

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Third Federal Savings and Loan Association of Cleveland, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | No. 14AP-902 |
| | : | (C.P.C. No. 12CV-14173) |
| Nelson Strong, III, | : | |
| | : | (REGULAR CALENDAR) |
| Defendant-Appellee, | : | |
| | : | |
| The Huntington National Bank, | : | |
| | : | |
| Defendant-Appellant. | : | |
| | : | |

D E C I S I O N

Rendered on July 28, 2015

Daniel K. Friend, for appellee Nelson Strong, III.

Weltman Weinberg & Reis Co., L.P.A., and *Jack J. Lah*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, The Huntington National Bank ("Huntington"), appeals the October 2, 2014 judgment of the Franklin County Court of Common Pleas disbursing the proceeds from a foreclosure sale to the prior homeowner-mortgagor ahead of Huntington's second mortgage. We reverse the trial court judgment and remand the case to the trial court to hold an evidentiary hearing on Huntington's motion.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On May 18, 1999, Nelson Strong, III, secured payment of a promissory note in the amount of \$140,000 to Third Federal Savings and Loan Association of Cleveland ("Third Federal") with a mortgage on his Fallis Road property. Third Federal recorded the mortgage several days later. On April 15, 2008, Strong secured payment of a line of credit in the amount of \$80,600 to Huntington with a mortgage on the same Fallis Road property. Huntington also recorded the mortgage.

{¶ 3} In 2012, Strong defaulted on his payments due under the note to Third Federal. Third Federal filed a complaint declaring an outstanding debt due on its note totaling \$74,082.91, claiming the first creditor lien on the Fallis Road property and requesting proceeds of a foreclosure sale if Strong did not pay the balance due. In the complaint, Third Federal named as defendants, among others, Strong as the property owner of record and Huntington as a recorded lienholder.¹

{¶ 4} On November 28, 2012, Huntington filed an answer claiming a junior lien on the Fallis Road property and requesting excess proceeds of a foreclosure sale. In the answer, Huntington stated Strong owed \$80,313.73 on the principal sum plus accrued interest and late fees amounting to \$1,633.78. Huntington attached to the answer a copy of the line of credit and the notarized mortgage. Huntington also included a debt collection notice to Strong.

{¶ 5} On March 3, 2013, Third Federal filed a motion for default judgment against Strong and several other defendants who failed to answer the complaint. In response, the trial court issued a judgment entry on March 22, 2013 that "forever barred [each defendant in default] from asserting any right, title or interest in" the Fallis Road property. (Judgment Entry, 1.) The trial court established the Franklin County Treasurer as holder of the first lien and Third Federal as holder of the second lien. The trial court acknowledged Huntington's claim as holder of a lien junior to Third Federal, but:

ma[de] no finding as to the claim * * * or lien * * * except to
note that such claim * * * or lien * * * is hereby ordered

¹ Under R.C. 2329.191(B)(7), a preliminary judicial report is required to be filed by the party seeking the judicial sale and must include, among other items, "the name * * * of each lienholder * * * as shown on the recorded lien of the lienholder." The title report returned Huntington as a holder of a recorded mortgage of the Fallis Road property in the original amount of \$80,600.

transferred to the proceeds derived from the sale of said premises, after the payment of costs [and taxes] and the amount hereinabove found due [Third Federal] and the same is hereby ordered continued until further order of the Court.

(Judgment Entry, 3.) The trial court further ordered that, unless Strong could pay the amount due Third Federal within three days, the equity of redemption of all defendants named in the action on the Fallis Road property would be foreclosed and the premises sold by the sheriff.

{¶ 6} Strong did not pay the amount due Third Federal. A few weeks later, Strong filed a Chapter 7 bankruptcy, which resulted in an automatic stay of the sheriff's sale. However, the bankruptcy court granted Third Federal relief from the automatic stay, and the sheriff's sale of the property resumed on September 20, 2013. Ultimately, a third party purchased the Fallis Road property for \$143,200.

{¶ 7} On October 8, 2013, the trial court issued a judgment entry confirming the sale and ordering distribution of sale proceeds. The trial court satisfied debts owed to the Clerk of Courts, the Sheriff's office, the Franklin County Treasurer, and Third Federal. Additionally, the trial court distributed "[t]o the Clerk of Courts, the balance of the sale proceeds, in the amount of \$49,276.65 to hold pending further Order of [the trial] court." (Confirmation of Sale, 2.) Lastly, the trial court ordered the clerk to cancel every lien or encumbrance affecting the property, including Huntington's mortgage on the property securing its line of credit to Strong.

{¶ 8} On August 8, 2014, Strong filed a motion for further distribution, submitting that, "unless and until timely submission with appropriate evidence be interposed claiming the balance of funds in the hands of the Clerk of this Court, Strong is entitled to those proceeds or any part of those proceeds which remain after a distribution to a more senior lien claimant, if any there be." (Strong's Motion for Further Distribution, 3.) Strong's motion noted that the trial court "specifically reserved on Huntington's claim, other than Ordering that its claim, right, interest, or lien, be transferred to the sale proceeds," and noted that he had been discharged from personal liability on his debts through the bankruptcy proceeding. (Strong's Motion for Further Distribution, 2.)

{¶ 9} On August 27, 2014, Huntington filed a "motion for distribution of excess proceeds and memorandum in opposition to [Strong's] motion for distribution."

(Huntington's Motion for Distribution, 1.) In its motion, Huntington moved the trial court to distribute the remaining excess proceeds and additionally opposed Strong's motion for proceeds. As the basis for its claim to the remaining proceeds, Huntington attached the notarized "open-end" mortgage deed securing the line of credit and a notarized affidavit. The affidavit states:

Now comes Robin Scott, first being duly sworn, deposes and states that he/she is the duly authorized representative for Defendant, The Huntington National Bank, and that among his/her duties is the supervision of the accounts to the Defendant, Nelson W. Strong, III, as evidenced by the Promissory Note secured by the Mortgage which are the subjects of this action.

Affiant further states that the payoff balance due this Defendant through the date of sale of the subject premises of Nelson W. Strong, III is \$86,170.21.

FURTHER AFFIANT SAYETH NAUGHT.

{¶ 10} The affidavit is signed by Ms. Scott over a signature block stating "Robin Scott, Authorized Signer" and "Defendant, The Huntington National Bank." (Huntington Affidavit, 1.) Huntington did not reattach the line of credit agreement that it had previously attached to its answer.

{¶ 11} On October 2, 2014, the trial court ruled on Strong's motion for further distribution. The trial court found that Huntington's motion was "filed out of rule, on August 27, 2014," and Huntington had not submitted an authenticated copy of the promissory note referred to in the affidavit. The court granted Strong's motion and distributed to him the full \$49,276.65 of excess proceeds from the foreclosure sale. (Oct. 2, 2014 Order and Entry, 1.) Huntington filed a motion to reconsider and motion to stay distribution of the sale proceeds. The trial court granted Huntington's motion to stay but denied the motion to reconsider. Huntington proceeded to file a timely appeal with this court.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant assigns four assignments of error for our review:

[1.] The trial court erred in finding that a mortgagor [sic] foreclosing in an *in rem* action on its mortgage must provide an authenticated copy of a promissory note to receive proceeds from the sale of the real property securing the note.

[2.] The trial court erred in awarding excess sale proceeds to a litigant whose interest in said proceeds was previously extinguished by way of a judgment by default.

[3.] The trial court erred in finding it equitable to allow a mortgagee [sic] who obtained a discharge of a debt secured by real property to receive excess sale proceeds ahead of the secured mortgagor [sic] whose right to seek a money judgment had been extinguished by way of the bankruptcy.

[4.] The trial court erred in finding that a motion for distribution of excess proceeds was not opposed where there was a dueling motion contra of record requesting the same relief.

III. DISCUSSION

A. Standard of Review

{¶ 13} A foreclosure action is a civil action in equity. *Wesbanco Bank, Inc. v. Ettayem*, 10th Dist. No. 14AP-452, 2015-Ohio-1230, ¶ 28, citing *Chemical Bank v. Neman*, 52 Ohio St.3d 204, 210 (1990). The standard of review applicable to claims for equitable relief is abuse of discretion. *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 274-75 (1984). An abuse of discretion connotes more than an error of law or judgment; rather, it implies that the court has acted either unreasonably, unconscionably, or arbitrarily. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

B. First and Fourth Assignments of Error

{¶ 14} For ease of discussion, we will address the first and fourth assignments of error together. Under its first assignment of error, Huntington contends because it proceeded in equity on its mortgage lien, rather than a legal claim on the promissory note, that it did not have to provide an authenticated promissory note underlying the lien. Strong contends the evidence attached to the motion was deficient by analogizing the

motion here to cases resolving motions for summary judgment on the issue of standing to foreclose.

{¶ 15} As a preliminary matter, while a mortgagor may, upon demand, have a statutory right to excess proceeds from a foreclosure sale, this right is secondary to the legitimate demands for excess proceeds of mortgagees that held liens on the foreclosed property. R.C. 2329.44; *Franklin Cty. Treasurer v. Kafele*, 10th Dist. No. 05AP-252, 2005-Ohio-6618, ¶ 5; *Stidham v. Wallace*, 12th Dist. No. CA2012-10-022, 2013-Ohio-2640, ¶ 12, fn. 1; *Bankers Trust Co. of California v. Munoz*, 142 Ohio App.3d 103, 110 (8th Dist.2001). In line with this rule, Strong expressly claims only "those proceeds or any part of those proceeds which remain after a distribution to a more senior lien claimant." (Strong's Motion for Further Distribution, 3.) Additionally, both parties agree that, under *Seabrooke v. Garcia*, 7 Ohio App.3d 167, 168 (9th Dist.1982), Strong's discharge of his underlying debt to Huntington in bankruptcy did not affect Huntington's mortgage lien. Therefore, if Huntington provides sufficient evidence to establish its lien and the amount owed prior to the bankruptcy, Huntington would take priority over Strong in the distribution of excess proceeds from the foreclosure sale.

{¶ 16} Where a lienholder submits a motion for distribution of excess proceeds but proper evidence of the secured debt is not in the record, in the interest of equity, an appellate court may remand the matter for the trial court to establish the status of the lien before ordering the distribution. *See Stidham* at ¶ 4, 11, 14; *Natl. City Bank v. Golden Acre Turkeys*, 3d Dist. No. 13-91-20 (July 17, 1992). *See also Munoz; Zumbrink v. Hercules*, 2d Dist. No. 1392 (June 21, 1996). This discretion furthers "the primary purpose and goal of a foreclosure sale: to protect the interests of the mortgagor-debtor * * * and at the same time ensure that secured creditors will receive payment for unpaid debts." *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 56 (1990).

{¶ 17} Several facts here support remand for a hearing on Huntington's motion. Strong does not dispute that he owed Huntington a sum of money on a line of credit secured by the Fallis Road property that exceeds the excess proceeds of sale. Huntington timely appeared in the action and asserted a claim for the excess proceeds in its answer to the foreclosure complaint. Huntington again submitted a claim for excess proceeds prior to distribution. Due to Strong's bankruptcy and the foreclosure of the Fallis Road

property, Huntington now has no other recourse except to potentially receive partial payment on the debt out of the excess proceeds of sale.

{¶ 18} Further, the trial court's disposition of Huntington's motion also supports remand for a hearing. As pointed out in Huntington's fourth assignment of error, the trial court never technically ruled on its motion. It simultaneously found the motion to not be properly before the court while expressing an opinion on its contents. To this point, Huntington contends the trial court improperly disregarded its motion to distribute proceeds as a stand alone claim to the excess proceeds, while Strong argues that Huntington's motion was untimely filed under Loc.R. 21.01 of the Franklin County Court of Common Pleas.

{¶ 19} Loc.R. 21.01 of the Franklin County Court of Common Pleas requires an "answer brief" to motions to be served "on or before the 14th day after the date of service." However, Huntington's motion was not solely an answer brief but primarily set out an independent claim for the excess proceeds of sale. We agree with the rationale that lienholders have an equitable right to have their liens satisfied out of the proceeds of sale of foreclosed property, and thus "in foreclosure actions claims may be brought in or filed up to the time of distribution, and may share in the proceeds according to priority." *Stidham* at ¶ 9, citing *Farmers S. & L. Co. v. Robison*, 7th Dist. No. 75 C.A. 39 (Feb. 11, 1976).

{¶ 20} Neither the parties nor the trial court submitted authority setting a hard deadline for junior lien claimants to establish a claim to proceeds, and no case schedule in the record provides an alternative deadline. Aside from the "time of distribution" rule stated above, our independent research reveals no other barrier for Huntington to have filed a claim for excess proceeds prior to distribution.

{¶ 21} Therefore, we find that the trial court abused its discretion in finding Huntington's motion insufficient and in determining Huntington's motion was filed out of rule. We further find that, under the facts of this case, an evidentiary hearing on Huntington's motion is warranted.

{¶ 22} Accordingly, Huntington's first and fourth assignments of error are sustained, and the matter is remanded to the trial court to rule on Huntington's motion for distribution of excess proceeds.

C. Second and Third Assignments of Error

{¶ 23} Huntington's second and third assignments of error both are predicated on the trial court's award of excess sale proceeds to Strong. As previously determined, whether Huntington is entitled to the excess proceeds of sale is yet to be resolved, as the matter is remanded for the trial court to consider the motion for distribution of excess proceeds filed by Huntington.

{¶ 24} Accordingly, Huntington's second and third assignments of error are rendered moot.

IV. CONCLUSION

{¶ 25} Having sustained Huntington's first and fourth assignments of error and rendered Huntington's second and third assignments of error moot, we reverse the judgment of the Franklin County Court of Common Pleas and remand the case for an evidentiary hearing to consider Huntington's motion and determine the parties' right to the excess proceeds.

*Judgment reversed;
cause remanded with instructions.*

BROWN, P.J., and KLATT, J., concur.
