

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

MILLSTONE CONDOMINIUMS UNIT OWNERS ASSOCIATION, INC., et al.,	:	MEMORANDUM OPINION
	:	
Plaintiffs-Appellees,	:	CASE NO. 2011-L-013
	:	
- VS -	:	
	:	
270 MAIN STREET, et al.,	:	
	:	
Defendant-Appellant.		

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 000789.

Judgment: Appeal dismissed.

Cullen J. Cottle, Kaman & Cusimano, 50 Public Square, #2000, Cleveland, OH 44114 (For Plaintiff-Appellee, Millstone Condominiums Unit Owners Association, Inc.).

Robert S. Rosplock, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For New Party Plaintiff-Appellee, Patricia J. Nicholson).

Donald A. Richer, 270 Main Street, #160, P.O. Box 1575, Painesville, OH 44077-1575 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On February 1, 2011, appellant, 270 Main Street, filed a notice of appeal from a January 4, 2011 entry of the Lake County Court of Common Pleas. In that entry, the court overruled appellant's motion to confirm sale to electors and found that the condominium property at issue must be sold at public sale in accordance with the

partition provisions. The trial court further ordered that a praecipe be issued to the Lake County Sheriff ordering the sale of the entire Millstone condominium property.

{¶2} Defendants, RBS Citizen, N.A., Stewardship Fund, LLP, Nationwide Advantage Mortgage Corp., and HSBC Mortgage Services, filed a motion to dismiss the appeal on March 23, 2011. In their motion, defendants allege that this court lacks jurisdiction to hear this appeal since the entry on appeal was not a final appealable order pursuant to Civ.R. 54(B).¹

{¶3} On April 4, 2011, appellant filed a combined brief in opposition to the motion to dismiss and a motion for a limited remand to the trial court.

{¶4} Civ.R. 54(B) provides that:

{¶5} “When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

1. We note that defendants, RBS Citizen, N.A., Stewardship Fund, LLP, Nationwide Advantage Mortgage Corp., and HSBC Mortgage Services, are not parties to this appeal.

{¶6} This court has stated that where there are multiple claims and/or parties involved, an entry that enters final judgment as to one or more but fewer than all of the claims is not a final appealable order in the absence of Civ.R. 54(B) language stating that “there is no just reason for delay[.]” *Montello v. Ackerman*, 11th Dist. No. 2009-L-111, 2009-Ohio-6383, at ¶6. See, also, *Kessler v. Totus Tuus, L.L.C.*, 11th Dist. No. 2007-A-0028, 2007-Ohio-3019, at ¶7.

{¶7} In the case at hand, the partition action between appellant and appellees were not the only claims before the trial court. It is clear from a review of the record that while some of the claims in the underlying suit have been determined, there are other claims that are still pending. Furthermore, the January 4, 2011 judgment entry that was appealed from does not contain any Civ.R. 54(B) language. Without the inclusion of Civ.R. 54(B) language, there is no final appealable order at this time.

{¶8} The March 23 motion to dismiss filed by defendants, RBS Citizen, N.A., Stewardship Fund, LLP, Nationwide Advantage Mortgage Corp., and HSBC Mortgage Services, is hereby stricken from the record of this appeal, and the portion of appellant’s motion requesting that this court remand the matter to the trial court for the inclusion of Civ.R. 54(B) language is hereby overruled.

{¶9} Based upon the foregoing, this appeal is hereby dismissed due to lack of a final appealable order.

{¶10} Appeal dismissed.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶11} I respectfully dissent from the decision to dismiss the present appeal without remanding it for the trial court to make a determination whether there is any just reason for delay.

{¶12} The subject of the present appeal is an order for the public sale of the Millstone condominium property. Appellant, 270 Main Street, maintains that it was entitled to purchase the property at its appraised value by right of election. See R.C. 5307.09. The trial court held that a public sale was required because multiple stakeholders in the condominium property had elected to purchase the property at the appraised value and, thus, the property could not be properly divided.

{¶13} The trial court's judgment constitutes a final order with respect to 270 Main Street. "It is well settled that the final orders in a partition action are the order of sale and the confirmation." *Schrader v. Schrader*, 4th Dist. No. 03CA20, 2004-Ohio-4104, ¶14, fn. 3 (citations omitted). As this court has explained, a judgment entry issuing the order of sale of real property is akin to an order for foreclosure and sale and, as such, is a final order. *Sky Financial Group, Inc. v. Mogul*, 11th Dist. No. 2000-T-0038, 2001 Ohio App. LEXIS 2480, *7 (citation omitted). See, also, *Wehrley v. Reigle*, 2nd Dist. No. CA 1166, 1986 Ohio App. LEXIS 9743, *2, citing 190 Ohio Jurisprudence 3d 410, Cotenancy and Partition, Section 167, ("the final orders from which appeals may be had in partition are limited to the order of partition and the order confirming the sale").

{¶14} This court, and others, has held that the failure to appeal the order of sale precludes the possibility of challenging the sale in a latter appeal. *Sky Financial*, 2001

Ohio App. LEXIS 2480, at *8 (“[b]ecause no timely appeal was filed from the December 14, 1998 judgment entry for the order of sale, this court lacks jurisdiction to address any issue concerning the order of sale”); *Durnbaugh v. Sutton*, 2nd Dist. Nos. 91 CA 14 and 90 CA 141, 1991 Ohio App. LEXIS 5320, *4 (emphasis added) (“[t]he **rights of the parties** concerned in the order of December 4, 1990, from which appeal was taken **were actually determined in the earlier order of October 16, 1990, which** approved the report of the appraisers, **overruled the elections of both parties, and ordered a public sale**”).

{¶15} Accordingly, dismissing 270 Main Street’s appeal could effectively prevent Main Street from having the order of sale reviewed at a later time.

{¶16} There are other claims that remain to be litigated. These claims, however, are ancillary to and independent of the order of sale and 270 Main Street’s right of election. As described in the Motion to Dismiss filed by RBS Citizens, Stewardship Fund, Nationwide Advantage Mortgage, and HSBC Mortgage, these claims are comprised of claims by condominium unit owners against their respective mortgage lenders for negligence, breach of fiduciary duty, misrepresentation and/or fraud, and claims by mortgage lenders against the unit owners regarding the amounts owed and the priority of liens. None of these claims have any bearing on the propriety of ordering a public sale of the condominium property and/or 270 Main Street’s right of election. Notably, the trial court specifically held that “no controversy exists” between 270 Main Street and RBS Citizens, Stewardship Fund, Nationwide Advantage Mortgage, and HSBC Mortgage, the parties moving for the dismissal of this appeal.

{¶17} For the foregoing reasons, I respectfully dissent and would remand this appeal for a determination as to whether any just cause exists for delay in our review of the order of sale.