

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

ROMAN PLUMBING COMPANY,	:	O P I N I O N
d.b.a. ROMAN PLUMBING AND	:	
EXCAVATING,	:	CASE NO. 2010-P-0069
Plaintiff-Appellant,	:	
- vs -	:	
ALEKSEY CHEREVKO, et al.,	:	
Defendants,	:	
FARM CREDIT SERVICES OF	:	
MID-AMERICA, FLCA,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2008 CV 0207.

Judgment: Affirmed.

Rex Wayne Miller, Lesh, Casner & Miller, 606 Belden Whipple Building, 4150 Belden Village Street, N.W., Canton, OH 44718 (For Plaintiff-Appellant).

Gregory F. Locke, Nordstrom & Locke, 34 West Second Street, P.O. Box 366, Ashland, OH 44805 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Roman Plumbing Co., appeals the judgment of the Portage County Court of Common Pleas, granting defendant-appellee, Farm Credit Services of Mid-America, FLCA, first priority in the distribution of the proceeds of the sheriff sale of the premises of defendants, Aleksey and Nadezhda Cherevko. For the following reasons, we affirm the decision of the court below.

{¶2} On January 25, 2008, Roman Plumbing filed a Complaint for Foreclosure against the Cherevkos, Farm Credit Services, the Portage County Treasurer, Keen Well & Pump, Inc., Straightline Drywall, Inc., Alside Supply Center, and FCEM Land, Ltd. Roman Plumbing alleged that Aleksey Cherevko had contracted with it to provide labor and materials for the construction of a residence at 3258 Alexander Road, Randolph Township (Atwater), Ohio. Roman Plumbing performed its obligations under the contract between April 21, 2006, and October 20, 2006. The Cherevkos failed to pay Roman Plumbing \$17,027.50 for the work performed. On November 9, 2006, Roman Plumbing filed an Affidavit to Obtain Mechanic's Lien with the Portage County Recorder. Accordingly, Roman Plumbing sought the foreclosure of its mechanic's lien.

{¶3} On December 3, 2008, the trial court entered a Judgment Entry of Foreclosure, finding that Roman Plumbing had a valid mechanic's lien in the amount of \$17,027.50, and ordering the premises to be foreclosed and sold.

{¶4} On February 23, 2009, the property was sold for \$140,400.00, with net proceeds of \$127,373.32. The Confirmation Entry, filed on July 30, 2009, acknowledged Farm Credit Services as holding an open-end mortgage on the property, recorded on April 17, 2006, in the amount of \$152,894.00.

{¶5} On August 5, 2009, Farm Credit Services filed a Motion and Memorandum in Support of Payment of Funds, seeking an order for the clerk of courts to disburse the net proceeds from the sale of the Cherevko property, by virtue of its first mortgage lien as of the date of sale in the amount of \$128,666.28.

{¶6} On October 19, 2009, Roman Plumbing filed a Motion for Award of Attorney Fees, pursuant to R.C. 1311.16. On this date, Keen Well & Pump dismissed its claim without prejudice.

{¶7} On November 3, 2009, and January 20, 2010, hearings were held on Farm Credit Services' Motion for Payment of Funds before a magistrate of the common pleas court.

{¶8} On June 18, 2010, the magistrate filed his Order and Journal Entry with Findings of Fact and Conclusions of Law. The magistrate's decision provides, in relevant part, as follows:

{¶9} Farm Credit is a federally chartered corporation which makes loans to farmers and loans for [the] construction of homes in rural areas. Defendants Aleksey *** and Nadezhda Cherevko *** obtained a loan from Farm Credit amounting to \$152,894.00. The proceeds of the loan were to be used for construction of the Cherevkos' residence. Aleksey served as the Cherevkos' contractor under a company name of "C.O.A. Construction."

{¶10} To secure the loan, Farm Credit took a mortgage on the premises. This mortgage was filed for record on April 17, 2006. The mortgage identified Farm Credit as the mortgagee and provided its proper address. The mortgage specifically stated that the loan proceeds were to be paid out by Farm Credit as provided by R.C. 1311.14.

{¶11} The other contract documents between Farm Credit and the Cherevkos, including the "Basic Membership and Lending Relationship Agreement" and "Construction Agreement," fleshed out in detail the relationship between the parties. Farm Credit required that the loan funds be used solely for the construction of the residence. The contract documents explicitly stated that Farm Credit was "obligated to disburse such proceeds any time a request by the [the Cherevkos] is in conformance with the terms of this Agreement." Farm

Credit was contractually obligated to disburse the loan proceeds as certain portions of the work were completed. Prior to disbursement of loan funds, Aleksey had to provide affidavits to Farm Credit certifying that subcontractors had been paid. But before payment was made the construction project was inspected by Farm Credit to verify that work had actually been done. In the event that Aleksey wrongfully refused to pay a subcontractor for its work, Farm Credit was permitted to pay it.

{¶12} Aleksey hired various subcontractors to perform work on and provide material to the construction project. Roman Plumbing was one of these subcontractors. Roman Plumbing began work on April 21, 2006. Aleksey filed fraudulent affidavits with Farm Credit claiming to have paid Roman Plumbing, when payment had not been made. After Farm Credit received Aleksey's affidavits and its inspector visited the construction site and found that the improvements had been completed, the funds were then disbursed to the Cherevkos as required by the contract documents and consistent with R.C. 1311.14.

{¶13} After the Cherevkos failed to pay Roman Plumbing for its work, on November 11, 2006, a mechanic's lien was filed against the project. Roman Plumbing did not notify Farm Credit of its lien.

{¶14} Farm Credit's final disbursement of construction loan funds to the Cherevkos was on February 27, 2007.

{¶15} ***

{¶16} Farm Credit's mortgage lien was first filed. The mortgage and contract documents between Farm Credit and the Cherevkos required obligatory disbursements of loan funds. Farm Credit substantially complied with the requirements of R.C. 1311.14. Thus, Farm Credit's mortgage lien has first priority over the mechanic's lien of Roman Plumbing and the other party lienholders.

{¶17} Additionally, the magistrate found that Roman Plumbing failed to avail itself of the statutory remedy provided in R.C. 1311.14, by not notifying Farm Credit Services that it had not been paid for its work by the Cherevkos.

{¶18} The magistrate denied Roman Plumbing's Motion for Attorney Fees, as it was not the prevailing party.

{¶19} On July 2, 2010, Roman Plumbing filed its Objections to Magistrate Decision.

{¶20} On August 24, 2010, the trial court issued its Order and Journal Entry, adopting the magistrate's decision and affirming Farm Credit Services' first priority in the distribution of proceeds from the sale of the Cherevko property.

{¶21} On August 31, 2010, Roman Plumbing filed its Notice of Appeal.

{¶22} On September 1, 2010, the trial court issued an Order and Journal Entry, ordering the clerk of the common pleas court to pay Farm Credit Services the balance of the proceeds from the foreclosure sale in the amount of \$127,373.32.

{¶23} On September 17, 2010, Roman Plumbing filed an Amended Notice of Appeal to include the trial court's September 1, 2010 Order and Journal Entry. On appeal, Roman Plumbing raises the following assignments of error:

{¶24} "[1.] The trial court judgment holding that all [Farm Credit Services] disbursements were obligatory is contrary to law and against the manifest weight of the evidence."

{¶25} "[2.] The trial court judgment holding that [Farm Credit Services] disbursements complied with the requirements of R.C. 1311.14 and were used and applied to construct the Cherevko's [sic] residence is contrary to law and against the manifest weight of the evidence."

{¶26} "[3.] The trial court judgment holding that Roman waived its right to priority over the [Farm Credit Services] mortgage by failing to serve [Farm Credit Services] with a copy of its mechanic's lien is contrary to law."

{¶27} “[4.] The trial court lacked jurisdiction to enter its judgment dated September 1, 2010.”

{¶28} “[5.] The trial court judgment denying an award of attorney fees is contrary to law.”

{¶29} We will first consider Roman Plumbing’s fourth assignment of error, since it is dispositive of the appeal.

{¶30} In the fourth assignment of error, Roman Plumbing argues the trial court was without jurisdiction to issue its September 1, 2010 Order and Journal Entry, ordering the clerk of court to distribute to Farm Credit Services the balance of the proceeds from the foreclosure sale. Roman Plumbing cites the general rule that “the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction.” *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97. Roman Plumbing contends the filing of its Notice of Appeal on August 31, 2010, divested the court of its jurisdiction to order the proceeds disbursed and, thus, such Order should be vacated and Farm Credit Services “ordered to refund such portion of the foreclosure proceeds as appropriate to fund distributions to the mechanic’s lien and court costs.”

{¶31} This court rejected a similar argument in *Triple F. Invest., Inc. v. Pacific Financial Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 Ohio App. LEXIS 2484. In *Triple F*, the appellant argued a trial court was without jurisdiction to enter an order confirming the sale and ordering the distribution of proceeds from the sale of a foreclosed property when the order of foreclosure was pending on appeal. *Id.* at *8.

We held “[t]he mere filing of an appeal does *not* deprive a trial court of its authority to enforce a final judgment.” *Id.* at *11 (emphasis sic) (citations omitted); R.C. 2505.09 (“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”). Thus, “a trial court retains jurisdiction to enforce a final judgment and to initiate any proceedings in support of that judgment unless a valid stay order and supersedeas bond have been posted.” *Id.* at *12 (citations omitted).

{¶32} Similarly, in *Atlantic Mtge. & Invest. Corp. v. Sayers*, 11th Dist. No. 2000-A-0081, 2002-Ohio-844, this court held that “[i]f an appellant neglects to obtain a stay of the judgment, the nonappealing party has the right to attempt to obtain satisfaction of the judgment even though the appeal is pending.” *Id.* at ¶6, citing *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 785. “When a nonappealing party is successful in obtaining a satisfaction of the judgment, ‘the appeal must be dismissed because the issues in the appeal have become moot.’” *Id.*

{¶33} This position is consistent with that of the Ohio Supreme Court, which has held “the mere filing of a notice of appeal from the order *** *does not divest the *** court of jurisdiction to enforce an interlocutory or final order pending appeal unless the party is granted a stay of execution of the order.*” *State ex rel. State Fire Marshall v. Curl*, 87 Ohio St.3d 568, 570, 2000-Ohio-248 (emphasis sic), citing *Oatey v. Oatey* (1992), 83 Ohio App.3d 251, 257.

{¶34} In *Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225, this court dismissed as moot an appeal regarding the validity of a lien interest in real property, where the subject property had been sold and the proceeds distributed. *Id.* at ¶21, citing *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶16. Other courts have held the same in similar situations. E.g. *Villas at the Pointe of Settlers Walk Condominium Assn., Inc. v. Coffman Dev. Co., Inc.*, 12th Dist No. CA2009-12-165, 2010-Ohio-2822, at ¶18 (“the sale and distribution of funds has rendered the matter extinguished through satisfaction of the judgment, and like unpeeling the apple, this court cannot afford relief to the parties in the action”); *Capitol Communications, Inc. v. GBS Corp.*, 10th Dist. Nos. 10AP-08 and 10AP-09, 2010-Ohio-5964, at ¶14 (where the dispute involved priority to escrowed funds, the distribution of the funds rendered the matter moot).

{¶35} Accordingly, Roman Plumbing’s fourth assignment of error is without merit and the remaining assignments of error are overruled as moot.

{¶36} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is affirmed with respect to the September 1, 2010 Order disbursing the proceeds of the sheriff sale. The other assignments of error are overruled as moot. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.