[Cite as *JDI Murray Hill, L.L.C. v. Flynn Properties, L.L.C.*, 2011-Ohio-301.]

[Please see original opinion at 2010-Ohio-6158.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94259

JDI MURRAY HILL, LLC
(On assignment from Republic Bank)

PLAINTIFF-APPELLEE

vs.

FLYNN PROPERTIES, LLC, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-557338

BEFORE: Gallagher, P.J., Sweeney, J., and Keough, J.

RELEASED AND JOURNALIZED: January 27, 2011

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ON RECONSIDERATION[1]

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendants-appellants, Flynn Properties, LLC, and Joseph Portale, have appealed several rulings by the Cuyahoga County Court of Common Pleas in this foreclosure action. For the reasons stated herein, we affirm the decision of the trial court.

{¶ 2} At the time this action was filed, Flynn Properties, LLC, was the owner of a mixed-use property located at 12110 Mayfield Road in Cleveland. A

[1] The original announcement of decision, *JDI Murray Hill, LLC v. Flynn Properties, LLC*, Cuyahoga App. No. 94259, 2010-Ohio-6158, released December 16, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

portion of the property is leased to La Dolce Vita Bistro, LLC ("La Dolce Vita"), a restaurant owned by Terry Tarantino.

{¶ 3} Flynn Properties had refinanced the property in 2003. Republic Bank became the holder of a promissory note in the principal sum of $550,000, which was secured by a mortgage on the property. The note was executed by Flynn Properties and personally guaranteed by Portale, who is an owner of Flynn Properties. Republic Bank also received an assignment of rents as additional security for the loan. Republic Bank filed this action in March 2005, following a default on the note.

{¶ 4} During the course of litigation, Republic Bank assigned the loan documents to JDI Murray Hill, LLC ("JDI"), and the trial court substituted JDI as the real party in interest. JDI also acquired the assignment of rents, pursuant to which it received rental payments for the La Dolce Vita lease.

{¶ 5} The trial court granted summary judgment to JDI on January 9, 2008. The court's judgment entry adopted a magistrate's decision, issued a decree of foreclosure, and awarded judgment on the note and guaranty. Attorney fees were later awarded to JDI.

{¶ 6} The magistrate's decision that was adopted by the trial court determined upon the evidence presented that "[i]n December of 2004, Flynn defaulted on the above promissory note. There is currently due on said note and guaranty from Flynn and Portale to JDI the sum of $529,423.19 plus interest" and late fees. The magistrate further found that JDI was entitled to have the property

foreclosed. The magistrate's decision also granted summary judgment to JDI as it pertained to the lease interest of La Dolce Vita and Tarantino.

{¶ 7} Two appeals were filed with this court, and the actions were consolidated for review. During the pendency of the appeal, Tarantino and La Dolce Vita entered into a settlement with JDI, whereby JDI agreed to grant priority of the lease over JDI's mortgage. A motion to enforce the settlement agreement was granted by the trial court.

{¶ 8} Ultimately, the appeal to this court was dismissed for a lack of a final appealable order. *Republic Bank v. Flynn Properties, LLC*, Cuyahoga App. Nos. 90941 and 91003, 2009-Ohio-1875. As a result, on May 20, 2009, the trial court amended its January 9, 2008 order to include necessary language, including: (1) "By this separate and distinct instrument," and (2) "Pursuant to Civ.R. 54(B) this court finds that there is no just cause for delay." This order was entered two days after Portale had filed for bankruptcy, as discussed below.

{¶ 9} After the summary judgment ruling had been made, Flynn Properties transferred title to the property via quit-claim deed to Portale's ex-wife, Frances Pulliam. Upon an emergency motion filed by JDI, the trial court appointed a receiver over the property. The appointment was affirmed on appeal to this court in *Republic Bank v. Flynn Properties, LLC*, Cuyahoga App. No. 91573, 2009-Ohio-5552.

{¶ 10} The trial court set a hearing for May 18, 2009, on the receiver's sale of the property. Prior to the hearing, Pulliam transferred title to the property to

Portale through a quit-claim deed. Portale recorded the deed and filed a Chapter 7 bankruptcy petition on the date of the sale hearing. Because Portale had filed the bankruptcy petition, the trial court stayed this action as to "that defendant only."

{¶ 11} In the bankruptcy proceedings, Portale failed to file required documents and failed to appear at show cause hearings. On June 11, 2009, the bankruptcy court granted JDI relief from the bankruptcy stay and also dismissed the bankruptcy case. The bankruptcy court later granted a motion for sanctions against Portale.

{¶ 12} On June 30, 2009, appellants filed a renewed motion to determine the redemption amount. The trial court denied the motion, citing its earlier decision that set forth the judgment amount.

{¶ 13} The trial court ordered a sheriff's sale, and the property was sold to JDI on November 2, 2009. The sale was confirmed on November 18, 2009, and this appeal followed.

{¶ 14} Appellants have raised eight assignments of error for our review. Their first and second assignments of error provide as follows:

{¶ 15} "I. The trial court erred in allowing execution upon a void judgment."

{¶ 16} "II. The trial court erred in releasing the stay of execution while the bankruptcy stay of proceedings was in place."

{¶ 17} Appellants argue that the "final" judgment entered against Portale on May 20, 2009, is void because it was entered during a bankruptcy stay. They

assert that because Portale was the record owner of the property at the time he filed the bankruptcy petition, the trial court erred in continuing to act against his interest. In response, appellees claim the May 20, 2009 order was a ministerial act that corrected a defect in its January 9, 2008 order and was not prohibited by the automatic stay provision. They further argue that the bankruptcy filing was a sham and, pursuant to equitable principles, should not operate against the actions taken in this matter.

{¶ 18} Appellants also argue that the trial court erred in issuing an order during the bankruptcy stay that released a supersedeas bond posted by Tarantino, and thereby lifted a stay of execution that was in place during a prior appeal to this court. In response, appellees claim this order was unrelated to Portale's bankruptcy.

{¶ 19} Even if the bankruptcy filing by Portale could have resulted in the application of the automatic stay provisions in 11 U.S.C. § 362 to the claimed matters herein, we find that equitable principles apply to defeat appellants' arguments under the specific circumstances of this case.

{¶ 20} We recognize there is a split in authority concerning whether actions taken in violation of a bankruptcy stay are void or voidable. See, e.g., *Lowenborg v. Oglebay Norton Co.*, Cuyahoga App. Nos. 88396 and 88397, 2007-Ohio-3408; *First Merit Mtge. Corp. v. Kolm* (Sept. 18, 2000), Stark App. No.1999CA00363; *Easley v. Pettibone Michigan Corp.* (C.A.6, 1993), 990 F.2d 905. This court has previously taken the view that "any act taken in violation of

an automatic bankruptcy stay is void and of no legal effect." *Lowenborg*, supra at ¶ 30. Nevertheless, regardless of whether the stay would otherwise render such acts void or voidable, courts have recognized that an equitable exception to a bankruptcy stay may be justified in limited circumstances. As this court stated in *Lowenborg*, "we do not rule out the possibility of recognizing an equitable exception to a bankruptcy stay in the limited circumstance where justice so requires[.]" Id. at ¶ 32; see, also, *Curtis v. Payton* (Feb. 5, 1999), Greene App. No. 98-CV-49 ("we do not rule out the possibility of recognizing an equitable exception to the automatic stay in circumstances where it would be manifestly unjust not to do so.")

{¶ 21} In the limited case where an equitable exception is found to apply, the automatic stay provision is inapplicable and a trial court retains jurisdiction to proceed in the matter. See *Coles v. Daniels*, Cuyahoga App. No. 85573, 2005-Ohio-4701, ¶ 9. In such circumstances, there is no violation of the automatic stay; the trial court's judgment is neither void nor voidable.

{¶ 22} Federal courts also have recognized that although actions taken in violation of a bankruptcy stay are generally invalid, equitable principles may be applied to override the automatic stay. See, e.g., *Garner v. Cuyahoga Cty. Juvenile Court* (Aug. 20, 2010), N.D. Ohio No. 1:02-CV-1286; *In re Calder* (C.A.10, 1990), 907 F.2d 953, 956; *Easley*, 990 F.2d at 911. "[E]quitable exceptions to [the automatic stay] rule may apply where 'the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is

able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result.'" *Garner*, supra, quoting *Easley*, 990 F.2d at 911. However, any equitable exception to the automatic stay must be applied sparingly. *Easley*, 990 F.2d at 911.

{¶ 23} In this case, shortly before the hearing on the sale of the property, Portale engaged in a last minute effort to avoid the sale by transferring the property into his own name and filing a bankruptcy petition. Although Portale did file notice of the bankruptcy, he did not disclose that the real property in the foreclosure action had been transferred to him. Therefore, the trial court had no way to know that the final foreclosure order would be subject to the automatic stay. Additionally, the bankruptcy court almost immediately granted JDI relief from the stay, dismissed the case because Portale failed to pursue the action, and sanctioned Portale pursuant to 11 U.S.C. § 109(g).[2] It is apparent from the record that Portale was attempting to use the automatic stay unfairly as a shield to avoid an unfavorable result.

{¶ 24} We find that this is the exceptional case where such extreme circumstances exist as to warrant the application of an equitable exception to an automatic bankruptcy stay. "To hold otherwise and permit the automatic stay

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[2] We note that JDI could have moved the bankruptcy court to annul the automatic stay and ratify the trial court's order under 11 U.S.C. § 362(d). While the bankruptcy court has authority to allow a party relief from the stay, a nonbankruptcy court has jurisdiction to determine the applicability of the automatic stay provision and whether an exception applies. *State ex rel. Petro v. Mid Ohio Petroleum Co.*, Butler App. No. CA2005-06-179, 2005-Ohio-6271; *Coles v. Daniels*, Cuyahoga App. No. 85573, 2005-Ohio-4701, ¶ 9.

provision to be used as a trump card played after an unfavorable result was reached in state court, would be inconsistent with the underlying purpose of the automatic stay[.]" (Quotations and citations omitted.) *In re Calder*, 90 F.2d at 956-957.

{¶ 25} Accordingly, because we find under these limited circumstances that the equitable exception to the automatic stay provision applies, we conclude there was no violation of the bankruptcy stay. Appellants' first and second assignments of error are overruled.

{¶ 26} Appellants' third assignment of error provides as follows:

{¶ 27} "III. The trial court erred in allowing execution on a judgment that is not a final judgment."

{¶ 28} Appellants contend that the May 20, 2009 order is not a final judgment because it is silent as to the priority of the La Dolce Vita lease and, therefore, does not resolve all issues submitted to the court. We find no merit to this argument.

{¶ 29} To be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64. R.C. 2505.02(B)(1) provides that a final appealable order is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" Pursuant to Civ.R. 54(B), "the court may enter final

judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."

{¶ 30} In the May 20, 2009 order, the trial court issued a decree of foreclosure and entered judgment in favor of JDI and against Flynn Properties and Portale. This clearly affected a substantial right of appellants and, in effect, determined the action and prevented judgment in their favor. The trial court added "no just cause for delay" language to its order, thereby resulting in a final judgment. We further recognize that the lease priority issue was resolved by the trial court on October 22, 2009, when it granted Tarantino and La Dolce Vita's unopposed motion to enforce the settlement agreement.

{¶ 31} Appellants' third assignment of error is overruled.

{¶ 32} Appellants' fifth and eighth assignments of error provide as follows:

{¶ 33} "V. The trial court erred by failing to determine the status of the lease." "VIII. The trial court erred in ordering that the lease has priority over the subject mortgage."

{¶ 34} On or about February 6, 2009, JDI reached a settlement agreement with La Dolce Vita and Tarantino that granted priority to the lease over JDI's mortgage. The trial court granted an unopposed motion to enforce the settlement agreement on October 22, 2009. Thereafter, appellants filed an untimely brief in opposition that was stricken by the trial court. Also, after the issue had been determined, appellants filed a motion to determine the status of the lease that the trial court denied. We find the arguments presented under

these assignments of error were waived as they were either not raised or not timely presented to the trial court.

{¶ 35} It is axiomatic that a party's failure to raise an issue in a timely manner in the trial court results in a waiver of the party's right to raise the issue on appeal. See *W&W Dev. Co. v. Hedrick* (Apr. 15, 1999), Cuyahoga App. No. 73965. In this case, judgment had been entered in favor of JDI and a receiver was appointed over the property. The trial court was free to accept the unopposed motion to enforce the settlement agreement, which contained a stipulation of the parties as to the priority of the lease. Further, to allow appellants to now challenge this issue, after the property has been sold, would frustrate the orderly administration of justice. Appellants' fifth and eighth assignments of error are overruled.

{¶ 36} Appellants' fourth assignment of error provides as follows:

{¶ 37} "IV. The trial court erred in denying appellants' motion to determine redemption amount."

{¶ 38} In denying appellants' renewed motion to determine redemption amount, the trial court referenced its decision that granted a decree of foreclosure, set forth the judgment amount, and expressly provided that "unless the sums hereinabove found due, together with the costs of this action, be fully paid within three days * * * there shall be no further equity of redemption, the interests of all defendants in the premises described above will be foreclosed and the property will be sold." Appellants claim that since the right of redemption is

absolute, the trial court erred in failing to resolve confusion concerning the redemption amount and by failing to afford appellants their absolute right of redemption up until the confirmation of the sale.

{¶ 39} Ohio law recognizes an absolute right of redemption that is dual in nature, arising both from equity and statute. *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190. In *Hausman*, the Ohio Supreme Court explained the equitable right of redemption, stating as follows: "The mortgagor's 'equity of redemption' is typically cut off once a mortgagee seeks and is granted a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property." Id. Further, after a decree of foreclosure has been made, a mortgagor retains a statutory right of redemption under R.C. 2329.33 that may be exercised at any time prior to the confirmation of sale by depositing the "amount of the judgment" with all costs in the common pleas court. R.C. 2329.33.

{¶ 40} In this case, the trial court's order provided appellants with the standard three-day grace period to exercise their equitable right of redemption that ended when the decree of foreclosure was granted. Appellants did not exercise this right. Further, they suffered no prejudice as they still had a statutory right of redemption pursuant to R.C. 2329.33. Because appellants did not deposit the amount of judgment as required by statute, their statutory right of

redemption expired upon the trial court's confirmation of the sale. See *FirstMerit Corp. v. Rohde*, Medina App. No. 05CA0094-M, 2006-Ohio-4922, ¶ 7.

{¶ 41} Although appellants assert that there was confusion as to the redemption amount and they attempt to challenge the trial court's calculation, these arguments are not properly before us. Appellants waived their ability to challenge the judgment amount because they failed to file an opposition to summary judgment or timely contest JDI's evidence in the lower court.

{¶ 42} Appellants' fourth assignment of error is overruled.

{¶ 43} Appellants' sixth assignment of error provides as follows:

{¶ 44} "VI. The trial court erred in confirming the foreclosure sale."

{¶ 45} Without citing anything in the record or providing further specificity beyond reference to their other arguments, appellants state "that there were numerous, material shortcomings in the trial court's handling of this matter."

{¶ 46} The confirmation of a judicial sale is left to the discretion of the trial court. *Ohio Sav. Bank v. Ambrose* (Dec. 12, 1990), 56 Ohio St.3d 53, 55, 563 N.E.2d 1388. Our review is limited to determining whether the sale was conducted as required by R.C. 2329.01 through R.C. 2329.61. See R.C. 2329.31; *Bank One Dayton, N.A. v. Ellington* (1995), 105 Ohio App.3d 13, 16, 663 N.E.2d 660. This court will not reverse the confirmation of a judicial sale absent an abuse of discretion.

{¶ 47} Appellants have failed to demonstrate any error with the sheriff's sale, the confirmation order, or other events that occurred after the decree of

foreclosure. Because appellants have failed to show any error in the record, and we have otherwise found no merit to their claims, we overrule their sixth assignment of error.

{¶ 48} Appellants' seventh assignment of error provides as follows:

{¶ 49} "VII. The trial court erred by granting relief to an entity that has not demonstrated that it is entitled to any relief."

{¶ 50} Appellants claim that JDI never established that it was validly formed and registered to do business in Ohio. Although appellants phrase their argument as a subject matter jurisdiction challenge, the lack of capacity to sue does not equate with the jurisdiction of the court to adjudicate the matter. See *State ex rel. Goshay v. Lucas*, Cuyahoga App. No. 95060, 2010-Ohio-4363, ¶ 7; *Natl. City Mtge. v. Skipper*, Summit App. No. 24772, 2009-Ohio-5940, ¶ 11; see, also, *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002. "Lack of capacity" is an affirmative defense that is waived when it is not timely asserted. See *Natl. City Mtge.*, supra at ¶ 12.[3] Appellants did not properly raise this issue in the trial court, and their untimely motion to dismiss was stricken. Therefore, we find that they waived this argument for appeal.

{¶ 51} Nevertheless, we recognize that JDI, as holder of the note and mortgage, had a contractual right to foreclose on the mortgage and recover on the note. The loan documents were assigned to JDI after litigation had already

[3] Pursuant to R.C. 2305.01, the trial court has basic subject matter jurisdiction over foreclosure actions.

commenced. We also note that JDI is presently a validly registered entity in Ohio, and was so at the time the judgment was rendered herein.

{¶ 52} Appellants' seventh assignment of error is overruled.

{¶ 53} Finally, appellee's request for sanctions on appeal is denied.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
KATHLEEN A. KEOUGH, J., CONCUR