[Cite as *State ex rel. Sponaugle v. Hein*, 2017-Ohio-1210.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

THE STATE OF OHIO, ex rel.
STEVEN SPONAUGLE

Relator

v.

THE HONORABLE JONATHAN
HEIN

Respondent

Appellate Case No. 16 CA 00007

[Original Action in Prohibition
and Procedendo]

DECISION AND FINAL JUDGMENT ENTRY
March 23, 2017

PER CURIAM:

{¶ 1} Steven Sponaugle filed this prohibition and procedendo action on August 3, 2016. He asks this court to prohibit the Honorable Jonathan Hein from taking certain actions in a foreclosure case against him, and to direct Judge Hein to vacate an order confirming the sheriff's sale therein. *See The Farmers State Bank v. Sponaugle*, Darke Common Pleas Court Case No. 13-CV-610 (the "Foreclosure Case"). The matter is currently before the court for resolution of the parties' dispositive motions.

Procedural History

Foreclosure Case

{¶ 2} The Farmers State Bank ("the Bank") filed a Foreclosure Case against Steven and Karen Sponaugle (and others) in 2013. On January 12, 2016, Judge Hein issued a "Judgment Entry – Decree of Foreclosure." The Foreclosure Decree set forth the following as liens on the property:

> The Court further finds that the Defendant, DARKE COUNTY TREASURER, may claim a lien against the property described herein and in the Complaint of the Plaintiff hereto, for unpaid real estate taxes which may have become a lien.
>
> The Court further finds that the Defendant, AMERICAN BUDGET COMPANY, claims an interest in the above-described real estate by virtue of a Certificate of Judgment, recorded at 12CJ00704, in the office of the Clerk of Courts of Darke County, Ohio.

The Foreclosure Decree did not include the amount of these two liens. The amount and priority of several other liens, including the mortgages being foreclosed upon, were set out and resolved. On February 26, 2016, the property was sold at sheriff's sale to the Bank.[1]

First Appeal

{¶ 3} The Sponaugles appealed the Foreclosure Decree. *See* Darke Appellate Case No. 16 CA 00002 (the "First Appeal"). This court questioned whether it was a final appealable order in a March 10, 2016 show cause order, and on April 18, 2016, dismissed the First Appeal. We held that the Foreclosure Decree was not a final order because it set forth the liens of the Darke Country Treasurer and American Budget Company, but did not determine the amounts of those liens.

---

[1] The Bank is not a party to the original action currently before us.

{¶ 4} The Sponaugles asked Judge Hein to set aside the Sheriff's Sale on March 14, 2016, just after this court issued the show cause order. They argued that because the Foreclosure Decree was interlocutory, no execution (i.e., sheriff's sale) could issue on it. Shortly thereafter, the Bank moved to confirm the sale. On April 21, 2016, after this court dismissed the First Appeal, Judge Hein overruled the Sponaugles' motion to set aside the sale, and sustained the Bank's motion to confirm it. Regarding the Darke County Treasurer's lien, Judge Hein held that the proposed confirmation order "properly accounts for the amount due to" the Treasurer. Regarding American Budget Company's lien, the court held that "summary judgment is properly granted against American Budget Company since it filed an answer to the complaint, no counter-claim and no pleadings in response to the motion for summary judgment." Judge Hein did not otherwise resolve the amount or status of American Budget Company's lien. He also did not issue an amended foreclosure decree.

{¶ 5} Judge Hein issued an "Order Confirming Sheriff's Sale, Ordering Deed and Order Distribution of Proceeds" (the "Confirmation Order") that same day. It said:

> The Court further finds that the Defendant, AMERICAN BUDGET COMPANY, released its Certificate of Judgment Lien on or about February 18, 2016, and that, therefore, no further action is required with reference to the cancellation and release of the Lien with reference to the within described property.

The Confirmation Order also found that the Darke County Treasurer was due $8,242.47 of the proceeds of the sale.

Second Appeal

{¶ 6} The Sponaugles appealed the Confirmation Order and the decision overruling their motion to set aside the Sheriff's Sale on April 27, 2016. *See* Darke Appellate Case No. 16 CA 00004 (the "Second Appeal"). That appeal is fully briefed and pending before this court.

Original Action

{¶ 7} The Confirmation Order awarded a writ of possession to the Bank. On July 11, 2016, the Bank filed a praecipe for such a writ, which the Clerk issued to the Sheriff on July 12, 2016. The writ required the Sponaugles to move from the property by August 4, 2016.

{¶ 8} On August 3, 2016, Steven Sponaugle filed the instant prohibition and procedendo case against Judge Hein, the Clerk of Courts, and the Darke County Sheriff. *See* Darke Appellate Case No. 16 CA 00007 (the "Original Action"). This court immediately overruled Sponaugle's request for peremptory and alternative writs of prohibition and procedendo. During a later telephone conference, counsel for the parties indicated that the Sponaugles were no longer residing in the property.

{¶ 9} Respondents filed answers and a motion to dismiss. On November 21, 2016, Sponaugle voluntarily dismissed the Clerk and the Sheriff, leaving Judge Hein as the sole respondent. Sponaugle also filed a motion for summary judgment; Judge Hein filed a cross-motion for summary judgment. Evidence was submitted by way of stipulations filed on December 5, 2016 and January 18, 2017. The dispositive motions are fully briefed and are now ripe for decision.

Legal Standards

Prohibition

{¶ 10} A writ of prohibition is "an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998), citing *State ex rel. Burtzlaff v. Vickery*, 121 Ohio St. 49, 50, 166 N.E. 894 (1929). "[T]he purpose of a writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction." *Id*., citing *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 39 Ohio St.3d 291, 530 N.E.2d 871 (1988). Such an extraordinary remedy "is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies." *Id*. (internal citation and quotation omitted).

{¶ 11} To be entitled to a writ of prohibition, Sponaugle must establish that (1) Judge Hein is about to exercise or has exercised judicial power, (2) Judge Hein's exercise of judicial power was unauthorized by law, and (3) "denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law." *State ex rel. R.W. v. Williams*, 146 Ohio St.3d 91, 2016-Ohio-562, 52 N.E.3d 1176, ¶ 13. However, if Judge Hein patently and unambiguously lacked jurisdiction, Sponaugle need not establish that he lacks an adequate remedy at law. *State ex rel. Ford v. Ruehlman*, Ohio Sup. Ct. Slip Opinion No. 2016-Ohio-3529, ¶ 62, citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals,* 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15. If Judge Hein did not patently and unambiguously lack jurisdiction, an appeal is generally "considered an adequate remedy that will preclude a writ of prohibition." *State ex rel. Smith v. Hall*, 145 Ohio St.3d 473, 2016-Ohio-1052, 50 N.E.3d 524, ¶ 8.

Procedendo

{¶ 12} A writ of procedendo is an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept*., 51 Ohio St.3d 43, 45, 553 N.E.2d 1354 (1990). It is intended to remedy a court's "refusal or failure to timely dispose of a pending action." *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, 819 N.E.2d 703, ¶ 16 (internal citations omitted). The writ tells the lower court to rule on a motion, but does not tell that court how to rule. *State ex rel. Morgan v. Fais*, 10th Dist. Franklin No. 14AP-910, 2015-Ohio-1514, ¶ 4. It "will not issue for the purpose of controlling or interfering with ordinary court procedure." *State, ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985).

{¶ 13} To be entitled to a writ of procedendo, Sponaugle must show "a clear legal right to require the court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Brown v. Logan*, 138 Ohio St.3d 286, 2014-Ohio-769, 6 N.E.3d 42, ¶ 13. "An appeal is an adequate remedy in the ordinary course of law that precludes an action for procedendo." *State ex rel. Elkins v. Fais*, 143 Ohio St.3d 366, 2015-Ohio-2873, 37 N.E.3d 1229, ¶ 8 (internal citations and quotation omitted).

Motions to Dismiss and for Summary Judgment

{¶ 14} Original actions "ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure." Loc.App.R. 8(A). Judge Hein appears to move to dismiss pursuant to Civ.R. 12(C). Dismissal under Civ.R. 12(C) "is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel.*

Midwest Pride IV, Inc. v. Pontious, 75 Ohio St.3d 565, 570, 664 N.E.2d 931, citing *Lin v. Gatehouse Constr. Co.*, 84 Ohio App.3d 96, 99, 616 N.E.2d 519 (8th Dist.1992).

{¶ 15} Both parties have moved for summary judgment. To be entitled to summary judgment, they must show that: "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977), citing Civ.R. 56(C).

Sua Sponte Review

{¶ 16} The Supreme Court of Ohio has held that "[s]ua sponte dismissal of a case on the merits without notice is warranted only when a complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." *State ex rel. Williams v. Trim*, 145 Ohio St.3d 204, 2015-Ohio-3372, 48 N.E.3d 501, ¶ 11 (internal quotations and citations omitted).

Analysis

{¶ 17} Before addressing the merits of the action and the arguments of the parties, it is necessary to review the specific requests for relief in this case. The Complaint says:

> WHEREFORE, Relator requests that this Court grant [him] the following relief:
>
> A. The issuance of a peremptory writ of prohibition, or at least an alternative writ, barring Respondents from (1) taking any action to execute on the January 12, 2016 *Judgment Entry-Decree of Foreclosure,* (2) taking any

action to enforce the April 21, 2016 *Order Confirming Sheriff's Sale, Ordering Deed and Ordering Distribution of the Proceeds*, and (3) taking any action in furtherance of the *Writ of Possession* issued by the Darke County Clerk of Courts.

B. The issuance of a peremptory writ of procedendo, or at least an alternative writ, (1) directing Respondent [Clerk] to quash the Writ of Possession, and (2) directing Respondent Jonathan Hein to vacate the *Order Confirming Sheriff's Sale, Ordering Deed and Ordering Distribution of the Proceeds*.

C. The issuance of an alternative writ staying the proceedings before Respondents pending resolution of this case; and

D. Such other relief as the Court shall deem appropriate.

In Sponaugle's December 5, 2016 summary judgment motion, he confirms that he seeks this relief, arguing that "Relator is entitled to a writ of prohibition barring any execution on the non-final judgment and a writ of procedendo to vacate the confirmation entry."

{¶ 18} As noted above, this court denied Sponaugle's request for peremptory and alternative writs of prohibition and procedendo. Sponaugle has not provided authority for his more general request that this court issue an alternative writ of some kind staying the foreclosure proceedings before Judge Hein, and the issue is not addressed in the dispositive motions currently before the court. The general request for stay is therefore OVERRULED.

Sua Sponte Review

{¶ 19} We sua sponte dismiss the procedendo claim. Because the Clerk has been dismissed from the case, the only remaining relief sought in procedendo is an order directing Judge Hein to vacate the Confirmation Order. A writ of procedendo cannot compel such relief as a matter of law. As noted above, a writ of procedendo is simply an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment on a pending matter. *Yee v. Erie Cty. Sheriff's Dept*., 51 Ohio St.3d 43, 45, 553 N.E.2d 1354 (1990). The writ tells the lower court to rule on a motion, but cannot tell that court how to rule. *State ex rel. Morgan v. Fais*, 10th Dist. Franklin No. 14AP-910, 2015-Ohio-1514, ¶ 4.

{¶ 20} Here, Sponaugle has not alleged that there is a pending motion that this court should compel Judge Hein to decide. Sponaugle did file a motion to vacate the confirmation order, but the trial court overruled it months before this action was filed. Even if there were a motion to vacate the Confirmation Order pending in the Foreclosure Case, the only relief available in procedendo would be an order that Judge Hein rule on the motion, not an order that he rule on it in a particular way, i.e., by granting it and vacating the Confirmation Order. That relief is not available in procedendo.

{¶ 21} We have so held in previous cases. For example, in *Wolfe v. Adkins*, we held that relator's request for "an order compelling Judge Adkins to not only decide his motion, but to decide it in a particular way, i.e., by journalizing the jury verdict consistent with the manner in which Wolfe interprets the record," was "not available in procedendo." *Wolfe v. Common Pleas Court Judge Dennis J. Adkins*, 2d Dist. Montgomery No. 26627 (Dec. 14, 2015), at 3. In *State ex rel. D.H. v. Capizzi,* we denied procedendo relief where

relator sought to challenge the sufficiency of bindover proceedings. We said, in observing that procedendo relief is narrow:

> D.H. has asked this court to control Judge Capizzi's actions with respect to how he conducted the bindover proceedings. A writ of procedendo cannot control how a lower court acts; it simply orders a court to act. *State, ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985). Here, D.H. asks us to compel Judge Capizzi to act in a particular way by conducting additional proceedings and affording to him specifically-identified due process rights. Such relief is unavailable in procedendo. *See Glass v. Terry*, 8th Dist. Cuyahoga No. 91704, 2008-Ohio-3347, ¶ 3-4 (denying procedendo relief where asked to compel respondent to take a particular action on a motion). In *Glass*, the court held that "[t]o the extent that [relator] is actually arguing that the judge must rule 'correctly' on the motion * * *, his argument is meritless." *Id*. at ¶ 4. "Such use of procedendo is an attempt to control the discretion of the judge in ruling on a motion or handling a case, and procedendo may not be used for that purpose." *Id*.

State ex rel. D.H. v. Capizzi, 2d Dist. Montgomery No. 27068, 2016-Ohio-5268, ¶ 14.

{¶ 22} "Because [Sponaugle] request[s] that this court compel respondent to reach a specific outcome, [his] complaint fails to state a claim in procedendo." *State ex rel. Internatl. Heat & Frost Insulators & Asbestos Workers Local No. 3 v. Cuyahoga Cty. Court of Common Pleas*, 8th Dist. Cuyahoga No. 85116, 2006-Ohio-274, ¶ 31. We conclude that Sponaugle "obviously cannot prevail" in obtaining a writ of procedendo to compel Judge Hein to vacate the Confirmation Order. *State ex rel. Williams v. Trim*, 145 Ohio

St.3d 204, 2015-Ohio-3372, 48 N.E.3d 501, ¶ 11. The procedendo claim against Judge Hein is therefore DISMISSED.

Dispositive Motion Arguments

{¶ 23} The parties' arguments do not vary significantly in their respective dispositive motions and responses, so we treat them together. We consider the issues in the order that best facilitates our analysis.

Standing and Mootness

{¶ 24} Judge Hein argues that Sponaugle lacks standing due to his "failure to preserve his right to appeal when he did not comply with the bond requirements of Civil Rule 62(B) and thereby permitted the real estate to be sold." Judge Hein cites cases that support the proposition that an appeal may be moot if the appellant has failed to post a bond. *See Front St. Bldg. Co. v. Davis*, 2d Dist. Montgomery No. 27042, 2016-Ohio-7412, ¶ 18, quoting *Cherry v. Morgan*, 2d Dist. Clark Nos. 2012 CA 11, 2012 CA 21, 2012-Ohio-3594, ¶ 4-5 (discussing appeals in forcible entry and detainer actions).

{¶ 25} We do not agree that Sponaugle lacks standing. An original action is fundamentally different than an appeal, and the rules that apply to one do not automatically translate to the other. Moreover, "[t]his argument confuses two distinct concepts, mootness and standing * * *." *State ex rel. Ford v. Ruehlman*, Slip Op. 2016-Ohio-3529, ¶ 54. "An issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question. * * * Standing, on the other hand, refers to whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Id*. at ¶ 55-56 (internal citations and quotations omitted).

{¶ 26} We are not convinced that the inability to post a bond implicates standing to seek relief in prohibition. A party has standing when it has a "right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyro Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting Black's Law Dictionary (8th Ed.2004) 1442. Respondent makes no cognizable argument why Sponaugle lacks the right to challenge Judge Hein's decisions affecting him, and we conclude that Sponaugle has standing to pursue prohibition relief.

{¶ 27} However, we agree that this matter is partially moot, albeit for a different reason. Judge Hein argues that the lack of a bond renders the action moot. We observe that the authority cited for this proposition applies to appeals arising from partition or forcible entry and detainer actions. This case is not an appeal, and does not concern a partition or forcible entry and detainer action. And, while failure to post a bond may, under some circumstances, render an appeal from a foreclosure decree moot, this court has held that it does not always do so. *Chase Manhattan Mtg. Corp. v. Locker*, 2d Dist. Montgomery No. 19904, 2003-Ohio-6665, ¶ 37-49. The dispute before this court – whether Judge Hein had jurisdiction to proceed as he did in the Foreclosure Case – is not mooted by Sponaugle's inability to post a bond in that case. Respondent has provided no authority for extending appellate caselaw into prohibition actions, and we decline to do so.

{¶ 28} The claim is partially moot in a more general sense. Filing the day before he was to be removed from the property by the Sheriff, Sponaugle sought an order barring Judge Hein from "taking any action" to execute on the Foreclosure Decree, or to enforce the Confirmation Order, or in furtherance of the writ of possession. From the evidence presented to this court, the Foreclosure Case appears to be complete. Neither party has

indicated that any further action is contemplated that this court could prohibit. Given that the writ of possession has been served and the sale has been confirmed, and appealed, we do not see what is left for Judge Hein to do. A writ prohibiting Judge Hein from taking further action in a completed matter would be meaningless; it would have "no practical significance and, instead, presents a hypothetical or academic question." *State ex rel. Ford v. Ruehlman*, Slip Op. 2016-Ohio-3529, ¶ 56. Thus, we conclude that the request for a writ of prohibition barring Judge Hein from taking action in the completed Foreclosure Case is moot. The motion to dismiss as moot is well-taken to that extent.

{¶ 29} Prohibition may also issue to vacate previous actions or "to undo the orders previously entered." *Id*. at ¶ 70; *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 330, 285 N.E.2d 22 (1972) (prohibition may correct the results of "excesses" of lower tribunals). While this is not what is sought in the request for prohibition relief or the motions in this case, Sponaugle indicates in the body of his complaint that prohibition is also needed "to correct the results of [Judge Hein's] prior unauthorized actions." Complaint at ¶ 20. Such relief could still be obtained and is not moot. To that extent, the motion to dismiss as moot is not well-taken.

{¶ 30} To vacate previous actions with a writ of prohibition, courts generally require a patent and unambiguous lack of jurisdiction. *State ex rel. V.K.B. v. Smith*, 142 Ohio St.3d 469, 2015-Ohio-2004, 32 N.E.3d 452, ¶ 8; *Gusweiler* at 329-330. We review the jurisdictional issues in the next section.

Adequate Remedy at Law

{¶ 31} Judge Hein argues that Sponaugle has an adequate remedy at law by way of appeal. Sponaugle argues that an appeal is an inadequate remedy, and moreover, that

he does not need to make such a showing where Judge Hein patently and unambiguously lacked jurisdiction to confirm the sale. We address the second argument first, as the jurisdictional question determines whether Sponaugle must show he lacks an adequate remedy. *State ex rel. Ford v. Ruehlman*, Slip Op. 2016-Ohio-3529, ¶ 62. We conclude that Judge Hein did not patently and unambiguously lack jurisdiction, so Sponaugle must show he lacks an adequate remedy. Ultimately, we find that Sponaugle has, and is exercising, his adequate remedy.

Patent and Unambiguous Lack of Jurisdiction

{¶ 32} Sponaugle argues that Judge Hein exceeded his judicial authority by allowing the Bank to execute on the non-final Foreclosure Decree. He cites, among other things, this court's statement that " '[i]t is axiomatic that a non-final, interlocutory order is not capable of execution.' " *Aselage v. Lithoprint, Ltd.*, 2d Dist. Montgomery No. 23527, 2009-Ohio-7036, ¶ 28, quoting *Nwabara v. Willacy*, 8th Dist. Cuyahoga No. 71122, 1997 WL 186842, *3 (April 17, 1997). Sponaugle asserts that there is no legitimate dispute as to this proposition, and Judge Hein does not directly dispute it.

{¶ 33} Instead, Judge Hein argues that R.C. 2323.07 expressly provided him jurisdiction to proceed in the Foreclosure Case. The statute provides: "When a mortgage is foreclosed or a specific lien enforced, a sale of the property, or a transfer of property * * * shall be ordered by the court having jurisdiction * * *." Judge Hein asserts he was acting as authorized by the statute.[2]

[2] Judge Hein also argues that the matters not resolved in the Foreclosure Decree were subsequently resolved by later orders, suggesting that the Foreclosure Decree was appealable upon that resolution. We make no determination on this question, which is not directly before us or necessary for our analysis.

{¶ 34} The Supreme Court of Ohio has in the past limited prohibition to situations where a trial judge lacks subject matter jurisdiction. In *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998), for example, the court said that prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the trial court." *Id*. at 73, quoting *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988). *See also State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 14 (referring to "the general rule that if a trial court has general subject-matter jurisdiction, prohibition will not lie * * *"). This court has held similarly. *See, e.g., State ex rel. D.H. v. Judges of Montgomery Cty. Court of Common Pleas, Gen. Div.*, 2d Dist. Montgomery No. 27067, 2016-Ohio-5269, ¶ 10; *State ex rel. Harwell v. Wiseman*, 2015-Ohio-4718, 49 N.E.3d 796, ¶ 9 (2d Dist.).

{¶ 35} The Supreme Court's limited focus has shifted somewhat in recent decisions. For example, in *State ex rel. Ford v. Ruehlman*, Slip Op. 2016-Ohio-3529, the court said that "even if a common pleas court has general jurisdiction over a case, a writ of prohibition will issue when the court seeks to take an action or provide a remedy that exceeds its statutory authority." *Id*. at ¶ 69. The scope of the shift is not entirely clear. As the Supreme Court has elsewhere noted, the term jurisdiction "can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. * * * The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of 'jurisdiction' is applicable in various legal analyses." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. We begin with the most-

straightforward jurisdictional question and proceed through the parties' more nuanced arguments.

{¶ 36} Judge Hein had subject matter jurisdiction over the Foreclosure Case. *See Wiegand v. Deutsche Bank Natl. Trust*, 8th Dist. Cuyahoga No. 97424, 2012-Ohio-933, ¶ 4 (elected Common Pleas Court judge had jurisdiction over foreclosure action by statute and constitutional provision). Sponaugle here does not challenge Judge Hein's subject matter jurisdiction. He instead initially challenged Judge Hein's jurisdiction in another sense, relying on an older decision of this court to argue that the issue here – whether a party can execute on a non-final order – is a jurisdictional one. *See State ex rel. Electrolert, Inc. v. Lindeman*, 99 Ohio App.3d 154, 650 N.E.2d 137 (2d Dist.1994). However, Sponaugle also recognized that this court overruled *Electrolert* in 2002, making the critical distinction between an error and a lack of jurisdiction:

> Having reviewed *Electrolert* and the pertinent cases cited therein, we find no legal authority for the proposition that a trial court lacks *jurisdiction* to enter an order in aid of execution of a non-final order. In *Roach*, the Ohio Supreme Court reasoned: "In order to have a judgment lien, there must be a final judgment for the payment of a definite and certain amount of money which may be collected by execution on property of the judgment debtor. * * * *Roach [v. Roach,* 164 Ohio St. 587, 592, 132 N.E.2d 742 (1956)]. Likewise, in *Marion*, the court merely held that "*it was error* to allow the foreclosure and subsequent sale of the mortgaged premises prior to complete disposition of the pending counterclaim." *Marion Prod. Credit Assn*. [*v.*

> *Cochran*, 40 Ohio St.3d 265, 270, 533 N.E.2d 325 (1988)] (emphasis added).
>
> Although it may be error for a trial court to execute on a non-final order, in neither *Roach* nor *Marion* did the Ohio Supreme Court hold that a trial court *lacks the jurisdiction* to do so. Not all error is jurisdictional and, notwithstanding our decision in *Electrolert*, we discern no reason why the trial court lacked the jurisdiction, under Ohio law, to enter its September 16, 2002, order, regardless of whether that ruling was correct. * * * The mere fact that [the judge] may have exercised that jurisdiction erroneously does not give rise to the extraordinary relief through a writ of prohibition. It is well-settled that "[p]rohibition does not lie to prevent a merely erroneous decision by the court." *State ex rel. Enyart v. O'Neill* (1995), 71 Ohio St.3d 655, 656.

(Emphases in original.) *State of Ohio ex rel. Hawes-Saunders Broadcast Properties, Inc. v. Hall,* Montgomery Appellate Case No. 19552 (Oct. 9, 2002) at 13-14; *see also Jimison v. Wilson*, 106 Ohio St.3d 342, 2005-Ohio-5143, 835 N.E.2d 34, ¶ 11 (distinguishing between a lack of jurisdiction and an error in the exercise thereof).

{¶ 37} In recognizing that the error asserted here may not be jurisdictional, Sponaugle asserts that a lack of judicial power, more broadly, can support prohibition relief. He relies on the Supreme Court of Ohio's recent decision in *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769 (*"Durrani"*), where the court found that a trial judge patently and unambiguously lacked jurisdiction to consolidate and reassign a large number of medical malpractice cases. The judge, who was not the administrative judge, signed an order prepared for the administrative judge's signature

consolidating the cases and transferring them from eleven other judges onto his own docket.

{¶ 38} The Supreme Court granted a writ of prohibition. In finding that the judge lacked authority, the court started with the familiar statutory, subject matter jurisdiction analysis:

> Here, Judge Ruehlman, as a judge of a court of common pleas, has the general jurisdiction to preside over a medical-malpractice case. R.C. 2305.01 ("the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts"). Appellants do not disagree. The question therefore is whether Judge Ruehlman had jurisdiction to consolidate and reassign the Durrani cases.

Durrani at ¶ 19.

{¶ 39} The court went on to find that the judge "lacked the judicial power" to consolidate and reassign the cases, primarily because he was neither the administrative judge who had authority to take such actions under the superintendence rules, nor the judge authorized to do so by local rule. The court also relied on Civ.R. 42(A), which at the time allowed consolidation only after a hearing. The court concluded that the judge patently and unambiguously lacked jurisdiction, and that prohibition would issue.

{¶ 40} Notably, the court in *Durrani* did not entirely accept the argument that the cited rules do not implicate the court's jurisdiction:

> Judge Ruehlman argues that local rules of court pertain to procedure and do not establish or change a court's jurisdiction. This argument is

> correct as far as it goes. *See Cole v. Cent. Ohio Transit Auth*., 20 Ohio App.3d 312, 312-313, 486 N.E.2d 140 (10th Dist.1984); *Martin v. Lesko*, 133 Ohio App.3d 752, 757, 729 N.E.2d 839 (2d Dist.1999); *Woodard v. Colaluca*, 8th Dist. Cuyahoga No. 101327, 2014-Ohio-3824, ¶ 7; *Palmer-Donavin v. Hanna*, 10th Dist. Franklin No. 06AP-699, 2007-Ohio-2242, ¶ 13.
>
> But this case is not about the jurisdiction of the trial court, or even of Judge Ruehlman, to hear the underlying tort cases. Rather, it is about Judge Ruehlman's authority to consolidate the Durrani cases and remove them from the judges to whom they had been assigned even though he was not at the time the court's administrative judge or the judge with the lowest case number as required by Loc.R. 7(G).

Durrani at ¶ 23-24. Under those circumstances, the court concluded that the judge patently and unambiguously lacked jurisdiction. Sponaugle argues the same is true here.

{¶ 41} *Durrani* is distinguishable. Judge Ruehlman's act of signing in the place of an administrative judge to collect 170 cases from all the other judges in his court is simply not comparable to Judge Hein's decision to proceed in the Foreclosure Case assigned to him. This case is also notably different where Judge Hein appears to have attempted to remedy the problematic issues from the Foreclosure Decree at the time he issued the Confirmation Order. Whether Judge Hein did so in the appropriate manner does not involve the same wholesale lack of authority underlying *Durrani.* We also observe that the *Durrani* case served the same interests as prohibition historically: to prevent judicial officers from usurping authority that rightly belongs to another. *State ex rel. McCaffrey v. Cleveland*, 54 Ohio St.2d 346, 347, 377 N.E.2d 490 (1978), citing *Marsh v. Goldthorpe*,

123 Ohio St. 103, 174 N.E. 246 (1930). That interest, which remains of primary importance in prohibition actions, is not present here.

{¶ 42} Judge Hein, as a judge of the Darke County Court of Common Pleas, had subject matter jurisdiction to hear foreclosure cases, and to hear this Foreclosure Case assigned to him. Ohio Constitution, Article IV, Section 4(A); R.C. 2305.01. He had general statutory authority to order a sale when a mortgage has been foreclosed. R.C. 2323.07. And, his jurisdiction to do so was not affected by the filing of the First Appeal. *See Horvath v. Packo*, 2013-Ohio-56, 985 N.E.2d 966, ¶ 16 (6th Dist.) ("It is well-settled law that a trial court retains jurisdiction over proceedings in aid of execution of its judgments, even while those judgments are on appeal").

{¶ 43} Having carefully considered all the facts and arguments, we cannot conclude that Judge Hein patently and unambiguously lacked jurisdiction to proceed in the Foreclosure Case. Allowing execution on a non-final order may arguably be error, but it does not present the sort of clear-cut jurisdictional problem as has historically supported prohibition relief or the type of excess judicial authority more recently recognized in *Durrani*. Although the line between the absence of jurisdiction and claims of error is somewhat less distinct since *Durrani*, we believe this case falls outside the narrow category of cases in which a judge patently and unambiguously lacks jurisdiction.

{¶ 44} We turn next to the question of whether Sponaugle otherwise has an adequate way to ask that the Confirmation Order be vacated.

Adequate remedy at law

{¶ 45} Judge Hein argues that Sponaugle can raise, and has raised, errors pertaining to the Foreclosure Case on appeal. He notes that the Confirmation Order at

the center of this case is currently on appeal in the Second Appeal. Generally, a "party claiming that a trial court lacked jurisdiction can raise that same argument in an appeal from an adverse final judgment." *Copenhaver v. Copenhaver*, 4th Dist. Athens No. 05CA16, 2005-Ohio-4322, ¶ 7. Indeed, the *Aselage* decision on which Sponaugle relies to argue that execution was error was rendered in an appeal. *Aselage v. Lithoprint, Ltd.*, 2d Dist. Montgomery No. 23527, 2009-Ohio-7036. Such "[a]n appeal is considered an adequate remedy that will preclude a writ of prohibition." *State ex rel. Smith v. Hall*, 145 Ohio St.3d 473, 2016-Ohio-1052, 50 N.E.3d 524, ¶ 8.

{¶ 46} Sponaugle argues that the appeal is inadequate because it is not speedy. He states that "[t]he very reason this case was filed was because a remedy in the ordinary course of law may be too late. With confirmation of the sheriff's sale, title to relator's property was transferred. In order to preserve his claimed right to the property, Relator had to act quickly to prevent a further transfer of title. Awaiting the outcome of the pending appeal does not provide a timely remedy."

{¶ 47} We conclude that Sponaugle's pending appeal is a timely and adequate remedy. Generally, the delay caused by an appeal does not make that appeal an inadequate remedy. *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 16. Sponaugle has presented no compelling reason why this is not true here. He can make his argument challenging the trial court's authority to allow execution of the non-final Foreclosure Decree on appeal and, if correct, can timely obtain the result he seeks here: an order vacating the Confirmation Order. His adequate remedy precludes a writ of prohibition. Judge Hein's motion to dismiss on this basis is well-taken.

Conclusion

{¶ 48} Sponaugle has standing to bring this action, although it is partially moot. As to the non-moot part of the prohibition claim, we conclude that Judge Hein did not patently and unambiguously lack jurisdiction to proceed in the Foreclosure Case. Sponaugle's pending appeal is an adequate way for him to raise the claimed error and, if correct, to obtain relief. Accordingly, prohibition relief is not available to him.

{¶ 49} Judge Hein's motion to dismiss is SUSTAINED. Sponaugle's motion for summary judgment is OVERRULED, and Judge Hein's cross-motion for summary judgment is OVERRULED as moot. The procedendo claim is DISMISSED sua sponte. This matter is DISMISSED in its entirety.

SO ORDERED.

MICHAEL T. HALL, Presiding Judge

MARY E. DONOVAN, Judge

MICHAEL L. TUCKER, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

MICHAEL T. HALL, Presiding Judge

Copies to:

Andrew Engel
Kendo Dulaney, LLP
7925 Paragon Road
Centerville, Ohio 45459
Attorney for Relator

R. Kelly Ormsby, III
Margaret Hayes
Darke County Prosecutor's Office
504 S. Broadway Street, 3rd Floor
Greenville, Ohio 45331
Attorneys for Respondents

Courtesy copy to:

Scott Rudnick
121 W. Third Street
Greenville, Ohio 45331
Attorney for The Farmers State Bank

CA3/KY