff's Trial Exhibit 2.*] The mortgage encumbers the real property commonly known as 20526 Byron Road, Shaker Heights, Cuyahoga County, Ohio. [*Id.*, p. 11.]

Prior to the commencement of this foreclosure, Home Advantage Funding Group Inc. indorsed the note to VirtualBank Mortgage, and VirtualBank Mortgage indorsed the note to Provident Funding Associates, L.P. ("Appellee"). [T.d. 118, *Trial Transcript*, pp. 16, 17.] Also prior to commencement, MERS assigned the mortgage to Appellee. [*Id.*, p. 29; *Plaintiff's Trial Exhibit 3.*] The note and mortgage were in Appellee's possession prior to the filing of the foreclosure. [*Id.*, pp. 20, 21, 30, 31, 37.]

There was a default in payment, and Appellee accelerated the debt. [T.d. 118, *Trial Transcript*, pp. 32, 33, 35-37; *see also, Plaintiff's Trial Exhibit 4.*] As of the filing of the Complaint, there was a balance owing to Appellee in the sum of \$271,932.00, with interest thereon at the rate of 6.000% per annum from August 1, 2008. [*Id.*, pp. 15, 35, 36; *see also, Plaintiff's Trial Exhibit 5.*]

A trial was held in March, 2013. At trial, Appellee produced the original note and mortgage and provided testimony in support of its case. Appellants did not appear at the trial and presented no testimony. [T.d. 118, *Trial Transcript*]

On May 7, 2013, the Magistrate entered a decision in favor of Appellee, and on June 26, 2013, the trial court adopted the Magistrate's Decision. [T.d. 109, *Magistrate's Decision*; T.d. 122, *Order Adopting Magistrate's Decision and Overruling Objections*.] Over Appellants' objections, the trial court found that the case was not barred by issue preclusion because the prior foreclosure cases that were dismissed due to lack of standing were not adjudications on the merits. [T.d. 122, *Order Adopting Magistrate's Decision and Overruling Objections*, p. 1]

The subject property was sold at sheriff's sale, according to statute, on September 3, 2013, for \$93,334.00. [T.d. 130, *Order of Sale Returned*.] The sale was confirmed on September 12, 2013. [T.d. 131, *Decree of Confirmation*.] Appellants did not move to stay execution of the judgment at any time.

Appellants appealed from the Order Adopting Magistrate's Decision (8th Dist. No. 100153) and the Decree of Confirmation of sheriff sale (8th Dist. No. 100493). The Eighth District dismissed both of the Appellants' appeals. In the first appeal, the Eighth District held as follows: "Therefore, because the Turners failed to move for a stay at any time during the proceedings, we dismiss the appeal as moot." *Provident Funding Assoc. v. Turner*, 8th Dist. 100153, 2014-Ohio-2529, ¶ 6. In the second appeal, the Eighth District held similarly, as follows: "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." *Provident Funding Assoc. v. Turner*, 8th Dist. 100493, 2014-Ohio-2190, ¶ 6.

II. STATEMENT OF APPELLEE'S POSITION

Because the sheriff sale was held, confirmed, and the proceeds distributed, there was no remaining relief that could be afforded to the Appellants. Appellants did not file a motion to stay execution of the judgment. Both appeals were moot, as held by the Eighth District.

Appellants allege, incorrectly, that (1) the Court of Appeals misapplied the doctrine of mootness; (2) the trial court lacked jurisdiction; and (3) even if the trial court had jurisdiction, the mootness doctrine did not apply. None of these arguments has any basis in law or fact.

The Appellants' allegation that the Court lacked jurisdiction appears to spring from their belief that the foreclosure was barred by the doctrine of issue preclusion. Contrary to their argument, issue preclusion creates an affirmative defense but cannot deprive a court of jurisdiction. Moreover, the case was not barred by issue preclusion.

Appellants further allege that the doctrine of mootness does not apply because the judgment was not voluntarily satisfied. Voluntary satisfaction of a judgment is one way that a matter can be mooted, but it is not the only way. This Court has held that when an appellate court cannot "grant [the appellant] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Miner v. Witt*, 82 Ohio St. 237, 239, 92 N.E. 21 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

This case presents neither a substantial constitutional question nor a matter of great public interest. Therefore, this case is not suitable for discretionary appeal.

III. LAW AND ANALYSIS

A. The Defense of Issue Preclusion Cannot Deprive a Court of Jurisdiction, and the Foreclosure was Not Barred by Issue Preclusion.

In their memorandum, Appellants erroneously argue that the defense of issue preclusion could deprive a court of jurisdiction. *Appellants' Memorandum In Support of Jurisdiction*, p. 7.

This is false. “[R]es judicata [including issue preclusion] is an affirmative defense that does not divest the jurisdiction of the second tribunal to decide the validity of that defense.” *State ex rel. Vanni v. McMonagle*, 8th Dist. 99507, 2013-Ohio-500, ¶ 7, citing *State ex rel. Flower v. Rocker*, 52 Ohio St.2d 160, 370 N.E.2d 479 (1977). The affirmative defense of issue preclusion does not deprive the court of jurisdiction or make a judgment void. *Id.*

The trial court’s adoption of the magistrate’s decision made clear the following:

Plaintiff’s claims are not barred by issue preclusion or collateral estoppel because the dismissals of the prior foreclosures were dismissals without prejudice. A dismissal without prejudice is other than on the merits and does not constitute a final judgment and this prevents the application of res judicata or collateral estoppel. *Bosl v. First Financial Inv. Fund I*, 8th Dist. No. 95464, 2001-Ohio-1938. “The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice.” *Fed. Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017.

[T.d. 122, *Order Adopting Magistrate’s Decision and Overruling Objections*, p. 1.] As a result, Appellants’ allegation that the trial court lacked jurisdiction fails as a matter of law.

B. The Eighth District Properly Found the Appeals to be Moot.

Appellants further argue, erroneously, that voluntary payment in full of a judgment is the only way that an appeal can be mooted. *Appellants’ Memorandum In Support of Jurisdiction*, p. 8. This too is false. Voluntary satisfaction of a judgment is one way that an issue can be mooted. *Lynch v. Board of Ed. Of City School Dist. Of Lakewood*, 116 Ohio St. 361, 372, 156 N.E. 188 (1927). However, this Court has also held that when an appellate court cannot “grant [the appellant] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.” *Miner v. Witt*, 82 Ohio St. 237, 239, 92 N.E. 21 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

In the case at bar, the Court did not base its finding of mootness upon payment in full. *Provident Funding Associates, L.P. v. Turner*, 8th Dist. No. 100153, 2014-Ohio-2529, ¶ 6.

Instead, the Court held as follows:

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.

Id. The Court relied in part upon its recent *Rains* decision, in which it held, "...Rains failed to file a motion to stay the confirmation of sale. ... Likewise, the property in the instant case has been sold and the deed has been recorded. The order of confirmation has been carried out to its fullest extent and there exists no relief that can be afforded to Rains." *Third Fed. Savings & Loan Assoc. of Cleveland v. Rains*, 8th Dist. No. 98592, 2012-Ohio-5708, ¶ 13.

The Court below found that the appeals were moot because the Appellants failed to seek a stay of execution of the judgment at any time; the sale proceeds have been distributed, and there is no further relief that can be afforded to the Appellants. *Turner*, 2014-Ohio-2529, ¶ 6; 2014-Ohio-2190, ¶ 6. The doctrine of mootness as related to voluntary payment of a judgment is simply irrelevant here.

C. This Case Is Not of Great General Interest.

Supreme Court Practice Rule 5.02(A)(3) includes as follows:

- (3) The case involves a question of public or great general interest pursuant to Article IV, Section 2(B)(2)(e) of the Ohio Constitution.

S.Ct.Prac.R. 5.02(A)(3). “Ohio Const. § 6, Art. IV provides that judgments of the courts of appeals of the state shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the court of appeals has original jurisdiction, and cases of public or great general interest. Except in those special circumstances, it is abundantly clear that in Ohio a party to litigation has a right to but one appellate review of his cause.” *Williamson v. Rubich*, 171 Ohio St. 253, 253, 168 N.E.2d 876 (1960).

Although Appellants claim that this case is of “great general interest,” they provide no specific reasons in support. A case as unusual as the one at bar likely will not be replicated with great frequency, and as a result, it is particularly lacking in great general interest. Here, Appellants failed to file a motion to stay execution of the judgment. The property was sold, and the sale proceeds were distributed. These facts make further appeal futile and moot. Throughout the pendency of the case, the Appellants were represented by counsel. There is no reason cited as to why the Appellants failed to file the motion to stay execution or why motions to stay execution could not be filed in other cases. The issue before the Court simply does not present a question of great general interest.

D. This Case Does Not Involve a Substantial Constitutional Issue.

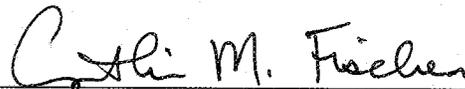
Appellants also suggest that this case involves a substantial constitutional issue because the Court of Appeals, allegedly, incorrectly applied the doctrine of mootness on a judgment that was, allegedly, void. This argument requires multiple leaps in logic that cannot be found within the facts of the case or the confines of the law. As a result, jurisdiction of this Court is inappropriate under the circumstances presented.

Appellants' argument here appears to be premised on the notion that the underlying judgment in this case was void due to issue preclusion. As discussed above, issue preclusion is an affirmative defense. *State ex rel. Flower v. Rucker*, 52 Ohio St.2d 160, 162, 370 N.E.2d 479, 480 (1977). Moreover, the foreclosure was properly filed and was not barred by issue preclusion. No substantial constitutional issue exists.

IV. CONCLUSION

The Eighth District properly found that the appeals from the Order Adopting Magistrate's Decision and the Decree of Confirmation were moot. Appellants have failed to demonstrate either a substantial constitutional question or a matter of great public interest. As a result, Appellants' request for jurisdiction should be denied.

Respectfully submitted,



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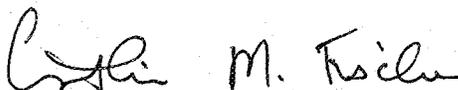
Attorneys for Plaintiff-Appellee,

Provident Funding Associates, L.P.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following by electronic means, pursuant to S.Ct.Prac.R. 3.11, by email, addressed as set forth below, this 16th day of October, 2014:

James R. Douglass, Esq.
(Firedcoach@aol.com)

A handwritten signature in cursive script that reads "Cynthia M. Fischer". The signature is written in black ink and is positioned above a horizontal line.

Cynthia M. Fischer