

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Plymouth Park Tax Services, LLC, et al.

Court of Appeals No. L-08-1277

Appellant

Trial Court No. CI2008-3381

v.

Michael Papa, et al.

DECISION AND JUDGMENT

Appellees

Decided: June 30, 2009

* * * * *

Dean Kanellis, for appellant.

* * * * *

SHERCK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas denying attorney fees in a property foreclosure action. Because we conclude that the trial court erred in denying appellant's request for attorney fees, we reverse.

{¶ 2} Appellant, Plymouth Park Tax Services, LLC, filed a complaint in foreclosure on real estate owned by appellee, Michael Papa, and Jane Doe, his unknown spouse. Appellees failed to answer or defend the suit. Consequently, the trial court granted appellant's motion for default judgment against appellees. Appellant then filed a motion for attorney fees in the amount of \$1,600 pursuant to R.C. 5721.39(A)(5), supported by a fee expert witness's affidavit averring that the requested sum was "not excessive" and was "fair and reasonable under the circumstances." Again, appellees did not respond.

{¶ 3} On May 30, 2008, despite no opposition, the trial court denied the motion for attorney fees. On June 25, 2008, however, the court issued its Judgment Entry and Foreclosure Decree, which included an award to appellant of \$1,600 in attorney fees. On July 28, 2008, the trial court then sua sponte filed a "Nunc Pro Tunc Order" which vacated the award of attorney fees. Appellant, thereafter, filed a motion for reconsideration, asking for a hearing on the denial of attorney fees. The trial court denied the motion for reconsideration.

{¶ 4} Appellant now appeals from the judgment vacating the award of attorney fees, arguing the following four assignments of error:

{¶ 5} "1. The trial court committed reversible error when it sua sponte vacated that portion of the June 25, 2008 Judgment Entry and Foreclosure Decree that awarded attorney fees to Plymouth Park.

{¶ 6} "2. The trial court committed reversible error when it denied Plaintiff-Appellant's Motion for Attorney Fees, which was filed under Ohio Revised Code §5721.39.

{¶ 7} "3. The trial court committed reversible error when it attempted to vacate the award of attorney fees and enter judgment that did not include a finding therefore.

{¶ 8} "4. The trial court committed reversible error when it denied Plaintiff's Motion for Reconsideration of the Motion for Attorney Fees.

i. I.

{¶ 9} We will address appellant's second assignment first. In its second assignment of error, appellant asserts that the trial court erred in denying its request for attorney fees. We agree.

{¶ 10} R.C. 5721.39 provides, in pertinent part:

{¶ 11} "(A) In its judgment of foreclosure rendered in actions filed pursuant to section 5721.37 of the Revised Code, the court or board of revision *shall enter a finding* that includes all of the following with respect to the certificate parcel:

{¶ 12} "* * *

{¶ 13} "(5) Fees and costs incurred in the foreclosure proceeding instituted against the parcel, including, *without limitation*, the fees and costs of the prosecuting attorney represented by the fee paid under division (B)(3) of section 5721.37 of the Revised Code, plus interest as provided in division (D)(2)(d) of this section, or *the fees and costs of the private attorney representing the certificate holder*, and charges paid or incurred in

procuring title searches and abstracting services relative to the subject premises."

(Emphasis added.)

{¶ 14} "In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus. The language of R.C. 5721.39 clearly indicates that attorney fees are mandatory and are to be awarded, "without limitation."

{¶ 15} In this case, pursuant to the mandatory language of R.C. 5721.39, appellant was entitled to attorney fees. Therefore, the trial court erred in denying appellant's motion for those fees.

{¶ 16} Accordingly, appellant's second assignment of error is well-taken.

1. II.

{¶ 17} We will now address appellant's first assignment of error, since it represents issues regarding the procedural posture of this case. Appellant argues that the trial court erred in issuing a nunc pro tunc judgment entry to vacate the award of attorney fees.

{¶ 18} The "purpose of a nunc pro tunc order is to have the judgment of the court reflect its true action. The power to enter a judgment nunc pro tunc is restricted to placing upon the record evidence of judicial action which has actually been taken. * * * It does not extend beyond the power to make the journal entry speak the truth * * * and can be exercised only to supply omissions in the exercise of functions which are merely clerical.

* * * It is not made to show what the court might or should have decided, or intended to decide, but what it actually did decide." *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75. When a court improperly enters a purported nunc pro tunc judgment, that judgment or order is void. See *Natl. Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, paragraph three of the syllabus; *Quinones v. Botello*, 6th Dist. No. S-03-016, 2004-Ohio-3162, ¶ 18.

{¶ 19} In this case, the trial court's initial June 25, 2008 foreclosure decree included a finding that, pursuant to R.C. 5721.39, appellant was entitled to be "reimbursed for private attorney fees in the reasonable sum of \$1,600.00." The court then awarded that sum to appellant later in the judgment entry.

{¶ 20} The June 28, 2008 nunc pro tunc judgment attempted to change that judgment, stating that the foreclosure decree

{¶ 21} "be amended nunc pro tunc as follows:

{¶ 22} "The Court finds that, Plaintiff IS NOT entitled to be reimbursed for private attorney fees.

{¶ 23} "It is further ORDERED that all other aspects of the Judgment Entry and Decree of Foreclosure dated June 25, 2008 are hereby affirmed."

{¶ 24} In this case, the trial court's initial denial of appellant's motion for attorney fees in its May 30 entry was an interlocutory order. Thus, the court had the discretion to change that decision at any time until the final order was issued, which it did in its final appealable order of June 25, 2008. The nunc pro tunc entry does not indicate that the trial court was correcting a clerical mistake. Rather, it attempts to "amend" the June 25,

2008 final judgment entry by changing a substantive finding. Consequently, under the facts of this case, we conclude that the nunc pro tunc order was improper and was void. Therefore, the June 25, 2008 judgment entry is valid.

{¶ 25} Accordingly, appellant's first assignment of error is well-taken.

{¶ 26} Appellant's two remaining assignments of error are moot.

{¶ 27} The June 28, 2008 nunc pro tunc judgment entry of the Lucas County Court of Common Pleas is void. The June 25, 2008 Judgment Entry and Foreclosure Decree of the Lucas County Court of Common Pleas is the final judgment entry. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT VOID.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.