

[Cite as *New York Community Bank v. Proster*, 2018-Ohio-2066.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 105578

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**NEW YORK COMMUNITY BANK**

PLAINTIFF-APPELLEE

vs.

**ALEX PROSTER, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-15-848019

**BEFORE:** Blackmon, P.J., Laster Mays, J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** May 24, 2018  
**FOR APPELLANT**

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PATRICIA ANN BLACKMON, P.J.:

{¶1} Defendant-appellant Alex Proster (“Proster”) appeals from the confirmation of sale in the foreclosure action filed by New York Community Bank (“New York Bank”). Proster’s pro se brief states that he lost his home after he was diagnosed with cancer and became unemployed. He complains that the appraisal issued in this matter was “fabricated,” and contains erroneous information. He also complains that after he attempted a short sale of the property, a “cease and desist order” erroneously prevented New York Bank from communicating directly with him. Finally, he complains that New York Bank’s attorneys improperly ignored bills he submitted to them for payment of utilities and other expenses, and harassed him.

{¶2} Having reviewed the record and relevant law, we affirm.

{¶3} The record indicates that in 1999, Proster purchased a home in Mayfield Heights, and obtained a mortgage and promissory note in the amount of \$77,100. The record also indicates that in 2003, Proster took out a line of credit and second mortgage on the property. By September 2011, New York Bank was the holder of the notes and assignee of the mortgages. The parties modified the terms of the 1999 note to provide for lower step-interest rates to repay the amount then due, \$64,090.

{¶4} New York Bank filed this matter in July 2015, alleging that Proster was in default of payment of the 1999 note, accelerating the balance, \$59,427, plus interest and costs. The record indicates that Proster was served with the complaint at his Mayfield Heights home.

{¶5} In September 2015, New York Bank filed a motion for a default judgment. Several days later, Proster obtained leave of court to file a short, pro se answer in which he asked the court to refer the matter to mediation. Proster appeared for the default hearing and informed the court that he was working on obtaining a loan modification. Several weeks later, the bank filed a motion for summary judgment that was unopposed. In February 2016, the magistrate issued a decision determining that there were no genuine issues of material fact and that New York Bank was entitled to foreclosure of the 1999 note and mortgage as a matter of law. The decision further indicated that New York Bank had advanced various sums including payment of insurance and other expenses that were added to the first mortgage lien. The 2003 second mortgage was also deemed a valid and subsisting lien on the parcel from which New York Bank was entitled to \$42,836, plus interest. Proster did not file objections to the magistrate's report, and it was adopted by the trial court on March 25, 2016. Proster did not appeal the order of foreclosure that was a final order.

{¶6} On April 14, 2016, the property was appraised at \$75,000, and the matter was scheduled for sheriff's sale. In May 2016, Proster filed a motion to stop or cancel the sheriff's sale, alleging that he was attempting to sell the property in a short sale. This motion also set forth a "counterclaim," filed out of rule, demanding \$512,000 in damages due to an erroneous "cease and desist" notice that New York Bank claimed it had received from Proster barring it from communicating directly with Proster for several months. He also complained that correspondence from the bank was erroneously directed to an address in Iowa, rather than his home in Mayfield Heights. He maintained that New York Bank was required to reimburse him for payment of his utility bills and other expenses.

{¶7} In response to Proster's motion, New York Bank filed a motion for an order returning the order of sale without execution so that it could "review the loan for loss mitigation options," and also moved to strike the counterclaim. The court granted these motions, and the sheriff was ordered to return the order of sale without execution.

{¶8} By November 2016, the matter was again set for sheriff's sale to take place in December 2016. Proster filed a second motion to stop or cancel the sheriff's sale in which he listed various disputes with the appraisal and also detailed his ongoing medical treatment. This motion also set forth a counterclaim for \$2,000,000.

{¶9} The property was subsequently sold at sheriff's sale on December 12, 2016 for \$56,000. The court notified the parties that it would entertain a motion for reimbursement of advances under R.C. 5301.233, and notified Proster of his right to redeem the property before confirmation of the sale. In response to this order, Proster filed a motion seeking recovery of expenses for moving, paying rent at a new location, utility bills, and other expenses. In opposition, New York Bank argued that the claimed items were personal expenses outside the

scope of R.C. 5301.233, and were also barred because Proster was not awarded judgment in the case and the property had sold for less than the amount of Proster's unpaid notes and costs. On February 17, 2017, the trial court confirmed the sale. Proster filed a notice of appeal, but did not file a motion for a stay with the trial court. New York Bank subsequently received a total of \$51,494 and a writ of possession in 2017. Proster filed a motion for a stay in this court in 2018, but it was denied under App.R. 7(A) because Proster did not first seek a stay below.

### **Foreclosure**

{¶10} With regard to Proster's statement that he lost his home after he was diagnosed with cancer and lost his job, we note that because Proster failed to pursue an appeal of the February 22, 2016 foreclosure order, any argument pertaining to it is now barred. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 39-40; *Beneficial Ohio, Inc. v. LaQuatra*, 8th Dist. Cuyahoga No. 99860, 2014-Ohio-605, ¶ 5; *Third Fed. S. & L. Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592, 2012-Ohio-5708, ¶ 10-12; *Deutsche Bank Natl. Co. v. Caldwell*, 8th Dist. Cuyahoga No. 100594, 2014-Ohio-2982, ¶ 18.

{¶11} Therefore, these claims can no longer be raised herein, and are barred.

{¶12} Similarly, Proster's challenge to the appraisal and his claims regarding the condition of the home were not raised prior to the sale so they are also barred. *See CitiMortgage, Inc. v. Hoge*, 8th Dist. Cuyahoga No. 98597, 2013-Ohio-698, ¶ 10; *Bank of Am., N.A. v. Allen*, 8th Dist. Cuyahoga No. 105473, 2017-Ohio-7726, ¶ 15.

### **Order Confirming Sale**

{¶13} Proster next argues that the court erred in confirming the sale because he attempted a short sale of the property, after the foreclosure, but a "cease and desist order,"

purportedly in his name, erroneously precluded him from communicating with the bank for a short time.

{¶14} A trial court has discretion to confirm or refuse to confirm a judicial sale. *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990). If the trial court, after examining the proceedings taken by the officers, finds the sale was made in conformance with R.C. 2329.01 to 2329.61, it shall confirm the sale. *Id.*, citing R.C. 2329.31.

{¶15} A short sale is generally understood to mean an agreement by which a mortgage holder allows the homeowner to sell his or her property for less than the amount due on the loan secured by the property. *Wells Fargo Bank, N.A. v. Perkins*, 10th Dist. Franklin No. 10AP-1022, 2011-Ohio-3790, ¶ 21.

{¶16} In *Caldwell*, this court held that the trial court did not abuse its discretion in refusing to delay confirmation of a sale in order for the mortgagor to work out a short sale of the home. 2014-Ohio-2982 at ¶ 11.

{¶17} Similarly, we find no abuse of discretion in this matter. Proster asserted that he signed a listing agreement and had a “few customers to see the home with intentions to buy the property” but the court was not provided with specific information regarding a purchase offer or a price. Further, the court was not made aware of the listing agreement until several months after the foreclosure order was issued and the matter was set for sale. Moreover, insofar as Proster complains that the “Cease and Desist” notice erroneously prevented the bank from communicating with him, and that some of the bank’s correspondence to him was erroneously sent to an address in Iowa, nothing in our record demonstrates any lack of notice of any required notification, pleading, hearing, or court entry to Proster.

{¶18} This claim is therefore without merit.

**R.C. 5301.233**

{¶19} Proster next argues that the trial court erred in failing to award him various sums including moving expenses, rent for a new apartment, and utility bill reimbursement.

{¶20} Under R.C. 2329.31(A), prior to confirming a foreclosure sale, the trial court is required to “carefully examine” the proceedings to determine the legality of the sale “in all respects.” As part of this examination, the trial court must determine whether amounts claimed to have been advanced by the mortgagee for taxes, insurance, property protection, or other items are accurate and properly recoverable by the mortgagee. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 35-36.

{¶21} In relevant part, R.C. 5301.233 provides that “a mortgage may secure unpaid balances of advances made, with respect to the mortgaged premises, for the payment of taxes, assessments, insurance premiums, or costs incurred for the protection of the mortgaged premises, if such mortgage states that it shall secure such unpaid balances.” Such items are a lien upon the premises. *Id.*

{¶22} In this matter, nothing in the parties’ mortgage or note and nothing in R.C. 2329.31 and 5301.233 permit Proster to recover the sums he seeks.

{¶23} Accordingly, this claim is without merit.

**Counterclaim**

{¶24} Proster also asserts that he was entitled to damages over the erroneous “Cease and Desist” notice and due to New York Bank’s harassment and other wrongful actions as alleged in his counterclaim within his motion to stop the sheriff’s sale.

{¶25} Proster’s counterclaim for damages was a “claim \* \* \* against any opposing party, [arising] out of” the foreclosure. Accordingly, it was a compulsory counterclaim that was

required to be asserted within Proster's answer. Civ.R. 13(A). Under Civ.R. 13(F), omitted counterclaims may be filed with leave of court. Here, the counterclaim was filed after and separate from Proster's answer and after the court issued its foreclosure judgment. It was also filed without leave of court. Accordingly, the trial court did not err in failing to grant Proster relief on his counterclaims. *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 61-63 (9th Dist.). Therefore, Proster's assigned error pertaining to the counterclaims lacks merit herein.

{¶26} Judgment is affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR

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