

[Cite as *Deutsche Bank Natl. Trust Co. v. Richardson*, 2011-Ohio-1123.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

DEUTSCHE BANK NATIONAL TRUST :
COMPANY : C.A. CASE NOS. 2010-CA-3
Plaintiff-Appellant : 2010-CA-13
vs. : T.C. CASE NO. 09-CV-50
HANK RICHARDSON, ET AL. : (Civil Appeal from
Defendants-Appellees : Common Pleas Court)

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O P I N I O N

Rendered on the 11th day of March, 2011.

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GRADY, P.J.:

{¶ 1} Plaintiff, Deutsche Bank National Trust Company ("Deutsche Bank"), appeals from orders denying its Civ.R. 60(B)(4) motion for relief from judgment and confirming a sale of real property.

{¶ 2} On March 18, 2009, Deutsche Bank commenced an action for foreclosure, alleging a default by Hank Richardson on a promissory note obligation secured by a mortgage deed on real property located at 6724 Ludy Road in Greenville ("the Richardson Property"). Deutsche Bank sought judgment against Richardson in the amount of \$97,747.76, plus interest at the rate of 8.725% from January 1, 2008, a sale of the Richardson Property, and a finding that Deutsche Bank had a valid and first lien on the Richardson Property that entitled it to proceeds from the sale. Deutsche Bank named as Defendants Hank Richardson, Linda Richardson, Eagle Savings Bank, The North Side Bank and Trust Company, and the Treasurer of Darke County ("the Treasurer").

{¶ 3} On April 3, 2009, the Treasurer filed an answer to Deutsche Bank's complaint and a cross-complaint for foreclosure of the Richardson Property. The Treasurer alleged first lien priority for unpaid real estate taxes in the amount of \$1,437.74,

and requested the court to determine the priority of liens and sell the Richardson Property. (Dkt. 21.)

{¶ 4} The Richardsons did not file an answer to Deutsche Bank's complaint or to the Treasurer's cross-complaint. Defendant The North Side Bank and Trust Company filed an answer to Deutsche Bank's complaint, alleging that it has an interest in the Richardson Property by way of a judgment lien. (Dkt. 22.) On May 4, 2009, Deutsche Bank filed a motion for leave to amend its complaint to include Second National Bank as a party, which the trial court granted. (Dkt. 29-31.) Second National Bank filed an answer to Deutsche Bank's complaint, seeking the sale of the Richardson Property and \$16,941.96 of the sale proceeds, based on its interests as a lienholder. (Dkt. 35.)

{¶ 5} On October 8, 2009, the trial court issued a scheduling order that set November 10, 2009 as the trial date on Deutsche Bank's complaint and the Treasurer's cross-complaint. (Dkt. 36.)

In an October 13, 2009 letter to the trial court, counsel for The Northside Bank and Trust Company stated, in part: "We don't believe it is necessary to participate in the trial which is scheduled for November 10, 2009. Our interest need only to be noted if there is a recovery over and above what is owed to the Plaintiff, Deutsche Bank National Trust Company." (Dkt. 37.) The trial court sent a letter in response to The Northside Bank

and Trust Company's counsel, copying all counsel of record, that stated, in pertinent part:

{¶ 6} "I understand your impression that your lien interest is relevant only if there are proceeds remaining after the Plaintiff's judgment is satisfied in full. However, since the matter is scheduled for trial, all issues must be proven and adjudicated. The failure of proof of the existence and validity of your lien may call into question whether your client has a valid lien, and therefore, whether your client is entitled [to] recovery of any proceeds." (Dkt. 38.)

{¶ 7} On November 9, 2009, the day before the scheduled trial, counsel for Deutsche Bank telephoned the court and explained that Deutsche Bank would not participate in the trial and that Deutsche Bank intended to voluntarily dismiss its complaint without prejudice.

{¶ 8} The trial proceeded on November 10, 2009. Only the Treasurer and counsel for Second National Bank were present at the trial. After the presentation of evidence, the Treasurer requested that its lien be granted first priority when the sale proceeds are distributed. (Tr. 9.) Second National Bank requested that all of the parties who did not appear at the trial be found in default of the Treasurer's cross-complaint and that the liens of any party who failed to appear at the trial be declared

null and void as to the Richardson Property and the resulting sale proceeds.¹ (Tr. 8-9.)

{¶ 9} On November 13, 2009, the trial court entered a Decision and Judgment Entry, finding that the Treasurer had established a right to delinquent real estate taxes in the amount of \$1,965.67, and that the Richardsons, Deutsche Bank, Eagle Savings Bank, and The North Side Bank and Trust Company had failed to appear at trial and prove the existence of any lien or other interest in the Richardson Property. The trial court found that, therefore, the interests of Deutsche Bank, Eagle Savings Bank, and The North Side Bank and Trust Company were "null and void" and they would not be entitled to any of the proceeds from the eventual sale of the Richardson Property. (Dkt. 43.)

{¶ 10} On November 20, 2009, the trial court entered a judgment entry, decree of foreclosure, and order of sale. The judgment entry provided that: (1) the Treasurer had a good and valid lien on the Richardson Property in the amount of \$1,965.67, plus additional taxes, penalties, and assessment; (2) the interests of Deutsche Bank, Eagle Savings Bank, and The North Side Bank and

¹ Two days after the trial, Deutsche Bank filed a notice of voluntary dismissal without prejudice of all of its claims and also filed a motion for leave to file an answer instanter to the Treasurer's cross complaint, which the trial court denied.

Trust Company "are adjudicated to be null and void and not entitled to any interest in any proceeds from the sale of the [Richardson Property]"; (3) the rights of the Richardsons were foreclosed, except for their equity of redemption and the statutory right to redeem; and (4) Second National Bank had a good and valid lien upon the Richardson Property in the amount of \$16,941.96, plus interest and costs. (Dkt. 44.) The trial court further ordered that the Richardson Property shall be sold and the proceeds distributed in the following order of priority: Clerk of Courts, the Treasurer, and Second National Bank.

{¶ 11} No party filed a notice of appeal from the November 20, 2009 judgment entry. Rather, on January 4, 2010, Deutsche Bank filed a Civ.R. 60(B)(4) motion for relief from the November 20, 2009 judgment. (Dkt. 47-48.) Deutsche Bank alleged that it had paid to the Treasurer \$1,998.43, which represented the current balance of property taxes owed to the Treasurer. The trial court denied Deutsche Bank's Civ.R. 60(B) motion. (Dkt. 51.) On March 4, 2010, Deutsche Bank filed a notice of appeal from the trial court's denial of the motion (Case No. 2010-CA-03).

{¶ 12} A sheriff's sale of the Richardson Property was scheduled for June 11, 2010. On May 18, 2010, Deutsche Bank filed a motion to stay the execution of the trial court's November 20, 2009 judgment and the scheduled sheriff's sale. The trial court denied

the motion. Deutsche Bank then filed a motion to withdraw the sheriff's sale, which the trial court denied on June 7, 2010. The Richardson Property was sold for \$30,000.00 at a sheriff's sale on June 11, 2010. On June 15, 2010, Deutsche Bank filed with this court a motion to stay the execution of the trial court's November 20, 2009 judgment. We overruled this motion, noting among other things that the Richardson Property had already been sold.

{¶ 13} On June 17, 2010, the trial court entered a judgment confirming the sale and ordering distribution of the proceeds from the sale to pay court costs; sheriff, auditor, and recorder costs; and real estate taxes, in that priority. The court ordered the balance of the proceeds from the sale, in the amount of \$27,430.55, held by the clerk of courts pending further order of the trial court. As part of the June 17, 2010 judgment entry, the trial court canceled Deutsche Bank's lien and partially released the certificate of judgment liens of Second National Bank, Eagle Savings Bank, and The North Side Bank. Deutsche Bank filed a notice of appeal from that judgment on June 24, 2010 (Case No. 10-CA-13).

THIRD ASSIGNMENT OF ERROR

{¶ 14} "THE TRIAL COURT ERRED IN NULL AND VOIDING PLAINTIFF'S LIEN."

FOURTH ASSIGNMENT OF ERROR

{¶ 15} "THE TRIAL COURT ERRED IN GRANTING JUDGMENT AND LIEN

PRIORITY IN FAVOR OF DEFENDANT SECOND NATIONAL BANK WHEN THE COURT'S DECISION AND JUDGMENT ENTRY RENDERED AFTER THE TRIAL DID NOT INCLUDE ANY JUDGMENTS IN FAVOR OF DEFENDANT SECOND NATIONAL BANK."

{¶ 16} Deutsche Bank argues that the trial court erred when it entered a judgment of foreclosure that failed to protect and preserve the interests of Deutsche Bank as first lienholder, and instead declared the lien held by Deutsche Bank to be null and void. Deutsche Bank asks us to reverse and vacate the judgment of foreclosure.

{¶ 17} "The object of the foreclosure action is to obtain a sale of premises pledged for the security of a debt, free from equities of redemption, and when suit is brought to foreclose a mortgage, all persons who may be affected by the judgment or the sale, especially all persons who appear of record to have a lien upon or interest in the mortgaged premises, must be made parties defendant in the foreclosure proceeding, to cut off and finally adjudicate all such claims and interests against the mortgaged property." 69 Ohio Jurisprudence 3d (2004) 432, Mortgages, Section 311, citations omitted.

{¶ 18} Both Deutsche Bank and the Treasurer filed complaints seeking the sale of the Richardson Property and the distribution of the resulting proceeds from the sale based on the priority of the liens on the Richardson Property. In order to ensure that

the foreclosure proceedings included all of the parties who had interests in the Richardson Property, Deutsche Bank and the Treasurer named the Richardsons, Eagle Savings Bank, The Northside Bank and Trust Company, and Second National Bank as Defendants.

The nature of a foreclosure proceeding, as well as the trial court's October 15, 2009 letter (Dkt. 38), clearly put each party to the foreclosure action on notice that failure to appear at the trial of the complaint and cross-complaint could adversely affect their order of priority to any proceeds distributed from the sale of the Richardson Property.²

{¶ 19} Deutsche Bank, the Richardsons, Eagle Savings Bank, and The Northside Bank and Trust Company failed to appear at trial and, as a result, failed to prove the existence or validity of any interest in the Richardson Property or entitlement to any proceeds from the sale of the property. On the other hand, the Treasurer and Second National Bank appeared at the trial and presented evidence of their liens on the Richardson Property. Consequently, the trial court did not err in finding that the Treasurer and Second National Bank had valid liens on the Richardson

² Unlike a Civ.R. 56 proceeding on a motion for summary judgment, which typically is used to determine actions in foreclosure, the proceeding in the present case was a trial hearing that required the parties to appear and prove their claims and defenses.

Property which entitled them to priority in receiving proceeds from the ultimate sale of the property.

{¶ 20} Deutsche Bank argues that the trial court erred by going further and finding that Deutsche Bank's lien was "null and void."

We are unaware of any authority for the trial court to declare a lien interest "null and void" in a judgment of foreclosure and order of sale. Apparently, the trial court intended to extinguish Deutsche Bank's lien interest through the use of this "null and void" language.

{¶ 21} A "foreclosure suit consists of a number of steps, culminating in the sale of the property, the confirmation of the sale, and the possible entry of a deficiency judgment, and until these steps are completed, it cannot be said that the property has been foreclosed. Thus, the filing of a foreclosure action is not the equivalent of foreclosure and does not, by itself, extinguish the mortgage or the lien." 69 Ohio Jurisprudence 3d (2004) 396-97, Mortgages, Section 280, citations omitted. Rather, the mortgage and liens are extinguished when a foreclosure sale of the underlying real property is completed and confirmed. Therefore, the trial court erred in extinguishing Deutsche Bank's lien interest in the November 20, 2009 judgment entry of foreclosure.

{¶ 22} The fact that the trial court erred by proclaiming

Deutsche Bank's interest "null and void" in the November 20, 2009 judgment of foreclosure, however, does not mean that Deutsche Bank is entitled to an order from this court reversing and vacating that judgment. It is undisputed that Deutsche Bank was prejudiced by the trial court's November 20, 2009 judgment. Further, the trial court's judgment of November 20, 2009, which ordered foreclosure, found the amount due to the Treasurer and Second National Bank, extinguished the other parties' lien interests, and ordered the sale of the real property was a final, appealable order. *Oberlin Sav. Bank v. Fairchild* (1963), 175 Ohio St. 311, 312-13; *Federal National Mortgage Association v. Day*, 158 Ohio App.3d 349, 2004-Ohio-4514, at ¶14. Therefore, in order to preserve appellate review of any error committed by the trial court in the November 20, 2009 judgment of foreclosure, Deutsche Bank was required to file a timely notice of appeal from the November 20, 2009 judgment. Deutsche Bank failed to do so. Therefore, we lack jurisdiction to review the error Deutsche Bank assigns relating to the November 20, 2009 judgment of foreclosure.

{¶ 23} The third and fourth assignments of error are overruled.

FIRST ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT WHEN THE TREASURER'S CLAIM HAD BEEN SATISFIED IN FULL."

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT BY REASON OF PLAINTIFF'S FAILURE TO OBTAIN PRIOR CONSENT OF ALL PARTIES."

{¶ 26} We review a trial court's denial of a Civ.R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 27} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 28} "To prevail on [a] motion under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B) (1) through

(5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150, citations omitted.

{¶ 29} Deutsche Bank filed its motion for relief from judgment pursuant to Civ.R. 60(B)(4), which states, in pertinent part:

{¶ 30} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * * (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]"

{¶ 31} The November 20, 2009 judgment of foreclosure and order of sale found that the Richardson Property would be sold if the amount owed to the Treasurer was not paid within three days. There was no evidence presented in Deutsche Bank's Civ.R. 60(B)(4) motion that the Treasurer was paid within three days from November 20, 2009. Further, the Treasurer and Second National Bank did not consent to a withdrawal of the judgments in their favor. Based on the record before us, we cannot find that the trial court abused its discretion in denying Deutsche Bank's request for Civ.R.

60(B)(4) relief.

{¶ 32} We also note that a motion for relief from judgment pursuant to Civ.R. 60(B) and a notice of appeal from a judgment are not the same remedies and a party cannot use Civ.R. 60(B) relief as a substitute for a timely appeal. *UBS Real Estate Securities, Inc. v. Teague*, Darke App. No. 2010CA5, 2010-Ohio-5634, at ¶16, citations omitted. Any error by the trial court in granting a judgment in foreclosure and canceling Deutsche Bank's lien could have been raised in a direct appeal of the court's judgment in foreclosure. Deutsche Bank cannot use a Civ.R. 60(B) motion to raise an issue that should have been raised in a direct appeal.

{¶ 33} The first and second assignments of error are overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 34} "THE TRIAL COURT ERRED IN PERMITTING DEFENDANT SECOND NATIONAL BANK TO CONTINUE TO ORDER SALE OF THE SUBJECT PROPERTY AND SUBSEQUENTLY SELL THE PROPERTY, WHEN THE COURT'S DECISION AND JUDGMENT ENTRY RENDERED AFTER THE TRIAL DID NOT INCLUDE ANY JUDGMENTS IN FAVOR OF DEFENDANT SECOND NATIONAL BANK AND THE PARTY HOLDING THE FORECLOSURE DECREE, DEFENDANT TREASURER'S, JUDGMENT HAD BEEN SATISFIED IN FULL."

{¶ 35} The proper time to challenge the existence and extent of mortgage liens is in the foreclosure action, not when the court faces confirmation of a judicial sale. *Day*, 2004-Ohio-4514, at

¶15-16; *Queen City Savings & Loan Co. v. Foley* (1960), 170 Ohio St. 383, 389-90. Rather, "confirmation involves only decisions on whether a sale has been conducted in accordance with R.C. 2329.01 through R.C. 2329.61. This includes issues such as whether the public-notice requirements in R.C. 2329.26 were followed and whether the sale price was at least two-thirds of the land's appraised value, as required by R.C. 2320.20. *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 55, 563 N.E.2d 1388." *Federal National Mortgage Association v. Day*, 158 Ohio App.3d 349, 2004-Ohio-4514, at ¶16 citing *Bank One Dayton, N.A. v. Ellington* (1995), 105 Ohio App.3d 13.

{¶36} Deutsche Bank does not argue that the sale of the Richardson Property was not conducted in accordance with R.C. 2329.01 through R.C. 2329.61. Rather, Deutsche Bank argues that the sale never should have happened because the trial court's November 20, 2009 judgment of foreclosure did not grant judgment in favor of Second National Bank. In short, Deutsche Bank is arguing that the trial court erred in its November 20, 2009 judgment of foreclosure. Once again, Deutsche Bank should have raised this argument in a direct appeal from the November 20, 2009 judgment. *Oberlin Sav. Bank*, 175 Ohio St. at 312-13. The failure to file a timely notice of appeal from the November 20, 2009 judgment of foreclosure requires us to overrule the fifth assignment of error.

{¶ 37} The assignments of error are overruled. The judgment of the trial court will be affirmed.

FAIN, J. and FROELICH, J. concur.

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