

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BANK OF AMERICA, NA.

Plaintiff - Appellee

-vs-

LEWIS J. VALENTINE, ET. AL.

Defendant - Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 14 CAE 07 0042

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County
Court of Common Pleas, Civil
Division, Case No. 10 CVE 09-1425

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

March 23, 2015

APPEARANCES:

For Plaintiff-Appellee

THOMAS WYATT PALMER
MICHAEL DILLARD
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215

For Defendant-Appellant

LEWIS VALENTINE
2783 Martin Rd. #245
Dublin, OH 43017-2094

Baldwin, J.

{¶1} Defendant-appellant Lewis Valentine appeals from the April 11, 2014 Judgment Entry of the Delaware County Court of Common Pleas denying his Motion to Stay Sheriff's Sale and Motion to Strike Plaintiff's Motion to Reinstate Case to the Active Docket and the July 3, 2014 Confirmation Entry of Sale and Distribution of Proceeds.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 29, 2010, appellee, Bank of America, N.A., filed a complaint in foreclosure against Debra Valentine and appellant, Lewis Valentine, for failure to pay on a note secured by a mortgage.

{¶3} A bench trial before a magistrate was held on October 28, 2011. By decision dated December 28, 2011, the magistrate found in favor of appellee as against appellant in the amount of \$674,918.76 plus interest. Appellant filed objections. By judgment entry filed February 27, 2012, the trial court denied the objections and approved and adopted the magistrate's decision.

{¶4} Appellant filed an appeal. Pursuant to an Opinion filed on February 13, 2013 in *Bank of America, N.A. v. Valentine*, 5th Dist. Delaware No. 12 CAE 03 0020, 2013 -Ohio- 598, this Court affirmed the judgment of the trial court.

{¶5} Thereafter, on February 12, 2014, appellee filed a Motion to Reinstate Case to the Active Docket. Appellee, in its motion, stated that the action had been automatically stayed under section 362 of the U.S. Bankruptcy Code, but that the automatic stay was no longer in effect. As memorialized in an Order filed on February 14, 2014, the trial court reinstated the action to the active docket.

{¶6} An Alias Praecipe for Order for Sale with Reappraisal was filed on February 21, 2014. An Alias Order of Sale with Reappraisal was filed on _____. A Notice of Sale was filed on March 17, 2014. The sale was scheduled for April 16, 2014.

{¶7} On March 27, 2014, appellant filed a Motion to Stay Sheriff Sale of Property and Motion to Strike Plaintiff's Motion to Reinstate Case to the Active Docket.

{¶8} Appellee, on March 28, 2014, filed a Notice of Withdrawal of Notice of Sale. Appellee, in the same, stated that it was withdrawing its Notice of Sale filed on March 17, 2014 but was not withdrawing the Sheriff's Sale set for April 16, 2014. A Notice of Sale was then filed on March 31, 2014.

{¶9} Appellee, on April 3, 2014, filed an opposition to appellant's Motion to Stay Sale and to Strike. Appellant filed a reply on April 8, 2014.

{¶10} Pursuant to a Judgment Entry filed on April 11, 2014, the trial court denied appellant's Motion to Stay Sheriff's Sale and Motion to Strike Plaintiff's Motion to Reinstate Case to the Active Docket. Appellant appealed from such Judgment Entry. The appeal was dismissed for lack of prosecution because there was no final appealable order.

{¶11} A Entry of Sale and Distribution of Proceeds was filed on July 3, 2014.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY KNOWINGLY ALLOWING APPELLEE'S COUNSEL MANLEY-DEAS-KOCHALSKI TO REPRESENT APPELLEE WHEN THERE WAS A

DOCUMENTED CONFLICT OF INTEREST AND NO MANDATORY HEARING TO RESOLVE THE INFRACTION.

{¶14} THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY IGNORING DELAWARE COUNTY'S LOCAL RULES OF PRACTICE AND JUDGE KRUEGER'S PUBLISHED RULES OF GENERAL PRACTICES AND PROCEDURES.

{¶15} THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY KNOWINGLY ALLOWING AND CERTIFYING THE DISTRIBUTION OF APPELLANT'S PROPERTY AFTER AN IMPROPER SHERIFF SALE.

{¶16} THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY VIOLATING APPELLANT'S 14TH AMENDMENT RIGHT AND APPELLANT'S RIGHT TO DUE PROCESS.

I

{¶17} Appellant, in his first assignment of error, argues that the trial court erred in allowing the law firm of Manley Deas Kochalski LLC to represent appellee when one of the attorneys representing appellee (Michael Carleton) had "advised [a]ppellant previously concerning [a]ppellee." Appellant points out that Attorney Carleton's name appears on the February 12, 2014 Motion to Reinstate Case to Active Docket and that he filed a Motion to Strike Plaintiff's Motion to Reinstate Case to the Active Docket on the basis on the alleged conflict of interest. The Motion to Strike was denied by the trial court.

{¶18} “A trial court's decision to grant or deny a motion to strike will not be overturned on appeal absent a showing of an abuse of discretion.” *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000 (2005), quoting *Samadder v. DMF of Ohio, Inc.* (2003), 154 Ohio App.3d 770. 2003-Ohio-5340, 798 N.E.2d 1141. Abuse of discretion means the decision is unreasonable, arbitrary or unconscionable. *State ex rel Crawford v. Cleveland* (2004), 103 Ohio St.3d 196, 814 N.E.2d 1218, at paragraph 24.

{¶19} This Court, in our Opinion filed on February 13, 2013 in *Bank of America, N.A. v. Valentine*, 5th Dist. Delaware No. 12 CAE 03 0020, 2013 -Ohio- 598, addressed the issue of whether or not there was a conflict of interest. We specifically found that appellant did not meet his burden of establishing a conflict. The law of the case doctrine establishes the “decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc.*, 81 Ohio St.3d 214, 218, 690 N.E.2d 515 (1998), quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). We find our prior decision on the issue of conflict of interest is law of the case as set forth in this Court's prior Opinion. The trial court, therefore, did not abuse its discretion in denying appellant’s Motion to Strike on_____.

{¶20} Appellant’s first assignment of error is, therefore, overruled.

II

{¶21} Appellant, in his second assignment of error, argues that the trial court erred in denying his Motion to Strike the Motion to Reinstate because appellee’s trial

counsel who signed the Motion to Reinstate the Case did not enter an appearance as required by local rules.

{¶22} “An appearance is ordinarily made when a party comes into court by some overt act of that party that submits a presentation to the court.” *Alliance Group, Inc. v. Rosenfield*, 115 Ohio App.3d 380, 390 (1st Dist.1996). We find that trial court made an appearance by presenting pleadings to the trial court.

{¶23} Moreover, we concur with appellee that it is undisputed that all parties and the trial court were aware that trial counsel represented appellee. As noted by the trial court in its April 11, 2014 Judgment Entry, the law firm of Manley Deas Kochalski LLC represented appellee from the outset (CHECK). On April 13, 2012, Laura A. Hauser, Esq. and Michael Dillard, Esq. and the law firm of Thompson Hine, LLP filed a Notice of Appearance as co-counsel, not substituted counsel, on behalf of appellee. We cannot say that any failure to file a notice of appearance prejudiced appellant in any manner. See *Bank of America v. Singh*, 12th Dist. Butler No. CA2012-07-146, 2013-Ohio-1305.

{¶24} Appellant’s second assignment of error is, therefore, overruled.

III

{¶25} Appellant, in his third assignment of error, argues that the trial erred in allowing and certifying the distribution of property after the Sheriff’s Sale because the sale was improper.

{¶26} Appellant specifically points out that appellee, on March 28,2014, filed a Notice of Withdrawal of Notice of Sale. Appellee, in the same, stated that it was withdrawing its Notice of Sale filed on March 17, 2014. but was not withdrawing the Sheriff’s Sale set for April 16, 2014. A Notice of Sale was then filed on March 31, 2014.

The March 31, 2014 Notice did not contain the name of Michael Carleton while the earlier Notice of Sale did.(ADD)

{¶27} Appellant's third assignment of error is, therefore, overruled.

IV

{¶28} Appellant, in his fourth and final assignment of error, contends that the trial court violated his constitutional rights. According to appellant, "[a]ssignment of Error 1, 2 and 3 individually show direct violation of [a]ppellant's Fourteenth Amendment right's (sic),..."

{¶29} As is discussed above, the trial court did not abuse its discretion in denying appellant's Motion to Strike the Motion to _____or by confirming the sale. Moreover, appellant has failed to explain how his rights were violated. Appellant argues that his due process rights were violated due to judicial bias. It is axiomatic that judicial bias in criminal proceedings is fundamentally unfair and violates a defendant's right to due process of law. *State v. LaMar*, 95 Ohio St.3d 181, 767 N.E.2d 166, 2002–Ohio–2128, ¶ 34, citing *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Judicial bias involves "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. There is no evidence of judicial bias in this case.

{¶30} Appellant's fourth assignment of error is, therefore, overruled.

{¶31} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.