

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

NEW RESIDENTIAL MORTGAGE LLC,	:	
Appellant,	:	CASE NO. CA2020-04-027
	:	
- vs -	:	<u>OPINION</u>
	:	12/28/2020
	:	
SARA L. BARNES, et al.,	:	
Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 19CV092563

Reimer Law Co., Mike L. Wiery, Katherine D. Carpenter, 30455 Solon Road, Solon, Ohio 44139, for appellant

Kaufman & Florence, Mark Florence, 144 East Mulberry Street, P.O. Box 280, Lebanon, Ohio 45036, for appellee Heritage Building Group, LLC

HENDRICKSON, P.J.

{¶1} Appellant, New Residential Mortgage LLC ("NRM"), appeals from a decision of the Warren County Court of Common Pleas denying its motion to set aside a sheriff's sale of real property sold to appellee, Heritage Building Group, LLC ("Heritage"). For the reasons set forth below, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶2} On August 30, 2007, Sara L. Barnes and Jesse L. Oliver executed a promissory note in favor of Guardian Savings Bank in the amount of \$136,000 for the purchase of real property located at 3864 Townsley Drive in Loveland, Ohio. The promissory note called for monthly payments for a period of 30 years, with interest accumulating on the principal amount at a yearly rate of 7.375 percent. The promissory note was secured by a mortgage on the property giving the mortgagee-bank, its successors and assigns the first and best lien on the property. The note and mortgage were eventually assigned to NRM.

{¶3} In 2013, Barnes and Oliver received a Chapter 7 bankruptcy discharge. In April 2018, Barnes and Oliver entered into a loan modification agreement. The terms of the loan modification agreement provided that as of April 1, 2018, the new principal balance of the note was \$139,464.10, which was to be paid over 40 years with a yearly interest rate of 3.875 percent. Barnes and Oliver failed to make payments under the terms of the loan modification agreement, and on August 28, 2019, NRM filed an in rem foreclosure action. In its complaint, NRM alleged that the sum of \$138,228.98 plus interest at the rate of 3.875 percent per annum from February 1, 2019 was due and owed. Neither Barnes nor Oliver filed an answer or otherwise appeared in the action and default judgment was granted to NRM on November 27, 2019.

{¶4} On January 8, 2020, NRM filed a praecipe for an order of sale. Subsequently, on January 27, 2020, NRM filed a Notice of Sale in which NRM stated that sale of the property would take place "on February 10, 2020 at 8:30 A.M. in the Grand Jury Room, Warren County Common Pleas Courthouse, 500 Justice Drive, Lebanon, Ohio 45036." This Notice of Sale was not signed by the trial court.

{¶5} Around the same time that NRM filed its Notice of Sale, the Warren County Sheriff's Office published on its official website information regarding sheriff's sales,

informing the public that sheriff's sales were moving online as of February 10, 2020. The notice specifically provided as follows:

Effective February 10, 2020, the Warren County Sheriff's Office will conduct the sale of all real estate subject to foreclosure on the "Official Public Sheriff's Sale Website" which is operated by RealAuction based on a contract with the Ohio Department of Administrative Services. The process under which these sales will be completed is detailed at the Warren County RealAuction website (<https://warren.sheriffsaleauction.ohio.gov>). All prospective bidders should familiarize themselves with this new process.

(Emphasis added). The website then set forth "key points" interested buyers should be aware of, including that:

1. *Any person wanting to bid on a property offered by the Warren County Sheriff's Office must register with RealAuction. Registration includes completion of the Purchaser Information Form.*
2. Properties will be open for bid at least seven days prior to the date of sale. This is generally known as a proxy bid.
3. *Unless otherwise advertised, we will continue auctions every other Monday at 8:30 a.m. Eastern Time (EST). Auctions will be conducted for each individual property; however, only one property will be sold at a time. After a property is sold, the next scheduled property sale will begin.*
4. To qualify as a participant, bidders must submit a deposit based on the total deposit requirement (\$2000/ \$5000/ \$10,000 set by law) for any properties by the predefined deadlines. The only acceptable deposit types are bank wire transfers or ACH – no cash deposits will be accepted. All Wire Deposits must be received by 5 p.m. EST two (2) business days before the auction sale date. All ACH Deposits must be initiated by 4 p.m. EST five (5) business days before the auction sale date. It is the bidder's responsibility to allow enough time for their bidding deposits to be received and processed within the time frames described above.
5. Plaintiff/Judgment Creditors – A Judgment Creditor is defined as the creditors (plaintiff or defendants) who are awarded judgment in the foreclosure case. *Judgment Creditors are required to register for a Username and Password and fill in all appropriate fields. Per Ohio Revised Code 2329.211, in every*

*action of Judicial Sale or Execution of residential property, if the Judgment Creditor is the purchaser, they shall not be required to make a deposit on the sale. However, Judgment Creditors are required to submit the bidding style choice (pre-sale manage bid or live bid) AND a copy of the court order stating they are the Judgment Creditor on the case they are bidding to RealAuction Customer Service * * * at least one (1) business day prior to the sale date. Submission can be done via email or fax. Submission must include the bidder number and user account contact first and last name in the submission. * * **

(Emphasis added.)

{¶6} Notice of the sheriff's sale of the Townsley Drive property was published in a newspaper on January 26, 2020, February 2, 2020, and February 9, 2020. The published notice provided that the sale would be "online @ <https://warren.sheriffsaleauction.ohio.gov> on **Monday, February 10, 2020 at 9:00 o'clock A.M.**" and that the appraised value of the property was \$150,000. (Bold emphasis sic.)

{¶7} Despite the published notice that the sale would occur online, Angelica Nelson, counsel for NRM, arranged for local counsel to appear in person in order to bid on the property on behalf of NRM. When local counsel appeared for the sale in the Grand Jury Room and discovered that the sale would be online, local counsel contacted Nelson. Nelson attempted to submit an online bid for the property. However, as Nelson did not have sufficient time to register NRM as a judgment creditor exempt from the deposit requirement, NRM's bid was rejected as lacking the required deposit. The minimum bid of \$100,000 submitted by Heritage was accepted for purchase of the Townsley Drive property.

{¶8} Eight days later, on February 18, 2020, NRM moved to set aside the sale of the property, claiming it intended to place a bid at the February 10, 2020 sheriff's sale but was unable to do so due to a mistaken belief that the sale was to be held in-person, rather than online. NRM supported its motion with an affidavit from Nelson, who averred that (1) she monitored the court's docket and the sheriff's website for a sale date for the property,

(2) she discovered the property was listed to be sold on February 10, 2020, (3) the listing indicated the sale date but did not state that the sheriff's sale was to be conducted online, (4) neither she nor anyone from her office received notice that Warren County sheriff's sales had been moved to an online platform, despite the fact that she has had several communications with the Warren County Sheriff's Office about previous sales over the past 10 years, (5) she had received "bidding instructions from [NRM] * * * to bid to an amount significantly in excess of the minimum/opening bid," (6) local counsel hired to attend the in-person sale of the property advised her via a phone call that the sale was being conducted online, and (7) "[i]mmediately upon learning this information, [she] logged online and attempted to enter a bid on behalf of [NRM] on the property * * * [but her] bidding efforts were rejected as there had not been enough time to link the bid so that the online system would know that it was coming from the Judgment Creditor."

{¶9} On February 27, 2020, Heritage appeared in the action and filed a memorandum opposing NRM's motion to set aside the sale. Attached to Heritage's memorandum in opposition was the affidavit of Aaron T. Hoyt, the Clerical Specialist for the Warren County Sheriff's Department who is in charge of implementing and facilitating the county's sheriff's sales. In his affidavit, Hoyt averred that on January 27, 2020, the Warren County Sheriff's Department published on the official public sheriff's sale website the "Notice of Online Sheriff's Sales," which provided that effective February 10, 2020, all sheriff's sales would be held online. The notice has been published continuously on the website since January 27, 2020. Hoyt further attested that the "last time that Sheriff's Sales were held in the Warren County Grand Jury Room was on March 8, 2017." After March 8, 2017, the sheriff's sales occurred in the Warren County Court until they moved online on February 10, 2020. Hoyt's affidavit further states that the notice of the sheriff's sale of the

Townsley Drive property was published in a newspaper, and that the notice specifically stated the sale would be "online."

{¶10} Hoyt's affidavit indicates that four bids were made on the Townsley Drive property on February 10, 2020. Ross made a bid in the amount of \$100,100, Hoyle made a bid in the amount of \$100,100, NRM bid \$130,500, and Heritage bid \$100,000. Hoyt stated that the "bids attempted to be made by Ross, Hoyle, and [NRM] did not comply with the requirement of depositing money with the Sheriff's Department * * * [and the] only successful bid was by Heritage." Due to the successful bid by Heritage, the Warren County Sheriff's Department prepared and filed the real estate judicial sale purchaser information form with the clerk of courts on February 11, 2020.

{¶11} NRM moved to strike Heritage's memorandum in opposition to its motion to set aside the sheriff's sale on the basis that Heritage was not a party to the case, had not been granted leave to intervene in the case, and had no interest in the Townsley Drive property as the sale had yet to be confirmed. On March 23, 2020, the trial court issued a decision denying NRM's motion to set aside the sale, finding that

[t]he location of the Sheriff's Sales were changed prior to the February 10, 2020 sale and some effort was made on the part of the Sheriff's Office to notify the parties of this change. Simply because [NRM's] counsel was mistaken regarding the location of the sale does not constitute such excusable neglect as to set aside what was presumably a lawfully held Sheriff's Sale. [NRM's] argument that the Notice of Sale in this case did not mention online sales is unpersuasive as [NRM's] counsel prepared the Notice of Sale and actually listed a location of the sale that has not been utilized in some time.

The trial court did not, however, expressly rule on NRM's motion to strike Heritage's memorandum in opposition to its motion to set aside the sheriff's sale.

{¶12} NRM timely appealed, raising two assignments of error for review.

{¶13} Assignment of Error No. 1:

{¶14} THE TRIAL COURT ERRED BY FAILING TO REQUIRE NON-PARTY HERITAGE BUILDING GROUP, LLC TO FIRST SEEK LEAVE OF COURT TO INTERVENE IN THE TRIAL COURT BEFORE CONSIDERING THEIR MEMORANDA IN OPPOSITION TO NEW RESIDENTIAL MORTGAGE LLC'S MOTION TO SET ASIDE SALE.

{¶15} In its first assignment of error, NRM contends the trial court erred by not striking Heritage's memorandum in opposition to NRM's motion to set aside as Heritage was not a party to the action and did not seek leave to intervene in accordance with Civ.R. 24.

{¶16} The trial court did not expressly rule on NRM's motion to strike Heritage's memorandum in opposition to its motion to set aside the sheriff's sale before denying the motion to set aside. When a trial court fails to rule on a motion, an appellate court considers the motion denied. *Bank of Am., N.A. v. Singh*, 12th Dist. Butler No. CA2012-07-146, 2013-Ohio-1305, ¶ 23; *Takacs v. Baldwin*, 106 Ohio App.3d 196, 209 (6th Dist.1995). An appellate court reviews a trial court's decision granting or denying a motion to strike under an abuse-of-discretion standard of review. *Allgeier v. Allgeier*, 12th Dist. Clinton No. CA2009-12-019, 2010-Ohio-5313, ¶ 11. An abuse of discretion is more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Id.*

{¶17} In *Bayview Loan Servicing, LLC v. Griffen*, 12th Dist. Warren No. CA2020-02-013, 2020-Ohio-6666, a recently decided case, this court had the opportunity to consider whether the purchaser of property at a sheriff's sale, prior to judicial confirmation of the sale, was permitted to participate in trial court proceedings without filing a motion to intervene. We held that

[a]lthough it appears [the purchaser] would not have had

standing to appeal "regarding the granting or denying of confirmation of said sale," *Bank of N.Y. v. Rains*, 12th Dist. Butler No. CA2012-04-092, 2013-Ohio-2389, ¶ 27, citing *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 55 (1990), once [the purchaser] became the successful bidder of the property at the sheriff's sale, [the purchaser] did have standing to appear and participate in the proceedings before the trial court to protect [its] newly acquired interest in the property. This holds true despite the fact that [the purchaser] did not first move the trial court to allow [it] to intervene in the case. See, e.g., *Treasurer v. Kafele*, 10th Dist. Franklin No. 05AP-252, 2005-Ohio-6618, ¶ 8 ("once [the buyer] became the successful bidder at sheriff's sale, he had standing to appear in the trial court and to move to protect his acquired interest in the property, although better practice may have been to move to intervene prior to doing so").

Griffen at ¶ 15. See also *Mid-Am. Natl. Bank v. Heiges*, 6th Dist. Ottawa No. 94OT025, 1994 WL 645780, *2 (Nov. 18, 1994) (noting that "[a]lthough lacking vested title and property rights prior to confirmation of the sale, a purchaser at a foreclosure sale is a party to the accompanying court proceedings").

{¶18} Accordingly, pursuant to our holding in *Griffen*, Heritage was not required to file a motion to intervene prior to appearing in the case and filing its memorandum in opposition to NRM's motion to set aside. The trial court was entitled to consider Heritage's memorandum in opposition and the affidavit attached in support of the memorandum in ruling on NRM's motion to set aside the sheriff's sale. The trial court, therefore, did not abuse its discretion in denying NRM's motion to strike, and NRM's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} THE TRIAL COURT ERRED BY APPLYING AN EXCUSABLE NEGLIGENCE STANDARD INSTEAD OF THE DOCTRINE OF MISTAKE WHEN DECIDING APPELLANT'S MOTION TO SET ASIDE [THE] SHERIFF'S SALE AND BY DECLINING

APPELLANT'S MOTION TO SET ASIDE [THE] SALE WHEN JUST CAUSE EXISTS TO SET ASIDE SAID SALE.

{¶21} "[T]he question of whether to confirm or set aside a judicial sale is a matter within the sound discretion of the trial court." *Am. Sav. & Loan Assn. v. Taylor*, 12th Dist. Butler No. CA85-02-015, 1985 WL 7691, *1 (July 31, 1985). See also *Wells Fargo Bank, N.A. v. Fortner*, 2d Dist. Montgomery 26010, 2014-Ohio-2212, ¶ 8. "A decision constitutes an abuse of discretion when the trial court acted unreasonably, arbitrarily, or unconscionably." *Wells Fargo Bank v. Maxfield*, 12th Dist. Butler No. CA2016-05-089, 2016-Ohio-8102, ¶ 32, citing *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶ 9.

{¶22} A trial court's exercise of discretion "must be bottomed upon the factual situations surrounding each sale." *Taylor* at *1, quoting *Merkle v. Merkle*, 116 Ohio App. 370, 372 (4th Dist.1961) Factors a court may consider in determining whether or not to set aside a sale include (1) the difference between what the property sold for at a judicial sale and the amount of mortgage indebtedness; (2) the timeliness of the motion to set aside; and (3) the likelihood of a higher bid if the sale is set aside. *Id.* at *2; *Chase Manhattan Mtge. Corp. v. Koan*, 6th Dist. Huron No. H-02-011, 2002-Ohio-6182, ¶ 18.

{¶23} NRM argues that the trial court abused its discretion in denying its motion to set aside the sheriff's sale on the ground of mistake. NRM contends that it was mistaken and acted under an erroneous conviction of fact when it sent local counsel to the Warren County Grand Jury Room on February 10, 2020 to make an in-person bid on the Townsley Drive property. NRM argues that under this court's prior decisions in *Taylor*, 1985 WL 7691, and *Kissell v. Lane*, 12th Dist. Warren No. CA85-04-017, 1985 WL 7746 (Sept. 30, 1985), the trial court should have granted its motion to set aside the sale. We agree.

{¶24} In *Taylor*, counsel for the mortgagee-judgment creditor appeared at a sheriff's sale with instructions to submit a bid on the foreclosed property at a maximum amount sufficient to cover the balance due on the mortgage, taxes in arrears, and estimated court costs. *Taylor* at *1. Counsel for the mortgagee submitted an opening bid of \$14,000, which was the minimum permissible bid. *Id.* While making notations relevant to a previous transaction, counsel for the mortgagee did not hear another party place a bid in the amount of \$14,100. *Id.* The sale was then closed, with the mortgagee's counsel believing he had made the only bid on the property. *Id.* Upon learning that the property had been sold to another bidder for \$14,100, counsel asked the deputy to rescind the sale. *Id.* The deputy refused to do so. *Id.* The next day, the mortgagee's counsel filed a motion to set aside the sale on the grounds of mistake and inadvertence. *Id.* The trial court denied the motion, confirmed the sale, and the mortgagee appealed. *Id.*

{¶25} On appeal, this court reversed the trial court's denial of the motion to set aside the sale, observing that the "primary object of judicial sales is to raise the money due the creditor, * * * not to allow the property to be sacrificed at a price significantly below its market value." *Id.* at *2. We noted that "the equities of the situation dictate[d] that the doctrine of mistake should be applied and the sale vacated" as the mortgagee's counsel promptly brought the mistake to the attention of the deputy and court and permitting the sale at \$14,100 would have resulted in an \$8,000 loss to the mortgagee-judgment creditor, as the mortgagee could not recover from the mortgagor who had filed for bankruptcy. *Id.* We therefore found the trial court abused its discretion in denying the judgment creditor's motion to set aside the sale. *Id.*

{¶26} In *Kissell*, the attorney for the mortgagee-judgment creditor failed to attend the sheriff's sale and bid on the foreclosed property due to a mistake as to the sale date. *Kissell*, 1985 WL 7746 at *1. The attorney for the mortgagee claimed he never received a

copy of the legal notice of sale and was advised by an employee of the sheriff's office that the sale would occur on January 18, 1985. *Id.* However, the property was offered for sale and was sold on January 14, 1985. *Id.* The winning bidder placed the minimum bid of two-thirds the appraised value. *Id.* Upon learning on January 18, 1985 that the property had been sold, counsel for the mortgagee immediately moved to set aside the sale. *Id.* at *1-2. The trial court granted the motion to set aside the sale and the winning bidder appealed. *Id.* at *2. We upheld the trial court's decision to set aside the sale, noting that "if the original sale to [the winning bidder] for two-thirds of the appraised value were to stand, the mortgagor would be faced with a deficiency judgment in excess of \$21,000 and such would also effectively defeat the purpose of the sale to raise money due the creditor." *Id.*

{¶27} The present case presents facts similar to those in *Taylor* and *Kissell*, and the rationale expressed in those cases applies herein. NRM's counsel, despite the exercise of some diligence in determining when the sheriff's sale was to be held, was unaware that the sheriff's sale for the Townsley Drive property was being held online. The grid listing of sheriff's sales that NRM's counsel viewed on the Sheriff's Office's website did not indicate the scheduled sale was online. The departure from in-person to online sales occurred for the first time in the county on February 10, 2020 – making the Townsley Drive property one of the first properties to be auctioned online. Furthermore, notice of the county's shift from in-person sales to online sales was not posted online until January 26, 2020 – a mere two weeks before the Townsley Drive property was scheduled to be sold online.¹ According to Nelson's affidavit, counsel for NRM did not receive notice from the sheriff's office about the

1. Warren County's shift from in-person sheriff's sales to online sheriff's sales does not explain NRM's counsel's confusion about where the in-person sheriff's sales used to take place, the Warren County Court versus the Grand Jury Room. Nonetheless, as discussed in the body of our opinion, equitable considerations demonstrate that under the facts presented in this case, the doctrine of mistake should be applied and the sheriff's sale set aside.

change in format for the sale and did not see the notice of the online sale on the sheriff's website.

{¶28} Once NRM's counsel learned that the sheriff's sale was being held online, counsel immediately sought to participate by registering with RealAuction and submitting a bid. However, because NRM was not able to register as a judgment creditor, and it did not otherwise have money deposited, its bid was rejected. Heritage's minimum bid of \$100,000 was accepted. The difference between the sale price of the property and the amount due to NRM is in excess of \$38,000. Like the judgment-creditor in *Taylor*, NRM is unable to seek further redress from Barnes and Oliver due to their bankruptcy discharge. NRM moved within eight days of the auction to set aside the sale. Furthermore, based on Nelson's affidavit – and the amount of NRM's rejected bid amount (\$130,500) – it is reasonable to expect a higher bid for the sale of the Townsley Drive property if the sheriff's sale is vacated and another sale is held. As the primary objective of judicial sales is to raise the money due to the creditor, and not to allow the property to be sacrificed at a price significantly below its market value due to the mistake of a party or the party's counsel, we find that the trial court abused its discretion in denying NRM's motion to set aside the sale. *See Taylor; Kissell.*

{¶29} NRM's second assignment of error is therefore sustained. The trial court's decision denying NRM's motion to set aside is hereby reversed and the matter is remanded for the issuance of an order granting NRM's motion to set aside the sheriff' sale and for further proceedings in accordance with law.

{¶30} Judgment affirmed in part, reversed in part and the matter remanded for further proceedings.

RINGLAND and M. POWELL, JJ., concur.

