[Cite as *Horvath v. Packo*, 2013-Ohio-56.]

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

Robin L. Horvath

Appellant

v.

Anthony L. Packo, Jr., et al.

Appellees

and

Terrie J. Horvath and Nancy Packo, LLC

Appellants

Court of Appeals No. L-11-1318

Trial Court Nos. CI0201005313
CI0201005789
CI0201005876
CI0201005881

DECISION AND JUDGMENT

Decided: January 11, 2013

* * * * *

Troy L. Moore and Thomas A. Matuszak, for appellants.

Christopher F. Parker, for appellee, Skutch Company, Ltd.

Alan J. Statman, William B. Fecher, and Patricia L. Hill, for appellee, Fifth Third Bank.

David J. Coyle, for TP Foods, LLC.

* * * * *

YARBROUGH, J.

{¶ 1} This matter is before the court on motions to dismiss appellants', Robin Horvath ("Horvath"), Terrie Horvath, and Nancy Packo, LLC (collectively "the Horvath group"), appeal of the trial court's December 19, 2011, and December 22, 2011 judgments. Those judgments authorized the receiver to execute an asset purchase agreement with TP Foods, LLC, and confirmed the contemplated asset sale. Fifth Third Bank, the judgment creditor, and The Skutch Company, Ltd., the court appointed receiver, now move to dismiss the appeal on the grounds of mootness. After full briefing on the matter, including supplemental briefing regarding a jurisdictional issue, the matter is decisional. Because we hold the trial court was without jurisdiction to issue the December 19 and 22, 2011 orders, those orders are void, and we therefore dismiss this appeal for lack of jurisdiction.

I. Background Facts

{¶ 2} This appeal arises from the protracted litigation regarding the Tony Packo's franchise. The genesis of the present matter occurred on August 18, 2010, when Fifth Third Bank filed for and obtained a cognovit judgment against the Packo companies[1] for their default on several notes totaling approximately $2.7 million. At the same time, Fifth Third Bank also obtained a cognovit judgment against Horvath and his co-owner Anthony Packo, Jr. for approximately $670,000 each, based on their respective capacities

[1] "The Packo companies" consists of Tony Packo's, Inc. and its wholly-owned subsidiary Tony Packo Food Company, LLC, Packo Properties, LLC, and Magyar Holdings, LLC.

as limited guarantors of the debt owed by the Packo companies. After issuing the judgment, the trial court appointed The Skutch Company, Ltd. as receiver over the assets of the Packo companies. Horvath did not appeal the cognovit judgment or the order appointing the receiver.

{¶ 3} Over a year later, on August 26, 2011, Horvath filed a Civ.R. 60(B) motion for relief from the cognovit judgment, arguing that Anthony Packo, Jr. and Anthony Packo, III tortiously interfered with the loan agreements between the Packo companies and Fifth Third. Horvath asserted that Fifth Third acted in concert with the Packos to divest him of his ownership interests in the Packo companies by procuring a contrived default, placing the assets of the Packo companies into receivership, and then endeavoring to sell the assets to a new entity associated with the Packos. Through his motion, Horvath sought to vacate the cognovit judgment against the Packo companies, himself, and Packo, Jr. The trial court summarily denied Horvath's Civ.R. 60(B) motion in its September 20, 2011 entry. Horvath appealed this denial on October 19, 2011, in case No. L-11-1270. Horvath did not move to stay the trial court proceedings pending resolution of his appeal.

{¶ 4} Following the denial of Horvath's Civ.R. 60(B) motion, but prior to the perfection of his appeal, the trial court held a hearing to determine which of three conditional offers to purchase the Packo companies' assets was the "highest and best offer." The three companies that submitted offers were (1) Front Ballpark Operations, LLC, owned by a group including Packo, III, (2) Nancy Packo, LLC, owned by Horvath

and his wife Terrie, and (3) TP Foods, LLC.[2] Pursuant to this hearing, the trial court issued an order on October 7, 2011, directing the receiver to accept the offer submitted by TP Foods. Horvath appealed from the October 7, 2011 order in case No. L-11-1287.[3] The appeal was perfected on November 3, 2011. Horvath did not move to stay the trial court proceedings.

{¶ 5} Proceedings continued in the trial court over Horvath's objection that the court lacked jurisdiction due to his two pending appeals. On December 19, 2011, the trial court authorized the receiver to execute the asset purchase agreement negotiated with TP Foods. In its authorization order, the trial court noted that although Horvath made several procedural objections to the asset purchase agreement, no objection was made to its value, nor were there any substantive objections to its terms and conditions. On December 22, 2011, the trial court issued its judgment confirming the sale of the receivership assets to TP Foods. The next day, December 23, 2011, the Horvath group filed the present appeal in case No. L-11-1318. They again did not seek a stay of the proceedings.

{¶ 6} On January 5, 2012, this court dismissed, inter alia, Horvath's appeal from the October 7, 2011 judgment for lack of a final, appealable order. The appeal from the

[2] Front Ballpark Operations later withdrew its bid and supported the bid submitted by TP Foods.

[3] This appeal was later consolidated with case No. L-11-1270.

denial of the Civ.R. 60(B) motion, and the present appeal from the December 2011 orders remain pending.

{¶ 7} On January 12, 2012, the Horvath group initiated a complaint for peremptory, alternative, and permanent writs of prohibition against respondents Hon. Gene A. Zmuda and the receiver. The complaint presents two counts. The first count alleges that once Horvath appealed the denial of the Civ.R. 60(B) motion, the trial court was divested of subject matter jurisdiction except to take action in aid of that appeal. Accordingly, relators argue that many of the intervening actions of the receiver and trial court are jurisdictionally void, including the December 19, and December 22, 2011 orders. The second count is similar, and alleges that because relators appealed the December 22, 2011 order confirming the sale of the receivership assets, the trial court and receiver do not have jurisdiction over issues that are inconsistent with this court's ability to reverse, affirm, or modify the orders being appealed. The complaint prays that we (1) vacate the December 19, and December 22, 2011 orders, (2) prohibit respondents from exercising any jurisdiction not in aid of relators' appeals while their appeals remain pending, and (3) prohibit respondents from taking any action that interferes with our ability to reverse, affirm, or modify those orders.

{¶ 8} In response to the complaint, this court issued an alternative writ on January 26, 2012, ordering that within 14 days respondents either do the acts requested by relators, or show cause why they are not required to do so by filing an answer pursuant to Civ.R. 8(B), or a motion to dismiss pursuant to Civ.R. 12. Before the 14-day deadline

had expired, the receiver "closed" the asset sale, thereby transferring ownership of the assets to TP Foods. A week after the closing, respondents separately moved to dismiss the complaint for a writ of prohibition pursuant to Civ.R. 12(B)(6).

{¶ 9} In early March 2012, the receiver and Fifth Third filed the present motions to dismiss the Horvath group's appeal from the December 19, and December 22, 2011 orders. Their arguments in support of dismissal in part mirror those in the motions to dismiss the original action, i.e., that the closing of the asset sale rendered the action moot since the assets are no longer reachable by the court. After the parties briefed the motion to dismiss, we sua sponte issued an order requesting further briefing on the question of whether the trial court retained jurisdiction to issue its December 19, and December 22, 2011 orders pending Horvath's appeal from the trial court's October 7, 2011 order directing the receiver to accept TP Foods' offer (case No. L-11-1287). Subsequently, TP Foods moved for, and was granted, leave to intervene in this appeal. The parties have submitted their jurisdictional memoranda, and the motions to dismiss are now decisional.

II. Analysis

{¶ 10} In their motions to dismiss, the receiver and Fifth Third similarly assert that this appeal is moot because of the closing on the sale of the receivership assets. Citing *Akron Dev. Fund I, Ltd. v. Advanced Coatings Intl., Inc.*, 9th Dist. No. 25375, 2011-Ohio-3277, the receiver explains that an appeal may become moot if it is extinguished by some event. Here, the receiver and Fifth Third argue that event is the subsequent sale of the receivership assets to TP Foods. They contend TP Foods is a bona fide purchaser for

value, and thus, pursuant to R.C. 2325.03,[4] the assets that were sold to TP Foods can no longer be affected by the Horvath group's appeal. Therefore, the receiver and Fifth Third conclude that since the subject matter of the appeal can no longer be reached, the appeal must be dismissed.

{¶ 11} In their opposition, the Horvath group presents three arguments. First, they argue that TP Foods is not a bona fide purchaser in good faith. In doing so, they take issue with the receiver's characterization of Horvath's Civ.R. 60(B) motion as impacting only the cognovit judgment against Horvath. The Horvath group argues that, to the contrary, Horvath's Civ.R. 60(B) motion sought relief from the cognovit judgments against himself *and* the Packo companies and Packo Jr. They contend the receiver's "blatantly false characterization" is material because (1) the receiver and trial court have previously acknowledged that Horvath's appeal of the denial of his Civ.R. 60(B) motion would divest that court of jurisdiction if it involved the entities in receivership or any other guarantor, and (2) the characterization is diametrically opposed to the duties of the receiver in that it leads to the conclusion that a $2.7 million dollar judgment is in the best interests of the receivership entities. Second, they argue that the appeal is not moot

[4] R.C. 2325.03 provides,

> The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack * * *. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.

because there has been no satisfaction of judgment. Finally, they argue that the receiver and trial court were divested of jurisdiction to act by three separate events: (1) Horvath's appeal of the denial of his Civ.R. 60(B) motion, (2) perfection of this appeal from the December 19 and 22, 2011 judgments, and (3) this court's issuance of the alternative writ of prohibition. The Horvath group contends that following those events, the trial court retained jurisdiction only to "take action in aid of the appeals." As such, they conclude the receiver and trial court were jurisdictionally prohibited from taking any act that would ostensibly moot the appeals, in particular, closing on the asset sale.

{¶ 12} In response to the Horvath group's argument that the trial court and receiver lacked jurisdiction to act pending our disposition of Horvath's appeals, the receiver and Fifth Third counter that, absent a stay of execution, a trial court retains jurisdiction to enforce its judgments, even while an appeal is pending. *State ex rel. Klein v. Chorpening*, 6 Ohio St.3d 3, 4, 450 N.E.2d 1161 (1983). Here, the Horvath group never sought a stay of execution of any judgment. Therefore, the receiver and Fifth Third conclude that the trial court and receiver retained jurisdiction to close on the asset sale to TP Foods.

{¶ 13} Before we address the merits of whether the closing of the asset sale moots the present appeal, we must first determine whether the trial court had jurisdiction to enter the December 19 and 22, 2011 judgments that authorized and confirmed the asset sale. If those judgments were entered without jurisdiction, they are void, and the appeal from them must be dismissed for lack of a final appealable order. *State ex rel. Ohio*

Democratic Party v. Blackwell, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 8 ("Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits. It is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'" (Internal citations omitted)); *State v. Gilmer*, 160 Ohio App.3d 75, 2005-Ohio-1387, 825 N.E.2d 1180, ¶ 6 (6th Dist.) (a void judgment is not a final, appealable order).

A. Jurisdictional Issue

{¶ 14} Two events are pertinent to whether the trial court had jurisdiction. First is Horvath's appeal from the denial of his Civ.R. 60(B) motion. Second is Horvath's appeal from the October 7, 2011 entry that ordered the receiver to accept TP Foods' offer to purchase the receivership assets. Notably, our issuance of the alternative writ does not bear on whether the trial court had jurisdiction to enter the December 19 and 22, 2011 orders since it occurred after the orders were entered.

1. Appeal from the Civ.R. 60(B) Denial

{¶ 15} As to the appeal from the denial of Horvath's Civ.R. 60(B) motion, we hold that, absent a stay of execution, the trial court retained jurisdiction to continue with the receivership proceedings. Horvath argues that his appeal divested the trial court of jurisdiction over the receivership matter because any further action would interfere with our ability to reverse, affirm, or modify the order on appeal. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990). Essentially, Horvath contends further action would interfere because if the Packo companies are sold through the

receivership, it would render any relief from the cognovit judgment ineffectual, ostensibly mooting his appeal. However, Horvath misapplies this principle in this particular context.

{¶ 16} A receivership sale is one manner of enforcement and satisfaction of a judgment; it is an alternative remedy to a sheriff's sale. *Huntington Natl. Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, 944 N.E.2d 1210, ¶ 8 (8th 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. *State ex rel. Klein*, 6 Ohio St.3d at 4, 450 N.E.2d 1161, citing R.C. 2505.09 ("[A]n appeal does not operate as a stay of execution until a stay of execution has been obtained * * * and a supersedeas bond is executed * * *"). For this reason, Civ.R. 62(B) affords an appellant the opportunity to stay the judgment pending appeal through the giving of an adequate supersedeas bond.

{¶ 17} It is true that the receivership proceedings, and subsequent sale of the assets, affects the remedy Horvath is seeking through his Civ.R. 60(B) motion, i.e., to remove the assets of the Packo companies from the receiver's control. However, the limiting of remedies available to Horvath does not interfere with our ability to affirm, modify, or reverse the appealed judgment. *See Chupp v. Thomas*, 6th Dist. No. H-97-027, 1997 WL 796532 (Dec. 8, 1997) (appeal from foreclosure order is not moot even though the property has been sold at a sheriff's sale). Even if we were to decide the trial court abused its discretion in denying Horvath's Civ.R. 60(B) motion, and even if the receivership assets are no longer available pursuant to R.C. 2325.03 because they

have been sold to a bona fide purchaser, Horvath would still be entitled to monetary relief from the proceeds of the asset sale. *See KeyBank Natl. Assn. v. Mazer Corp.*, 188 Ohio App.3d 278, 2010-Ohio-1508, 935 N.E.2d 428, ¶ 55 (2d Dist.).

{¶ 18} In *KeyBank*, a printing company went out of business, and its assets were placed into receivership for the benefit of the judgment creditor, KeyBank. One of the assets was 300,000 pounds of paper. However, a third party, Data Recognition Corporation ("DRC"), claimed that it owned the paper, and that the paper was in possession of the printing company pursuant to a bailment agreement. DRC moved for an order directing the receiver to return the paper. Following a hearing, the trial court ruled that no contract of bailment existed, and therefore KeyBank's lien was paramount. DRC appealed and moved to stay the sale of the paper. Before the motion to stay was granted, the receiver sold the paper.

{¶ 19} On appeal, DRC claimed the trial court erred when it ordered the receiver to sell the paper when there was no evidence that the printing company owned the paper or had any other right to sell it. KeyBank argued that DRC's request for a return of the paper or the full purchase price was moot because DRC failed to obtain a stay of the trial court's decision. The court of appeals held that DRC had an ownership interest in the paper that was superior to KeyBank's lien. Further, it rejected KeyBank's mootness argument, reasoning:

> The right to appeal is not conditioned upon obtaining a stay of the judgment from which the appeal is taken. A party who cannot afford the

> requisite supersedeas bond, or who is otherwise unable to obtain a stay of the offending judgment-perhaps, as in the [sic] case, because the party loses the race between the appellant's attempt to obtain a stay and the appellee's attempt to reduce its judgment to money, does not thereby lose the right to appeal. A *voluntary* satisfaction of a judgment waives any appeal from that judgment. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 245, 551 N.E.2d 1249, citing *Rauch v. Noble* (1959), 169 Ohio St. 314, 8 O.O.2d 315, 159 N.E.2d 451, and *Lynch v. Lakewood City School Dist. Bd. of Edn.* (1927), 116 Ohio St. 361, 156 N.E. 188. There was nothing voluntary, from DRC's point of view, about the receiver's decision to satisfy KeyBank and other lien holders by selling the paper and applying the proceeds from the sale. *KeyBank Natl. Assn. v. Mazer Corp.* at ¶ 54. *Contra Hagood v. Gail*, 105 Ohio App.3d 780, 790, 664 N.E.2d 1373 (11th Dist.1995) (applying the principle that "appellant will only be deemed to have acted involuntarily if she has been the subject of duress" to conclude that appellant who filed motion for stay one day before depositing the required funds with the clerk voluntarily satisfied the judgment).

{¶ 20} Finally, the *KeyBank* court recognized the principle that "[w]here a judgment is reversed, the successful appellant is entitled to a judgment of restitution for all that he or she has lost because of the judgment." *KeyBank Natl. Assn. v. Mazer Corp.* at ¶ 55, citing *Portis v. Summit Cty. Bd. of Elections*, 67 Ohio St.3d 590, 621 N.E.2d

1202 (1993). Therefore, because factual issues existed concerning the value of the paper that had been lost by DRC, and because the paper may have been sold to an innocent third-party purchaser, the *KeyBank* court remanded the case to the trial court to consider the amount of restitution to award. *Id.*

{¶ 21} Here, Fifth Third obtained a cognovit judgment against Horvath, Packo Jr., and the Packo companies. Proceedings for a receivership sale were initiated as a means of satisfying that final judgment. We think it is beyond dispute that had Horvath appealed from the cognovit judgment, the receivership proceedings would not be stayed during the appeal unless a stay had been granted. To conclude otherwise would be to ignore the provisions of R.C. 2505.09[5] and Civ.R. 62(B). *See State ex rel. Klein*, 6 Ohio St.3d at 4, 450 N.E.2d 1161 (during appeal from judgment, trial court retains jurisdiction over the subject matter and the person for purposes of discovery in aid of execution of the judgment).

{¶ 22} We see no reason to reach a different result where Horvath is appealing from the denial of his Civ.R. 60(B) motion. Regardless of whether Horvath's Civ.R. 60(B) motion applied solely to him, or whether it applied to all of the judgment debtors,

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[5] R.C. 2505.09 provides,

> Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, *an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner*, and a supersedeas bond is executed by the appellant to the appellee * * *." (Emphasis added.)

the purpose of the motion was to attack the validity of the cognovit judgment. Contrary to his assertion, the receivership proceedings and even the sale of the receivership assets do not interfere with our ability to affirm, modify, or reverse the denial of the Civ.R. 60(B) motion. As explained by *KeyBank*, the involuntary sale of the receivership assets does not extinguish Horvath's right to appeal the denial of his Civ.R. 60(B) motion. If we ultimately determine the trial court abused its discretion in denying that motion, Horvath would be entitled to restitution for what he has lost because of that judgment. Because the receivership assets have been sold to a purchaser who might qualify for protection under R.C. 2325.03, Horvath may be relegated to receiving restitution in the form of the amount paid for the assets, instead of the assets themselves. However, this result is solely of his own doing for failing to seek a stay of execution of the cognovit judgment. Therefore, we hold the trial court retained jurisdiction to proceed with the receivership sale pending Horvath's appeal from the denial of his Civ.R. 60(B) motion.

2. Appeal from the October 7, 2011 Order

{¶ 23} In contrast, the context of Horvath's appeal from the October 7, 2011 order leads to a different result. Within the receivership proceedings, the trial court issued its interlocutory order directing the receiver to accept the offer put forth by TP Foods. Horvath appealed. While this appeal was pending, and after discussions regarding whether the trial court retained jurisdiction over the matter, the court proceeded towards the receivership sale, ultimately issuing its December 19 and 22, 2011 judgments

approving the asset purchase agreement and confirming the sale. We conclude that this further action was done without jurisdiction.

{¶ 24} In reaching this conclusion, we are guided by the Ohio Supreme Court's decision in *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149. In that case, Supportive Solutions Training Academy, L.L.C. ("Supportive Solutions") initiated a multi-count complaint against Electronic Classroom of Tomorrow ("ECOT"). Nearly two years after the filing of the complaint, ECOT moved for leave to amend its answer so that it could assert the affirmative defense of political subdivision immunity. The trial court denied the motion, and ECOT appealed. Supportive Solutions moved to stay the proceedings pending resolution of the appeal, conceding that several of its claims against ECOT would be impacted by the immunity defense. Nevertheless, the trial proceeded on all claims. The jury returned a $1.2 million verdict in favor of Supportive Solutions. After the trial court entered its judgment reflecting the jury verdict, the appeals court dismissed ECOT's earlier appeal for lack of a final, appealable order.

{¶ 25} ECOT then filed a petition for writs of mandamus and prohibition, seeking, in part, a writ requiring the trial court to vacate that portion of the judgment based on claims that would have been subject to the immunity defense. The Ohio Supreme Court, citing the principle "once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment," reasoned:

> When ECOT appealed from Judge Suster's denial of its motion for leave to file an amended answer to raise the affirmative defense of political-subdivision immunity, the common pleas court and its judges lacked authority to proceed with the trial of any claims that might be subject to ECOT's immunity defense because those claims were within the appellate court's jurisdiction on review. *Id.* at ¶ 14.

{¶ 26} Addressing the argument that the appeal from the order denying ECOT's motion for leave to amend its answer had since been dismissed for lack of a final, appealable order, the Supreme Court stated:

> It is true that the court of appeals has now dismissed ECOT's appeal from the denial of its motion for leave to file an amended answer for lack of a final, appealable order and that the jurisdictional bar of a pending appeal does not apply when the appeal is no longer pending. See *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 12-13. But the common pleas court acted *while the appeal was pending* by conducting a jury trial on the affected claims and entering judgment on the jury verdict; the court did not wait for the court of appeals to resolve the appeal before it proceeded.
>
> Moreover, the mere fact that ECOT perfected the appeal from an order that the court of appeals ultimately determined not to be a final, appealable order did not confer authority on the trial court to proceed on

> those claims that could be affected while the appeal was pending. "[T]he determination as to the appropriateness of an appeal lies solely with the appellate court," and a trial court judge's opinion that the order appealed from is not a final, appealable order does not alter the fact that the filing of the notice of appeal divests the trial court of jurisdiction to proceed with the adjudication during the pendency of the appeal. *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 10-11; see also *In re Terrance P.* (1997), 124 Ohio App.3d 487, 489, 706 N.E.2d 801 ("the trial court does not have any jurisdiction to consider whether the person has validly invoked the jurisdiction of the appellate court"). (Emphasis sic.) *Electronic Classroom*, at ¶ 15-16.

{¶ 27} The Ohio Supreme Court concluded, "consistent with longstanding precedent, the common pleas court and judges patently and unambiguously lacked jurisdiction to proceed on all the claims against ECOT that were affected by its appeal, i.e., all the claims except for breach of express contract." *Id.* at ¶ 18. It then granted the writ of mandamus to compel the trial court to vacate the portions of the judgment that were based on claims subject to the immunity defense.

{¶ 28} The parties have provided supplemental briefing on the application of *Electronic Classroom* to the present situation. TP Foods first argues that *Electronic Classroom* is inapplicable because the October 7, 2011 order was unnecessary and not required, and therefore, further proceedings in the receivership sale process did not

interfere with this court's ability to reverse, modify, or affirm the October 7, 2011 order. Essentially, TP Foods contends that the October 7, 2011 order was inconsequential, and regardless of whether it was affirmed, modified, or reversed, the trial court would still have jurisdiction and authority to confirm the asset sale to TP Foods. TP Foods' argument leads to the conclusion that any order the trial court issues that is not specifically required by law is meaningless. We decline to adopt such a position.

{¶ 29} Next, the receiver, in its brief, recognizes the general rule that a notice of appeal divests a trial court of jurisdiction to act except over issues not inconsistent with the appellate court's jurisdiction. However, the receiver contends that an appeal from a non-appealable order does not divest the trial court of jurisdiction to act while the appeal is pending. It cites *Fifth Third Bank v. L & A Investments*, 2d Dist. No. 23601, 2010-Ohio-3769, in which the defendants in a foreclosure action moved the trial court to reconsider or vacate its order modifying a bankruptcy stay so that the stay applied only to the defendant that filed for bankruptcy. The trial court denied the motion. Fifth Third then moved for default judgment against the remaining defendants. Thereafter, the defendants filed their notice of appeal from the denial of their motion for reconsideration, but the appeal was ultimately dismissed for lack of a final, appealable order. However, while the appeal was still pending, the trial court entered a default judgment against the defendants. Upon appeal from the default judgment, the defendants argued that the trial court lacked jurisdiction to enter the default judgment because of the pending appeal from the denial of the motion for reconsideration. The Second District disagreed. It

recognized an exception that "[a]n appeal from a non-appealable order does not divest a trial court of jurisdiction to act while the appeal is pending." *Id.* at ¶ 12. Therefore, it held that the trial court retained jurisdiction to enter the default judgment. *Id.* at ¶ 13.

{¶ 30} The receiver first argues that *Electronic Classroom* does not overturn the general rule of law confirmed in *Fifth Third Bank v. L & A Investments*. We disagree. *Fifth Third Bank v. L & A Investments* held that an appeal from a non-appealable order does not divest the trial court of jurisdiction. *Electronic Classroom* does not adhere to that rule: ECOT's appeal, although later dismissed for lack of a final, appealable order, divested the trial court of jurisdiction. *Electronic Classroom*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, at ¶ 16. Therefore, following *Electronic Classroom*, we reject the receiver's first argument.

{¶ 31} The receiver next attempts to distinguish *Electronic Classroom* from the present situation in two ways. First, the receiver contends that the order appealed from in *Electronic Classroom* was, in fact, a final, appealable order, whereas the October 7, 2011 order that Horvath appealed from was not. The receiver uses this distinction to support its argument that the exception recognized in *Fifth Third Bank v. L & A Investments* remains good law. However, this argument is undermined by the fact the Ohio Supreme Court specifically declined to address whether the order ECOT appealed from was final and appealable:

> Therefore, consistent with longstanding precedent, the common pleas court and judges patently and unambiguously lacked jurisdiction to

> proceed on all the claims against ECOT that were affected by its appeal, i.e., all the claims except for breach of express contract. *By so holding, we need not address ECOT's arguments that the order appealed from constitutes a final, appealable order*. (Emphasis added.) *Id.* at ¶ 18.

Thus, we find it irrelevant whether the order appealed from is a final, appealable order.

{¶ 32} The second distinction raised by the receiver is that in *Electronic Classroom*, Supportive Solutions filed a motion to stay the proceedings. Here, in contrast, Horvath has never sought a stay. Notably, the distinction recognized by the receiver is not truly indicative of the issue before us. In *Electronic Classroom*, the appellee moved to stay the proceedings. The appellant—ECOT in *Electronic Classroom*, and Horvath in the present case—did not seek to stay the proceedings. Moreover, the Ohio Supreme Court did not address the importance of attempting to stay the proceedings. Instead, the important fact in the analysis was that the proceedings continued in the trial court despite the pending appeal. Therefore, we find the receiver's second distinction to be immaterial.

{¶ 33} Finally, the receiver argues that our query into whether the trial court was divested of jurisdiction following Horvath's appeal from the October 7, 2011 order is inconsistent with our recent holding in *Natl. City Bank v. TAB Holdings, Ltd.*, 6th Dist. No. E-11-09, 2012-Ohio-2346. In *TAB Holdings*, we held that the trial court retained jurisdiction to enter a foreclosure decree and order of sale even though the appeal from the order granting summary judgment against the debtor was pending at that time. We

reasoned that "'[u]ntil and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same.'" *Id.* at ¶ 3, quoting *State ex rel. Klein*, 6 Ohio St.3d at 4, 450 N.E.2d 1161. Because no stay was sought in that case, we concluded the trial court had jurisdiction.

{¶ 34} The receiver argues that the December 19 and 22, 2011 orders were in aid of execution of the cognovit judgment against the Packo companies. As such, the receiver concludes that absent a stay of execution, the trial court retained jurisdiction to issue the December 2011 orders in accordance with *State ex rel Klein* and *TAB Holdings*. We agree with the receiver on this point. *TAB Holdings* is analogous to, and consistent with, the first portion of our analysis: Horvath's appeal from the denial of his Civ.R. 60(B) motion did not divest the trial court of jurisdiction over the receivership proceedings. However, the receiver's argument does not address the impact of Horvath's appeal from the October 7, 2011 order that was issued *within* the receivership proceedings.

{¶ 35} Regarding this issue, Fifth Third and TP Foods contend that the trial court retained jurisdiction despite Horvath's appeal from the October 7, 2011 order because a stay of execution was never sought or granted. Both parties cite the rule that "the mere filing of a notice of appeal from the order * * * *does not divest the* * * * *court of jurisdiction to enforce an* interlocutory or final *order pending appeal unless the party is granted a stay of execution of the order*." (Emphasis sic.) *State ex rel. State Fire*

Marshal v. Curl, 87 Ohio St.3d 568, 570, 722 N.E.2d 73 (2000), quoting *Oatey v. Oatey*, 83 Ohio App.3d 251, 257, 614 N.E.2d 1054 (8th Dist.1992).

{¶ 36} In *State Fire Marshal*, a fireworks company obtained a writ of mandamus against the state fire marshal in the court of common pleas, ordering the fire marshal to issue a fireworks license to the company. The fire marshal appealed, and also moved to stay the order pending appeal. The motion to stay was denied by the trial court, and later by the court of appeals. Subsequently, the common pleas judge advised the fire marshal that if he failed to issue the fireworks license, the judge would issue a warrant for his arrest. The fire marshal thereafter sought a writ of prohibition to prevent the common pleas judge from holding a contempt hearing and ordering him to issue the fireworks license. The fire marshal also sought a writ of mandamus to compel the common pleas judge to issue the stay pending appeal.

{¶ 37} In the prohibition and mandamus proceedings, the Ohio Supreme Court held that, under Civ.R. 62, the fire marshal was entitled to a stay pending appeal; the trial court had no discretion to deny it. Further, pursuant to Civ.R. 62(C), the stay could not be conditioned on posting a supersedeas bond. The Court concluded, "Because the State Fire Marshal was entitled to a stay of the judgment, [the common pleas judge] patently and unambiguously lacked jurisdiction either to enforce the judgment or to conduct contempt proceedings." *State ex rel. State Fire Marshal* at 573.

{¶ 38} Although not directly stated, by citing at the beginning of its analysis the rule referenced by Fifth Third and TP Foods, the Supreme Court implied that the appeal

itself did not divest the trial court of jurisdiction to enforce its writ of mandamus ordering the fire marshal to issue the fireworks license. This is consistent with the rule announced in *State ex rel. Klein*, and our reasoning in *TAB Holdings*.

{¶ 39} In *State ex rel. Klein*, a civil judgment was entered against Klein, one of the defendants in the action. The plaintiff subsequently began proceedings in aid of judgment by sending notice of a deposition to Klein. Klein did not appear for his deposition, but appealed the judgment against him. He did not seek to stay execution of the judgment. While the appeal was pending, the trial court ordered Klein to make himself available for deposition, and when he did not, found him in contempt. The court issued a bench warrant, and Klein was arrested. He was later released on bond. Klein then petitioned for a writ of prohibition to prevent the trial judge from proceeding further in the matter. *State ex rel. Klein*, 6 Ohio St.3d at 3, 450 N.E.2d 1161.

{¶ 40} The Ohio Supreme Court denied the writ. In so doing, the Supreme Court rejected Klein's argument that the trial judge lost jurisdiction over the subject matter and the person when his notice of appeal was filed. The specific issue before the court was whether the trial court retained jurisdiction over proceedings for the judgment creditor to obtain discovery in aid of execution as allowed by Civ.R. 69. In its analysis, the Supreme Court recognized that execution of judgment, or proceedings in execution of judgment, were not stayed upon appeal, unless a supersedeas bond was posted. *Id.* at 4, citing Civ.R. 62(B) and R.C. 2505.09.

{¶ 41} The common element between *State ex rel. Klein* and *TAB Holdings* is that in both cases the trial court was exercising jurisdiction through the execution of a final judgment. Notably, "execution of judgment" and "proceedings in execution of judgment" have a special meaning. Civ.R. 69 provides, "Process to enforce a judgment for the payment of money shall be a writ of *execution*, unless the court directs otherwise." (Emphasis added.) R.C. 2327.01 defines "execution" as "a process of a court, issued by its clerk, [or] the court itself * * * and directed to the sheriff of the county." R.C. 2327.02 identifies three kinds of executions: (1) "[a]gainst the property of the judgment debtor, including orders of sale," (2) "[a]gainst the person of the judgment debtor," and (3) "[f]or the delivery of the possession of real property."

{¶ 42} In *TAB Holdings*, the trial court was exercising jurisdiction over the execution of judgment through the sale of the property in foreclosure. In *State ex rel. Klein*, the trial court was exercising jurisdiction over the execution of judgment through contempt proceedings against the defendant for failure to comply with the plaintiff's Civ.R. 69 discovery requests in aid of execution. *State ex rel. State Fire Marshal* also presents an analogous situation because although the trial court was not attempting to enforce a monetary judgment, it was enforcing its final judgment of a writ of mandamus. Civ.R. 70 provides that "If a judgment directs a party to * * * perform any other specific act, and the party fails to comply within the time specified, the court may * * * * in proper cases adjudge the party in contempt."

{¶ 43} The present case, however, is distinguishable. Here, the October 7, 2011 order was not a final judgment, and the proceedings that followed it were not proceedings in aid of its execution as contemplated by the holdings in *State ex rel. Klein* or *State ex rel. State Fire Marshal*. *Compare State ex rel. Brown v. Lyndhurst Mun. Court*, 8th Dist. No. 90912, 2008-Ohio-567 (trial court retained jurisdiction pending appeal to grant extension on writ of restitution); *Fifth Third Mtge. Co. v. Rankin*, 4th Dist. No. 11CA18, 2012-Ohio-2804 (trial court retained jurisdiction to confirm sheriff's sale pending appeal of judgment of foreclosure, but did not have jurisdiction to vacate the sheriff's sale pending appeal from the order confirming it); *Roman Plumbing Co. v. Cherevko*, 11th Dist. No. 2010-P-0069, 2011-Ohio-1991 (trial court retained jurisdiction to distribute proceeds pending appeal of order establishing the relative priorities of lienholders). Therefore, we decline to apply the rule urged by Fifth Third and TP Foods that the trial court retains jurisdiction to enforce its judgments absent a stay of execution.

{¶ 44} Instead, we find this situation to be directly analogous to that in *Electronic Classroom*. In both cases, the trial court issued an order that was not a final judgment. Following the notices of appeal, neither appellant sought a stay of the proceedings. In addition, while the appeals were pending, both trial courts continued in a manner consistent with the appealed orders,[6] but the trial courts' subsequent actions were not

[6] This is distinguishable from those cases where a trial court vacates or modifies an order while it is on appeal. In such cases, Ohio courts have commonly held that the trial court lacked jurisdiction to vacate or modify the order because it interfered with the appellate court's ability to affirm, modify, or reverse the appealed order. *See, e.g., Howard v.*

proceedings in aid of execution. The trial courts entered final judgment on the matter while the initial appeals were still pending. Finally, the initial appeals were later dismissed for lack of a final, appealable order. Because we find no material distinction between *Electronic Classroom* and the present situation, we find its reasoning applicable here, and conclude that the trial court lacked jurisdiction to enter its December 19 and 22, 2011 orders while Horvath's appeal from the October 7, 2011 order was still pending.

{¶ 45} We recognize, and are not unsympathetic towards, the warnings raised by the receiver and TP Foods that a party could interminably delay litigation without the requirement of a bond by appealing every interlocutory order issued by the trial court. However, we interpret the guidance of the Ohio Supreme Court in *Electronic Classroom* to be that, except in cases of proceedings to enforce a final judgment, where an issue is appealed, the trial court loses jurisdiction over that issue during the pendency of the appeal. *See also State ex rel. Blanchard Valley Health Assn. v. Bates*, 112 Ohio St.3d 146, 2006-Ohio-6520, 858 N.E.2d 406 (judge lacked jurisdiction to proceed with trial while one party's appeal of denial of motion to stay pending arbitration was still pending, because proceeding would have been inconsistent with the court of appeals' jurisdiction to review the judgment denying the motion to stay); *In re S.J.*, 106 Ohio St.3d 11,

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Catholic Social Servs. of Cuyahoga Cty., Inc., 70 Ohio St.3d 141, 637 N.E.2d 890 (1994) (trial court lacks jurisdiction to entertain a Civ.R. 60(B) motion for relief from judgment while that judgment is being appealed); *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, 922 N.E.2d 214 (trial court patently lacked jurisdiction to issue an amended QDRO while the original QDRO was being appealed).

2005-Ohio-3215, 829 N.E.2d 1207 (appeal from juvenile court's findings in mandatory-bindover hearing divested juvenile court of jurisdiction to proceed with the adjudication of the child).

{¶ 46} Here, the issue was the propriety of the trial court's decision to direct the receiver to accept TP Foods' offer as opposed to that of Nancy Packo, LLC. That issue was appealed. While the appeal was still pending, the trial court entered its December 2011 orders, which confirmed the sale to TP Foods. On the authority of *Electronic Classroom*, we hold that the December 19 and 22, 2011 orders were entered without jurisdiction. Accordingly, they are void. *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988) ("a judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*"). Because an appeal cannot lie from a void judgment, this cause is dismissed.

B. Effect on the Proceedings

{¶ 47} We turn now to the effect of our decision on the proceedings. The receiver, Fifth Third, and TP Foods uniformly argue that the sold assets cannot revert back to the receivership by virtue of R.C. 2325.03, which provides,

> The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack; nor shall the title to property that is

> sold before judgment under an attachment be affected by the proceeding or attack. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.
>
> This section does not apply if in the proceeding resulting in the judgment or order sought to be vacated, modified, or set aside, the person then holding the title in question was not lawfully served with process or notice, as required by the law or Civil Rules applicable to the proceeding.

We disagree with the argument of the receiver, Fifth Third, and TP Foods, and conclude that because the confirmation of sale is void, TP Foods is not protected by R.C. 2325.03.

{¶ 48} "Sales by receivers, since they are made pursuant to orders of the court in the receivership proceedings, are judicial sales and, hence, are governed by the general rules and statutes governing those proceedings, subject to certain exceptions." 80 Ohio Jurisprudence 3d, Receivers, Section 113 (2012), citing *Bloomberg v. Roach*, 43 Ohio App. 178, 182 N.E. 891 (5th Dist.1930). *See also Advantage Bank v. Waldo Pub, LLC*, 3d Dist. No. 9-08-67, 2009-Ohio-2816, ¶ 31; *but see Huntington Natl. Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, 944 N.E.2d 1210, ¶ 8 (8th Dist.) (receivership sale not subject to the notice provisions of R.C. 2329.26).

{¶ 49} The Ohio Supreme Court has held that "purchasers at a foreclosure sale have no vested interest in the property *prior to confirmation of the sale by the trial court*." (Emphasis added.) *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990). Here, the trial court was without jurisdiction to confirm the sale

during the pending appeal from the October 7, 2011 judgment. Thus, although it has "closed" on the asset sale, TP Foods does not currently have a vested interest in the property. Notably, however, the jurisdictional bar to the entry of confirmation has since been removed by our January 5, 2012 dismissal of Horvath's appeal. Accordingly, on remand, the trial court may enter an order confirming the sale.[7]

{¶ 50} We think a note on the confirmation of receiver sales is appropriate. "An order of foreclosure and sale is a final appealable order, * * * and the later order confirming the sale and distributing the proceeds is a second, separate, final appealable order." *Smith v. Najjar*, 163 Ohio App.3d 208, 2005-Ohio-4720, 837 N.E.2d 419, ¶ 11 (5th Dist.). "An order of confirmation thus becomes 'dispositive as to *the propriety of the sale* and the sale confirmation procedures * * *.'" (Emphasis sic.) *Sky Bank v. Mamone*, 182 Ohio App.3d 323, 2009-Ohio-2265, 912 N.E.2d 668, ¶ 26 (8th Dist.), quoting *Triple F Invests., Inc. v. Pacific Fin. Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 WL 589343 (June 2, 2001). "[T]he final order of confirmation * * * cures all such irregularities, misconduct, and unfairness in the making of the sale, departures from the provisions of the decree of sale, and errors in the decree and the proceedings under it." *Peoples Liberty Bank & Trust Co. v. Cornett*, 86 Ohio App. 222, 223-224, 90 N.E.2d 450 (1st Dist.1949). Further, as we have previously stated,

[7] "[T]he confirmation of a judicial sale relates back to the day of the sale and passes title as of that day." *In re Vieland*, 41 B.R. 134, 139, (N.D. Ohio 1984), citing *Jashenosky v. Volrath*, 59 Ohio St. 540, 53 N.E. 46 (1899).

> [I]n exercising its discretion in a foreclosure action, the court must keep in mind that the primary purpose of the judicial sale is to protect the interest of the mortgagor-debtor and to promote a general policy which provides judicial sales with a certain degree of finality. *Ohio Savings Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 56. Therefore, the confirmation of a judicial sale cannot be set aside except for "fraud, *mistake* or some other cause, for which equity would avoid a like mistake between private parties." (Emphasis added.) *Dairymen's Cooperative Sales Co., Inc. v. Frederick Dairy, Inc.* (1934), 17 Ohio Law Abs. 690, 692. *Soc. Natl. Bank v. Wolff*, 6th Dist. No. S-90-13, 1991 WL 64865, *4 (Apr. 26, 1991).

{¶ 51} An order confirming a receiver sale is a final, appealable order. *Mandalaywala v. Zaleski*, 124 Ohio App.3d 321, 329-330, 706 N.E.2d 344 (10th Dist.1997). The "decision whether to confirm or set aside a judicial sale is left to the sound discretion of the trial court." *Citimortgage, Inc. v. Haverkamp*, 12th Dist. No. CA2010-11-089, 2011-Ohio-2099, ¶ 14, quoting *Natl. Union Fire Ins. Co. v. Hall*, 2d Dist. No. 19331, 2003-Ohio-462, ¶ 12. "Where the trial court abuses its discretion in confirming the sale, a reviewing court will reverse that decision." *Ohio Sav. Bank*, 56 Ohio St.3d at 55, 563 N.E.2d 1388.

{¶ 52} The argument is raised that where a judicial sale has been confirmed, and the sale has been completed, resulting in transfer of title to the purchaser, those assets are unassailable by any subsequent attack. This is incorrect. While it is true that the

purchaser of assets at a duly confirmed judicial sale is protected if the underlying judgment of foreclosure is reversed or vacated, that protection does not apply where the order confirming the judicial sale is reversed or vacated. 64 Ohio Jurisprudence 3d, Judicial Sales, Section 112 (2012). Because it is the order of confirmation of sale that vests title in the purchaser, it follows that where that order is vacated or reversed, the purchaser no longer has title to the assets. *See id.* ("An order confirming a judicial sale having been set aside, the case stands as though the order had never been made. The sale and the confirmation are nullified so that no title passes to the purchaser"). Thus, the assets can be resold.[8]

{¶ 53} For example, in *Rak-Ree Ents., Inc. v. Timmons*, 101 Ohio App.3d 12, 654 N.E.2d 1310 (4th Dist.1995), property was sold to an unmentioned party at a sheriff's sale. The trial court entered an order of confirmation and distribution. The judgment debtor appealed the order confirming the sale, arguing that the public notice of sale was insufficient because it listed the wrong sale date. The court of appeals agreed, and held that the trial court abused its discretion in confirming the sale. The court of appeals reversed the order of confirmation and distribution, and remanded the case for a new public sale. *Id.* at 20. In doing so, the court directed the parties to R.C. 2329.46, which provides,

[8] In this event, "[t]he purchaser is entitled to reimbursement for the purchase money which he has paid, sometimes with interest, expenses, and the cost of any improvements that he may have made, and any taxes he may have paid." 64 Ohio Jurisprudence 3d, Judicial Sales, Section 112 (2012).

> Upon the sale of property on execution, if the title of the purchaser is invalid by reason of a defect in the proceedings, he may be subrogated to the right of the creditor against the debtor to the extent of the money paid and applied to the debtor's benefit, and, to the same extent, may have a lien on the property sold, as against all persons, except bona fide purchasers without notice.

{¶ 54} Related to this issue, is the argument that completion of a sale renders an appeal from the order confirming the sale moot. In so arguing, the receiver and TP Foods direct us to *Lee v. Scaldini*, 8th Dist. No. 91535, 2009-Ohio-2486. The facts in *Scaldini* are convoluted. In that case, Lee and Ho were members on the Board of Trustees of Myers University. They filed a complaint alleging breach of fiduciary duty for wrongful removal of trustees and for wrongful closure of Myers, and sought declaratory and injunctive relief. The trial court enjoined Myers from disbursing or transferring any funds. On the same day, the trial court appointed a "Special Master" over Myers under the receivership statute, R.C. 2735.01. The Ohio Attorney General intervened in the action, and filed an answer and counterclaim asserting that Lee and Ho have an inherent conflict of interest by virtue of their membership on the board of trustees of Myers, and their affiliation with University of Northern Virginia Properties, LLC ("UNVA"), since UNVA expressed an interest in acquiring Myers. The trial court subsequently enjoined Myers' Board of Trustees from taking any and all actions.

{¶ 55} Two months later, the special master moved on behalf of Myers for an order authorizing the sale of all or substantially all of Myers' assets. After the first attempted sale failed, the special master again moved for an order authorizing sale of the assets. Both times, Lee and Ho submitted a bid, but failed to conform to the bidding requirements. Following the submission of bids in the second sale, the trial court held a hearing at which the special master recommended sale to the highest bidder, a separate entity named Myers 160. The next day, the trial court granted the special master's second motion for an order authorizing the sale of Myers' assets. Three months later, the special master and Myers 160 entered into an asset purchase agreement. "Thereafter, ownership of real property, tangible property, and other assets transferred to Myers 160." *Id.* at ¶ 31.

{¶ 56} Lee and Ho appealed the trial court's preliminary injunction against them, and the order granting the special master's motion for an order authorizing the sale of Myers' assets. They argued the trial court erred by authorizing the sale of the assets, by enjoining the board of trustees from exercising their authority to govern Myers, by authorizing the sale of Myers' assets without permitting any discovery, and by authorizing the sale without fair consideration of the alternative offers submitted by Lee and Ho. They requested that the court of appeals rescind the sale.

{¶ 57} As the entirety of its analysis, the Eighth District noted that Lee and Ho did not move the trial court to stay the sale, did not appeal the appointment of the special master, and did not appeal the contested injunction, and, in the interim, the assets were

sold to Myers 160. The Eighth District then quoted the doctrine of mootness that, "when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Id.* at ¶ 36, quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895). The court reasoned, "In the case sub judice, Myers' assets were sold pending appeal, rendering it impossible for this court, if it should decide the case in favor of Lee and Ho, to grant them any effectual relief." *Scaldini* at ¶ 38. Therefore, the Eighth District deemed the appeal moot, and dismissed it.

{¶ 58} We find the analysis in *Scaldini* unpersuasive. There was no discussion of whether the authorized sale was confirmed, whether Lee and Ho could appeal the confirmation of sale, and what effect reversal of an order confirming sale would have on the assets. Instead of providing reasoning why a sale could not be rescinded, the court of appeals perfunctorily proclaimed that it could not afford any effective relief and dismissed the appeal. Furthermore, we note that no other court has cited *Scaldini*, or relied on it in any way. Therefore, we reject the application of *Scaldini* in this case.

{¶ 59} In a separate part of its memorandum, the receiver points us to *Akron Dev. Fund I, Ltd. v. Advanced Coatings Internatl., Inc.*, 9th Dist. No. 25375, 2011-Ohio-3277, which reaches a similar result as *Scaldini*. In that case, Akron Development Fund received a judgment against Advanced Coatings for its default on two notes, which were

secured by certain patents and assets. A receiver was appointed over the assets, and it was recommended that the assets be sold to Genesis Materials Technology ("Genesis"). The president of Advanced Coatings, Steven Johnson, was also the president of Genesis.

{¶ 60} At this point in the litigation, a group of Advanced Coatings' shareholders, claiming that they were "real parties in interest," opposed the motion for an order approving the sale to Genesis. The shareholders argued that Johnson, in effect, was trying to obtain full control over the assets at a reduced price in breach of his fiduciary duty to Advanced Coatings. Subsequently, a second company submitted an offer for the assets, and the receiver proposed a formal procedure to establish bids and conduct an auction. The formal procedure was approved by the magistrate. At the auction, Genesis was the highest bidder. Eleven days later, the trial court entered an order "authorizing and approving" the sale to Genesis, and directed the receiver to "consummate the sale" and "close the transaction." After the transfer of the assets had taken place, the receiver moved for an order to approve his final report, allow him to distribute the funds, discharge him, and terminate the receivership. The shareholder group opposed this motion. The magistrate concluded the receiver's motion should be granted. The shareholder group then filed objections to the magistrate's decision. Thereafter, the trial court, noting that "the parties" had not filed objections to the report, adopted the magistrate's decision.

{¶ 61} Two of the shareholders appealed. The court of appeals dismissed the appeal, determining that the trial court's order was not final and appealable because it

merely adopted the magistrate's decision to order the distribution of funds and terminate the receivership without independently entering judgment.

{¶ 62} The case then remained inactive for a year and a half, until it was consolidated with a separate action by Advanced Coatings against Johnson and Genesis. Akron Development Fund was excused from a settlement conference in that matter because its claims against Advanced Coatings had "been fully adjudicated," and it had assigned its judgment to the company that bid against Genesis during the auction for the assets.

{¶ 63} A month later, Johnson and Genesis moved the trial court to issue an order to terminate the receivership and turn over the proceeds to Akron Development Fund. They argued the receivership remained open due to a clerical error in the previous order. They asked the court to confirm the asset sale and close the receivership, even though the assets and the sale proceeds had transferred almost two years earlier. After a hearing, the trial court confirmed the receiver's sale and closed the receivership. Advanced Coatings appealed.

{¶ 64} The Ninth District dismissed the appeal, finding it moot. The court of appeals reasoned that the relief sought by Advanced Coatings—setting aside the asset sale and placing the assets back in its name—was no longer available because the assets had transferred to the purchaser, the funds had been distributed, and the judgment between Akron Development Fund and Advanced Coatings had been satisfied.

{¶ 65} We find the present situation to be distinguishable. In *Akron Dev. Fund*, the asset sale occurred, the funds were transferred, and the trial court ordered the receivership to be closed. Shareholders, who were not parties to the litigation, appealed the order terminating the receivership, not the order "authorizing and approving" the asset sale. That appeal was dismissed for lack of a final, appealable order. After nearly two years of inactivity on the case, the trial court entered an order confirming the sale and closing the receivership. Here, in contrast, Horvath, a judgment debtor, filed an immediate appeal from the judgment confirming the sale. Furthermore, although the assets were transferred a month and a half later, the proceeds have not been distributed to the creditors, and the judgment has not been satisfied. Therefore, we think the reasoning in *Akron Dev. Fund* is appropriately limited to its facts, and we decline to apply it here.

{¶ 66} Of the numerous cases that have decided whether a trial court's order confirming a judicial sale should be reversed, our research has identified only one other case that has dismissed the issue as moot. In *Meadow Wind Health Care Center v. McInnes*, McInnes' property was sold at a sheriff's sale. *Meadow Wind Health Care Ctr., Inc. v. McInnes*, 5th Dist. No. 2002CA00319, 2003-Ohio-979. Afterwards, McInnes objected to the appraisals, moved for a reappraisal, and requested a denial of the confirmation of sale. The trial court denied his motion for a reappraisal, and confirmed the sale. McInnes appealed. The Fifth District noted that no stay was requested or granted, and that the appellee's debt has been satisfied, although other outstanding creditors' debts have not been satisfied. In addressing McInnes' requests to vacate the

confirmation of sale, the deed to the purchasers, and the order of distribution, the court noted, "Appellant asks this court to unpeel the apple." *Id.* at ¶ 7. The Fifth District summarily concluded, "Upon review, we find the issue is moot and hereby dismiss the appeal. There was no satisfaction of judgment but an order of sale to third parties unrepresented and not served by the parties." *Id.* at ¶ 8.

{¶ 67} We disagree with the holding in *McInnes*. Further, to the extent that *Scaldini* and *Akron Dev. Fund* hold that the completion of the sale and transfer of assets following confirmation render an appeal from the confirmation of sale moot, we disagree with those cases as well. Instead, we adhere to the accepted principle that it is the confirmation of sale that transfers title, and where the confirmation of sale is reversed or vacated, it is as if no title has transferred to the purchaser. *Ohio Sav. Bank*, 56 Ohio St.3d at 55, 563 N.E.2d 1388.

{¶ 68} Moreover, we reject the argument that the judgment debtor could seek a stay on the transfer of assets to prevent the appeal from becoming moot. If this were the rule, it would render the right to appeal from the order of confirmation of sale meaningless in many instances. A person who has had his or her assets sold to satisfy a judgment is unlikely to have the financial wherewithal to post an adequate supersedeas bond. Thus, he or she would be unable to ensure through a reviewing court that the sale process approved by the trial court adequately protected his or her interests, and realized an appropriate sale price for the property. Therefore, we find no merit in the receiver's

and TP Foods' argument that the completion of sale and transfer of assets moots an appeal from the order confirming the sale.

{¶ 69} Whether the completion of the sale and transfer of the assets renders an appeal from the order of confirmation moot is a separate issue from whether satisfaction of the underlying judgment renders an appeal from the order of confirmation moot. There is significant discussion in case law that could pertain to the latter, and the key issue appears to turn on whether the judgment was "voluntarily satisfied." *See, e.g., Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. No. 19904, 2003-Ohio-6665. Here, though, because no satisfaction of judgment has occurred in this case, we need not determine whether a judgment is "voluntarily satisfied" where satisfaction occurs through the distribution of proceeds following a judicial sale.

{¶ 70} Finally, we must address the Horvath group's argument that because the December 19 and 22, 2011 orders are void, we should immediately unwind the sale to TP Foods, and the assets should be returned to the possession and control of the receivership until we determine the merits of Horvath's appeal from the denial of his Civ.R. 60(B) motion. The Horvath group also argues that because of that appeal, control of the receivership has now passed to this court, and we may substitute receivers, order sale of the receivership assets to Nancy Packo, LLC, or order mediation between the parties. We find these arguments to be meritless.

{¶ 71} Horvath's argument implicitly relies on the sale being entered into without jurisdiction as a result of his appeal from the denial of his Civ.R. 60(B) motion.

However, as discussed above, that appeal does not divest the trial court of jurisdiction in the receivership proceedings. Moreover, even if it did, the receiver sale culminating in the October 6 and 7, 2011 hearings, at which the trial court directed the receiver to accept TP Foods' bid, occurred prior to Horvath perfecting his appeal from the order denying his Civ.R. 60(B) motion. Thus, in no way was the sale entered into without jurisdiction. In addition, the sale "closing" occurred after we dismissed Horvath's appeal from the October 7, 2011 order, thereby removing any jurisdictional defects that prevented the trial court from proceeding. Accordingly, there are no jurisdictional grounds to unwind the sale.

{¶ 72} This, however, does not mean that the sale cannot be unwound. On remand, the trial court must decide whether to confirm or set aside the asset sale. If the trial court decides to set aside the asset sale, or if we reverse the trial court's confirmation of sale for an abuse of discretion, then the sale will be unwound. On the other hand, if the trial court confirms the asset sale and we affirm, it will not be unwound. Importantly, we have not formed, nor do we intend to express by our comments, any opinion whatsoever on whether confirmation of the asset sale would constitute an abuse of discretion. Such an issue cannot be addressed until it is properly before this court on appeal from an order confirming the asset sale.

III. Conclusion

{¶ 73} The trial court's December 19 and 22, 2011 orders authorizing the receiver to enter into the asset purchase agreement, and confirming the asset sale, respectively, are

void. Accordingly, this appeal is dismissed for lack of a final, appealable order. On remand, the trial court is to determine whether to confirm or set aside the asset sale.

{¶ 74} It is so ordered.

Appeal dismissed.

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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE