

[Cite as *Wells Fargo Bank, N.A. v. Brooks*, 2016-Ohio-8561.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

|                        |   |                     |
|------------------------|---|---------------------|
| WELLS FARGO BANK N.A., | ) | CASE NO. 15 CO 0010 |
|                        | ) |                     |
| PLAINTIFF-APPELLEE     | ) |                     |
|                        | ) |                     |
| VS.                    | ) |                     |
|                        | ) |                     |
| KAMI L. BROOKS         | ) | JUDGMENT ENTRY      |
|                        | ) |                     |
| DEFENDANT-APPELLEE     | ) |                     |
|                        | ) |                     |
| AND                    | ) |                     |
|                        | ) |                     |
| SCOTT STEELE           | ) |                     |
|                        | ) |                     |
| INTERVENING            | ) |                     |
| DEFENDANT-APPELLANT    | ) |                     |

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|---------------------------|-----------------------------------------------------------------------------------------------------|
| CHARACTER OF PROCEEDINGS: | Civil Appeal from the Court of Common<br>Pleas of Columbiana County, Ohio<br>Case No. 2014 CV 00215 |
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| JUDGMENT: | Affirmed. |
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| APPEARANCES:                                                                    |                                                                                                          |
| For Plaintiff-Appellee John W. Ellis<br>(Attorney in Fact for Appellee Brooks): | Atty. Curtis H. Knapp<br>Steptoe & Johnson PLLC<br>41 S. High Street, Suite 2200<br>Columbus, Ohio 43215 |

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| For Intervening Defendant-Appellant<br>Scott Steele: | Atty. Nicholas M. Barborak<br>120 S. Market Street<br>Lisbon, Ohio 44432 |
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JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: December 30, 2016

{¶1} Intervening Defendant-Appellant, Scott A. Steele, appeals the March 11, 2015 entry of the Columbiana County Court of Common Pleas denying his motion to intervene and granting Defendant-Appellee Kami L. Brooks' motion for redemption in this foreclosure action. The only evidence before the trial court was Steele's affidavit, which was attached to his motion to intervene. Because the trial court's denial of the motion to intervene was not unreasonable, arbitrary, or unconscionable, the decision of the trial court relative to the motion to intervene is affirmed.

#### Facts and Procedural History

{¶2} On April 30, 2014, Plaintiff-Appellee, Wells Fargo Bank, N.A. filed an action seeking foreclosure against Brooks on the real property located at 40820 State Route 518, Lisbon, Ohio 44432. Brooks failed to defend the action and a decree of foreclosure was ordered. Steele was the successful bidder (\$225,000.00) at the sheriff's sale conducted on January 13, 2015. Steele Aff. at ¶ 1-2. He deposited the required 10% down payment and signed a purchase agreement on the day of the sale. *Id.* at ¶ 2-3. On January 14, 2015, the Columbiana County Sheriff returned the writ of sale naming Steele as the successful bidder.

{¶3} On January 15, 2015, Brooks executed a *pro se* power of attorney, naming as her attorney-in-fact John W. Ellis, an unsuccessful bidder at the sheriff's sale. *Id.* at ¶ 4. Ellis bid approximately \$175,000.00. *Id.* at ¶ 5. On January 16, 2015, Ellis, through counsel and acting as Brooks' attorney-in-fact, filed a motion to stay confirmation of the sheriff's sale.

{¶4} On January 27, 2015, Steele filed a motion to intervene, with a request to be heard on the pending motion to stay. On the same day, the attorney for Ellis filed a motion for redemption and deposited \$172,000.00, the amount necessary to redeem the property pursuant to R.C. 2329.33, with the Clerk of Courts.

{¶5} R.C. 2329.33, captioned, "Redemption by judgment debtor," reads, in its entirety:

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court of common pleas thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase money paid by him, and the interest from the clerk. This section does not take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to April 16, 1888.

{¶6} On January 29, 2015, Steele filed a motion to enforce the sale and a request for an evidentiary hearing. In the motion, Steele objected to the request for stay. Steele contended that “[Brooks] authorized [Ellis] to be her power of attorney and redeem the property for her so that he could undercut the high bid and purchase it from her. These actions clearly give an interest in the property to a third party, and thus violate the law.” (1/29/15 Motion to Enforce Sale, p. 2.) On February 4, 2015, Steele deposited the balance of the purchase price (\$203,519.50) with the Clerk of Courts.

{¶7} On February 10, 2015, Brooks filed in opposition to Steele’s motion to intervene. Brooks argued that she had an absolute right to redeem the property, because she had satisfied the statutory requirements of R.C. 2329.33. She relied on the mandatory language in the statute (“[t]he court of common pleas thereupon *shall* make an order setting aside such sale), to argue that her \$172,000.00 deposit with the Clerk of Courts “cut off” Steele’s “interests as the purchaser of the foreclosure sale \* \* \* thereby obviating any ‘right’ he may have to intervene in the action.” (Emphasis added.) (2/10/15 Memorandum Contra Motion to Intervene, p. 2.) Brooks also took the position that an evidentiary hearing would require additional discovery and simply serve to further crowd the court’s docket. *Id.* at 3.

{¶8} On March 11, 2015, without an evidentiary hearing, the trial court issued the judgment entry at issue in this case. In it, the court overruled Steele’s motion to intervene, granted Brooks’ motion for redemption, set aside and vacated the sheriff’s sale, and dismissed as moot Brooks’ motion to stay confirmation of the

sale. The judgment entry was amended on March 13, 2015 to correct certain instructions to the Clerk of Courts that are not relevant to this appeal.

ASSIGNMENTS OF ERROR

{¶9} Steele advances two assignments of error on this appeal:

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO PERMIT STEELE TO INTERVENE AND HOLD AN EVIDENTIARY HEARING TO ESTABLISH THE PARTIES' RESPECTIVE RIGHTS CONCERNING THE SUBJECT REAL PROPERTY.

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEE'S MOTION FOR REDEMPTION WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING TO DETERMINE THE FACTS SURROUNDING THE MATTER.

Law

{¶10} It is well-settled that an appeal from the denial of a motion to intervene is limited solely to the issue of intervention. *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 18, citing *Fouche v. Denihan*, 66 Ohio App.3d 120, 126, 583 N.E.2d 457 (10th Dist.1990) (reversing the denial of intervention and holding that the appeal was limited to the denial of the intervention motion).

{¶11} Of equal import in this case, purchasers at a foreclosure sale have no vested interest in the property prior to confirmation of the sale by the trial court. Consequently, they have no standing to appeal if the trial court denies confirmation. *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 563 N.E.2d 1388 (1990). Even if the motion to intervene had been granted, the Eleventh District Court of Appeals has held that the rule announced in *Ambrose* applies with equal force to purchaser-intervenors. *Fed. Home Loan Mtge. Corp. v. Slagle*, 11th Dist. No. 92-L-022, 1992 WL 361441, \*2 (Dec. 4, 1992).

{¶12} As a non-party, Steele lacks standing to challenge the trial court's determination on the merits. Accordingly, we will review only his arguments regarding his alleged right to intervene. His second assignment of error, attacking the merits of the trial court's decision, will only be addressed to the extent necessary to review his request to intervene.

#### Intervention

{¶13} Civ.R. 24 captioned "Intervention," states in pertinent part:

(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's

ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(C) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

{¶14} Civ.R. 24 is construed liberally in favor of granting intervention. See *State ex rel. Merrill v. ODNR*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 41. Steele does not discuss whether he sought intervention in the trial court as a matter of right pursuant to Civ.R. 24(A)(2) or whether he believed his request was for permissive intervention pursuant to Civ.R. 24(B)(2). He asserted only that he had an “equitable interest” in the real estate. (1/27/15 Motion to Intervene, p. 1.) Because of the characterization of Steele’s arguments and because the answer to this issue is identical here whether the request was made as a matter of right or permissively, we will assume Steele sought intervention as a matter of right.

{¶15} The standard of review for intervention is whether the trial court abused its discretion in denying intervention. *Merrill, supra*. See also *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503, 696 N.E.2d 1058, fn. 1 (1998). “ ‘The term “abuse of discretion” connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’ ” *West v. Devendra*, 7th Dist. No. 11 BE 35, 2012-Ohio-6092, 985 N.E.2d 558, 569, ¶ 49, quoting *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985).

*Intervention as a matter of right*

{¶16} Pursuant to Civ.R. 24(A)(2), a party can intervene as a matter of right (1) upon timely application, (2) if the applicant claims an interest relating to the property or transaction that is the subject of the action, (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the



applicant's ability to protect that interest, and (4) the applicant's interest is not adequately represented by existing parties. The Supreme Court has stated that the interest must be one that is legally protectable. *Merrill*, 130 Ohio St.3d 30 at ¶ 42, 955 N.E.2d 935.

{¶17} We recently observed in a foreclosure case that "[j]ust because a purchaser does not have a vested property right upon a mere successful bid (prior to confirmation) does not mean they have no right to seek intervention." *Freedom Mtge. Corp. v. Milhoan*, 7th Dist. No. 13 CO 15, 2014-Ohio-881, ¶ 55 distinguishing *Ambrose, supra*. The *Milhoan* panel recognized that purchasers may have some interest relating to the real property prior to confirmation of the sale, and so may have a right to intervention under Civ.R. 24(A)(2). *Milhoan* at ¶ 57-58, citing *Ambrose* at 54 (purchasers at a sheriff's sale generally possess "some type of right in the proceedings prior to confirmation."). (Emphasis sic.)

{¶18} Brooks argues that any interest Steele had in the property was extinguished when she fulfilled the statutory requirements of R.C. 2329.33. Like *Milhoan*, this case requires an analysis of the trial court's determination on the merits, despite the fact that Brooks has no standing to raise the trial court's determination on the merits as an independent assignment of error in this appeal. A review of our decision in *Milhoan* is informative.

{¶19} In *Milhoan*, the bank sought to vacate the sheriff's sale because it failed to provide notice of the sale to the defendants. However, the Bostons, the successful bidders, argued in their motion to intervene that the notice provision specifically

exempted the defendants from the notice requirement because they were in default. The bank omitted that portion of the notice statute in its motion to vacate the sheriff's sale. The Bostons' successful bid was the minimum bid, representing two-thirds of the property's appraised value. In a statement of facts submitted to the trial court, the bank conceded that it had intended to bid on the property but had inadvertently failed to send a representative to attend the auction. As a consequence, the bank's motion to vacate appeared to rely on an erroneous legal argument only so they could improperly have a second chance to bid on the property. The trial court nonetheless denied the Bostons' motion to intervene and granted the bank's motion to vacate the sheriff's sale. We determined that it was error to deny the Bostons' motion to intervene.

**{¶20}** On appeal, we recognized the invalidity of the bank's legal argument in concluding that the trial court abused its discretion, despite the fact that the bank argued that the order on the motion to vacate and the merits of that decision was not properly before us. In making our determination, we stated:

[T]he Bostons' second assignment of error does not allege merely that the trial court erred in vacating the sale on the bases asserted by the bank, that assignment also alleges that the court erred in denying intervention on these same bases. As the Bostons point out, the bank continued to set forth an erroneous statutory argument in opposing their request to intervene.

In order to properly review the case that is before us, we must evaluate the statutory arguments that were presented by the bank below (and that were fully briefed by both parties herein). The egregiously erroneous nature of the bank's legal claims in its motion to vacate and again in their opposition to intervention is relevant to a determination as to whether intervention should have been ordered here.

*Id.* at ¶ 32-33.

{¶21} The same is true in the present case. Brooks relies on R.C. 2329.33 to argue that the trial court did not abuse its discretion in denying the motion to intervene. We can only properly review this argument if we review, at least to some extent, the underlying merits of the case.

{¶22} R.C. Chapter 2329 governs the procedures for executing against property. The Ohio Supreme Court has observed that "[t]he statutory scheme for foreclosure proceedings is designed to protect the interest of the mortgagor." *Union Bank Co. v. Brumbaugh*, 69 Ohio St.2d 202, 208, 431 N.E.2d 1020, 1025 (1982).

{¶23} Within thirty days of the sheriff's return of a writ of execution on lands sold, the trial court shall confirm a sale if, on careful examination of the proceedings of the sheriff, it finds that the sale was made, in all respects, in conformity with R.C. 2329.01-R.C. 2329.61. See R.C. 2329.31(A). The Ohio Supreme Court has recognized, however, that the mortgagor's right to redeem is absolute and may be validly exercised at any time prior to the confirmation of sale. *Women's Fed. Sav. Bank v. Pappadakes*, 38 Ohio St.3d 143, 146, 527 N.E.2d 792, 795 (1988).

{¶24} The statutory right to redemption “allows the mortgagors a final eleventh-hour opportunity to redeem their property.” *Id.* at 147. If the mortgagor exercises his or her right to redemption and makes the appropriate payment prior to confirmation of sale, confirmation of sale cannot be granted. The Ohio Supreme Court has recognized for more than 130 years that, if confirmation is not granted, “the rights of the purchaser fall to the ground.” *Reed v. Radigan*, 42 Ohio St. 291, 294 (1884).

{¶25} Brooks argues that due to the mandatory language in the redemption statute, which requires the trial court to set aside the sheriff’s sale once she complies with the statute, Steele’s legally protectable interest relating to the property (recognized by this Court in *Milhoan*) is extinguished. She appears to argue that the protections afforded to the mortgagor by Chapter 2329, coupled with her compliance with the requirements of R.C. 2329.33, automatically have the same effect as denial of confirmation by the trial court.

{¶26} Brooks’ argument on this point is inaccurate, because R.C. 2329.31(A) employs the same mandatory language as the redemption statute. R.C. 2329.31(A) reads, in pertinent part:

Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer making the sale, if the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code, it *shall*, within thirty days of

the return of the writ, direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale and that the attorney who filed the writ of execution make to the purchaser a deed for the lands and tenements. (Emphasis added).

{¶27} Brooks' interpretation of the redemption statute suggests that the trial court has no duty to confirm the statutory requirements set forth R.C. 2329.33 are met before setting aside the sale. To the contrary, the redemption statute imposes a duty on the trial court to grant a motion to redeem only after the statutory requirements are fulfilled. The same is true with respect to R.C. 2329.31(A). Therefore, the trial court's duty under the redemption statute does not automatically dissolve when a motion for redemption is filed.

{¶28} Pursuant to statute, then, Steele's legally protectable interest relating to the property (recognized by us in *Milhoan*) is not extinguished until the trial court has confirmed statutory compliance by the mortgagor and entered the order granting redemption and setting aside the sale. Steele had the right to intervene to offer evidence that the proposed redemption conformed to the requirements of the statute as it has been interpreted in Ohio, pursuant to *Milhoan*.

{¶29} Our examination does not end here, however. While Steele may have had a right to intervene based on the law, this record reveals that he suffered no prejudice from the trial court's denial of his motion to intervene. In *Milhoan*, the Bostons offered a valid legal argument why the trial court should not grant the motion to vacate, however, this record reveals that Steele's legal argument in this case lacks

merit. In his affidavit attached to the motion to intervene, Steele contends that Ellis, not Brooks, is the actual beneficiary of the statutory right of redemption in this case. Because the redemption statute provides a “super priority” only to the actual property owner, the mortgagor Ellis may not benefit by this statute. Ellis is a third party, not entitled to the benefit of the redemption right. He is not “redeeming” the property because he never possessed a property right.

{¶30} Steele cites *Wayne Savings and Loan Co. v. Young*, 49 Ohio App.2d 35, 37-38 (1976), for the proposition that the statutory right to redemption may not be transferred to a third party. In that case, the defendant-mortgagor conveyed his legal title to a junior lien-holder after the foreclosure sale, who then attempted to exercise the statutory right to redeem pursuant to R.C. 2329.33. The Ninth District held that the statutory right of the debtor to redeem foreclosed property is not transferable.

{¶31} However, in *Huntington Nat. Bank v. The Euclid Theatre Co. Inc.*, 11th Dist. No. 11-156, 1986 WL 9060, \*2 (Aug. 15, 1986), the defendant-mortgagor exercised its statutory right to redemption and, at the same time, entered into a contingent sales contract with a third party for the sale of the subject property. A down payment of \$260,000.00 was to be deposited with the escrow agent, who was to remit this sum to the Clerk of the Common Pleas Court of Lake County in the name of the defendant-mortgagor for the purpose of redeeming the subject property prior to the confirmation of the sheriff's sale. In the event that redemption of the subject property was not permitted by the court, the parties were to be returned to their original positions.

{¶132} Despite the fact that in *Euclid Theatre Co.* a third party was to reap the benefit of the redemption statute, the Eleventh District held that the facts of *Wayne Savings, supra*, were distinguishable. The court determined that the defendant-mortgagor did not transfer its statutory right of redemption to a third party. Instead, the mortgagor invoked its statutory right to redeem the subject property under an agreement to then sell the property to a third party. So long as it was the mortgagor who was exercising the redemption right, this was valid pursuant to statute despite the intent to immediately thereafter transfer the property to a third party. The Ninth and Fifth District Courts of Appeals in two unreported cases, *Citicorp Person-to-Person Financial Ctr. v. Vieland*, 9th Dist. Nos. 11758 & 11800, 1985 WL 10924 (Jan. 9, 1985), and *Malone College v. Stocker*, 5th Dist. No. CA 6294, 1987 WL 20495 (Apr. 16, 1987), as well as the Sixth District in *Toledo Trust Co. v. Yakumithis Enterprises, Inc.*, 35 Ohio App.3d 31, 34, 519 N.E.2d 425, 428 (6th Dist.1987), likewise distinguished *Wayne Savings & Loan Co, supra*, on facts similar to *Euclid Theatre Co., supra*, involving post-redemption transfer.

{¶133} Based on the foregoing, Brooks' redemption, here, did not violate R.C. 2329.33. As the statute has been interpreted by Ohio appellate courts, Brooks' alleged intent to transfer the property to Ellis following redemption is completely irrelevant. Redemption is valid because Brooks complied with the plain language of R.C. 2329.33: she redeemed the property in her own name. Even if Steele is correct that Brooks actually intends to transfer the property to Ellis, her actions fully comport with the law.

{¶34} The statutory requirements for intervention as a matter of right were met in this case. The motion to intervene was timely filed, and Steele did have an interest related to the real property. Redemption and setting aside the sale would preclude, rather than simply impair or impede, Steele's ability to protect his interest. It is also apparent that Steele's interest was not adequately represented by the existing parties. Based on this record, the trial court should not have denied Steele's motion for intervention.

{¶35} However, in order to find that the trial court abused its discretion in this matter, we must find that Steele may be entitled to some relief. It is equally apparent that Steele's legal argument against redemption had no merit. In *Milhoan*, the intervenor raised valid arguments against the action sought to be taken in the trial court, hence, the court abused its discretion in failing to allow intervention to address these arguments. *Id.* at ¶ 58. Based on the record here, the trial court did not completely foreclose a valid legal argument when it denied Steele's motion to intervene. Accordingly, we cannot conclude that the trial court acted arbitrarily, unreasonably, or unconscionably in denying the motion.

#### Conclusion

{¶36} Although Steele fulfilled the requirements for seeking intervention as a matter of right in this foreclosure action, the trial court acted within its discretion when it denied his motion to intervene. A successful bidder's interest in the property prior to confirmation is not entirely foreclosed the moment a motion for redemption is filed, but Steele's legal argument against allowing redemption of the property here was



meritless. Consequently, denial of the motion to intervene did not foreclose any valid legal argument and was not arbitrary, unreasonable, or unconscionable. Accordingly, Steele's first assignment of error is overruled.

{¶37} Steele's second assignment of error is not properly before us because Steele is not a party to this case and has standing only to appeal the denial of his motion to intervene. As such, his second assignment of error was not considered.

{¶38} The judgment entry of the trial court denying the motion to intervene is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.