

[Cite as *Charter One Bank v. Tutin*, 2006-Ohio-1361.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86556

CHARTER ONE BANK,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
SANDRA L. TUTIN, ET AL.,	:	
	:	
Defendants-Appellants	:	

DATE OF ANNOUNCEMENT OF DECISION	:	MARCH 23, 2006
-------------------------------------	---	----------------

CHARACTER OF PROCEEDING:	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. 422454

JUDGMENT	:	DISMISSED.
----------	---	------------

DATE OF JOURNALIZATION	:	
------------------------	---	--

APPEARANCES:

For plaintiff-appellee:	Jay R. Carson, Esq. FRANTZ WARD LLP 2500 Key Center 127 Public Square Cleveland, Ohio 44114-1230
-------------------------	--

James E. Goranson, Esq.
405 Madison Avenue
Suite 1430
Toledo, Ohio 43604

For defendants-appellants:	David A. Corrado, Esq. Robert E. Somogyi, Esq. 410 Skylight Office Tower 1660 West Second Street Cleveland, Ohio 44113
----------------------------	--

For United States of
America:

Kent W. Penhallurick, Esq.
801 W. Superior Avenue
Suite 400
Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, J.:

{¶ 1} Defendants Sandra Tutin, Edie Buchanan and David Corrado appeal from a summary judgment in favor of plaintiff Charter One Bank in a foreclosure matter. We are constrained to find that we lack a final, appealable order because there are outstanding claims under Civ.R. 54(B) and the court did not personally specify that there was no just reason for delay. We dismiss this appeal.

{¶ 2} The court referred Charter One's motion for summary judgment to a magistrate for consideration. The magistrate decided that summary judgment should issue to Charter One on its foreclosure claim, but reserved ruling on similar claims asserted by the United States. The magistrate specified that there was no just reason for delay. Buchanan and Corrado objected to the magistrate's decision. By journal entry, the court overruled those objections and adopted the magistrate's decision, incorporating it by reference to the journal entry. The court did not make any Civ.R. 54(B) certification.

{¶ 3} In *United Companies Lending Corp. v. Robinson* (1999), 134 Ohio App.3d 96, 99-100, we addressed the issue of the court's adoption of a magistrate's decision without making an express certification of no just delay under Civ.R. 54(B):

{¶ 4} "Civ.R. 54(B) mandates that the court make 'an express determination that there is no just reason for delay;' not a referee, magistrate, or any other bureaucratic functionary below the trial court judge whose recommendation to the court, in the form of a report, is merely adopted by reference by the judge. Such adoption and incorporation, standing alone, is insufficient to comply with the judge's duty under Civ.R. 54(B). The trial court judge's entry fails to state such an express determination of no just reason for delay in the status form entry utilized by the trial court. Absent this express determination language appearing in the order of the judge, this appellate court is deprived of jurisdiction to entertain the appeal sub judice due to the order appealed from being a non-final order."

{¶ 5} The court's journal entry approving and adopting the magistrate's decision did not make an express certification of no just delay under Civ.R. 54(B). Therefore, not all of the claims against all of the parties have been adjudicated. We therefore lack a final appealable order and must dismiss the appeal.

Appeal dismissed.

This appeal is dismissed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
JUDGE

PATRICIA ANN BLACKMON, J., CONCURS.

KENNETH A. ROCCO, P.J., CONCURS WITH
SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86556

CHARTER ONE BANK,	:	
	:	
Plaintiff-appellee	:	CONCURRING
	:	
vs.	:	OPINION
	:	
SANDRA L. TUTIN, ET AL.,	:	
	:	
Defendants-appellants	:	

DATE: MARCH 23, 2006

KENNETH A. ROCCO, P.J., CONCURRING:

{¶ 6} While I agree that the trial court's failure to find no just cause for delay precludes our review of this appeal, I write separately to note that this decision puts the appellants in an extremely difficult position. Ohio Supreme Court authorities have made clear that the order of foreclosure is the final order from which an appeal should be taken, that an appeal from an order of confirmation and distribution is untimely. *Third Nat'l. Bank of Circleville v. Speakman* (1985), 18 Ohio St.3d 119; *Oberlin Sav. Bank v. Fairchild* (1963), 175 Ohio St.3d 311. Yet, if the foreclosure order does not determine the priorities of all lienholders and the amounts due to them, our decisions hold that an appeal from the foreclosure order is premature. *United Cos. Lending Corp. v. Robinson* (1999), 134 Ohio App.3d 96. The trial court can extricate the appellants from this quandary by finding no just reason for delaying an appeal of the foreclosure order here, even though the priority and amount of other liens has yet to be determined. However, if the court does not find "no just cause for

delay," appellants may not have a determination of the priority and amount of the liens until the court confirms the sale and orders distribution of the proceeds, and any attempt to appeal from that order will require them to distinguish *Circle*ville and *Oberlin* before their appeal will be heard.