Supreme Court of Ohio Clerk of Court - Filed December 29, 2014 - Case No. 2014-0485

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST	*	**CASE NO. 2014-0485**
Appellee	*	**On Appeal from the Butler County Court of Appeals, 12th District Case Nos. CA 2012-11-0239 and CA 2013-05-0068**
-vs-	*	
SHARI LEWIS, et al.	*	
Appellant.	*	

APPELLANT'S MOTION FOR STAY PENDING APPEAL

Andrew M. Engel (0047371)(COUNSEL OF RECORD)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
7925 Paragon Road
Centerville, OH 45459
(937) 433-4090/Fax: (937) 433-1510
aengel@kacelawllp.com

Christine M. Cooper (0079160)
Chad D. Cooper (0074322)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
810 Sycamore Street, 3rd Floor
Cincinnati, OH 45202
(513) 579-2323/Fax: (513) 263-9003
cmcooper@kacelawllp.com
cdcooper@kacelawllp.com
Counsel for Appellant Shari Lewis

John B. Kopf, III (0075060)(COUNSEL OF RECORD)
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
614.469.4743/Fax: 614.469.3361
John.Kopf@ThompsonHine.com

Scott A. King (0037582)
Terry W. Posey, Jr. (0078292)
THOMPSON HINE LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45342-4934
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
Scott.King@Thompsonhine.com
Terry.Posey@Thompsonhine.com
Counsel for Appellee SRMOF 2009-1 Trust

Appellant Shari Lewis moves this Court for an order staying further execution in this case pending appeal for the reasons set forth below.

Respectfully submitted,

/s/ Andrew M. Engel
Andrew M. Engel (0047371)
ANDREW M. ENGEL CO., L.P.A.
7925 Paragon Road
Centerville, OH 45459
(937) 433-4090, ext. 49
Fax: (937) 433-1510
aengel@kacelawllp.com
Attorney for Appellant Shari Lewis

MEMORANDUM

After Ms. Lewis appealed the trial court's grant of summary judgment, she moved the trial court for both a specific stay of a scheduled sheriff's sale of the property[1] and a general stay of execution.[2] The trial court granted the stay of the sheriff's sale conditioned on Lewis posting a supersedeas bond of twice the amount judgment. The judgment amount was "in the principal amount of $125,683.50, plus interest at the rate of 7.000 percent per annum from April 1, 2010 together with late charges, advances for the protection and maintenance of the property, and costs." [3]

As a result, the bond required by the trial court was more than a $250,000 on the principal amount of the judgment, plus an additional amount for interest and costs and some unknown amount for advances. All of this was required by the trial court even though Lewis has

[1] Filed April 17, 2013.
[2] Filed April 17, 2013. Although these motions were intended to be filed in the trial court, they were inadvertently filed under the Court of Appeals Case No. CA2012-11-0239. The trial court kindly recognized the mistake and ruled on the motions.
[3] The trial court made no determination of the amounts owed for "advances for the protection and maintenance of the property." Thus, Lewis could not have determined the amount of the bond was she able to post it.

no personal liability to pay the debt. As set for in the pleadings, and as argued by SRMOF, Lewis obtained a bankruptcy discharge of her debt. Thus, SRMOF's only recourse is against the real property. Lewis was unable to post such a large bond in order to stop the sheriff's sale.[4]

The sheriff's sale was held on April 23, 2013, and Plaintiff/Appellee, SRMOF Trust 2009-1, was the successful bidder. To date, SRMOF has not yet sought confirmation of the sale. Recently, however, SRMOF's counsel has stated that, after over 20 months of inaction in the trial court, he will be filing a motion in the trial court to confirm the sale. Confirmation of the sale would transfer legal title to the property to SRMOF before this Court rules on the validity of the underlying judgment that led to the sale itself.

Lewis asks that the Court stay any proceedings to confirm the sheriff's sale without requiring an additional bond for two reasons. First, confirmation of the sale by the trial court would be inconsistent with this Court's jurisdiction over the case. Second, a bond is not necessary to maintain the status quo. SRMOF's rights in the property are secure, and it has little, if any, risk of loss should the stay be granted.

A. The trial court lacks jurisdiction to confirm the sale.

Once an 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 0.O.3d 88, 378 N.E.2d 162 (1978) and *Yee v. Erie Cty. Sheriffs 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-

[4] Copies of the two orders of the trial court regarding the requested stay are attached.

Ohio-4982, 999 N.E.2d 661, ¶ 8. As a result, acts by the lower courts which would vitiate the appeal are void. *Id.*

Confirmation of the sale in this case would effectively deprive this Court of the power to reverse the foreclosure judgment itself. The concept of foreclosure applies to cutting off the property owner's right to redeem the property from the debt owed. *Hembree v. Hid-America Federal Savings & Loan Assn*., 580 N.E.2d 1103, 64 Ohio App.3d 144 (Ohio App. 2 Dist. 1989) ("An action to sell the mortgaged property is called a "foreclosure" because, through judicial process, it will foreclose or cut off the rights in the property of all parties to the action"). And in fact, that is the relief the SRMOF sought in this case. *See Complaint, Appellee Brief Supp. S-3* (" . ..that the equity of redemption of the Defendant-Grantor, Shari Lewis, aka, Shari Frances Lewis, and all persons claiming under or through them be foreclosed. . .").

The specific remedy granted by the trial court in this case was foreclosure of Lewis's right of redemption. The statutory right of redemption can be exercised prior to confirmation. R.C. 2329.33. "In Ohio, a mortgagor's right to redeem is 'absolute and may be validly exercised at any time prior to the confirmation of sale.' " *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 653 N.E.2d 1190 (1995), *quoting Women's Fed. Sav. Bank v. Pappadakes*, 38 Ohio St.3d 143, 146, 527 N.E.2d 792 (1988). In other words, although the judgment entry granting foreclosure is a determination of the parties' rights and duties, it is the confirmation of the sale that actually terminates the right of redemption.

Thus, should the sale be confirmed, Lewis's right to redeem will be terminated, negating the ability of this Court to reverse or modify the underlying judgment. Confirmation of the sale is inconsistent with this Court's jurisdiction and should be stayed.

B. SRMOF is adequately protected with the status quo.

The sole purpose of requiring a supersedeas bond is to protect the interest of the judgment creditor. The requirement of a bond is to maintain the status quo. Civ.R.62(D); *Buckles v. Buckles*, 46 Ohio App.3d 118, 121-122, 546 N.E.2d 965 (10th Dist.1988), and *Grussell v. Poll*, 5 Ohio N.P. 439, 441, 7 Ohio Dec. 428, 1898 WL 1454 (1898). But since April 2013, SRMOF has felt comfortable enough with the status quo that it had no need to obtain confirmation of the sale. SRMOF's failure to seek confirmation of the sale for nearly two years demonstrates that the status quo is sufficiently preserved, thus negating the need for a bond.

Moreover, the Sixth District Court of Appeals recently held that a stay can be granted without bond in cases like that before the Court because individuals in Lewis's position are merely attempting to maintain the status quo while the appeal is pending. *U.S. Bank Natl. Assn. v. Perdeau*, 2014-Ohio-155, ¶5. It observed:

> Thus, a supersedeas bond is only necessary where a monetary judgment or other equitable interest was granted that needs to be protected because the appellant has obtained a stay of execution of the judgment of the trial court. *National City Bank N.E. v. Beyer*, 6th Dist. Huron No. H-99-017, 1999 WL 1203742, *3 (Dec.17, 1999) (no supersedeas bond required because appellee had "no interest at stake 'that could be lost or squandered by' [appellant] while the appeal is pending"), and *Tuteur v. P. & F. Ents., Inc.*, 21 Ohio App.2d 122, 125-126, 255 N.E.2d 284 (8th Dist.1970).

Id. at ¶6.

Discussing analogous federal law, several courts have held that the court should require that which is needed to *preserve the status quo* while protecting the judgment creditor's rights pending appeal. *Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.* (1999, ED Va) 190 FRD 190. Numerous federal courts have held that it is within the court's discretion to allow a lessor bond amount or waive the supersedeas bond requirement entirely. *See Wunschel & Small, Inc. v. United States* (1983) 1 Cl Ct 101, 554 F Supp 444, 30 CCF P 70354, citing *Federal*

Prescription Service, Inc. v. American Pharmaceutical Ass'n, 636 F.2d at 760-761.

Additionally, as set forth before the trial court, SRMOF already has over $15,000 cash in its possession that it has not yet applied to the judgment balance. Those monies are insurance proceeds relating to an insured loss at the property in 2012. This cash, coupled with the property which SRMOF purchased at sale, is sufficient to maintain the status quo and protect SRMOF from loss pending appeal.

Conclusion

For the foregoing reasons, Lewis respectfully requests that this Court stay confirmation of the sheriff's sale pending the resolution of her appeal without bond.

/s/ Andrew M. Engel
Andrew M. Engel (0047371)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
7925 Paragon Road
Centerville, OH 45459
(937) 433-4090
Fax: (937) 433-1510
aengel@kacelawllp.com

Christine M. Cooper (0079160)
Chad D. Cooper (0074322)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
810 Sycamore Street, 3rd Floor
Cincinnati, OH 45202
(513) 579-2323
Fax: (513) 263-9003
cmcooper@kacelawllp.com
cdcooper@kacelawllp.com
Counsel for Appellant Shari Lewis

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon John B. Kopf, III, Esq. **THOMPSON HINE LLP,** 41 South High Street, Suite 1700, Columbus, Ohio 43215 and Scott A. King, Esq. and Terry W. Posey, Esq., THOMPSON HINE LLP, **THOMPSON HINE LLP,** Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio 45342-4934 on this 29th day of December, 2014.

*/s/ Andrew M. Engel*_____ ____
Andrew M. Engel

FILED
2013 APR 17 PM 4:00
MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

SRMOF 2009-1 TRUST,	:	CASE NO: CV 2011 08 3073
Plaintiff,	:	JUDGE PATRICIA S. ONEY
vs.	:	DECISION AND ENTRY
SHARI LEWIS, et al.,	:	
Defendants.	:	

On April 17, 2013, Defendant, Shari Lewis (referred to hereinafter as "Defendant"), inadvertently filed an Emergency Motion to Cancel Sheriff's Sale, asking this Court to cancel the Sheriff's Sale set for April 18, 2013, under the appellate case no, CA 2012 11 0239. Nevertheless, this Court has reviewed the Emergency Motion and, upon consideration, will grant said Motion upon the filing of a supersedeas bond by the Defendant in an amount double what is owed on the subject property.

ENTER

Patricia S. Oney, Judge

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

cc:

Andrew Engel
7071 Corporate Way, Suite 201
Centerville, OH 45459
(Via Email)

Matthew Taulbee
3962 Red Bank Rd.
Cincinnati, OH 45227
(Via Email)

APR 23

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

SRMOF 2009-1 TRUST,	:	CASE NO: CV 2011 08 3073
Plaintiff,	:	JUDGE PATRICIA S. ONEY
vs.	:	DECISION AND ENTRY
SHARI LEWIS, et al.,	:	
Defendants.	:	

On April 17, 2013, Defendant, Shari Lewis (referred to hereinafter as "Defendant"), inadvertently filed under the appellate case no, CA 2012 11 0239, a Motion to Stay Pending Appeal. Defendant's Motion asks this Court to stay execution on the Judgment pending the appeal. This Motion was filed the day before the Sheriff's Sale, on April 18, 2013. The sale went forward as no supersedeas bond was posted. The Motion is moot.

ENTER

Patricia S. Oney, Judge

cc:

Andrew Engel
7071 Corporate Way, Suite 201
Centerville, OH 45459
(Via Email)

Matthew Taulbee
3962 Red Bank Rd.
Cincinnati, OH 45227
(Via Email)

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio