

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 Trust,	:	
	:	Case No. 2014-0485
Plaintiff-Appellee,	:	
	:	On Appeal from the Butler County
vs.	:	Court of Appeals, 12th Appellate District
	:	
Shari Lewis, et al.,	:	Court of Appeals Case Nos. CA201-11-239
	:	and CA2013-05-068
Defendant- Appellant.	:	

APPELLEE’S MEMORANDUM IN OPPOSITION TO MOTION FOR STAY

John B. Kopf (0075060)
Counsel of Record
Scott A. King (0037582)
Terry W. Posey, Jr. (0078292)
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215
(614) 469-3200
(614) 469-3361 (fax)
john.kopf@thompsonhine.com
scott.king@thompsonhine.com
terry.posey@thompsonhine.com

Andrew M. Engle (0047371)
Kendo, Alexander, Cooper & Engle LLP
7071 Corporate Way, Suite 201
Centerville, Ohio 45459
(937) 938-9412
(937) 938-9411 (fax)
amengel@sbcglobal.net

Counsel for Defendant- Appellant
Shari Lewis

Counsel for Plaintiff-Appellee SRMOF
2009-1 Trust

I. Introduction.

Pursuant to Supreme Court Rule of Practice 4.01(B), Appellee SRMOF 2009-1 Trust (“Trust”) respectfully requests that the Court deny *Appellant’s Motion for Stay Pending Appeal* filed December 29, 2014 (the “Motion”), or at least condition a stay upon the posting of a supersedeas bond. The Motion should have been filed in the Trial Court. In any event, a stay is unnecessary because the Trial Court’s confirmation of the foreclosure sale will not deprive this Court of jurisdiction. If a stay is ordered, a bond is required.

II. Facts.

On October 31, 2012, the Trial Court entered judgment, finding there was \$125,683.50 plus interest at 7% per annum from and after April 1, 2010 outstanding under the promissory note and secured by the mortgage.

On November 28, 2012, Ms. Lewis, through counsel, appealed. She did not seek a stay.

On November 29, 2012, the Trust filed a Praecipe for Order of Sale. On January 15, 2013, the Sheriff filed the appraisal for the sale, with a value of \$97,200.00.

On February 1, 2013, Ms. Lewis moved to vacate the judgment. Again, she did not seek a stay, and the Sheriff scheduled the sale. On April 5, 2013, the Trial Court denied the motion to vacate the judgment.

On April 17, 2013, Ms. Lewis filed an *Emergency Motion to Cancel Sheriff’s Sale* and a *Motion to Stay Pending Appeal*. That same day, the Trial Court granted the *Emergency Motion to Cancel Sheriff’s Sale*, but required a bond in twice the amount of the judgment. On April 23, 2013, the Trial Court found that the *Motion to Stay Pending Appeal* had become moot because it had “ask[ed] the Court to stay the sale of the property pending appeal” and the sale had by then already occurred.

On April 23, 2013, the Sheriff filed his return of the sale, which reported that the property had been sold to the Trust for \$64,800.00.

On May 1, 2013, Ms. Lewis moved to set aside the sale, arguing that she had not been served with advanced notice pursuant to R.C. 2329.26. On June 18, 2013, the Trial Court denied the motion.

On December 22, 2014, the Trust served Ms. Lewis with the Trust's motion to confirm the Sheriff's sale. On December 29, 2014, Ms. Lewis filed the instant Motion in this Court.

III. Law & Argument.

Filing an appeal does not automatically stay further proceedings in the trial court. R.C. 2505.09. Nor does it divest a trial court of jurisdiction to proceed on the judgment. *State ex rel. Klein v. Chorpening*, 6 Ohio St.3d 3, 4, 450 N.E.2d 1161 (1983) (“Until and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same.”).

In a foreclosure case, confirming a sheriff's sale and does not interfere with an appellate court's review of the underlying foreclosure judgment because the appellant may have restitution if the judgment is later reversed. *See* R.C. 2329.45 (providing for restitution when a judgment that resulted in a sale of land is later reversed); *U.S. Bank Nat'l Assoc. v. Mobile Assocs. Nat'l Network Sys.*, 195 Ohio App.3d 699, 704, 2011-Ohio-5284, ¶ 23 (10th Dist.) (appeal not mooted due to sale of property because restitution remains as a remedy).

To stay further proceedings on a judgment in a trial court, an appellant must: (1) obtain a stay of execution “pursuant to the Rules of Appellate Procedure or in another applicable manner” and (2) post a bond “executed by the appellant to the appellee, with sufficient sureties and in a

sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved[.]” R.C. 2505.09.

As a general matter of practice, an application for stay should “ordinarily be made in the first instance in the trial court.” *Cf.* App.R. 7(A) (if the application is made directly to the court of appeals, then the application “shall show that application to the trial court for relief is not practicable, or that the trial court has, by journal entry, denied an application or failed to afford the relief which the applicant requested”).¹

A. The Motion Should Have Been Filed In The Trial Court.

Stay motions are typically better suited for resolution by trial courts, which heard the underlying action, which have pending before them the proceedings sought to be stayed, and which, as trial courts, are usually better suited to conduct hearings, if necessary, to fully evaluate the necessity of a stay and the facts and circumstances that influence setting a bond. *Cf.* App.R. (7)(A).

The Motion does not demonstrate that it was not practicable for Ms. Lewis to file it in the Trial Court. *See id.* Nor does the Motion show that the Trial Court denied a request by Ms. Lewis to stay confirmation. *See id.* Instead, the record reflects that Ms. Lewis had previously filed an emergency motion to cancel the Sheriff’s sale for lack of notice under R.C. 2329.26, which motion the Trial Court granted, albeit conditioned upon posting a bond. Ms. Lewis also filed a motion to stay the Sheriff’s sale (not the confirmation of sale) pending appeal. The Trial Court found the latter motion had become moot because the Sheriff had already sold the

¹ To be sure, the Appellate Rules by their terms only apply “to courts of appeals from the trial courts of record in Ohio.” App.R. 1. This Court’s Rule regarding stay relief—S.Ct.Prac.R. 4.01(A)(2)—does not include a requirement that a stay should be sought first in the Trial Court. Nor does this Court’s Rule include any provision that attempts to overcome R.C. 2505.09’s mandatory statutory requirement that a bond must be posted to effect a stay. *See* Part III.C. *infra.*

property. Ms. Lewis has not asked the Trial Court to stay confirmation, and there is no reason why the request for a stay should not be presented to the Trial Court. The Motion should be denied without prejudice to Ms. Lewis refiling it in the Trial Court.

B. The Trial Court Has Jurisdiction To Confirm the Sale, And Confirmation Will Not Deprive This Court Of The Power To Reverse The Foreclosure Judgment.

Ms. Lewis argues that Trial Court lacks jurisdiction to proceed with confirmation of the Sheriff's sale. Motion at 3. She suggests that "confirmation of the sale by the trial court would be inconsistent with this Court's jurisdiction over the case." *Id.* She claims confirmation "would effectively deprive this Court of the power to reverse the foreclosure judgment itself." *Id.* at 4. The law says otherwise.

First, the Trial Court does not lack jurisdiction to proceed with confirmation of the Sheriff's sale. "Until and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same." *State ex rel. Klein*, 6 Ohio St.3d at 4. *See also* R.C. 2505.09 (filing an appeal does not stay execution upon a judgment). Filing an appeal from a foreclosure judgment does not divest a trial court of the jurisdiction to subsequently confirm a sheriff's sale. *Chase Manhattan Mortg. Corp. v. Urquhart*, Twelfth Dist. Butler App. Nos. CA2004-04-098 and CA2004-10-271, 2005-Ohio-4627, ¶¶ 26-29 (citing *State ex rel. Klein*). The Motion cites no case that has held that the filing of an appeal from a foreclosure judgment divests a trial court of jurisdiction to confirm a sheriff's sale.

Second, confirming the Sheriff's sale is not inconsistent with this Court's jurisdiction because this Court can still reverse the judgment even if title to the property has been transferred to the purchaser from the Sheriff's sale. R.C. 2329.45 provides that "[i]f 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" but "[i]n 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.”

This Court retains the power to review and reverse the judgment, notwithstanding confirmation of the sale, because confirmation does not cause the case to become moot for lack of available relief. *U.S. Bank Nat’l Assoc.*, 2011-Ohio-5284, ¶¶ 14-24 (denying motion to dismiss appeal, since an appeal from a foreclosure judgment does not become moot due to a subsequent sale of the property because restitution remains a remedy pursuant to R.C. 2329.45). *See also Keybank Nat’l Assoc. v. Mazer Corp.*, 188 Ohio App.3d 278, 290, 2010-Ohio-1508, ¶ 54 (2d Dist. Ct. App.) (“A party who cannot afford the requisite supersedeas bond, or who is otherwise unable to obtain a stay of the offending judgment—perhaps, as in th[is] case, because the party loses the race between the appellant’s attempt to obtain a stay and the appellee’s attempt to reduce its judgment to money, does not thereby lose the right to appeal.”).

Finally, Ms. Lewis mentions that her statutory right to redeem the property from the sale terminates upon confirmation. Motion at 4.² While that is true, it is irrelevant to whether confirmation would deprive this Court of the power to reverse the underlying foreclosure judgment. *See CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶¶ 26-30 (statutory right to redeem property is not hampered by an earlier appeal from the foreclosure judgment).

The Trial Court has jurisdiction to confirm the sale. *State ex rel. Klein*, 6 Ohio St.3d at 4. *Chase Manhattan Mortg. Corp.*, 2005-Ohio-4627, ¶¶ 26-29. This appeal proceeds even if the

² The Motion states that “the right of redemption” terminates upon confirmation. Motion at 4. To be clear, *equitable* redemption was foreclosed when Ms. Lewis did not make a redemption payment within five days of the October 31, 2012, final judgment entry and decree of foreclosure. The *statutory* right of redemption under R.C. 2329.33 may be exercised prior to confirmation.

Trial Court confirms the sale over Ms. Lewis’s objection. R.C. 2329.45; *U.S. Bank Nat’l Assoc.*, 2011-Ohio-5284, ¶¶ 14-24. A stay is unnecessary.

C. At A Minimum, Ms. Lewis Should Post A Bond.

Even if a stay were warranted, a bond is required by statute. R.C. 2505.09 vests judgment creditors with a statutory right to a bond. It provides:

Except as provided in section 2050.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal *does not* operate as a stay of execution *until* a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, *and* a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and *in a sum that is not less* than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken.

R.C. 2505.09 (emphasis added). Thus, the General Assembly has instructed that in order to stop the appellee’s enjoyment and enforcement of its judgment rights, the appellant must (1) obtain a stay of execution, and (2) post a bond that is not less than the value of the claims covered by the judgment. *Id.* While certain appeals are exempt from these statutory requirements, *see* R.C. 2505.12, this appeal is not one of them.

A few courts of appeal have held that Appellate Rule 7(B)—which states that a court of appeals “may” condition a stay upon the filing of a bond—trumps the statute’s mandatory bond requirement, thereby enabling courts to freeze a party’s judgment rights without requiring any bond at all. *E.g. U.S. Bank, Nat’l Assoc. v. Perdeau*, 6th Dist. Lucas App. No. L-13-1226, 2014-Ohio-155, ¶ 4 (relying upon either the “exception” clause at the beginning of R.C. 2505.09 or Article IV Section 5(B) of the Ohio Constitution, which provides that laws in conflict with court

rules on procedure shall have no further force and effect after the rules have taken effect). There are two problems with relying upon these cases.

First, at least by the terms of the Appellate Rules, Rule 7(B) does not appear to apply in this Court. App.R. 1 (“These rules govern procedure in appeals to courts of appeals *from the trial courts of record in Ohio.*”) (emphasis added). *See also* App.R. 7(B) (“Relief available *in the court of appeals under this rule* may be conditioned upon the filing of a bond or other appropriate security in the trial court.”) (emphasis added). Even if the Appellate Rule 7(B) could be interpreted as being intended to overcome the General Assembly’s bond mandate, the Rule does not apply here.

Second, even if there was an applicable court rule that was intended to trump the statutory bond requirement, interpreting and applying the rule to deny an appellee of its substantive rights (even if temporarily) would violate the Ohio Constitution. Article IV, Section 5(B) of the Ohio Constitution provides that court rules “shall not abridge, enlarge, or modify any substantive right.” Denying an appellee its judgment rights (even if only while an appeal is pending) without security is not merely a matter of “practice and procedure” under Article IV, Section 5(B) of Ohio’s Constitution which could take precedence over a conflicting statute. Instead, a stay abridges the substantive judgment right itself by preventing it from being enforced or enjoyed. Moreover, R.C. 2505.09 creates a separate substantive right to a bond as security if the appellee’s judgment rights are to be suspended. It would be unconstitutional to apply Appellate Rule 7(B), or any other court rule, as enabling the abridgement or modification of a party’s substantive judgment or bond rights. A bond is necessary.

The Trial Court and the Court of Appeals have both held that the Trust is entitled to foreclose, the Trust was the successful bidder at the sale, and a stay will deprive the Trust of

realizing recovery sooner, rather than later. The Trust loses the ability to realize benefits in the form of rents or sale proceeds while a stay is in place. There is no dispute that Ms. Lewis has not been paying the debt secured by the mortgage, yet she continues to reside in the property while the Trust is denied its substantive rights.

R.C. 2505.09 provides that the minimum amount of the bond should be the total of all claims covered by the judgment. Here, that amount is at least \$125,683.50 plus interest at 7% per annum from and after April 1, 2010. The Motion argues that the property still deeded in Ms. Lewis's name and in her possession and some unsubstantiated "insurance proceeds" should be sufficient security for a stay. Motion at 6. But the purpose of a bond is to provide substitute security for that which the judgment creditor is denied due to the stay, as well as to protect against risks associated with the property and to compensate for costs associated with the property while it is being tied up by a stay. A stay disrupts the status quo by depriving the Trust of enforcing its judgment rights to realize recovery and minimize its costs and risks. If a stay is ordered at all, it should be conditioned upon a bond for at least \$125,683.50 plus interest at 7% per annum from and after April 1, 2010.

IV. Conclusion.

The Motion to stay should have been filed in and considered by the Trial Court. A stay is not necessary to preserve this Court's power to reverse the judgment, and a bond should be required if a stay is granted. The Trust respectfully requests that the Court deny the Motion or, alternatively, condition any stay upon the posting of a supersedeas bond in the amount of \$125,683.50 plus interest at 7% per annum from and after April 1, 2010.

Respectfully submitted,

/s John B. Kopf

John B. Kopf (0075060)

Counsel of Record

Scott A. King (0037582)

Terry W. Posey, Jr. (0078292)

THOMPSON HINE LLP

41 South High Street, 17th Floor

Columbus, Ohio 43215

(614) 469-3200

(614) 469-4743 (direct)

(614) 469-3361 (fax)

john.kopf@thompsonhine.com

scott.king@thompsonhine.com

terry.posey@thompsonhine.com

Counsel for SRMOF 2009-1 Trust

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2015, I served a copy of the foregoing Appellee's Memorandum in Opposition to Motion for Stay by ordinary U.S. Mail, postage prepaid, upon Andrew M. Engel, Esq., Kendo, Alexander, Cooper & Engle LLP, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, counsel for Defendant-Appellee Shari Lewis.

/s John B. Kopf _____
John B. Kopf (0075060)

786890.2