[Cite as *Fifth Third Mtge. Co. v. Paskan*, 2010-Ohio-1450.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FIFTH THIRD MORTGAGE COMPANY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-117**
- vs -	:	
STEVEN E. PASKAN, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 06 CV 000623.

Judgment: Affirmed.

Harry W. Cappel and *John C. Greiner*, Graydon, Head & Ritchey, L.L.P., 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, OH 45202-3157 (For Plaintiff-Appellee).

Glenn E. Forbes, Cooper & Forbes, 166 Main Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steven E. Paskan, appeals the judgment of the Lake County Court of Common Pleas denying his objections to the magistrate's decision in favor of appellee, Fifth-Third Mortgage Company, concerning the value of appellant's real estate for purposes of a sheriff's sale. At issue is whether the trial court abused its discretion. For the reasons that follow, we affirm.

{¶2} On March 16, 2006, appellee filed a complaint in foreclosure against appellant, alleging he had defaulted on a promissory note that was secured by a mortgage on his residence located at 12456 Huntoon Road, Concord, Ohio. Appellant

filed an answer, and subsequently, on October 19, 2006, the trial court entered judgment in foreclosure. On October 30, 2006, the clerk issued an order of sale to the Lake County Sheriff. Pursuant to R.C. 2329.17, the sheriff appointed three disinterested residents of the county to appraise the property. The sheriff's appraisal, which was filed on January 25, 2007, provides that the three appraisers "estimate[d] the real value in money of said premises to be *** [$]2,100,000." On February 2, 2007, a sheriff's sale was scheduled for March 5, 2007. On February 9, 2007, appellant filed his objection to the sheriff's appraisal, arguing that appraisal was "unreasonably low." The sale proceeded on March 5, 2007, and on that date appellee purchased the property for $1,456.280. The sale has not yet been confirmed.

{¶3} The magistrate held a hearing on appellant's objection on October 3, 2007. Appellant called Dan Forrester, a licensed real estate appraiser, as his sole witness. Mr. Forrester testified that in 2003, his office appraised the property at $2.9 million. He said that he appraised the property again in 2005, and at that time he appraised it at $2.9 million. He performed an informal analysis in 2007 and testified his opinion of the property's value was still $2.9 million.

{¶4} Following the hearing, the magistrate filed his decision on January 7, 2009, denying appellant's objection. The magistrate noted that the sheriff's appraisal valued the property at $2.1 million, which set the minimum bid at $1,400,000, while appellant's expert valued the property at $2.9 million. The magistrate found that the difference between the appraisals was due to a general downturn in the economy. Ultimately, the magistrate found that appellant had failed to prove the value established by the sheriff's appraisal was clearly and convincingly incorrect.

{¶5} Thereafter, on January 21, 2009, appellant filed objections to the magistrate's decision in the trial court, arguing the sale should not be confirmed because the value established by the sheriff's appraisers was too low. The trial court denied appellant's objections, finding that appellant had failed to prove that the sheriff's appraisal was clearly and convincingly wrong.

{¶6} Appellant appeals the trial court's judgment, asserting the following as his sole assignment of error:

{¶7} "The court erred and abused its' [sic] discretion in upholding a magistrate's decision denying Defendant's objections to sheriff's appraisal in the face of uncontroverted evidence that the sheriff's appraisal was unreasonably low."

"*** When reviewing an appeal from a trial court's decision to accept or reject a magistrate's decision, an appellate court must determine whether the trial court abused its discretion. *In re Ratliff*, 11th Dist. Nos. 2001-P-0142 and 2001-P-0143, 2002-Ohio-6586, at ¶14. Where the court's decision is supported by a substantial amount of competent and credible evidence, the decision will not be reversed absent an abuse of discretion. *Bates v. Bates* (Dec. 7, 2001), 11th Dist. No. 2000-A-0058, 2001-Ohio-8743, 2001 Ohio App. LEXIS 5428, *8, citing *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23." *Hayes v. Hayes*, 11th Dist. No. 2005-L-138, 2006-Ohio-6538, at ¶10 (citation omitted). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} "R.C. Chapter 2329 governs the procedures for executing against property. R.C. 2329.17 provides that when execution is levied upon lands, the officer

who makes the levy must call an inquest of three disinterested freeholders who are residents of the county where the lands taken are situated. The appraisers must swear to impartially appraise the property and then return an estimate of the real value of the property. Thereafter, the officer must give public notice of the time and place of sale for at least 30 days before the sale by advertisement in a newspaper published in and of general circulation in the county. R.C. 2329.26. The land cannot be sold for less than two thirds of the appraised value. R.C. 2329.20. There is no statutory dictate that a hearing be held at this time. If the court, after examining the proceedings taken by the officers, finds the sale was made in conformance with R.C. 2329.01 to 2329.61, inclusive, it shall confirm the sale. R.C. 2329.31. ***" *The Union Bank Co. v. Brumbaugh* (1982), 69 Ohio St.2d 202, 208.

{¶9} Under his assignment of error, appellant raises two issues. First, he argues the trial court abused its discretion by not sustaining his objections because, he claims, the testimony of his private appraiser was uncontroverted since it was the only evidence the court had before it of value. We do not agree.

{¶10} While Mr. Forrester was the only witness who testified at the hearing, the sheriff's appraisal was also before the court. As noted supra, the sheriff's appraisal had previously been filed in the case. Further, appellant's objections challenged the value of the property set by the sheriff's appraisal. Also, Mr. Forrester referred to the sheriff's appraisal in his testimony. Moreover, the trial court in its judgment entry indicated it had considered the sheriff's appraisal in ruling on appellant's objections. Finally, on appeal appellant does not argue that the sheriff's appraisal was not properly before the court.

As a result, Mr. Forrester's testimony was not the only evidence and his appraisal was not uncontroverted.

{¶11} Appellant also argues that the trial court improperly relied on *BFP v. Resolution Trust Corp.* (1994), 511 U.S. 531 to modify the test of value as stated in R.C. 2329.17. However, contrary to appellant's argument, the trial court did not rely on *BFP* to deviate from the statutory requirements. We agree with the following findings of the trial court:

{¶12} "*** [T]his court finds no defects in either the foreclosure process or the sale, nor does the defendant raise any such issues. *** Because sheriff's appraisals are *prima facie* correct unless clear and convincing evidence proves otherwise, this court cannot find that the magistrate's decision is unfair to the defendant ***. *** The court finds that the magistrate *** base[d] his opinion on *** the fact that the sheriff's appraisal, conducted two years after Forrester's last true appraisal, was not clearly and convincingly wrong." (Emphasis sic.)

{¶13} For his second issue, appellant argues that because no evidence was presented regarding the general economic downturn, the magistrate incorrectly took judicial notice of this downturn in modifying Mr. Forrester's appraisal. Again, we do not agree.

{¶14} "The taking of judicial notice is governed by Evid.R. 201. Under Evid.R. 201(B), '[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned.'" *State v. Kress*, 11th Dist. No. 2007-T-0078, 2008-Ohio-1658, at ¶11.

{¶15} In its judgment entry, the trial court found that the magistrate did not base his decision on judicial notice of an economic downturn, but rather on the fact that the sheriff's appraisal, conducted two years after Mr. Forrester's last true appraisal, was not clearly and convincingly wrong. The trial court found:

{¶16} "Although the defendant alleges that the magistrate must have based his opinion on judicial notice of an economic downturn that may have driven down the value of the defendant's property, after reading the transcript of the magistrate's hearing, the court does not agree. On the contrary, there was direct testimony by Mr. Forrester that between 2005 when he conducted his last full appraisal and 2007, there was a general slow down in sales of luxury homes, and fewer people were able to afford them because the economy in Greater Cleveland was not as healthy as it once was. *** Although Forrester believed that the defendant's property was still worth at least $2,900,000, apparently he did not convince the magistrate of this fact."

{¶17} As a result, contrary to appellant's argument, because evidence was presented of the general economic downturn, the court's judgment was not based on judicial notice.

{¶18} In its judgment entry, the trial court set forth the reasons in support of its findings. We therefore hold the trial court did not abuse its discretion in overruling appellant's objections to the magistrate's decision.

{¶19} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.