[Cite as *Bank One v. DWT Realty, Inc.*, 2006-Ohio-7271.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BANK ONE, N.A. PLAINTIFF-APPELLEE VS. DWT REALTY, INC., et al. DEFENDANTS-APPELLANTS	)))))))))	CASE NO. 04 MA 206 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 02 CV 3251
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Jerry M. Bryan Henderson, Covington, Messenger, Newman & Thomas Co., L.P.A. 34 Federal Plaza West, Suite 600 Youngstown, Ohio 44503
For Defendants-Appellants:	Donald and Patricia Macejko, Pro-se 6952 Killdeer Drive Canfield, Ohio 44406 Atty. Bruce M. Broyles 219 Brainard Drive Boardman, Ohio 44512
JUDGES: Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: May 23, 2006

[Cite as *Bank One v. DWT Realty, Inc.*, 2006-Ohio-7271.]
WAITE, J.

{¶1} Appellants have filed an appeal of a judgment of the Mahoning County Court of Common Pleas denying a motion to vacate the sale of goods on execution. Appellants had previously defaulted on a promissory note issued by Appellee Bank One, N.A. The note contained a confession of judgment. Appellee attempted to partially satisfy the note by executing a forced sale of two automobiles owned by two of the defendants. Appellants contend that they were not given notice of the execution sale and that the sale was not properly advertised pursuant to R.C. §2329.13(A)(1)(a). Appellee contends that Appellants were in default for failure to make an appearance in this case, and thus, have no right to protest the lack of notice or lack of proper advertisement. The record reflects that Appellants did make an appearance in this case by filing an answer, but that they specifically waived all errors in the proceedings as part of their answer and by agreeing to certain waiver provisions in the note itself. In addition, Appellants have not alleged or demonstrated any prejudice because of the purported errors in the sale proceedings. Due to Appellants' waivers and their failure to allege or show prejudice, the judgment of the trial court is affirmed.

PROCEDURAL HISTORY

{¶2} On October 17, 2002, Appellee filed a complaint for judgment on a defaulted promissory note in the amount of $436,250.30. The note was issued to DWT Realty, Inc., and was signed by Mary Ann Barnett, as president; Donald W. Macejko, as vice president; and Patricia A. Macejko, as secretary/treasurer. The three individuals also signed separate "commercial guaranty" forms.

{¶3} The promissory note contained a confession of judgment provision (a.k.a., cognovit judgment) that reads as follows:

{¶4} "WARNING - BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE."

{¶5} On October 17, 2002, Appellants filed an answer to the complaint. They waived the issuance and service of process, and confessed judgment in favor of Appellee. The answer also stated that, "I do hereby waive and release all errors in said proceedings, petitions in error and the right of appeal from the judgment rendered."

{¶6} Also dated October 17, 2002, is the trial court's judgment entry granting Appellee's complaint against DWT Realty, Inc., and against the three individual defendants as guaranties on the note.

{¶7} On October 20, 2003, the trial court issued orders for the defendants to appear in person to testify concerning property that would be subject to execution.

{¶8} On December 16, 2003, the court filed a show cause contempt order against Mary Ann Barnett for failure to appear for the examination of her property.

{¶9} On February 9, 2004, further orders were issued for the defendants to appear for an examination of their property.

{¶10} On April 16, 2004, Appellee filed praecipes for writ of execution on vehicles owned by all three individual defendants. The vehicles included a 1999 Saab owned by Mary Ann Barnett and a 2003 Dodge Caravan owned by Patricia Macejko. On June 2, 2004, Mary Ann Barnett and Patricia Macejko filed requests for a hearing to determine if the property was exempt from execution. A magistrate's hearing was held, and on June 11, 2004, the magistrate determined that the 2003 Dodge Caravan was subject to execution, except for a $1000 statutory exemption. The trial court adopted the magistrate's decision on July 8, 2004, and subsequently denied Patricia Macejko's untimely objection to the magistrate's decision.

{¶11} On August 5, 2004, Appellants filed a motion to vacate the sale of goods on execution. The motion alleged that writs of execution had been issued on May 14, 2004; that the vehicles were seized by the sheriff on June 1, 2004; and that the vehicles were sold at private auction on July 7, 2004. Appellants argued that they were not served with actual notice of the sale; that the sale was not advertised in a newspaper pursuant to statute; that the property was sold before the trial court had ruled on a pending motion concerning the property; and that no appraisal was done.

{¶12} On August 27, 2004, the trial court overruled Appellants' motion to vacate.

{¶13} On September 9, 2004, Appellee filed a motion for order of confirmation and distribution. The motion alleged that on July 21, 2004, the 1999 Saab had sold for $10,700 and the 2003 Dodge Caravan had sold for $7,400.

{¶14} On September 10, 2004, Appellants filed an appeal of the August 27, 2004, judgment entry.

{¶15} On September 17, 2004, the trial court filed its order of confirmation and distribution.

{¶16} On September 21, 2004, Appellants filed a stay of execution with the trial court. There is no record that the trial court ruled on this motion, and no similar motion was filed in this Court.

{¶17} This appeal was voluntarily dismissed on February 10, 2005, due to a settlement agreement, but was reinstated on March 17, 2005, after disputes over settlement arose.

{¶18} On April 7, 2005, a notice was filed indicating that Appellant Mary Ann Barnett had died.

{¶19} On April 22, 2005, notice was filed that Appellant Donald Walter Macejko had filed for bankruptcy in United States Bankruptcy Court of the Southern District of Florida. A notice of bankruptcy termination was filed on January 17, 2006.

{¶20} On May 3, 2005, this Court filed a journal entry granting the personal representative of Mary Ann Barnett thirty days to file a notice of substitution of party. No notice has been filed. Mary Ann Barnett is dismissed as a party to this appeal because the personal representative of the decedent's estate has neither appeared in

this action, nor has otherwise notified this Court of any intent to further pursue the appeal on behalf of the decedent's estate.

ASSIGNMENT OF ERROR

{¶21} "The Trial Court erred in failing to vacate the sale of goods on execution."

{¶22} Appellants raise three subissues in this appeal. The first and second subissues are related. Appellants argue that R.C. §2329.13 required Appellee to serve a written notice upon Appellants of the date, time and place of the sale of the vehicles, and required Appellee to file a copy of the notice with the clerk of courts. Appellants contend that these procedural requirements were not performed, and that the sale should be vacated. Appellants' third argument is that the confession of judgment contained in the promissory note does not act as a waiver of the right to notice in subsequent enforcement proceedings.

{¶23} R.C. §2329.13(A)(1)(a) states:

{¶24} "(A) Goods and chattels levied upon by virtue of an execution of a court of record shall not be sold until both of the following occur:

{¶25} "(1)(a) Except as otherwise provided in division (A)(1)(b) of this section, the judgment creditor who seeks the sale of the goods and chattels or the judgment creditor's attorney does both of the following:

{¶26} "(i) Causes a written notice of the date, time, and place of the sale to be served in accordance with divisions (A) and (B) of Civil Rule 5 upon the judgment debtor and upon each other party to the action in which the judgment giving rise to the execution was rendered;

{¶27} "(ii) At least three calendar days prior to the date of the sale, files with the clerk of the court that rendered the judgment giving rise to the execution a copy of the written notice described in division (A)(1)(a)(i) of this section with proof of service endorsed on the copy in the form described in division (D) of Civil Rule 5."

{¶28} R.C. §2329.13(A)(2)(a) states:

{¶29} "(2)(a) Subject to division (A)(2)(b) of this section, the officer who levies upon the goods and chattels gives public notice of the date, time, and place of the sale for at least ten days before the day of sale by advertisement in a newspaper published in and of general circulation in the county. The court ordering the sale may designate in the order of sale the newspaper in which this public notice shall be published."

{¶30} Appellants contend, and Appellee does not appear to dispute, that no notice was given of the sale, that no notice was filed with the clerk of courts, and that no notice was published in a local newspaper ten days prior to the sale, which took place on July 21, 2004. Appellee does present three rebuttal arguments that explain why Appellants should not be granted relief in this appeal even though the notice requirements of R.C. §2329.13(A) were not met.

{¶31} Appellee first argues that Appellants did not file an appeal of the final appealable order in this case. It is axiomatic that this Court only has jurisdiction to review final appealable orders as defined by R.C. §2505.02. *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037, ¶17; *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus. Appellee contends that the judgment that was appealed was an interlocutory order. Appellee argues that the order of

confirmation and distribution constitutes the final appealable order when goods are sold in execution of a prior judgment, and that Appellants' appeal was filed before the confirmation order was issued. Appellee contends that Appellants were required to file an appeal of confirmation and distribution order, and that no such appeal was ever made.

{¶32} Appellee is partially correct. As stated by the Second District Court of Appeals:

{¶33} "[A]n order confirming a sale is a final order and appealable. Confirmation is part of the sale proceedings, and such proceedings are special proceedings to enforce a judgment or decree. Further, as to the appellant property owner, the right to retain ownership of his property is clearly a substantial right, and it is the confirmation order which operates to divest him of that right." *Citizens Loan & Sav. Co. v. Stone* (1965), 1 Ohio App.2d 551, 552-553, 206 N.E.2d 17; accord, *Metropolitan Bank Trust Co. v. Roth*, 9th Dist. No. 21174, 2003-Ohio-1138; see also, *Rak-Ree Enterprises, Inc. v. Timmons* (1995), 101 Ohio App.3d 12, 19, 654 N.E.2d 1310 (Fourth District); *RCR Services, Inc. v. Ceranowski* (Jan. 16, 1992), 10th Dist. No. 91AP-450.

{¶34} The interlocutory nature of the order that was actually appealed in this case is further evidenced by the wording of R.C. §2329.13(B):

{¶35} "(B)(1) A sale of goods and chattels levied upon by virtue of an execution of a court of record may be set aside in accordance with division (B)(2) of this section.

{¶36} "(2) Subject to divisions (B)(3) and (4) of this section, all sales of goods and chattels levied upon by virtue of an execution of a court of record that are made without compliance with the written notice requirements of division (A)(1)(a) of this section and the public notice requirements of division (A)(2) of this section shall be set aside, on motion, by the court to which the execution is returnable.

{¶37} "(3) Proof of service endorsed upon a copy of the written notice required by division (A)(1)(a) of this section shall be conclusive evidence of the service of the written notice in compliance with the requirements of that division, unless, prior to the confirmation of the sale of the goods and chattels as described in division (B)(4) of this section, a party files a motion to set aside the sale pursuant to division (B)(1) of this section and establishes by a preponderance of the evidence that the proof of service is fraudulent.

{¶38} *"(4) If the court to which the execution is returnable enters its order confirming the sale of the goods and chattels, the order has both of the following effects:*

{¶39} "(a) The order shall be deemed to constitute a judicial finding as follows:

{¶40} "(i) That the sale of the goods and chattels complied with the written notice requirements of division (A)(1)(a) of this section and the public notice requirements of division (A)(2) of this section, or that compliance of that nature did not occur but the failure to give a written notice to a party entitled to notice under division (A)(1)(a) of this section has not prejudiced that party;

{¶41} "(ii) That all parties entitled to notice under division (A)(1)(a) of this section received adequate notice of the date, time, and place of the sale of the goods and chattels.

{¶42} *"(b) The order bars the filing of any further motions to set aside the sale of the goods and chattels.*" (Emphasis added.)

{¶43} As stated in the statute, once the trial court enters its order of confirmation and distribution, no further motions to set aside the sale may be filed. The clear implication is that, prior to the order of confirmation, a party may file a motion to set aside the sale. Thus, until the order of confirmation is filed, the sale and the process leading up to the sale are not final and can be changed by the court.

{¶44} Although Appellee is correct as to which order is final and appealable in this case, the appeal will not be dismissed. Normally a premature appeal is treated as being filed immediately after the entry of judgment of the final appealable order. App.R. 4(C). Appellants filed their premature appeal on September 10, 2004. The order of confirmation was filed by the trial court only one week later, on September 17, 2004. This is not a case where the final appealable order does not exist. Appellants have simply failed to properly reference the final appealable order in their notice of appeal. Therefore, we will treat the appeal as if it were timely filed on September 17, 2004.

{¶45} Appellee's second argument is that, despite the lack of notice of the sale, Appellants have not alleged any prejudice. Appellee contends that a showing of prejudice is required in order to set aside the sale due to lack of notice. Appellee is

correct that, generally, errors occurring in the trial court that are not prejudicial to the rights of the parties cannot be grounds for reversing a final judgment. See Civ.R. 61. R.C. §2329.13(B)(4) also appears to imply that an execution sale should not be overturned due to lack of notice if no prejudice has resulted. R.C. §2329.13(B)(4) states:

{¶46} "(4) If the court to which the execution is returnable enters its order confirming the sale of the goods and chattels, *the order has both of the following effects*:

{¶47} "(a) *The order shall be deemed to constitute a judicial finding as follows*:

{¶48} "(i) *That the sale of the goods and chattels complied with the written notice requirements* of division (A)(1)(a) of this section and the public notice requirements of division (A)(2) of this section, *or that compliance of that nature did not occur but the failure to give a written notice to a party entitled to notice under division (A)(1)(a) of this section has not prejudiced that party*;" (Emphasis added.)

{¶49} If the confirmation order acts as an implicit finding by the trial court that no prejudice resulted from the lack of notice, then it would seem that prejudice, or the harmless error rule, is part of the statutory framework for overturning an execution sale due to lack of notice. *Weithman Bros., Inc. v. Harmon*, 3rd Dist. No. 3-05-05, 2005-Ohio-3239. Since the confirmation order is the final appealable order in this case, and since any attempt to overturn the confirmation order must also challenge the trial court's implicit finding that no prejudice occurred, Appellants were required to explain and demonstrate how they were prejudiced by the lack of notice. Appellants did not

allege prejudice, nor did they submit a reply brief in response to Appellee's argument concerning the prejudice requirement. Thus, there has been no allegation or showing of prejudice, and there is no basis for nullifying the sale.

{¶50} Appellee's third argument is that Appellants waived any right to notice because they were in default for failing to appear. Appellee relies on R.C. §2329.13(A)(1)(b), which states:

{¶51} "(b) Service of the written notice described in division (A)(1)(a)(i) of this section is not required to be made upon any party who is in default for failure to appear in the action in which the judgment giving rise to the execution was rendered."

{¶52} Appellants argue that they were not in default pursuant to R.C. §2329.13(A)(1)(b) because they filed an answer in this case. Appellants are correct. The phrase "in default for failure to appear" is a common procedural phrase and appears in various procedural rules, including Civ.R. 5 and 58. "An appearance involves some presentation to the court. The most common form of appearance is a pleading responsive to the merits of the claim asserted. However, even pleadings that do not respond to the merits of the claim may suffice. Thus, a motion for an extension of time within which to respond has been held to be an appearance * * *." *Miamisburg Motel v. Huntington Natl. Bank* (1993), 88 Ohio App.3d 117, 131, 623 N.E.2d 163. In this case, Appellants filed an answer to the complaint, and thus, have clearly made an appearance in the action.

{¶53} Appellee also seems to argue, though, that the wording of the confession of judgment, as well as the wording of the admission contained in Appellants' answer

to the complaint, constitute waivers of the notice requirements found in R.C. §2329.13. Appellee is on firmer ground here. Appellants' answer to the complaint specifically stated that, "I do hereby waive and release all errors in said proceedings * * *." This waiver is above and beyond the waiver already contained in the promissory note itself, which stated, "BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL * * *." These waivers are not a result of statutory language or due to a statutory default, but rather, are waivers that the Appellants voluntarily accepted. Appellants are theoretically correct that not every confession of judgment in a promissory note necessarily constitutes a waiver of the notice requirements of R.C. §2329.13. Nevertheless, a promissory note is a contract containing a promise to repay a certain sum in a certain time period, and it is the language of the particular contract at hand--rather than conjectural provisions in theoretical contracts--that determines the intent of the parties. *Commercial Credit Co. v. Bishop* (1927), 34 Ohio App. 217, 225, 170 N.E. 658. In this case, the cognovit clause clearly contains a waiver of notice. Appellants further waived their rights by the very terms of their answer to the complaint. Appellants were not required to include a waiver of procedural errors in their answer, but specifically added such a waiver. Therefore, due to the specific language of the cognovit clause, and due to the further waivers in Appellants' answer to the complaint, we find no reversible error in Appellee's failure to satisfy the notice requirements of R.C. §2329.13.

{¶54} In conclusion, we determine that Appellants have filed a timely appeal in this matter. Appellants' notice of appeal was premature, but is deemed to have been

filed immediately after the issuance of the September 17, 2004, confirmation order. We hereby overrule Appellants' sole assignment of error because there has been no allegation or proof of prejudice, and because Appellants waived the right to challenge procedural errors, including errors regarding notice, by agreeing to the cognovit provision in the promissory note and by filing a responsive pleading that contained a waiver of procedural errors. Accordingly, the judgment of the Mahoning County Court of Common Pleas is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.