

FILED
COMMON PLEAS COURT
DARKE COUNTY OHIO

2009 SEP 29 PM 1 42

CINDY FINE
CLERK

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

WELLS FARGO BANK, N.A.	:	CASE NO. 09-CV-00301
Plaintiff,	:	
vs.	:	
LEROY E. YOUNG, et. al.	:	Nunc Pro Tunc*
Defendants.	:	Plaintiff's Motion for Default Judgment; Revised Decision and Entry: Ordering Conveyance Without Judicial Sale

This matter came before the Court following the Plaintiff's request for a default judgment pursuant to Civil Rule 55. An evidentiary hearing was conducted on September 15, 2009. Counsel for the Plaintiff appeared. Defendant owners, Leroy and Marta Young, are in default for an answer or appearance; Defendants failed to appear or to contest the proposed remedy. On August 13, 2009, the Court provided a notice to all parties to show cause why the property herein should not be transferred back to Plaintiff without a judicial sale. The Court expressed its intention to cause the transfer by court-appointed Commissioner's Deed instead of a judicial sale conducted by the Sheriff. Objections by Plaintiff were initially prohibited as untimely, but argument was heard by counsel on many related cases, including 09-CV-00270, which objections are incorporated herein.

* to correct typographical errors on pages 8 and 9 as underlined.

Case Facts

In this case, the Plaintiff is the mortgage holder and possesses a first lien on the property, subject to the statutory priority of real estate taxes and assessments. There is no present attempt between the owners and mortgage holder to re-negotiate the debt. No short sale is pending or anticipated. The titled owners have not objected to conveyance without judicial sale; they are in default.

The Court further finds that the allegations contained in the Plaintiff's Complaint, as supported by the pleadings herein, are true and that Plaintiff is entitled to a judgment on the promissory note which is the subject of this matter in the amount of \$75,740.44 plus accrued interest from February 1, 2009 at 3.75% per annum, plus any advancements for taxes, insurance of protection of the property. The Court finds that the mortgage described herein, as recorded in Official Record Volume 362, Page 779, has been broken and the Plaintiff is entitled to have the equity of redemption foreclosed. The Court finds that the mortgage described herein is the first and best lien on the premises except for the interest of the Darke County Treasurer for any unpaid taxes and assessments.

Legal Analysis

The motion for default judgment and supporting affidavit provides an adequate statement of the facts herein. The evidentiary hearing herein on September 15, 2009 provided an overview of the current state of foreclosure litigation in Ohio, including the circumstances of this case. In short, there is no shortage of foreclosure litigation. [The Court casts no aspersions on any party, there having been an abundance of both irresponsible lending and borrowing in the recent past.] While each case is unique on its own facts, there are many commonalities within these cases, including Defendant owners and lien holders who default for appearance or answer

On August 13, 2009 on pages three and four of its decision, the Court set forth reasons for implementing the use of a Commissioner's Deed to convey title under the certain circumstances described herein. Based upon the testimony presented and the Clerk of Court's affidavit filed on August 13, 2009, such reasons are incorporated herein. For the following reasons, the objections of the Plaintiff are overruled.¹

First, a foreclosure proceeding is an equitable proceeding, *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204. This conclusion is supported by the Plaintiff's prayer which asks for other equitable relief that may be necessary. The use of equitable authority is commonly invoked by mortgage lenders for various reasons, including gaining pre-judgment entrance to the property, to insulate or otherwise prevent deterioration, to evict squatters, etc. Clearly, the Court - and litigants -- are not constrained by statutory procedures. The authority to convey by Commissioner's deed is within the equitable powers of the Court and is widely recognized by the common law.

Second, all necessary procedural due process requirements have been satisfied. When a party fails to appear in a foreclosure matter after receipt of service of process, their rights can be extinguished without further notice or due process. See *Fifth Third Bank v. NCS Mtg. Lending Co.*, 2006-Ohio-571. In this case, the Defendant owners have been served with summons and a copy of the complaint. They are in default for answer or appearance. And while the Plaintiff has not prayed for conveyance by Commissioner, the Court has provided adequate notice to all parties of its proposed remedy. Fulfillment of such procedural due process authorizes the Court to proceed with equitable remedies. See *Galt Alloys, Inc v. KeyBank Natl.*

¹Concerns by counsel that Commissioner's Deeds will occur in all foreclosures are misplaced. Instead, conveyance where all defendants are in default appears prudent. Sale by the Sheriff under Chapter 2329 appears appropriate where Defendants defend in order to determine lien priorities, distribution of sale proceeds, etc

Assn (1999), 85 Ohio St.3d 353. With procedural due process having been satisfied, the Court concludes that it is within its legal and equitable authority to implement remedies provided such remedies are fair.

The Plaintiffs assert that (1) appraisal, (2) publication and (3) notice of sale are substantive rights. However, such argument is only custom and not legally required. Appraisal under R.C. 2329.20 is only required where the Court orders a sale. Also, the notice of sale requirement is expressly required only when a sale is ordered [R.C. 2329.26(A)] and then negated against any party who is in default. See R.C. 2329.26(A)(1)(b) which provides that "service of written notice * * * is not required to be made upon any party who is in default for failure to appear..." Otherwise, service pursuant to the Civil Rules would be necessary after appraisal, which certainly is not the daily practice with real estate sales today.

Third, the Court finds that the Plaintiff has not provided any objections which convince the Court that conveyance of title by Commissioner's deed is fundamentally unfair or unlawful. Provisions of R.C. 2329 (including appraisal, publication and notice of sale prior to transfer by Sheriff's Deed) are not stated as the exclusive methods for foreclosures. Admittedly, these procedures have been historically and commonly employed, but a reading of the statute does not list them as exhaustive. In fact, recent changes to R.C. Chapters 2327 and 2329 by Sub. H.B. 139, effective September 11, 2008, did not indicate any exclusivity of remedy by compliance with Chapter 2329. For example, R.C. 2327.02 expressly allows transfers of property without sale as a means of executing upon a judgment:

(C) In the case of foreclosures of real property, including foreclosures for taxes, mortgages, judgment liens, and other valid liens, the description of the property, the order of sale, **order to transfer**, and any deed or deed forms may be prepared, adopted, and otherwise approved in advance by the court having jurisdiction or the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code, directly

commanding the sheriff to sell, convey, or deliver possession of the property as commanded in that order. In those cases, the clerk shall journalize the order and deliver that writ or order to the sheriff for execution. If the property is sold under an order of sale or transferred under an order to transfer, the officer who conducted the sale or made the transfer of the property shall collect the recording fee and any associated costs to cover the recording from the purchaser or transferee at the time of the sale or transfer and, following confirmation of the sale or transfer and the payment of the balance due on the purchase price of the property, shall execute and record the deed conveying title to the property to the purchaser or transferee. For purposes of recording that deed, by placement of a bid or making a statement of interest by any party ultimately awarded the property, the purchaser or transferee thereby appoints the officer who makes the sale or is charged with executing and delivering the deed as agent for that purchaser or transferee for the sole purpose of accepting delivery of the deed. [Emphasis added]

While foreclosure sales conducted by the Sheriff may be a more customary or common way to accomplish execution of a judgment, it is not the sole means to accomplish such execution.

The Plaintiff cites R.C. 2323.07 for the proposition that foreclosure sales must be accomplished by fulfilling provisions in R.C. 2329. However, R.C. 2323.07 was adopted to establish that judgment liens are general liens, and that such general liens are entitled to be collected in the same manner as a specific (mortgage) lien. See *Feinstein v. Rogers* (1981), 2 Ohio App. 3d 96, which held:

“R.C. 2329.02 is intended to create a specific lien upon the lands and tenements of the judgment debtor within the county at the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of judgment. The lien applies specifically to all such property identified as belonging to the debtor at the time of the filing of the certificate and may be enforced as a specific lien pursuant to R.C. 2323.07 by a foreclosure action.

Further, *Feinstein v. Rogers, supra.* at 98, clearly indicates that the remedies provided in Chapter 2323 and Chapter 2329 are alternative remedies.

“The Revised Code provides two alternative methods of enforcing a judgment. The first method is to foreclose directly upon the real property of the debtor located in the county where the certificate of judgment is filed based upon the specific lien thereby acquired and R.C. 2323.07. The second method is to levy execution upon the property of the debtor pursuant to R.C. Chapter 2329. Neither method is intended to be exclusive.

R.C. 2323.07 should not be misconstrued as a statement that the exclusive remedy to assert mortgage rights is by foreclosure sale.

Fourth, the Court finds that considerations of third parties who are not joined in the litigation are not ripe for adjudication. While opposing a conveyance by Commissioner’s Deed, the Plaintiff argues that the Court interferes with its re-insurance contract² between the Plaintiff and either a private mortgage re-insurance company or a government mortgage guarantee agency. While there may be economic considerations regarding re-insurance agreements between the Plaintiff and a third-party, it was clear from legal arguments and witness testimony that contracts outside the record are not for the Court to interpret – nor should they be argued by parties.

Fifth, the Court concludes that there are no violations of the Ohio Marketable Title Act or the Ohio Marketable Title Standards as promulgated by the Real Property Committee of the Ohio State Bar Association. The Court heard the testimony of Kenton L. Kuehne, Esq. Mr. Kuehne expressed his opinion that a “cloud” on the title would occur if appraisal, publication and notice procedures of R.C. 2329 were not followed. However, he also agreed that no duty is owed by any party – or the Court for that matter - to any defendant in default for appearance or answer. Ergo, once judgment is granted as requested under Civil Rule 55, the

² An industry practice has been to insure mortgage loans for default whereby the insurer (private mortgage insurance company or federal government program) guarantees to pay any deficiency in the event the note should not be paid. These practices often require consent by the insurer to any acceptance by the lender of a deed in lieu of foreclosure – the consent of which is often difficult to obtain in a reasonably timely manner.

Plaintiff may proceed as it wishes. This conclusion is consistent with the holding of the Ohio Supreme Court in its syllabus in *Galt Alloys, Inc. v. KeyBank Natl. Assn.*, *supra.*:

"1. Due process requires that persons whose property interests are jeopardized by the filing of legal proceedings be given notice reasonably calculated, under all the circumstances, to apprise those persons of the pendency of the action and afford them an opportunity to present their objections. (*Mullane v. Cent. Hanover Bank & Trust Co.* [1950], 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, followed.)

"3. Where a party to a foreclosure proceeding has been served with process in compliance with the Civil Rules and has thereby been provided an opportunity to answer and appear to protect his or her interests in connection with a foreclosure sale, but has neither answered nor appeared, due process does not require that the party be given additional specific notice of the date, time, and place of the sheriff's sale.

However, Mr. Kuchnle's opinion that a cloud appears on the title apparently did not consider the express provisions of R.C. 2327.02 which permit transfers of real estate by means other than sale. While his practice standard of being overly protective was appreciated by the Court, the Court disagrees with his opinion when Defendants fail to defend claims against them.

This Court is aware of the concern posed on behalf of real estate title insurance companies (eg. Ohio Bar Title Insurance Co., First American Title Insurance Co., Republic Title Insurance Co.) that conveyance by Commissioner's Decd in a foreclosure case is a unique remedy that *may* cause such companies to defend claims regarding marketability of title. However, the Court also is aware that marketable title standards clearly recognize the forfeiture of rights by parties where the parties' fail to defend or appear. [See standards and comments set forth under O.S.B.A. Title Standards 6.1 and 9.1 through 9.5 which rely on proper service of process – with the apparent opinion that failures to defend or appear after service does not cause marketability problems.] The Court concludes that, when a Plaintiff provides minimum

procedural due process by notice to opposing parties, the failure of opposing parties to assert their claims will result in their forfeiture of any rights, including rights under Chapter 2329. The rights of parties in default are declared to be non-existent when judgment is granted against them; no marketable title "clouds" are created. [The court declines to accept Plaintiff's contention that procedural rights under Chapter 2329 to appraisal, publication and notice of sale become, in essence, substantive rights for a party who is in default in a foreclosure case. If the Court were to agree with Plaintiff that substantive rights are involved, the Court would be required to ignore the plain language allowing transfer of realty as found in R.C. 2327.02 (C) This Court concludes that, provided service of process is properly obtained over a party pursuant to Civil Rule 4 at commencement of the action, no additional substantive rights are created merely because of the custom of using Chapter 2329 to effect a public sale.

Further, while familiarity with legal customs may help title insurance companies comprehend risk, their abandonment of other legal principles should not occur, including their reliance on Civil Rule 55 regarding default judgments and R.C. 2325.03, which provides as follows:

"The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack; nor shall the title to property that is sold before judgment under an attachment be affected by the proceeding or attack. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.

"This section does not apply if in the proceeding resulting in the judgment or order sought to be vacated, modified, or set aside, the person then holding the title in question was not lawfully served with process or notice, as required by the law or Civil Rules applicable to the proceeding.

Civil Rule 55, R.C. 2325.03 and R.C. 2327.02(C) ameliorate concerns by title insurance companies – and other purchasers – that “clouds” will affect marketable title if conveyance occurs by Commissioner’s Deed where Defendants in a foreclosure are in default for appearance or answer.

Sixth, the Commissioner’s deed is not a voluntary conveyance like a deed in lieu of foreclosure. While the Plaintiff is correct in its conclusion that the Court cannot order the voluntary conveyance by deed between the mortgagor and the mortgagee since such conveyance requires both voluntary conveyance and voluntary acceptance, the conveyance by Commissioner’s Deed is not conditioned upon the agreement by either party to accept this method of conveyance.³ To require agreed acceptance by the creditor would, in effect, allow a party to an action to dictate the Court’s decision and vacate the provisions of R.C. 2327.02(C). Such “veto authority” does not exist in a foreclosure case. The use of a court ordered conveyance by Commissioner Deed is a memorialization of the Court ordered conveyance of title – in the same manner as a Sheriff’s Deed is a memorialization of the Court ordered conveyance of title caused by a Sheriff.

The Court’s conclusion is consistent with counsel’s agreement during the hearing that a “sale” is not the same as a “conveyance” or “transfer.” Provisions in Chapter 2329.33 regarding legal process express apply when a sale is ordered; such provisions are not required when a Commissioner’s Deed is ordered. See also R.C. 2327.02. So long as the Court provides the titled owner with a right to assert the owner’s equity of redemption within three days [a substantive right guaranteed to an owner regardless of any default], and so long as the Court

³ The Court notes the testimony of Kenton L. Kuehnle, Esq. that no marketable title “cloud” occurs where the Plaintiff and all defendants in a foreclosure action agree to conveyance by Commissioner’s Deed in lieu of the procedural requirements of Chapter 2329

approves the Commissioner's Report following compliance with the Order of conveyance, other "sale" requirements of Chapter 2329 are not applicable.

Conclusion

The Court determines that the procedures of appraisal, publication and notice of sale as found in Chapter 2329 of the Revised Code are not mandated in foreclosure cases, since judicially ordered sales under said Chapter are not the exclusive remedy in a foreclosure.

The Court determines that, where all defendants in a foreclosure action are properly served with notice, and where such defendants are in default for answer or appearance, conveyance of title to real estate by Commissioner's Deed is permissible and does not create any marketable title problems.

IT IS THEREFORE ORDERED AND DECREED that conveyance by Commissioner's deed is ordered. Judgment for the Plaintiff is awarded in the amount of \$75,740.44 plus interest from February 1, 2009 at 3.75% per annum. The right to petition the Court for a deficiency judgment after any subsequent sale of the property is preserved.

IT IS FURTHER ORDERED AND DECREED that, unless the owner of the realty exercises the equity of redemption within three (3) days hereafter, the Court will cause an Order to issue to convey the realty involved herein to Plaintiff by and through the Court's appointed Commissioner according to the Court's instructions herein, who shall report proceedings to the Court upon completion. Such conveyance by Commissioner Deed shall be free and clear of the claims of all parties herein.

IT IS FURTHER ORDERED AND DECREED that the Commissioner shall convey said realty free and clear of all liens identified herein, including cancellation of the Plaintiff's mortgage, with satisfaction of any other liens listed herein as to the subject real estate,

with payment of all taxes due and owing to the Darke County Treasurer, and with payment of all court costs incurred and conveyances fees and expenses. The Commissioner is not charged with any duty to examine title to the real estate, but instead shall rely on the evidence of title provided by the Plaintiff herein. [Notation of such limitation shall be included in the Commissioner's Deed.] The Commissioner shall cause cancellation and/or certificates of cancellations to be filed with Clerk of Courts and Recorder for cancellation of any and all mortgages and liens as the same pertain to the realty described herein. [R.C. 2329.36.]

IT IS FURTHER ORDERED AND DECREED that Margaret B. Hayes, Esq is appointed Commissioner to complete the Court-ordered conveyance herein, and such Commissioner is authorized to prepare and execute all documents necessary to convey title, cancel the Plaintiff's mortgage lien, prepare any partial releases and cancellations, and prepare all documents necessary to convey title to the Plaintiff. The Commissioner shall receive fees from Plaintiff in the sum of \$450.00, payable within 15 days hereafter.

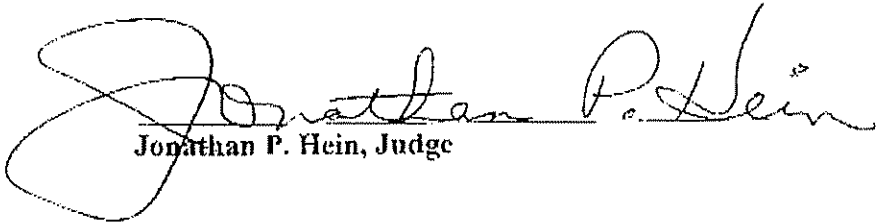
IT IS FURTHER ORDERED AND DECREED that, within 15 days after itemized request by the Commissioner to Plaintiff's counsel, that Plaintiff shall advance all funds necessary to convey title herein, including court costs, release and conveyance fees, recording fees, real estate taxes, and other necessary expenses as itemized by the Commissioner.

IT IS FURTHER ORDERED AND DECREED that the Commissioner shall prepare and file herein a Final Report of compliance with this Order as confirmation of the conveyance and compliance with this Order.

IT IS FURTHER ORDERED AND DECREED, following recording of the Commissioner's deed herein, that title to the realty shall be quieted against the Defendant and the Plaintiff is subrogated to all rights of the parties herein for the protection of title to the realty, and

that Plaintiff shall be entitled to possession of the realty, and any buildings thereon, and that a Writ of Possession shall issue compelling delivery of possession to Plaintiff.

All claims having been adjudicated, this Entry is a FINAL APPEALABLE ORDER. Costs to the Defendant owner.



Jonathan P. Hein, Judge

cc: Douglas Mackinnon / Rick DeBlasis, Attorneys for Plaintiff (via fax to each)
Leroy / Marta Young, 514 Washington Ave., Greenville, OH 45331
Margaret B. Hayes, 127 W. Fifth Street, Greenville, OH 45331 (via fax)

jph/ foreclosure/4c deny objections post bfg