[Cite as *Keever v. Jordan*, 2009-Ohio-5850.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PATRICIA J. KEEVER, ET AL.,	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiffs-Appellees	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-5
BRANT L. JORDAN, ET AL.,	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morrow County Court of Common Pleas Case No. 2005CV00197
JUDGMENT:	DISMISSED
DATE OF JUDGMENT ENTRY:	November 3, 2009

APPEARANCES:

For Plaintiffs-Appellees:	For Defendants-Appellants:
MATTHEW GRIFFITH 0078023 Griffith and Brininger, LLC	WILLIAM D. FERGUS, JR. 0064463 Peterson, Ellis, Fergus, & MacDowell LLP
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Delaney, J.

{¶1} Defendants-Appellants, Brant Jordan, Ruth Jordan, David Jordan, and Kathleen Jordan appeal from a March 11, 2009, journal entry of the Morrow County Court of Common Pleas, which modified the terms of two previous judgment entries filed on July 29, 2008, and October 17, 2008. Patricia Keever and Timothy Keever, are Plaintiffs-Appellees.

{¶2} This action was instituted in the Morrow County Court of Common Pleas on May 26, 2005, by Plaintiffs Patricia Keever and Timothy Keever against Defendants Brant Jordan, Ruth Jordan, David Jordan, Kathleen Jordan, Barbara Newman, and Marion Newman, in a complaint for partition of a piece of real property located at 6284 County Road 59, Mount Gilead, Ohio. In the complaint, Plaintiff Patricia Keever asserts that she is one of four beneficiaries named in a transfer on a death deed executed by Eloise M. Jordan and that her spouse, Timothy Keever, holds a dower interest in the property. The other three beneficiaries are named as Brant Jordan, David Jordan, and Barbara Newman. The remaining Defendants are spouses of the three remaining beneficiaries. Plaintiffs assert that they are the lawful owners of one-fourth interest in the property at issue. In their complaint, Plaintiffs requested that the property be partitioned and their interest set off in severalty, or in the alternative, if the property could not be set off in severalty, that the property be sold at the highest price and that Plaintiffs be awarded one-fourth of the proceeds of sale.

{¶3} Defendants Barbara and Marion Newman filed an answer, stating that they do not have any claim in the property and that they conveyed their interest to Defendant, Brant Jordan by warranty deed on May 18, 2005. Plaintiffs filed a voluntary

dismissal without prejudice of Defendants Barbara and Marion Newman on June 20, 2005.

{¶4} Defendants Brant Jordan, Ruth Jordan, David Jordan, and Kathleen Jordan, filed an answer on June 17, 2005, admitting the allegations contained within the complaint and requested that the property be sold and that the parties be awarded the proceeds from sale proportionate to each party's interest in the land.

{¶5} On August 18, 2006, Plaintiffs filed a motion for summary judgment, asserting that since Defendants did not dispute any allegations contained within the complaint and that since Defendants requested the same relief as did Plaintiffs, that Plaintiffs are entitled to judgment as a matter of law.

{¶6} Defendants filed a reply on September 8, 2006, agreeing that there are no outstanding issues of law and that the resolution of the matter should proceed in accordance with R.C. 5307.09 et seq., as the parties had effectively agreed that the real property in question "cannot be divided . . . without manifest injury to its value."

{¶7} On March 21, 2007, the trial court entered judgment granting Plaintiffs' motion for summary judgment, stating, "since there is no issue of fact and since the law supports this Court ordering a sale of the real estate after first complying with the law of partition of real estate with respect to the options of the property owners. The attorney for the Plaintiffs shall prepare and submit an appropriate journal entry setting forth the procedures and orders pursuant to the partition statutes leading up to the sale of this real estate, if necessary."[1]

[1] The record is void of a proposed judgment entry filed by Plaintiffs-Appellees as ordered by the trial court.

{¶8} On May 6, 2008, Defendants filed a proposed judgment entry in lieu of the proposed entry being submitted by Plaintiffs. On May 13, 2008, Plaintiffs filed a "Brief in Opposition to Defendants' Memorandum In Support of Judgment Entry." As the parties could not agree on the language to be included in the judgment entry, the trial court held a hearing on July 24, 2008, to determine what should be included in the entry.

{¶9} On July 29, 2008, the trial court filed a journal entry, which in pertinent part, stated the following:

{¶10} "If no party elects to purchase the real estate, or if more than one party (not joined together) elects to purchase the real estate, the real estate shall be sold at public auction by the Morrow County Sheriff. Said sale shall be made at the door of the courthouse or as otherwise directed by this Court, as upon execution. The real estate shall not be sold for less than two-thirds of the appraised value. If a party purchases the real estate at auction, the purchase money shall be payable as follow: [sic] one-third on the day of sale, one-third within one year after the sale, and one-third within two years after the sale, with interest at the legal rate [currently being eight (8%) percent per annum]. If a non-party purchases the real estate at the auction, the purchase money shall be payable one-third on the day of sale, and the balance within thirty (30) days thereafter."

{¶11} Neither party objected to this language in the entry.

{¶12} On September 5, 2008, Defendants made a motion to modify the journal entry to delete the following two sentences:

{¶13} “”If two (2) or more parties elect to purchase the real estate, the real estate shall proceed to sale as set forth below. However, the parties may join together to purchase the interest of the other(s).”

{¶14} In lieu of the above language, Defendants requested that the following paragraph be inserted “to ensure that a party does not elect to purchase merely to frustrate the desire of another party to exercise the right to purchase the property as set forth in the statute”:

{¶15} “Any two parties may join together to elect to purchase the interest of the remaining party. If more than one party, not electing jointly, elects to purchase the property for the appraised value, each electing party shall have 45 days from the date of notice of valuation to the parties to demonstrate to the satisfaction of the Court that the party is presently capable of purchasing the interest upon the terms set forth in the Journal Entry. Acceptable methods of demonstrating the ability to purchase shall include cash deposit of the purchase price, or a letter of credit or written loan commitment from a financial institution. If only one electing party makes such demonstration, the property will be sold to that party as set forth above. If two or more parties either fail to make, or make, the required demonstration, the real estate will proceed to sale as set forth below.” The language “as set forth below” includes the quoted text contained within ¶10 of our opinion, above.

{¶16} On October 8, 2008, another hearing was held based upon Defendants’ motion to modify the previous order. On October 17, 2008, the court put on a journal entry, adding the additional language as requested by Defendants, and without objection by Plaintiffs.

{¶17} Plaintiffs and Defendants both provided proof of ability to pay for the property by December 5, 2008.

{¶18} On March 11, 2009, the trial court put on an additional journal entry, following a hearing that took place on February 19, 2009, wherein both parties indicated a desire to purchase the real estate. Defendants moved the court not to consider Plaintiffs' election to purchase as valid due to the alleged failure to comply with the court's prior order of October 17, 2008, regarding the requirement that the election to purchase include documentation showing the ability to purchase the property. The trial court denied the motion, finding Plaintiffs had sufficiently complied with the court's order.

{¶19} The trial court then instructed the Clerk of Court to issue an order of sale to the Sheriff of Morrow County, directing him to advertise the sale of the premises. The court again ordered the terms of purchase in an identical manner as set forth within ¶10 of this Court's opinion.

{¶20} It is from the March 11, 2009, journal entry that Appellants now appeals.

{¶21} Prior to the filing of Appellants' brief on June 22, 2009, Appellees filed a motion to dismiss on June 3, 2009. In their motion, Appellees state that though Appellants attached the March 11, 2009, judgment entry as being the entry from which they appealed, the language which Appellants contend constitutes error first appeared in the July 29, 2008, judgment entry, thus the appeal was untimely.

{¶22} On June 18, 2009, Appellants filed a memorandum contra to Appellees' motion to dismiss, claiming that the July 29, 2008, journal entry was not a final appealable order, as it did not have "any immediate irreparable effect on any of the

parties with respect to the conduct of a Sheriff's sale." Appellants assert that a final appealable order did not exist until the filing of the March 11, 2009, journal entry was filed, ordering the Sheriff's sale of the property.

{¶23} Appellants now raises one Assignment of Error:

{¶24} "I. THE COURT ERRED WHEN IT ORDERED THE FOLLOWING TERM OF SALE IN CONTRAVENTION OF THE CLEAR AND UNAMBIGUOUS LANGUAGE CONTAINED IN R.C. 5307.12: "IF A NON-PARTY PURCHASES THE REAL ESTATE AT THE AUCTION, THE PURCHASE MONEY SHALL BE PAYABLE ONE-THIRD AT ON [SIC] THE DAY OF SALE, AND THE BALANCE WITHIN THIRTY (30) DAYS THEREAFTER." (JOURNAL ENTRY DATED MARCH 11, 2009, R. 45).[2]

{¶25} Within their brief, Appellants argue that the March 11, 2009, journal entry contains the following objectionable language:

{¶26} "If a non-party purchases the real estate at the auction, the purchase money shall be payable one-third at on [sic] the day of the sale, and the balance within thirty (30) days thereafter."

{¶27} Appellants assert that this language is not permitted by the "plain and unambiguous language of the statute" and argues that R.C. 5307.12 provides one way in which to make a sale of an estate under R.C. 5307.11. Specifically, R.C. 5307.12 provides, in pertinent part:

{¶28} "A sale of an estate under section 5307.11 of the Revised Code shall be made at the door of the courthouse, unless for good cause the court of common pleas

[2] Plaintiffs-Appellees failed to file a brief on the merits after filing their Motion to Dismiss.

directs it to be made on the premises. The sale shall be conducted as upon execution, except that it is unnecessary to appraise the estate; but it shall not be sold for less than two thirds of the value returned by the commissioner or commissioners. Unless by special order, on good cause shown, the court directs the entire payment to be made in cash, the purchase money shall be payable one third on the day of sale, one third in one year after the sale, and one third in two years after the sale, with interest."

{¶29} Appellants assert that the alternate language used by the trial court in its March 11, 2009, journal entry "will make it easier for a prospective non-party purchaser to obtain conventional financing to purchase the property than would be possible under the terms of sale authorized by statute, thereby increasing the number of prospective bidders at the Sheriff's sale and the likely winning bid. Simply stated, Appellants contend that the terms of sale authorized by R.C. 5307.12 are more beneficial to Appellants' interests than those ordered by the Court. . .."[3]

{¶30} While such may be the case, this language was part of the trial court's July 29, 2008, journal entry and in fact, Appellants, when requesting a modification of the July 29, 2008, journal entry, chose not to contest the identical language in that entry.

{¶31} We find the Seventh District Court of Appeals' opinion in *Gruger v. Koehler*, (7th Dist. No. 01-CA-16), 2001-Ohio-3165, to be instructive in guiding our decision in this matter. In *Gruger*, an original order in partition establishing one-fourth interests of the parties, who were children of decedent, was entered on March 10, 2000.

[3] Appellants' brief, p. 10.

As the parties with conflicting interests had each elected to take the real property at its appraised value, it was ordered sold at public sale.

{¶32} On November 22, 2000, the trial court ordered a sale for not less than two-thirds of the appraised value with a required deposit of ten percent (10%) and the balance to be paid on confirmation and deed. No appeal was taken from either the March 10, 2000, order in partition or the November 22, 2000, order setting a public sale. Instead, the appellants attempted to have the order of public sale modified by permitting installment payments of the purchase price as permitted by R.C. 5307.12. The motion to modify was overruled on December 11, 2000.

{¶33} Subsequently, on January 24, 2001, the trial court signed a new order of sale in partition which had been submitted by the appellants. This new order of sale provided for the payment in installments of the purchase price, despite the original order having a different provision and the trial court having denied a motion to modify the order the month before. Two days later, the trial court rescinded its modification order of January 24, 2001, and reaffirmed its original order of public sale filed on November 22, 2000. Appellants appealed and obtained a temporary stay of the public sale from the court of appeals which had been scheduled for February 20, 2001. On March 5, 2001, after hearing, the Seventh District set aside the temporary stay, ordered appellants to pay all costs associated with the postponed public sale and deferred ruling on a pending motion to dismiss the appeal. On February 23, 2001, the appellees filed a motion to dismiss for lack of a final appealable order. Appellants responded to the motion, asserting that the trial court abused its discretion in approving the order of sale in partition submitted by appellees.

{¶34} On June 29, 2001, appellants filed a merit brief claiming error by the trial court in rescinding its order of sale entered on January 24, 2001. The Seventh District examined the issue and concluded that the order appealed was not final and appealable under R .C. 2505.02, finding that the modified order of January 24, 2001, and rescission order of January 26, 2001, were nothing more than a denial of an attempted reconsideration of the original order of public sale in partition entered on November 22, 2000. A denial of a motion for reconsideration is not a final appealable order. *Pitts v. Transportation Co.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105.

{¶35} Additionally, the Seventh District held that the assigned error claimed an abuse of discretion in the trial court's ordering that the sale price be paid in full upon confirmation rather than the statutory allowance of one-third payments at confirmation and successive years. The appeals court determined that "[t]he order establishing method of payment was entered on November 22, 2000. Appellants did not appeal that judgment and cannot now be heard to complain."

{¶36} A final appealable order "determines" the action when it disposes of all issues and leaves nothing for further adjudication. R.C. 2505.02; see also *McCall v. Sexton* (4th Dist. No. 06CA12), 2007-Ohio-3982. We find in this case that the journal entry of July 29, 2008, establishing the terms of sale was akin to an order for foreclosure and sale. As such, it was a final appealable order. *Sky Financial Group, Inc., v. Mogul* (June 2, 2001), 11th Dist. No. 2000-T-0038, citing *Oberlin Sav. Bank Co. v. Fairchild* (1963), 175 Ohio St. 311, 312-313, 194 N.E.2d 580.

{¶37} Accordingly, Appellants' appeal is dismissed for failing to file a timely appeal of the July 29, 2008 judgment entry.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *Keever v. Jordan*, 2009-Ohio-5850.]

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO

FIFTH APPELLATE DISTRICT

PATRICIA J. KEEVER, ET AL.,	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
BRANT L. JORDAN, ET AL.,	:	
Defendants-Appellants	:	Case No. 09-CA-5

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is dismissed. Costs assessed to Appellants.

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE