

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

WELLS FARGO FINANCIAL OHIO 1, INC.

Plaintiff-Appellant

v.

MICHAEL LIEB, et al.

Defendants-Appellees

Appellate Case No. 27390

Trial Court Case No. 2007 CV 02175

(Civil Appeal from the
Common Pleas Court)

DECISION AND FINAL JUDGMENT ENTRY

April 26, 2017

PER CURIAM:

{¶ 1} This matter is before the court for resolution of our show cause order. Wells Fargo Financial Ohio 1, Inc. (“Wells Fargo”) appeals the trial court’s November 21, 2016 Order vacating the order of sale issued by the Clerk of Courts in the underlying foreclosure case. It appeared to this court that the November 21 Order might not be final and appealable, in that it was neither a decree of foreclosure nor a confirmation of sale, the two final orders

that typically arise in foreclosure cases. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 35. We ordered Wells Fargo to show cause why this appeal should not be dismissed for lack of jurisdiction.

{¶ 2} Wells Fargo responded, arguing that the November 21 Order is final and appealable because it is “[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.” R.C. 2505.02(B)(2). Appellees did not file a reply to Wells Fargo’s response.

{¶ 3} The proceedings that lead up to a decree of foreclosure and order of sale are not special proceedings. *Second Nat. Bank of Warren v. Walling*, 7th Dist. Mahoning No. 01-C.A.-62, 2002-Ohio-3852, ¶ 17. “ ‘Once an order of sale and decree of foreclosure is filed, a creditor may file a praecipe for an order directing the sheriff to sell the property. This second phase of the proceedings is viewed as a separate and distinct action seeking enforcement of an order of sale and decree of foreclosure.’ ” *Sky Bank v. Mamone*, 182 Ohio App.3d 323, 2009-Ohio-2265, 912 N.E.2d 668, ¶ 24 (8th Dist.), quoting *Triple F Invests., Inc. v. Pacific Fin. Servs., Inc.*, Portage App. No. 2000-P-0090, 2001 WL 589343 *3 (June 2, 2001). The “ ‘appraisal of the foreclosed property, the sheriff’s sale, and the confirmation of that sale have [all] been described as special proceedings to enforce an order of sale and decree of foreclosure.’ ” *Countrywide Home Loans Servicing v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565, ¶ 6, quoting *Triple F Invests., supra*. We agree that proceedings on an order of sale, which follow the decree of foreclosure and precipitate the sheriff’s sale, are special proceedings. R.C. 2505.02(B)(2).

{¶ 4} The November 21 Order must also affect a substantial right, which is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a

rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). Wells Fargo argues that the November 21 Order denies its right to execute on the foreclosure decree, “forcing Wells Fargo to either re-file this action to again obtain a decree of foreclosure, or to commence proceedings to revive the decree, proceedings which do not apply.” We agree that the right to execute on a foreclosure decree is a substantial right. See, e.g., R.C. 2323.07 (“When a mortgage is foreclosed or a specific lien enforced, a sale of the property * * * shall be ordered by the court”). However, we are not convinced that this right has yet been “affected” within the meaning of the statute.

{¶ 5} “An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993), *holding modified by Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331. In other words, an order affects a substantial right “only if an immediate appeal is necessary to protect the right effectively.” *PNC Bank, N.A. v. Creative Cabinet Sys., Inc.*, 2d Dist. Darke Nos. 2013-CA-14, 2013-CA-15, 2014-Ohio-3264, ¶ 10.

{¶ 6} Here, an Order of Sale was filed and issued to the sheriff on September 26, 2016. The sale was scheduled for December 2, 2016. Dru Lieb asked the court to vacate the order on November 17, 2016, arguing that the foreclosure decree was dormant and that any attempt to execute on it would be a nullity. On November 21, 2016, before Wells Fargo could respond, and before the scheduled sale occurred, the trial court signed the order that was prepared by Dru Lieb and was submitted with the motion to vacate. The November 21 Order provides, in its entirety:

This matter is before the Court on the Motion of the Defendant, Dru

Lieb, by and through counsel, to vacate the Order of Sale issued September 26, 2016, and cancel the Sale presently scheduled for December 2, 2016.

The motion is found to be well-taken and is hereby **GRANTED**.

The Order of Sale is hereby vacated, and the Sale scheduled for December 2, 2016 is cancelled.

IT IS SO ORDERED.

(Emphasis in original.)

{¶ 7} The November 21 Order does not make any specific findings on the matter or conduct any legal analysis of dormancy under the statutes, and, importantly, does not state that an order of sale can never be issued or that the property can never be sold. It does not dismiss the case or advise the parties of their appellate rights, as is common in orders that conclude proceedings. Rather, it appears that the November 21 Order was quickly entered to avoid any additional issues that could arise if the property was sold to enforce a dormant judgment. Wells Fargo has not had the opportunity to make its arguments to the trial court, and the trial court has not evaluated those arguments and entered a substantive decision concluding that Wells Fargo is barred from executing on the foreclosure decree. And, although the November 21 Order cancels “the Sale presently scheduled for December 2, 2016,” it does not say whether another sale can or cannot be scheduled. We do not view the trial court’s order vacating a particular order of sale as “affecting” Wells Fargo’s substantial right to enforce its judgment or foreclosing Wells Fargo from seeking appropriate relief. Under the unique circumstances of this case, we conclude that the November 21 Order is not a final appealable order under R.C. 2505.02(B)(2).

{¶ 8} Wells Fargo cites *Wheeler*, a case pre-dating the current final appealable order

statute, to argue that a trial court order setting aside an order of sale is appealable. *Wheeler v. Lorenz*, 21 Ohio App. 218, 153 N.E. 195 (6th Dist.1926). *Wheeler* is factually and legally distinguishable. It concerned an order setting aside a sheriff's sale, not the order issued to the sheriff to sell the property. It was also decided long before R.C. 2505.02(B) was revised to clarify what orders may be appealed. And, to the extent that it recognized a rule, it was one "carefully and guardedly" recognized and subject to "some exceptions, and some decisions to the contrary." *Id.* at 220. Even if *Wheeler* dealt with the type of order currently before the court, we would find it of limited utility in determining whether the November 21 Order is final and appealable under the statute. We are not persuaded that it is.

{¶ 9} An appellate court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). We conclude that our show cause order is NOT SATISFIED. This matter, Montgomery Appellate Case No. 27390, is therefore DISMISSED.

{¶ 10} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

MICHAEL T. HALL, Presiding Judge

JEFFREY M. WELBAUM, Judge

MICHAEL L. TUCKER, Judge

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