[Cite as *Home Fed. S. & L. Assn. of Niles v. Keck*, 2016-Ohio-651.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

HOME FEDERAL SAVINGS & LOANS ASSOCIATION OF NILES, et al., PLAINTIFFS-APPELLEES, VS. BRUCE KECK, et al., DEFENDANTS-APPELLANTS.	)	CASE NO. 15 MA 0041 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 09CV4139

JUDGMENT: Affirmed.

JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 11, 2016

[Cite as *Home Fed. S. & L. Assn. of Niles v. Keck*, 2016-Ohio-651.]
APPEARANCES:

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[Cite as *Home Fed. S. & L. Assn. of Niles v. Keck*, 2016-Ohio-651.]

ROBB, J.

{¶1} Defendant-Appellant Bruce Keck appeals the decision of the Mahoning County Common Pleas Court refusing to vacate orders of foreclosure and sale confirmation. In the first assignment of error, Appellant argues that he is entitled to Civ.R. 60(B)(5) relief from the order confirming the foreclosure sale. In the second assignment of error, Appellant contends the order confirming the sale is void and should be vacated due to the failure to comply with a local rule requiring service of the notice of sale on parties in default for failure to appear. He also contends the underlying foreclosure decree is void and should be vacated due to the failure to file a proper final judicial report. For the following reasons, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶2} In 2006, Bruce and Becky Keck executed a note in favor of Plaintiff-Appellee Home Federal Savings & Loan Association of Niles ("the bank") secured by a mortgage on property located at 10565 and 10718 Springfield Road in Poland, Ohio. In October 2009, the bank filed a foreclosure complaint against the Kecks, alleging that $143,476.28 was due plus interest from December 1, 2008. A preliminary judicial report was attached to the complaint. The complaint was served on the Kecks by certified mail. The address on the service of process was 10565 Springfield Road, Poland, Ohio.

{¶3} The bank filed a motion for default judgment in January 2010. When the Kecks filed for bankruptcy in February 2010, the foreclosure action was stayed. The case was returned to the court's active docket in January 2011, after the bankruptcy case was dismissed. On March 28, 2011, the court entered default judgment against the Kecks on the note and ordered foreclosure and sale.

{¶4} On April 14, 2011, the bank filed a "Corrected Preliminary Judicial Title Report," disclosing the permanent parcel numbers were incorrectly identified in the preliminary judicial report. The court filed a nunc pro tunc foreclosure decree on November 28, 2011. The bank assigned its rights in the note, mortgage, and

judgment to John R. Ramun, a neighboring property owner, and Ramun was substituted as plaintiff in March 2012.

{¶5} A notice of sheriff's sale, with the attached advertisement of sale, was filed on March 16, 2012. The certificate of service showed the notice was mailed that day to the Kecks at 10565 Springfield Road, Poland, Ohio. The sheriff's April 13, 2012 return of sale showed Ramun as the successful bidder. On May 3, 2012, the trial court entered an order confirming the sale. On June 15, 2012, Bruce Keck, through counsel, filed an appeal from the May 3, 2012 confirmation order. This court dismissed the appeal as untimely. *See Ramun v. Keck*, 7th Dist. No. 12MA109 (July 12, 2012 J.E.).

{¶6} On July 2, 2013, Appellant Bruce Keck filed a request for relief from judgment under Civ.R. 60(B)(5) and/or a request to vacate a void judgment under the court's inherent authority. The motion sought to vacate the March 28, 2011 foreclosure order, the November 28, 2011 nunc pro tunc foreclosure order, and the May 3, 2012 confirmation order. As to the foreclosure decrees, the motion alleged the decrees were entered without a final judicial report in violation of R.C. 2329.21. As to the confirmation order, the motion alleged Appellant did not receive the notice of sale or the order confirming the sale as required by Loc.R. 13(D).

{¶7} Appellant's affidavit attested to the following: he lived at 10718 Springfield Road, Poland, Ohio; he fell from a tree stand on November 12, 2011 and suffered major head, neck, and back injuries; he was in the hospital for over five weeks and then stayed in a bed in his living room until May 1, 2012. He asserted he would have been aware of any mail delivered to his house and said he did not receive the notice of sale. Ramun submitted the property tax records for 10718 Springfield Road to show the Kecks' mailing address was 10565 Springfield Road on November 1, 2011; the same address as was in the 2006 deed. Two hearings were held on the matter; the magistrate initially denied the motion, but the matter was returned to the magistrate to take additional evidence.

{¶8} The bank intervened and was re-admitted as co-plaintiff. The bank asked to correct a clerical error, claiming the "Corrected Preliminary Judicial Title

Report" filed on April 14, 2011 should have been titled "Final Judicial Report." The bank urged that the status of title was unchanged since the preliminary judicial report as no additional liens were filed. The affidavit of the independent title examiner confirmed that she conducted a preliminary title search in September 2009 and an updated search in 2010 and found no additional items related to the title. She said the April 14, 2011 filing constituted her final judicial report but was mislabeled.

{¶9} The magistrate vacated the foreclosure decree and the confirmation order in an October 15, 2013 decision. Findings of fact and conclusions of law were requested. The magistrate issued a decision on December 19, 2014, using the findings and conclusions proposed by Appellant. The magistrate found the Kecks moved from 10565 to 10718 Springfield Road on or about January 1, 2011. The magistrate concluded the bank knew of this move as: the property insurance for 10565 Springfield Road was cancelled due to it being vacant, requiring the bank to purchase lender's insurance; the bank began mailing the passbook to 10718 Springfield Road (the procedure used after payments were made); and the bank served the motion to return the case to the active docket on the Kecks at 10718 Springfield Road. The magistrate noted that Ramun had to pass Appellant's property to get to his own neighboring property and that photographs of 10565 Springfield Road showed the house appeared vacant.

{¶10} The magistrate referred to Appellant's accident. It was also explained that Appellant retained a bankruptcy attorney and was waiting to receive notice of any sheriff's sale as he wished to file his bankruptcy petition just prior to the sale and redeem the property through bankruptcy. The magistrate believed the Kecks did not receive the notice of sale by mail and Appellant learned of the sale after a neighbor informed him his house had been sold.

{¶11} In the conclusions of law, the magistrate concluded the corrected preliminary judicial report was not a final judicial report as required by R.C. 2329.131, finding it did not update the status of title or include a copy of the court's docket. The magistrate found this deficiency rendered the foreclosure decrees void. As there was no foreclosure decree remaining, the order confirming the sale was also declared

void. The magistrate alternatively stated the confirmation order should be vacated due to failure to serve the Kecks with notice of sale in violation of Loc.R. 13(D), citing Civ.R. 4.1(A)(1) for the proposition that a certified mail receipt is to show the address to which it was delivered.

{¶12} Ramun filed objections to the magistrate's decision on December 31, 2014. He pointed out: the Kecks were served with the complaint by certified mail at 10565 Springfield Road in 2009; they received the motion for default and the return to active status and knew of the default judgment; and, they allowed the case to progress without notifying the court of their change of address. Ramun sent notice of sale by regular mail to the address on file with the court, and it was not returned by the post office. Ramun states the magistrate's citation to Civ.R. 4.1, dealing with certified mail, was improper in relation to the notice of sale, which need only be served by regular mail (when service is required). Ramun argued Appellant failed to present extraordinary circumstances for purposes of Civ.R. 60(B)(5). Finally, he recited that a motion for relief from judgment is not to be used as a substitute for appeal.

{¶13} The bank filed objections on January 12, 2015. It argued there was no violation of R.C. 2329.131 as a final judicial report was filed (just mislabeled) and the failure to submit a copy of the court's own docket with the judicial report was not critical. Appellant filed a response after obtaining leave on February 25, 2015.

{¶14} On March 5, 2015, the trial court rejected the magistrate's decision by sustaining the objections. The court found the motion to vacate the original foreclosure decree was untimely. In addition, the court expressed the issues should have been raised in a timely appeal. The court also held that Appellant stated insufficient grounds justifying relief under Civ.R. 60(B)(5).

{¶15} Appellant filed a timely notice of appeal. Appellant sets forth two assignments of error: one claiming entitlement to relief from the confirmation order under Civ.R. 60(B)(5), and one claiming the foreclosure decrees and the confirmation orders are void. Appellant does not argue that he is entitled to Civ.R. 60(B) relief from the foreclosure decrees (the initial decree or the nunc pro tunc decree). He

concedes that a decision denying Civ.R. 60(B) relief as to the order of foreclosure would be reasonable due to issues concerning timeliness, sufficiency of the grounds for relief, and the ability to raise his arguments on appeal.

ASSIGNMENT OF ERROR NUMBER ONE: CIV.R. 60(B)

{¶16} Appellant's first assignment of error provides:

> The trial court abused its discretion in sustaining the objections to the Magistrate's Decision and denying Appellant Bruce Keck's motion for relief from judgment.

{¶17} The question of whether relief should be granted under Civ.R. 60(B) is left to the trial court's sound discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988); *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). In reviewing for abuse of discretion, the appellate judges do not substitute their judgment for that of the trial court, and the appellate court cannot reverse unless the trial court's decision is unreasonable, unconscionable, or arbitrary. *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940.

{¶18} Civ.R. 60(B) is not to be used as a substitute for an appeal. *See, e.g., Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548 (1998). Consequently, it cannot be used to argue why a trial court's judgment was erroneous on the filings before the court. *See id.*; *Hankinson v. Hankinson*, 7th Dist. No. 03MA7, 2004-Ohio-2480, ¶ 19 (where movant sought relief from judgment on a ground which we could have cured in an appeal that had been dismissed as untimely). Nor is Civ.R. 60(B) a means to extend the time for perfecting an appeal from the original judgment. *Key*, 81 Ohio St.3d at 90-91.

{¶19} A Civ.R. 60(B) movant must demonstrate: (1) entitlement to relief under one of the five grounds listed in the rule; (2) there exists a meritorious defense or claim to present if relief is granted; and (3) the motion was filed within a reasonable time (with a maximum time limit of one year for the first three grounds). *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150, 351

N.E.2d 113 (1976). Each of these three requirements is independent and mandatory. *Id.* at 151.

{¶20} Appellant's motion was filed under Civ.R. 60(B)(5), which entails "any other reason justifying relief from the judgment." Although this subdivision is said to be a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, the grounds for relief asserted under Civ.R. 60(B)(5) must be substantial. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983). *See also Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983) (such as active participation in fraud upon the court by an officer of the court, e.g. an attorney). Therefore, use of the fifth ground for relief is limited to the *extraordinary or unusual case* requiring relief from the unjust operation of a judgment. *See In the Estate of Dombroski*, 7th Dist. No. 14HA5, 2014-Ohio-5828; *Sell v. Brockway*, 7th Dist. No. 11CO30, 2012-Ohio-4552, ¶ 25.

{¶21} As a meritorious defense, Appellant states he was prepared to file for bankruptcy prior to the sale which would have halted the sale and allowed him to attempt to redeem the property through bankruptcy. Appellant points to the magistrate's factual findings that Appellant: retained the services of a bankruptcy attorney, who prepared a bankruptcy petition; was waiting to be notified of the date of the sheriff's sale in order to file his bankruptcy petition prior to the sale date; and intended to redeem his realty through the filing of a bankruptcy.

{¶22} Concerning the timeliness of his request to vacate the confirmation order, Appellant points out that his motion for relief from judgment was filed sixty days after the May 3, 2012 confirmation order. He adds that he did not receive notice of the confirmation order, in violation of Loc.R. 13(D). He also notes that he filed an untimely appeal from that order on June 15, 2012.

{¶23} As for entitlement to relief from judgment, Appellant argues he was not served with the notice of sale, also in violation of Loc.R. 13(D). He posits this issue could not have been raised in a timely appeal from the order of confirmation because he was not served with either the notice of sale or the order of confirmation. He acknowledges the service issue did not extend the time for appealing the

confirmation order as it involved a local rule. However, he urges that his failure to file a timely appeal of the confirmation order can be attributed to the local rule violation. For this reason, he concludes that his motion should not be labeled an improper substitute for a timely direct appeal.

{¶24} If a claim for relief is supported by relevant items outside of the record, a Civ.R. 60(B) motion may not necessarily constitute an improper substitute for appeal. However, the items relied upon must be dispositive and pertinent. If the debtor is not entitled to notice in the first instance, the items outside the record, e.g., whether he received notice and his proper address, become irrelevant.

{¶25} Concerning the sufficiency of the ground for relief asserted, Appellant states that failure to serve the debtor with notice of sale is a sufficient ground for relief from a confirmation order, *citing Smith v. Najjar*, 5th Dist. No. 02CA69, 2003-Ohio-3745. He notes that failure to serve a summary judgment motion is a sufficient ground for relief under Civ.R. 60(B), citing *Kostoglou v. D&A Trucking & Excavating Inc.*, 7th Dist. No. 06MA77, 2007-Ohio-3399 (upholding trial court's use of discretion to grant relief from judgment). However, the defendants in those cases filed answers to the complaints.

{¶26} Appellant, on the other hand, admits that he was a party in default for failure to appear. Appellant recognizes he is not statutorily entitled to be served with written notice of sale as was the *Smith v. Najjar* debtor, who was not in default for failure to appear. *Smith,* 5th Dist. No. 02CA69 at ¶ 22. That is, R.C. 2329.26(A)(1)(a) provides that lands taken in execution shall not be sold unless the creditor serves a written notice of sale upon the judgment debtor in accordance with Civ.R. 5(A)-(B).

{¶27} However, this provision is clearly prefaced with an exception: "Except as otherwise provided in division (A)(1)(b) of this section * * *." R.C. 2329.26(A)(1)(a). Division (A)(1)(b) provides: "Service of the written notice described in division (A)(1)(a)(i) of this section is not required to be made upon any party who is in default for failure to appear in the action in which the judgment giving rise to the execution was rendered." R.C. 2329.26(A)(1)(b). Therefore, the only

notice of sale a defaulting party is statutorily entitled to is that used to notify the general public: advertisement in a newspaper of general circulation under R.C. 2329.26(A)(2). (There is no dispute as to compliance with this provision.)

{¶28} Appellant relies, however, on Mahoning County Civil Rule, Loc.R. 13(D), which provides: "the County Treasurer and all parties to the action or their counsel of record, whether they have appeared in the action or not, shall be served with a copy of the sheriff sale advertisement no later than two weeks prior to a sale scheduled thereon, and shall also be served with a copy of the confirmation of sale or dismissal entry." Appellant concludes the violation of this local rule, by failing to serve the notice of sale upon him prior to the sale, is a sufficient ground for relief under Civ.R. 60(B)(5).

{¶29} Initially, we point out that the certificate of service attests the notice of sale was sent by regular mail to Appellant at 10565 Springfield Road. A document is served by mailing it to the person's last known address by United States mail, in which event service is complete upon mailing. Civ.R. 5(B)(2)(c). The 10565 street number was used to serve the complaint in 2009. The magistrate found that Appellant moved to 10718 Springfield Road in approximately January 2011. Yet, Appellant did not advise the court of his new mailing address. Appellant owned two homes on the same street and did live in 10565 at one time.

{¶30} Appellees urge that the burden should not be on plaintiffs to ascertain which address Appellant wanted to use in the known civil action pending against him. *See State ex rel. Halder v. Fuerst*, 118 Ohio St.3d 142, 143, 2008-Ohio-1968, 886 N.E.2d 849, 851, ¶ 6 (ensuring pro se litigant's new address is utilized is not the duty of the clerk of court, the trial court, or the opposing party). The bank had no obligation to change Appellant's address for him. The new plaintiff had no obligation to assume Appellant no longer wished to receive mail at 10565 even if it appeared to be vacant.

{¶31} Even where a non-defaulting party is required to be served with notice of sale by statute, the proof of service endorsed on the copy of the written notice is conclusive evidence of its service in compliance with the statute unless the party files

a motion to set aside the sale and establishes by a preponderance of the evidence that the proof of service is fraudulent. R.C. 2329.27(B)(2). A trial court could rationally conclude that the proof of service on the notice of sale was not "fraudulent."

{¶32} Furthermore, the November 28, 2011 nunc pro tunc default judgment of foreclosure was served upon Appellant by the clerk of courts at 10565 Springfield Road. Appellant states he was aware of the foreclosure judgment entered against him. In fact, he says he was waiting for a sheriff's sale to be scheduled so he could file bankruptcy at the last minute. Parties have a duty to keep abreast of the docket and the status of the case. *See, e.g., PHH Mtge. Corp. v. Northup*, 4th Dist. No. 11CA6, 2011-Ohio-6814 (collecting cases). This is especially true of a party in default, who is not entitled to receive service of various filings and entries. *See* R.C. 2329.26(A)(1); Civ.R. 5(A); Civ.R. 58(B) (the court shall endorse on the judgment a direction to the clerk to serve notice of the judgment on the parties not in default for failure to appear).

{¶33} Although the local rule states that even parties in default for failure to appear are entitled to be served with notice of sale (and with confirmation of the sale), the state statute and civil rules do not so state. Pursuant to R.C. 2329.26(A)(1)(b), service of written notice of the sheriff's sale is not required to be made upon a party who is in default for failure to appear. By civil rule, service of papers after the original complaint is not required on parties in default for failure to appear, except for pleadings asserting new or additional claims for relief or for additional damages. Civ.R. 5(A). *See also* Civ.R. 58(B) (as to the confirmation order).

{¶34} It has been stated that enforcement of a local rule lies within the sound discretion of the local court. *See, e.g., Eckstein v. Eckstein*, 12th Dist. No. CA2010-10-097, 2011-Ohio-1724, ¶ 11; *Dvorak v. Petronzio*, 11th Dist. No. 2007-G-2752, 2007-Ohio-4957, ¶ 30; *In re D.H.*, 8th Dist. No. 89219, 2007-Ohio-4069, ¶ 25. A decision on Civ.R. 60(B) relief also lies in the sound discretion of the trial court. *Rose Chevrolet,* 36 Ohio St.3d at 20; *Griffey*, 33 Ohio St.3d at 77. Appellant suggests that the violation of the local rule violated his due process rights. Although compliance

with local rules is expected of an attorney, violation of a local rule does not per se mandate relief from judgment.

{¶35} Applying due process to a local rule typically involves the situation where case law or a statute requires a "reasonable" time and a court holds that there should at least be compliance with the local rule to satisfy the "reasonable" time required by the state law. *See, e.g. Hillabrand v. Drypers Corp.*, 87 Ohio St.3d 517, 518, 721 N.E.2d 1029, 1030 (2000) (where a prior Supreme Court case requires a "reasonable opportunity to defend against dismissal," the case law contemplates that a trial court will allow the non-movant to respond at least within the time frame allowed by the procedural rules of the local court). Here, however, the state statute specifically declares that serving written notice of sale on a defaulting party is not required. We also note that even a violation of the statutory right of a non-defaulting party to be served with written notice of sale does not require relief from judgment where a proof of service is endorsed on the notice, unless the proof of service is proved to be fraudulent and there is prejudice. *See* R.C. 2329.27(B)(2), (3)(a)(i). A confirmation order is a judicial finding that the sale complied with the written notice requirements of R.C. 2929.26(A)(1)(a) (or that compliance did not occur but the failure has not prejudiced that party) and that "all parties *entitled to notice under division (A)(1)(a) of section 2329.26* of the Revised Code received" it. R.C. 2923.27(B)(3)(a)(i)-(ii) (emphasis added).

{¶36} The Second District ruled on a similar local rule in Montgomery County. That local rule required notice of sale to the property owner whether or not they were in default for failure to appear and added that failure to provide timely notice constitutes grounds for denying confirmation of the sale. The Second District observed that the local rule attempted to confer a substantive right of notice on a defendant that is expressly rejected by R.C. 2329.26(A)(1)(b). *Ford Consumer Fin. Co. v. Johnson*, 2d Dist. No. 20767, 2005-Ohio-4735, ¶ 22. The Second District pointed out: "A local rule of court cannot prevail when it is inconsistent with the express requirements of a statute." *Id.* at ¶ 22, quoting *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 485 N.E.2d 706 (1985), ¶ 3 of syllabus.

{¶37} The court further cited the Ohio Constitution: "Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court." *Id.* at ¶ 24, quoting Ohio Const. Art. IV, Sec. 5. *See also Vance v. Roedersheimer*, 64 Ohio St.3d 552, 554, 597 N.E.2d 153 (1992) (local rules cannot be inconsistent with the rules promulgated by the Supreme Court, and thus, the Civil Rules will prevail over inconsistent local rules); Civ.R. 83 ("local rules of practice which shall not be inconsistent with these rules or with other rules promulgated by the Supreme Court"). The Second District concluded that the local rule's requirement to serve notice of sale on a defaulting party was of no effect because it was inconsistent with both R.C. 2329.26(A)(1)(b) and Civ.R. 5(A). *Ford Consumer,* 2d Dist. No. 20767 at ¶ 23-24.

{¶38} This court concludes that the ground for relief asserted by Appellant does not mandate relief from the confirmation order. Appellant's appeal of that order was dismissed as untimely. The ground for relief asserted under Civ.R. 60(B)(5) must be substantial. This is not an extraordinary or unusual case requiring relief from the unjust operation of a judgment. The trial court did not abuse its discretion in denying Appellant's Civ.R. 60(B)(5) motion. In accordance, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO: VOID JUDGMENTS

{¶39} Appellant's second assignment of error contends:

> The trial court abused its discretion in reversing the Magistrate's decision which vacated the judgment entries by requiring Bruce Keck to fulfill the Civil Rule 60(B) requirements in a motion to vacate.

{¶40} Appellant points out that the movant need not establish the *GTE* requirements for vacating a judgment under Civ.R. 60(B) where the judgment sought to be vacated is void, as opposed to voidable. Although state law excepts the defaulting party from entitlement to service of notice of sale, Appellant alleges the order confirming the sale was void ab initio because he was not served with written notice of sale as required by a local rule of court. Appellant also argues that the

foreclosure decree was void ab initio because the corrected preliminary judicial report does not satisfy the requirements for a final judicial report under R.C. 2329.191.

{¶41} Appellant states the bank's objections were untimely filed and Ramun's timely objections did not make specific arguments concerning R.C. 2329.191. He also says Ramun's objections failed to address Appellant's claim that the judgments were void as Ramun focused on Civ.R. 60(B). Regardless, a trial court is not constrained to adopt a magistrate's decision finding a judgment void merely because a party did not specifically address the doctrine.

{¶42} Civ.R. 53 provides: "*Except for a claim of plain error*, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Civ.R. 53 (D)(3)(b)(iv) (emphasis added). Improperly labeling a judgment as void can constitute plain error. Furthermore, the rule acts to restrict the assignments of error of an appellant on appeal; it does not shackle the trial court. "*Whether or not objections are timely filed*, *a court may* adopt or *reject a magistrate's decision* in whole or in part, with or without modification." Civ.R. 53(D)(4)(b) (emphasis added). As a result, the rule does not force a trial court to adopt a magistrate's decision because a specific argument was not raised in a timely objection.

{¶43} A court has inherent authority to vacate a void judgment. *See Westmoreland v. Valley Homes Mut. Hsg. Corp.*, 42 Ohio St.2d 291, 294, 328 N.E.2d 406 (1975). "Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation. * * * In effect then, Civ.R. 60(B) deals with vacation of voidable judgments." *Id.*, citing Staff Note to Civ.R. 60(B) (1970).

{¶44} A judgment is void ab initio where there is a lack of subject matter jurisdiction. *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17; *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11-12. Subject matter jurisdiction can be challenged at any time and is not subject to waiver. *See Kuchta*, 141 Ohio St.3d 75 at ¶ 17; *Pratts*, 102 Ohio St.3d

81 at ¶ 11-12. "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases * * * A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case." *Kuchta*, 141 Ohio St.3d 75 at ¶ 19.

{¶45} Where the matter was not already litigated, a judgment can also be void where the trial court lacked personal jurisdiction over the party seeking to vacate judgment. *See, e.g., Westmoreland v. Valley Homes Mut. Hsg. Corp.*, 42 Ohio St.2d 291, 294, 328 N.E.2d 406 (1975); *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956), syllabus. *See also State ex rel. Doe v. Capper*, 132 Ohio St.3d 364, 2012-Ohio-2686, 972 N.E.2d 553, ¶ 13, 15, 18 (order void where court lacked personal jurisdiction over relator). *Compare Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948) (but due process does not require that a party be afforded an opportunity to relitigate jurisdictional facts in a collateral attack). Personal jurisdiction "may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." *Maryhew v. Yova*, 11 Ohio St.3d 154, 156, 464 N.E.2d 538 (1984) ("It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant.").

{¶46} There is a third type of "jurisdiction" which involves the authority of a court in a particular case (where the case falls into a class of cases within the court's subject matter jurisdiction). *Id.* at ¶ 18; *Pratts*, 102 Ohio St.3d 81 at ¶ 12. "[L]ack of jurisdiction over the particular case merely renders the judgment voidable." *Pratts*, 102 Ohio St.3d 81 at ¶ 12. *See also Kuchta*, 141 Ohio St.3d 75 at ¶ 19 ("If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void.").

{¶47} In *Kuchta*, the Court explained that a foreclosure action is within the common pleas court's subject matter jurisdiction. *Kuchta*, 141 Ohio St.3d 75 at ¶ 20.

The Court concluded that a lack of standing by the plaintiff did not eliminate subject matter jurisdiction or cause a foreclosure judgment to be void ab initio; rather, the lack of standing dealt with the third type of jurisdiction, which does not result in a void judgment. *Id.* at ¶ 21-24. (The *Kuchta* Court also addressed Civ.R. 60(B) and concluded that the issue could have been raised in an appeal.)

{¶48} The decrees sought to be vacated by Appellant include a foreclosure decree and an order confirming the sale entered in that same action. Appellant acknowledges his argument as to the final judicial report would have been the proper subject of appeal from the foreclosure decree; he therefore did not raise this argument in the prior assignment of error. He contends, however, that lacking a final judicial report would render the foreclosure judgment (and therefore necessarily the confirmation of sale) void ab initio.

{¶49} The arguments by Appellant do not make the foreclosure decree void. Inadequacies in the judicial report filed after the preliminary judicial report would not remove the case from the court's subject matter jurisdiction. *See Farm Credit Servs. of Am. v. Pertuset,* 4th Dist. No. 14CA3659, 2015-Ohio-3558, ¶ 10-11, 14 (the sale was not void as any issue with the filing of the final judicial report should have been apparent at the time of original appeal). The present action is one in foreclosure. A foreclosure action is within the subject matter jurisdiction of the common pleas court. *Kuchta*, 141 Ohio St.3d 75 at ¶ 19.

{¶50} Similarly, even if there was a failure to serve notice of sale in violation of a local rule, this would not remove the case from the trial court's subject matter jurisdiction. Violation of a local rule requiring service of notice on a defaulting party does not result in a void judgment. *See National City Bank v. Parker*, 9th Dist. Nos. 17531, 17578 (Aug. 21, 1996) (sheriff's sale in violation of local rule did not render sale void). The state statute specifically provides that notice of sale was not required on a party in default for failure to appear, and Appellant concedes he was such a party. *See* prior assignment of error. In addition, the order confirming the sale was entered in a foreclosure action, which lies within the trial court's subject matter jurisdiction.

{¶51} Furthermore, service of process results in personal jurisdiction. *Maryhew*, 11 Ohio St.3d at 156. Appellant does not allege the foreclosure complaint initiating this action was not served upon him. He suggests a due process violation from the allegedly faulty judicial report and the claimed lack of notice of sale. Yet, a due process violation other than a lack of personal jurisdiction, can only render a judgment voidable and does not render it void. *Deutsche Bank Natl. Trust Co. v. Lagowski*, 7th Dist. No. 10BE28, 2012-Ohio-1684, ¶ 53-54, citing *Northland Ins. Co. v. Poulos*, 7th Dist. No. 06MA160, 2007-Ohio-7208, ¶ 40-41.

{¶52} Even where service of the notice of sale was statutorily required because the party was not in default, the Sixth District concluded that the sale was not void. *Kest v. Leasor*, 6th Dist. No. L-06-1200, 2007-Ohio-1871, ¶ 12-16. After service is obtained, the failure to serve a later notice in the case does not affect personal jurisdiction to enter a later order. *Kostoglou*, 7th Dist. No. 06MA77 at ¶ 17 (failure to serve summary judgment motion does not affect personal jurisdiction and does not void a judgment as it does not involve service of the complaint). *See also* R.C. 2329.26; R.C. 2329.27. Because the trial court had both subject matter and personal jurisdiction, the trial court's judgment was not void. This assignment of error is without merit.

{¶53} For all of the foregoing reasons, the trial court decision is affirmed.

Waite, J., concur.

DeGenaro, J., concur.