[Cite as *Am. Tax Funding, L.L.C. v. Robertson Sandusky Properties* , 2014-Ohio-5831.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

AMERICAN TAX FUNDING, LLC, PLAINTIFF-APPELLEE, VS. ROBERTSON SANDUSKY PROPERTIES, DEFENDANT-APPELLEE, PREMIER REAL ESTATE MANAGEMENT LTD., DEFENDANT-INTERVENOR/ APPELLANT.	)	CASE NO. 14 MA 1 O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 12CV27.

JUDGMENT: Affirmed.

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 29, 2014

[Cite as *Am. Tax Funding, L.L.C. v. Robertson Sandusky Properties* , 2014-Ohio-5831.]

APPEARANCES:

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[Cite as *Am. Tax Funding, L.L.C. v. Robertson Sandusky Properties* , 2014-Ohio-5831.]
VUKOVICH, J.

{¶1} Intervening Defendant-Appellant Premier Real Estate Management, LTD., appeals the decision of the Mahoning County Common Pleas Court finding that its previous Judgment of Foreclosure of the 1290 Crescent Street property, the Sheriff's Sale of that property, and the Sheriff's Deed transferring title of that property to Premier were void due to lack of service on the property's original owner Defendant-Appellee Robertson Sandusky Properties. The controlling issue in this case is whether Plaintiff-Appellee American Tax Funding, LLC (ATF) used reasonable diligence to ascertain Robertson Sandusky Properties' address for purposes of serving it with notice of the foreclosure action. For the reasons expressed below, the trial court's decision that ATF did not use reasonable diligence is supported by the record and accordingly, the foreclosure judgment, Sheriff's sale and sheriff's deed were properly determined to be void. Thus, the trial court did not abuse its discretion in granting Robertson Sandusky Properties' motion to vacate. The judgment of the trial court is hereby affirmed.

Statement of the Facts and Case

{¶2} Robertson Sandusky Properties acquired 1290 Crescent Street in 1973 and built a warehouse on that land. Tr. 71. Robertson Sandusky Properties had continuously owned that premises from 1973 until it was sold at Sheriff's sale in 2012; the warehouse has continuously operated since its inception in 1973. Tr. 79. Currently Robertson Heating Supply Company operates out of the Crescent Street warehouse.

{¶3} Robertson Heating Supply is the controlling company for multiple entities, which includes Robertson Sandusky Properties. Structurally, Robertson Sandusky Properties is the real estate company that maintains ownership of the real estate. Tr. 80.

{¶4} It appears that until 2004, Robertson Sandusky Properties' primary place of business was 500 West Main Street, Alliance, Ohio. This was also the property tax mailing address for the Crescent Street property. In 2004, Robertson Sandusky Properties moved to 2155 West Main Street, Alliance, Ohio. However, the

company failed to notify the Mahoning County Treasurer's Office of the change of address. The property tax invoices for the Crescent Street property were not forwarded to the new address and thus, from 2004 until 2010 the taxes went unpaid.

{¶5} ATF purchased that tax lien from Mahoning County and notified Robertson Sandusky Properties of this in May 2011 by having one of its agents call and leave a voicemail indicating that it had purchased the tax lien. Andy Forrest, one of Robertson Heating Supply's in-house accountants who was responsible for the payment of various real estate tax bills of various related Robertson companies, received the voicemail and looked into whether or not the property taxes on the Crescent Street property were current. Forrest discovered they were not and obtained a payoff quote on ATF's website. Tr. 44-45. The pay-off amount included the principal and the interest. Forrest instructed the accounts payable clerk to pay the principal; Forrest disputed the interest portion since Robertson Sandusky Properties had not received a bill from Mahoning County for those years. Tr. 45-46.

{¶6} On May 25, 2011, shortly after obtaining the pay-off amount, Forrest contacted Mahoning County to change the tax mailing address for the Crescent Street property to P.O. Box 2448, 2155 Main Street, Alliance, Ohio. Tr. 13; 45.

{¶7} On May 26, 2011, a check for the principal amount was drafted and sent to ATF. The drawer of the check was Robertson Heating Supply Co., which listed its address as P.O. Box 2448, Alliance, Ohio.

{¶8} In response to this check, ATF, on or about June 15, 2011, sent a letter to Robertson Heating Supply at the P.O. Box 2448 address to inform it that the money it received was only a partial payment and that more was still due. ATF instructed Robertson Heating Supply to contact ATF for the balance owed and to remit the remainder to ATF. Forrest received this letter but took no further action.

{¶9} Due to the failure to pay the remainder of the taxes owed, ATF forwarded the file to its attorney to file a foreclosure action. Counsel filed a notice of intent to foreclose with the Mahoning County Treasurer's Office. That office followed its normal procedure and checked to see if there were any unpaid taxes. Tr. 31. If there are, a bill is provided to the party seeking to foreclose so that those are paid

prior to the time of filing the foreclosure action. Tr. 31. On this bill the tax mailing address would be present. Here, there were no delinquent taxes because once Mahoning County had the correct address, the 2011 tax bills were sent to that address and those were promptly paid by Robertson Heating and Supply. Exhibits D, E, F, and G.

{¶10} On January 4, 2012, a Complaint in Foreclosure was filed. Service was attempted at the 500 West Main Street, Alliance address. Service by certified mail failed; it was returned "not deliverable as addressed." Counsel for ATF then attempted service by publication.

{¶11} Robertson Sandusky Properties did not answer or respond. Thus, on April 19, 2012, ATF moved for default judgment. On June 15, 2012 a judgment for foreclosure was issued. A week later the praecipe for order of sale was issued. The property sold on October 16, 2012 and the sale was confirmed one month later. 11/14/12 J.E.

{¶12} On November 30, 2012, E. Scott Robertson, president and part owner of Robertson Sandusky Properties, received a phone call from Kevin Dill, principal and member of Premier. Dill was claiming to be the owner of the Crescent Street property and wanted to talk to Robertson. Tr. 73. Robertson thought it was a hoax and disregarded the call. On December 3, 2012, an eviction notice was served at the Crescent Street property. ATF filed for a writ of possession on December 4, 2012.

{¶13} That same day Robertson Sandusky Properties filed a motion to vacate. 12/04/12 Motion. The next day it filed a motion for a temporary restraining order. 12/05/12 Motion.

{¶14} On January 15, 2013, the court adopted the parties agreed judgment entry enjoining ATF and Premier from attempting to recover possession of the premises while the matter was pending. On April 1, 2013, a hearing before a magistrate was held on the motion to vacate. The magistrate granted the motion on June 26, 2013; the findings of fact and conclusions of law were issued on October 2, 2013. Premier filed objections to that decision. 10/15/13 Objections. The trial court

considered the objections, overruled them, adopted the magistrate's decision and issued judgment in Robertson Sandusky Properties' favor. 12/13/13 J.E.

{¶15} Premier timely appeals that decision.

Assignment of Error

{¶16} "The trial court committed error in finding that all matters in this case, beginning with the judgment of foreclosure, the Sheriff's sale of the property and the Sheriff's deed transferring title of the property to Premier are void, and thereby granting Defendant Robertson Sandusky Properties' motion to vacate."

{¶17} We review a trial court's decision to grant or deny a motion to vacate for an abuse of discretion. *Spotsylvania Mall Co. v. Nobahar*, 7th Dist. No. 11MA82, 2013-Ohio-1280, ¶ 14 (common law motion to vacate based on inherent authority is reviewed under an abuse of discretion standard); *Motorists Mut. Ins. Co. v. Roberts*, 12th Dist. No. CA2013-09-089, 2014-Ohio-1893, ¶ 30 (common law motion to vacate based on inherent authority is reviewed under an abuse of discretion standard). An abuse of discretion implies that a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). An abuse of discretion cannot be found merely because the reviewing court would have decided it differently. *Summit at St. Andrews Home Owners Assn. v. Kollar,* 7th Dist. No. 11MA49, 2012–Ohio–1696, ¶ 12.

{¶18} Premier presents five arguments as to why the trial court's decision to grant the motion to vacate was improper. First, it argues that it was a good faith purchaser for value and that title obtained by a good faith purchaser for value should not be affected. Second, it argues that since the foreclosure and sheriff's sale were completed and the proceeds were distributed to ATF, the trial court lacked jurisdiction to vacate; the matter is moot. Third, along the same theory as the first argument, Premier argues that it was a good faith purchaser for value and thus, vacation is not the proper remedy for any deficiency in service, rather restitution, i.e. money damages, is the most that Robertson Sandusky Properties can receive. Fourth, it argues that the trial court incorrectly determined that Robertson Sandusky Properties was not properly served. It contends that the evidence does demonstrate that ATF

exercised reasonable diligence in serving Robertson Sandusky Properties. The fifth and final argument is that the trial court wrongfully granted vacation because Robertson Sandusky Properties did not have a meritorious defense that would entitle it to relief under Civ.R. 60(B).

{¶19} Robertson Sandusky Properties responds to these arguments by first focusing on whether or not the trial court's decision that Robertson Sandusky Properties was not properly served is correct. It contends that given the evidence the court correctly determined that ATF did not exercise reasonable diligence in attempting to ascertain Robertson Sandusky Properties' address and thus, vacation was appropriate based on the trial court's inherent authority to vacate void judgments. On that basis, it asserts that Premier's other arguments fail.

{¶20} ATF also filed a brief in this case. It states that the crux of this appeal rests on whether the trial court correctly determined that it did not exercise reasonable diligence in attempting to ascertain Robertson Sandusky Properties' address. ATF is of the position that it did exercise reasonable diligence and thus, the trial court incorrectly vacated the foreclosure and sale. However, it acknowledges that if this court finds that the trial court correctly determined that it did not exercise reasonable diligence, the trial court's judgment should be affirmed.

{¶21} In reviewing the arguments presented by the parties, both Robertson Sandusky Properties and ATF are correct that the controlling issue in this case is whether Robertson Sandusky Properties was properly served. Thus, we will address that issue first.

Service

{¶22} Here, service by certified mail was attempted in the beginning of January 2012 at the 500 West Main Street address. That was returned as "not deliverable as addressed" at the end of January 2012. Counsel for ATF then filed an affidavit for service by publication avowing that reasonable diligence had been used to ascertain Robertson Sandusky Properties' address but was unsuccessful. Service by publication was accomplished by publishing a legal notice in the Daily Legal News

once a week for three consecutive weeks. Proof of service by publication was filed with the trial court.

{¶23} Civ.R. 3(A) states that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant. Service of process must comply with Civ.R. 4.1 through 4.6.

{¶24} The effect of not properly serving a defendant is that the trial court's jurisdiction over that person was not invoked; "If a plaintiff fails to perfect service on a defendant and the defendant has not appeared in the action or waived service, a trial court lacks the jurisdiction to enter a default judgment against the defendant." *Bendure v. Xpert Auto, Inc.,* 10th Dist. No. 11AP–144, 2011–Ohio–6058, ¶ 16. *See generally*, *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990), paragraph one of the syllabus ("trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings"). If a court renders judgment when it does not have jurisdiction over the parties, the judgment is a nullity and is void ab initio*. Lincoln Tavern, Inc. v. Snader,* 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956); *Tuckosh v. Cummings,* 7th Dist. No. 07HA9, 2008–Ohio–5819, ¶ 17; *Beachler v. Beachler,* 12th Dist. No. CA2006–03–007, 2007–Ohio–1220, ¶ 12 ("In order to render a valid judgment, a court must have jurisdiction over the defendant in the action."), citing *Maryhew v. Yova,* 11 Ohio St.3d 154, 156, 464 N.E.2d 538 (1984).

{¶25} In this instance, ATF tried to serve Robertson Sandusky Properties by certified mail at the 500 Main Street, Alliance, Ohio address. Tr. 97. Service could not be completed and was returned as undeliverable. Tr. 97. Following that attempt, service was done through publication.

{¶26} Service by publication is found in Civ.R. 4.4 and has specific requirements. The rule provides that service by publication may be obtained if the residence of a defendant is unknown and where such service is authorized by law. Civ.R. 4.4(A). The rule also requires that the party seeking service by publication to file an affidavit which avers that "service of summons cannot be made because the

residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant cannot be ascertained with reasonable diligence." Civ.R. 4.4(A). A party seeking to serve by publication must strictly comply with the rule's requirements. *Anstaett v. Benjamin*, 1st Dist. No. C-010376, 2001-Ohio-7339, ¶14, citing *Moor v. Parsons*, 98 Ohio St. 233, 238, 120 N.E. 305 (1918).

{¶27} The arguments presented in this appeal focus on whether reasonable diligence was used to ascertain the proper address for Robertson Sandusky Properties. If reasonable diligence was not used then service by publication was not permitted and any judgment rendered thereafter is void.

{¶28} Reasonable diligence as used in Civ.R. 4.4. has been discussed by the Ohio Supreme Court. *Sizemore v. Smith*, 6 Ohio St.3d 330, 331-332, 453 N.E.2d 632 (1983). The Court explained that when an affiant avows that the defendant's address is unknown and that it cannot be discovered with reasonable diligence, that averment gives rise to a rebuttable presumption that reasonable diligence was exercised. *Id*. at 331. That said, a bare allegation is not conclusive on the subject and if challenged, the plaintiff must support the fact that reasonable diligence was used. *Id*. at 332.

{¶29} The hearing on the motion to vacate was partially about whether reasonable diligence was used. Robertson Sandusky Properties challenged the averment that reasonable diligence was used. Thus, ATF was required to support that averment and had the opportunity to do so at the hearing.

{¶30} In *Sizemore*, the Ohio Supreme Court began the analysis of what constitutes reasonable diligence with a Blacks' Law Dictionary definition. *Id*. "Reasonable diligence" is "[a] fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity." *Id*. quoting Black's Law Dictionary (5 Ed.1979), at 412. It further explained:

> Reasonable diligence requires taking steps which an individual of ordinary prudence would reasonably expect to be successful in

> locating a defendant's address. Certainly a check of the telephone book or a call to the telephone company would hold more promise than a contact of one's own client. Other probable sources for a defendant's address would include the city directory, a credit bureau, county records such as the auto title department or the board of elections, or an inquiry of former neighbors.

Sizemore at 332.

{¶31} That said, the Court recognized that what constitutes reasonable diligence will depend on the facts and circumstances of each case. *Id*. It specifically indicated that the examples provided in the opinion of what reasonable diligence is does not constitute a mandatory checklist. *Id*. Rather, those examples exemplify that reasonable diligence requires counsel to use common and readily available sources in the search of the defendant's address. *Id*.

{¶32} Here, counsel for ATF testified that after service by certified mail to the 500 Main Street, Alliance, Ohio address failed, he searched public records for any other address for Robertson Sandusky Properties. Tr. 97. This included a search of the Mahoning County Clerk of Court's records to see if Robertson Sandusky Properties had ever been sued before, a search of the Mahoning County Recorder's records to ascertain whether or not the property owner owns any additional deeded property, an online search of the Mahoning County Auditor's records, a search of the Secretary of State's records since this was a business entity, a general Google search, and a telephone directory search. Tr. 97-98. None of these searches produced an address for Robertson Sandusky Properties.

{¶33} That said, an employee from the Mahoning County Treasurer's office testified that the information could have been obtained by calling the Treasurer's office. She indicated that on May 25, 2011 Robertson Sandusky Properties contacted the Treasurer's Office to change the tax mailing address from 500 West Main Street Alliance to P.O. Box 2448, 2155 Main Street, Alliance. Tr. 13. She explained that the change of address was effective that date and anyone who called and asked for the address would be given that address. Tr. 14. The employee,

however, did explain that the new mailing address would not be accessible online. Tr. 20. If a person were to do an online search at the Auditor's webpage, the owner would be listed as "Robertson Sandusky Prop USA." The mailing information would state, "Negotiated Sold Tax Lien Contact Mahoning County Treasurer Youngstown, OH 44503 USA." Tr. 20; Intervening Defendant's Joint Exhibit 1.

{¶34} In addition to the above information, the record also discloses that after acquiring the tax lien and before the foreclosure action was filed, ATF had some contact with Robertson Sandusky Properties. After acquiring the tax lien, ATF notified Robertson Sandusky Properties by phone that it owned the tax lien. Robertson Sandusky Properties acquired a pay-off amount from ATF's webpage, but only paid the principal amount because it disputed the interest. The check issued to ATF to pay the principal of the tax lien was not drawn by Robertson Sandusky Properties. Rather, it was drawn by Robertson Heating Supply and contained the P.O. Box 2448 Alliance, Ohio address. In response to that payment, ATF sent a letter to the P.O. Box 2448, Alliance, Ohio address to inform Robertson Heating Supply that a balance was still owed and to contact ATF for the amount due. Exhibit L.

{¶35} However, when ATF forwarded the file to counsel to proceed with foreclosure, it did not give counsel any information about the prior payment or the letter that it had sent to Robertson Heating Supply about an amount still being due. Tr. 107. Counsel stated that even if he had received that information prior to the lawsuit, he is "not sure" if he would have used that address because it was not addressed to Robertson Sandusky Properties. Tr. 107-108.

{¶36} In considering all of this information, the magistrate concluded that "the correct mailing address for Robertson was readily ascertainable by ATF through information within its own files, through the Mahoning County Auditor's Office website" and "through the Treasurer's Office". 10/02/13 Magistrate Decision. Thus, the magistrate determined that ATF did not use reasonable diligence to ascertain Robertson Sandusky Properties' address and that service by publication was not permitted. On that basis, it granted the motion to vacate because the judgments

were void for lack of service. The trial court reviewed that determination and adopted it.

{¶37} Considering the evidence, this is a close case. Given that our standard of review is an abuse of discretion, we cannot conclude that the trial court abused its discretion in reaching the conclusion that it did. The information in the record shows that ATF had within its own files information that allowed it to successfully notify someone associated with Robertson Sandusky Properties of ATF's purchase of the tax lien; it received payment of a portion of that lien and it then was able to notify Robertson Heating Supply that more was due on the tax lien. It may be true that without further inquiry counsel would not have used the address on the check for the principle payment of the tax lien as an address to attempt service of the foreclosure action. However, that does not mean that the information would not have been useful in ascertaining Robertson Sandusky Properties' address. As stated above, reasonable diligence requires taking steps which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address. Having the information of who paid the principal of the taxes and its address could have been used to ascertain the correct mailing address of Robertson Sandusky Properties.

{¶38} Consequently, for those reasons, the record supports the trial court's conclusion that the judgments were void for lack of service; the trial court did not abuse its discretion in finding that reasonable diligence was not used to ascertain Robertson Sandusky Properties' address and thus, service by publication was improper. Premier's argument regarding service fails.

Meritorious Defense

{¶39} The next argument addressed is Premier's assertion that the trial court erred when it granted the motion to vacate when Robertson Sandusky Properties failed to present a meritorious defense.

{¶40} In order to prevail on a motion for relief from judgment, pursuant to Civ.R. 60(B) the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under

one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable amount of time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.,* 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶41} Civ.R. 60(B) is used to vacate judgments that are voidable. *Howell v. Howell*, 10th Dist. No. 12AP-961, 2014-Ohio-2195, ¶ 8 (voidable judgments attacked by direct appeal or Civ.R. 60(B)). However, here, the trial court's authority to grant the motion to vacate in this case is not based on Civ.R. 60(B). Rather it is based on its inherent authority to vacate a void judgment. Trial courts have inherent authority to vacate void judgments; a party need not seek relief under Civ.R. 60(B) in order to have the judgment vacated. *Patton v. Diemer,* 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988); *see also, Ross v. Olsavsky,* 7th Dist. No. 09MA95, 2010–Ohio–1310, ¶ 11.

{¶42} Therefore, Robertson Sandusky Properties did not need to meet the *GTE* requirements; it did not have to demonstrate a meritorious defense. Premier's argument to the contrary fails.

Moot

{¶43} Premier also argues that the trial court lacked jurisdiction to grant the motion to vacate because the matter was moot. Premier argues that the judgment has been satisfied because the trial court found that the foreclosure was granted, the sheriff's sale was completed, the sheriff's deed was filed, and the proceeds were distributed to ATF. Thus, Premier contends that the matter should have been dismissed as moot and cites this court to a Tenth Appellate Court decision to support its position, *Kevin O'Brien & Associates v. Baum*, 10th Dist. No. 03AP1010, 2004-Ohio-2713.

{¶44} In *Kevin O'Brien & Associates*, in April 2001, plaintiff-appellee Kevin O'Brien & Associates filed a complaint against defendant-appellant Baum for a breach of contract; Baum owed the plaintiff $6,300 for legal services. *Id*. at. ¶ 2. Service was attempted through certified mail, express mail, ordinary mail and personal service through the Sheriff's office. *Id*. at ¶ 3. Each attempt was

unsuccessful. *Id*. Appellee then filed a motion for default judgment, which was granted in November 2001. *Id.* at 4. A lien was attached to appellant's real property in December 2001. *Id.* In August 2003, appellant sold her house and appellee received a check for $6,300 from the proceeds of the sale. *Id*. A few days later appellee filed a satisfaction of judgment and released the lien. *Id*. Ten days later appellant filed a motion to vacate judgment alleging lack of service of process and want of personal jurisdiction. *Id*. at ¶ 5. The trial court overruled the motion. *Id*. Appellant appealed. The Tenth Appellate District did not address the merits of the appeal, but rather found that the appeal was moot due to satisfaction of judgment. *Id.* at ¶ 7-11.

{¶45} That case is distinguishable from the matter at hand. The Tenth Appellate District stated that appellant failed to present any evidence that the payment was anything other than voluntary. *Id*. at ¶ 10. The language of the Tenth Appellate District's decision seems to indicate that a stay could have been sought or appellant could have taken another action to prevent the payment of the lien. *Id*. The court stated, "Where a final judgment orders the payment of money, and the order is not stayed, but, instead complied with by voluntary payment of the amount ordered, an appeal from the order would be dismissed as moot since reversal of that order would be ineffectual in affording any relief to the appellant." *Id*. A lien is an encumbrance on the title of real property. Thus, when a sale occurred and was finalized, it is apparent that the seller would be aware of the encumbrance and could have taken some action to prevent the payment of the lien or request a stay from the judgment that had ordered the money judgment/lien.

{¶46} In the instant matter, there was no ability to stay the Sheriff's sale or the filing of the Sheriff's deed. The record is devoid of any evidence that Robertson Sandusky Properties was aware of the foreclosure or the Sheriff's sale. It was only after the Sheriff's deed was filed and it received an eviction notice that Robertson Sandusky Properties was aware of what happened. At that point, it immediately moved to have the matter set aside. Furthermore, possession of the property has not changed hands in this matter. A preliminary injunction was sought and the parties

agreed that the Sheriff was enjoined from enforcing the writ of possession issued in ATFs favor and that no party was to take any action which would impair or encumber the legal or equitable title to the Crescent Street property until the matter is fully adjudicated.

{¶47} Thus, Robertson Sandusky Properties took action as soon as it became aware of the matter and stayed further execution of the judgments. This is not a situation where Robertson Sandusky Properties voluntarily satisfied the judgment against it.

{¶48} Those distinctions do not provide the only basis for finding no merit with Premier's mootness argument. There is a line of cases that provides logical reasoning as to why the doctrine of mootness and the principle of satisfaction of judgment do not apply when the judgment is deemed void ab initio. The Ohio Supreme Court has stated:

> It is a well-established principle of law that a satisfaction of judgment renders an appeal from that judgment moot. Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.

(Internal citations and quotations omitted.) *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, N.E.2d (1990).

{¶49} Both the Eighth and Tenth Appellate Districts have looked at this language and have found that jurisdiction is a prerequisite to mootness. *Francis David Corp. v. Mac Auto Mart, Inc.*, 8th Dist. No. 93532, 2010-Ohio-1064, ¶ 3; *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals,* 10th Dist. No. 03AP-625, 2004-Ohio-2943, ¶ 5. Or, in other words, if the trial court did not have jurisdiction over the action, the judgment is a nullity; it is void ab initio. *Nextel West Corp*. "Therefore, no 'satisfaction' of such void judgment * * * could occur." *Id*. Consequently, while satisfaction of a judgment normally moots any appeal from that judgment, that is only

"[w]here the court rendering judgment ha[d] jurisdiction of the subject matter of the action and the parties * * *." *Blodgett; Nextel West Corp*; *Francis David Corp*.

{¶50} As explained above, the judgments against Robertson Sandusky Properties in the foreclosure action are void ab initio because there was no proper service on it. *Lincoln Tavern, Inc.*; *Tuckosh,* 2008–Ohio–5819, ¶ 17. Therefore, the judgment against it could not have been satisfied and the mootness doctrine does not apply.

{¶51} Consequently, for those reasons Premier's argument that the appeal is moot fails.

Good Faith Purchaser

{¶52} The last two arguments addressed focus on Premier's status as a good faith purchaser for value. Premier contends that since it is a good faith purchaser for value its title cannot be affected by the motion to vacate, even if it has merit. It contends that the most that Robertson Sandusky Properties would be entitled to would be restitution, i.e. money damages. This argument is based on R.C. 2329.45 and the Ohio Supreme Court's decision in *Moor v. Parsons*, 98 Ohio St. 233, 120 N.E. 305 (1918).

{¶53} Robertson Sandusky Properties conversely asserts that this issue is governed by R.C. 2325.03 and the Ohio Supreme Court's decision in *Lenz v. Frank*, 152 Ohio St. 153, 87 N.E.2d 578 (1949). It contends that the statute and the case law provide that when title transferred to a good faith purchaser for value is attacked based on failure of service and failure of service is found, the title must transfer back to the original owner.

{¶54} The analysis will start with a comparison of the statutes that the parties cite. The statute cited by Premier, R.C. 2329.45, titled Reversal of Judgment states:

> If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

R.C. 2329.45.

{¶55} The statute cited by Robertson Sandusky Properties, R.C. 2325.03, titled Title of Purchaser in Good Faith Not Affected by Attack on Judgment by which He Obtained Title; Purchasers in Good Faith include Purchasers at Judicial Sale, states:

> 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 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 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.

R.C. 2325.03.

{¶56} These statutes protect purchasers of land. However, there are differences between the two statutes. One of the most obvious differences is that R.C. 2325.03 contains an exception to the general rule that the title of a good faith purchaser for value is protected. That statute indicates that the protection does not apply if the original holder of the title was not lawfully served with process or notice as required by the law or Civil Rules. R.C. 2329.45 contains no such exception.

{¶57} In 1918, the Ohio Supreme Court reviewed the predecessor to R.C. 2325.03 and found that the title of a good faith purchaser for value's title was protected. *Moor v. Parson*s, 98 Ohio St. 233, 120 N.E. 305 (1918). Premier asserts that the case before us is akin to *Moor*.

{¶58} *Moor* is a foreclosure case and service of process was completed by publication. The property was sold at Sheriff's sale and nearly three years after that one of the original owners of the property asked for the judgment to be opened and that he be let in to defend. *Id*. at 236. The Ohio Supreme Court stated that the issue presented to it was whether title to said property can be divested from good faith purchasers for value under General Code 11632.[1] That old general code section stated that a party against whom a judgment or order has been rendered without service other than by publication in a newspaper, may within five years after the date of the judgment, move to have the case opened and be let in to defend.

{¶59} The trial court found in favor of the good faith purchaser, finding that title could not be affected. *Id*. at 237. The appellate court reversed that decision and found that service by publication was not proper. *Id*. The appellate court stated that the original owner's address could have been ascertained by reasonable diligence. *Id*.

{¶60} The Ohio Supreme Court reversed the appellate court's decision. It stated that the proceedings were valid and regular in every respect. *Id*. It then explained:

> Section 11292, General Code, authorizes service by publication in an action for foreclosure of a mortgage 'when the defendant is not a resident of this state or his place of residence cannot be ascertained.' Section 11293, General Code, requires that before service by publication can be made an affidavit must be filed that service of summons cannot be made within this state on the defendant sought to be served, and that the case is one of those mentioned in the preceding section. Under these provisions, therefore, in the actions in rem mentioned therein, service may be made by publication upon a defendant whose place of residence cannot be ascertained, although he may be in fact a resident of the state. It follows that a judgment

[1]General Code 11632 became R.C. 2325.02. That section was repealed in 1971 and has not been reenacted.

> rendered upon such service, where the record shows that all the requirements of the statute have been complied with, and the proceedings are in all respects regular, is not void.

Id. at 239.

{¶61} Premier contends that the facts of *Moor* are similar to the matter at hand because service was done by publication. It is true that one procedural aspect of the case is similar to the matter at hand. However, that does not mean that the same result that occurred in *Moor* should occur in this matter. In *Moor*, the Court stated:

> Defendant Parsons sought the favor and benefit of section 11632, General Code. Undoubtedly the right was conferred upon him by that section to proceed as he did in this case, but the right there conferred carried with it the limitation imposed by the succeeding section, that the title to property which by reason of the judgment had passed to bona fide purchasers should not be disturbed. The contention that the provisions of section 11633, General Code, have no application except in a proceeding instituted by a defendant whom the proof in the subsequent hearing shows was in fact a nonresident of the state, or if a resident thereof, could not have been found, begs the question entirely. Defendant was a party, served only by publication, and on that ground he sought the favor of section 11632. The benefits thereby conferred are limited by the provisions of section 11633, and the defendant cannot enjoy the beneficial provisions of the one, freed from the restrictions imposed by the other.

Id. at 242-243.

{¶62} General Code section 11633 is the predecessor to R.C. 2325.03. As aforementioned, that section protects a good faith purchaser for value's title except when the title is subject of a final judgment that is being attacked because the original owner was not properly served. General Code section 11633 did not contain that exception; it solely stated the general rule that the title of a good faith purchaser

could not be affected by the attack. The exception language was not added until 1977. Thus, when the Ohio Supreme Court was considering *Moor*, there was no exception for a lack of service to affect the title of a good faith purchaser for value.

{¶63} Furthermore, a pertinent question in *Moor* and in the matter at hand is whether service by publication was proper. In *Moor*, the Court found that it was proper; the General Code section governing service was followed. In this instance, for the above stated reasons, service by publication was not proper.

{¶64} Thus, the case at hand is distinguishable from *Moor*. Furthermore, it is noted that the Ohio Supreme Court has declined to apply the *Moor* decision in a different factual and procedural context. *Lenz*, 152 Ohio St. 153. *Lenz* is a tax foreclosure case and the property was sold at Sheriff's sale. *Id*. at 154. The original owner filed an action approximately a month and half after the sheriff's deeds were delivered and two weeks after she learned of the sale. *Id*. at 156. In this action, she sought to have the tax foreclosure deed against her declared void and to have the deeds delivered by the sheriff set aside. *Id*. at 153. The trial court held that the decrees were void because she was not served with a summons and held in her favor. *Id*. at 154. The appellate court affirmed that decision. *Id*. Upon review, the Ohio Supreme Court also affirmed that decision.

{¶65} In addressing the *Moor* decision, it stated several reasons as to why that decision was inapplicable.[2] *Id*. at 156. One of those reasons was that service of summons in the *Moor* case was "in complete conformity with the provisions of the statute applicable thereto." *Id.* Thus, the Court was recognizing that the foreclosure decree was not void for lack of service.

{¶66} Another reason discussed in *Lenz* as why in *Lenz* the decree should be vacated as opposed to the decree in *Moor* was based on fairness:

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[2]The first and the third reasons are in reference to General Code Sections 11632 and 11633. As mentioned above 11633 is the predecessor to R.C. 2325.03 and language now used includes the proviso that the good faith purchaser's title is affected if the original owner was not lawfully served. Likewise, 11632 became R.C. 2325.02, but that statute has been repealed. Furthermore, it regards to those two reasons, it is noted that it no longer matters if the attack is direct or collateral. R.C. 2325.03 states "any type of proceeding or attack."

> Then, too, in [the *Moor*] case the property was in the hands of bona fide purchasers for nearly three years before the collateral attack was made. In the instant case the action was filed a month and a half after the sheriff's deeds were delivered and two weeks after the plaintiff learned of the sale because of tax delinquencies of $28.11 on one lot and $125.76 on the other. The defendant Boyd [purchaser for value] purchased the two lots for a total of $276.05 although the plaintiff claims that their real value is not less than $2,500. Boyd soon resold the property for the latter sum to the defendant Copen [purchaser for value] who then resold it to the defendant Faulks [purchaser for value] for $3,800. * * * The trial court protected the rights of all these parties by ordering that Boyd be refunded the amount he paid at the sheriff's sale and that all the purchasers be permitted to recover for any permanent improvements made by them.
>
> This court is of the view that the Court of Appeals was not in error in affirming the decree of the trial court which accomplishes a just result for all parties including the plaintiff who is now 82 years of age and whose property was eventually resold for almost fourteen times the sum for which it was sold at the sheriff's sale.

Id. at 156-157.

{¶67} Those facts are similar to the matter at hand. Vacation of the foreclosure decree and sale were sought within a month and a half of the sale and within three weeks of the confirmation of the sale. Furthermore, the market value listed on the auditor’s page is $413,380, which is $61,380 for the real property and $352,000 for the improvements. Premier bought the property at the sheriff’s sale for $40,000, which is roughly 10% of the market value of the land and improvements combined. Premier has not possessed the property; therefore, none of the improvements are attributable to it. Rather, all improvements were made by Robertson Sandusky Properties. Thus, the result rendered by the trial court in the matter at hand is fair.

{¶68} Consequently, in considering R.C. 2325.03 and 2329.45 and the Ohio Supreme Court's decisions in *Lenz* and *Moor*, we hold that in this instance R.C. 2325.03 is applicable and that this case is more akin to *Lenz* than it is to *Moor*. Therefore, Premier's status as a good faith purchaser for value, which typically would protect its title to the property, does not do so in this case because Robertson Sandusky Properties has shown that service was improper. Thus, the exception in R.C. 2325.03 applies and like in *Lenz*, the foreclosure decree and sale must be vacated based upon fairness. Premier's good faith purchaser argument fails.

Conclusion

{¶69} For the reasons expressed above, all of the arguments presented in the sole assignment of error are deemed meritless. We cannot find that the trial court abused its discretion in vacating the judgments. As there was some credible evidence in support of the judgment, we defer to the trial court's conclusion that Robertson Sandusky Properties' address was ascertainable and that ATF failed to use due diligence to discover that address. Without service, the trial court did not have jurisdiction over Robertson Sandusky Properties and any judgment rendered against it was void, not voidable. Pursuant to R.C. 2325.03, Premier's status as a good faith purchaser did not protect it in this instance. Furthermore, such result was fair due to the fact that the Robertson Sandusky Properties acted quickly to have the judgments vacated and due to the fact that the property sold for only 10% of its appraised market value at the sheriff's sale. The trial court's decision is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, P.J., concurs.