

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

WELLS FARGO BANK, N.A.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-10-214
	:	
- vs -	:	<u>OPINION</u>
	:	7/27/2015
	:	
RANDY P. WASHINGTON, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY AREA III COURT
Case No. CVG1300484

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Randy P. Washington, appeals from a judgment of the Butler County Area III Court issuing plaintiff-appellee, Wells Fargo Bank, N.A., a writ of possession. For the reasons set forth below, we affirm.

{¶ 2} The parties in the present case have had a litigious and tumultuous history that spans over five years. To fully understand the issues presented in the present appeal, it is necessary to discuss the parties' dealings since 2010.

The Foreclosure Action

{¶ 3} In March 2010, Wells Fargo filed a foreclosure action in Butler County Court of Common Pleas Case No. CV2010-03-1153 against appellant and his former wife, Artiffany A. Washington, seeking to foreclose on the real property located at 7754 Hunters Trail in West Chester, Ohio after appellant and Artiffany defaulted in payment on a promissory note. On April 20, 2010, shortly after the lawsuit was filed, Wells Fargo filed a notice of voluntarily dismissal pursuant to Civ.R. 41(A)(1). Wells Fargo then moved to vacate the dismissal, stating it had inadvertently dismissed the lawsuit due to mistake and error. The trial court granted Wells Fargo's motion to vacate and the foreclosure action proceeded. In June 2010, the trial court issued a judgment and decree in foreclosure. Appellant's home was sold at a sheriff's sale to Federal Home Loan Mortgage Corporation ("Freddie Mac"), and confirmation of this sale was entered by the trial court on October 12, 2011. Appellant and Artiffany appealed from the confirmation of sale of their real estate to this court. *See Wells Fargo Bank, N.A. v. Washington*, 12th Dist. Butler No. CA2011-11-211 (Nov. 10, 2011) (Notice of Appeal).

{¶ 4} While the appeal was pending, a sheriff's deed transferring title of the Hunters Trail property to Freddie Mac was recorded in the Butler County Recorder's Office on November 28, 2011. Thereafter, on February 23, 2012, Freddie Mac transferred the property to Wells Fargo by quitclaim deed. The quitclaim deed was recorded in the Butler County Recorder's Office on April 4, 2012. During this time, Artiffany and appellant continued to reside on the property.

{¶ 5} On March 4, 2013, this court issued an opinion in which we found that the trial

court had been divested of jurisdiction following Wells Fargo's voluntarily dismissal of its complaint. *Wells Fargo Bank, N.A. v. Washington*, 12th Dist. Butler No. CA2011-11-211, 2013-Ohio-773, ¶ 11 (hereafter, *Washington I*). Specifically, we held that the confirmation of sale was "reversed and vacated for lack of jurisdiction, as are all judgments orders and decrees issued by the trial court after the April 20, 2010 voluntary dismissal." *Id.* at ¶ 12. In *Washington I*, we were not asked to decide, nor did we decide, the legal affect our reversal had on the title to the Hunters Trail property.

The Forcible Entry and Detainer Action

{¶ 6} By all accounts, appellant and Artiffany continued to reside at the Hunters Trail property after we issued our opinion in *Washington I*. Then, on June 14, 2013, Wells Fargo filed a complaint for forcible entry and detainer in the Butler County Area III Court, seeking to have appellant and Artiffany evicted from the Hunters Trail property. The complaint alleged that appellant and Artiffany were in possession of the property when an entry confirming sale of the property was entered in the Butler County Court of Common Pleas Case No. CV2010-03-1153 on October 12, 2011, that a sheriff's deed transferring title of the property to Freddie Mac was recorded on November 28, 2011, and that a quitclaim deed transferring the property from Freddie Mac to Wells Fargo was recorded on April 4, 2012. The complaint also alleged appellant and Artiffany continued to occupy the property without color of title and that the forcible entry and detainer action was proper pursuant to R.C. 1923.02(A)(3) and (5). Wells Fargo stated it had served appellant and Artiffany with a notice to vacate the premises, as required by law, on May 29, 2013, and that pursuant to R.C. 2325.03, as a purchaser in good faith, its title to the property was not affected by our decision in *Washington I*. A copy of the entry confirming the sale, the sheriff's deed, the quitclaim deed, and the notice to vacate the premises were attached to the complaint.

{¶ 7} The Butler County Area III Court issued a summons and set an August 7, 2013

hearing date. A copy of the summons and complaint were sent by certified mail to appellant and Artiffany at 7754 Hunters Trail, West Chester, Ohio 45069. Service was perfected on Artiffany on July 1, 2013. Service on appellant was returned as unclaimed, and then reissued as regular mail on July 22, 2013. Neither appellant nor Artiffany filed an answer or appeared before the court at the August 7, 2013 hearing.

{¶ 8} On August 7, 2013, after finding that appellant and Artiffany had been properly served with the complaint but had failed to appear in the case, the magistrate issued a decision granting judgment to Wells Fargo. The magistrate found that the allegations contained in Wells Fargo's complaint were "admitted by the tenant[s] to be true" and appellant and Artiffany were ordered to vacate the premises. The trial court adopted the magistrate's decision, and on September 11, 2013, issued a judgment entry granting Wells Fargo's complaint for forcible entry and detainer. Neither appellant or Artiffany appealed from this judgment.

{¶ 9} On June 6, 2014, after appellant and Artiffany failed to relinquish possession of the Hunters Trail property, Wells Fargo filed a Motion for Issuance of Writ of Possession. The magistrate issued a decision stating that a writ of possession would issue on June 25, 2014, unless objections were filed. On June 24, 2014, appellant filed objections, arguing that a writ should not be issued for the following reasons: (1) the decision in *Washington I* "voided the auction sale * * * reversed the confirmation of sale * * * and the confirmation of sale was void;" (2) Wells Fargo's Notice to Vacate "was defective since it did not provide the number of days to vacate, since Wells Fargo * * * does not have ownership, [and] since a Fair Debt Collection Practices Act disclosure" was not included; (3) Wells Fargo failed to refile the foreclosure action against appellant within one year of its voluntary dismissal and res judicata bars it from refiling now; (4) Wells Fargo did not obtain service on all of the defendants in the foreclosure action, thereby preventing the court from having personal jurisdiction over all

parties; and (5) Wells Fargo "knew or should have known it did not have ownership when it tried to evict [appellant]."¹ Wells Fargo filed a memorandum in opposition to appellant's objections, arguing that appellant's failure to appeal the trial court's September 11, 2013 judgment entry granting its complaint for forcible entry and detainer barred appellant from challenging the trial court's prior factual and legal findings.

{¶ 10} A hearing on appellant's objections was held on September 9, 2014. Thereafter, on October 8, 2014, the trial court issued an entry overruling appellant's objections, adopting the magistrate's opinion, and issuing a writ of possession.

{¶ 11} Appellant timely appealed from the trial court's entry, raising one assignment of error.

{¶ 12} THE TRIAL COURT ERRED BY GRANTING [WELLS FARGO'S] MOTION FOR ISSUANCE OF WRIT OF POSSESSION.

{¶ 13} In his sole assignment of error, appellant argues the trial court erred in issuing the writ of possession as Wells Fargo did not have ownership or color of title to the Hunters Trail property. Appellant asserts that this court's decision in *Washington I* vacating the confirmation of sale had the legal effect of keeping title to the property with appellant. He further argues the writ of possession should not have been issued as the notice to vacate served on him by Wells Fargo was defective. Finally, appellant contends, for the first time on appeal, that the writ of possession was improperly issued as he was never properly served with Wells Fargo's complaint for forcible entry and detainer.

{¶ 14} A writ of possession gives "a successful ejectment-action plaintiff the possession of the recovered land." *Gvozdanovic v. Woodford Corp.*, 139 Ohio App.3d 11, 35-36 (1st Dist.2000). Under the writ, the sheriff is ordered to remove the defendant and his

1. Artiffany did not file objections to the magistrate's decision, and she is not a party to the present appeal.

personal property from the real property recovered in ejectment. *Id.*, citing *Black's Law Dictionary* 716 (7th Ed.1999). "This means that the purchaser of real property at a judicial sale may obtain actual possession where a party to the foreclosure proceeding refuses to vacate voluntarily." *Integra Bank Natl. Assn. v. 3700 Williston Northwood S & B*, N.D. Ohio 3:09 CV 00547, 2010 WL 3604409, * 5 (Sept. 9, 2010), citing *Bank One, Cincinnati v. Wait*, 110 Ohio App.3d 460, 465 (4th Dist.1996). "The sheriff has a duty to deliver actual and exclusive possession to the purchaser, even where such delivery requires forcible removal by the occupant." *Id.*

{¶ 15} It is clear from appellant's arguments that although he has appealed from the trial court's entry granting the writ of possession, appellant is actually attempting to challenge the trial court's findings in the forcible entry and detainer portion of the underlying action. *See, e.g., Sheehe v. Demsey*, 8th Dist. Cuyahoga No. 99965, 2014-Ohio-305. When the trial court granted judgment to Wells Fargo on its complaint for forcible entry and detainer on September 11, 2013, the trial court made the following relevant findings in its entry:

[A]ll parties have been duly served with summons and a copy of the Complaint, and are properly before the Court, but that the defendants, Randy P. Washington and Artiffany A. Washington are in default for motion or answer. * * *

* * *

1. Defendants have unlawfully and forcibly detained from [Wells Fargo] possession of the real property * * *.
2. Defendants were in possession of the property when a Sheriff's Deed, arising from Butler County Common Pleas Case No. CV 2010-03-1153, transferring the property from Defendants to * * * [Freddie Mac] was recorded on November 28, 2011.
3. The property was transferred to [Wells Fargo] by Quitclaim Deed recorded April 4, 2012.
4. Defendants continue to occupy the property without color of title and this action is proper pursuant to R.C. 1923.02(A)(3) and (5).

* * *

6. On May 29, 2013, [Wells Fargo] duly served upon Defendants, as required by law, notice in writing to leave the premises.

7. Pursuant to R.C. 2325.03, Plaintiff's title to the property is not affected by the Appellate decision entered March 4, 2013, Twelfth District Case No. CA2011-11-211.

IT IS THEREFORE ORDERED THAT [Wells Fargo], as the record and rightful owner of the premises, shall be put in possession of the premises, that Defendants have no claim or color of title to the premises, and that defendant shall relinquish possession of the same to [Wells Fargo].

The trial court's September 11, 2013 decision, therefore, established Wells Fargo as the rightful titleholder of the Hunters Trail property. This decision was final and appealable when issued. See *Sheehe* at ¶ 6, citing *Cuyahoga Metro Hous. Auth. v. Jackson*, 67 Ohio St.2d 129, 132 (1981). "[A] judgment entry in a forcible entry and detainer action which contains an order relating to the right to possession of the property is a final, appealable order pursuant to R.C. 2505.02 * * * because a proceeding for forcible entry and detainer is a special proceeding which affects a substantial right." *Id.*; *Skillman v. Browne*, 68 Ohio App.3d 615, 619 (6th Dist.1990).

{¶ 16} Although a final, appealable order had been issued in the forcible entry and detainer action, appellant failed to appeal the trial court's decision. Appellant ignored the trial court's ruling, and he did not relinquish possession of the property to Wells Fargo as ordered. The fact that Wells Fargo had to file a subsequent motion seeking a writ to obtain possession of the property does not mean that appellant is allowed a second opportunity to litigate the issues of Wells Fargo's title to the property pursuant to R.C. 2325.03 or its compliance with R.C. 1923.04 in serving the notice to vacate.² These issues were previously determined by

2. R.C. 2325.03 provides in relevant part the following:

the trial court and were subject to appellate review upon appeal of the court's September 11, 2013 decision. Appellant chose not to appeal the court's decision, and he was barred from relitigating or challenging these issues in his defense against the writ of possession. The trial court, therefore, did not err in issuing the writ of possession over appellant's objections regarding these issues.

{¶ 17} Appellant also argues for the first time on appeal that the trial court lacked personal jurisdiction over him because he was never properly served with the complaint for forcible entry and detainer.³ By failing to raise the issue of improper service below, appellant submitted to the trial court's jurisdiction and waived the right to raise the issue on appeal. See *Rose v. Warman*, 12th Dist. Clermont No. CA83-06-049, 1984 WL 4293, * 2 (Jan. 9, 1984); *BAC Home Loans Servicing, LP v. Mullins*, 12th Dist. Preble No. CA2013-12-015, 2014-Ohio-4761, ¶ 33 ("it is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal and failure to raise an issue before the trial court results in waiver of that issue for appellate purposes"); *Fields v. Strange*, 10th Dist. Franklin No. 03AP-48, 2004-Ohio-1134, ¶ 9 ("A question of personal jurisdiction may not be raised for the first time on appeal").

{¶ 18} Accordingly, for the reasons set forth above, we conclude that appellant's

The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack; nor shall the title to property that is sold before judgment under an attachment be affected by the proceeding or attack. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.

Similarly, R.C. 2329.45 provides that "[i]f a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser."

3. A review of the record demonstrates that the only argument regarding service appellant made to the trial court dealt with service of the foreclosure complaint in Butler County Court of Common Pleas Case No. CV2010-03-1153. Appellant never challenged service of the complaint for forcible entry and detainer below.

arguments are without merit. The record in the present case demonstrates that Wells Fargo obtained a judgment to evict appellant from the Hunters Trail property on September 11, 2013, and that appellant failed to remove himself from the property. Because appellant was found to be in unlawful possession of the property, we conclude the trial court did not err in restoring possession of the property to Wells Fargo by issuing the writ. See *Gvozdanovic*, 139 Ohio App.3d at 35-36.

{¶ 19} Appellant's sole assignment of error is overruled.

{¶ 20} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.