[Cite as *US Bank, N.A. v. Alex*, 2015-Ohio-871.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101276

US BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

vs.

JAMES A. ALEX, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-09-702651

BEFORE: E.A. Gallagher, J., Jones, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 12, 2015

ATTORNEYS FOR APPELLANTS

Grace Mary Doberdruk
Marc E. Dann
Daniel M. Solar
The Dann Law Firm
P.O. Box 6031040
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

FOR US BANK NATIONAL ASSOCIATION

Ted A. Humbert
Timothy R. Billick
Stephanie L. Deka
Charles V. Gasior
Robert Hoose
Jason A. Whitacre
Law Offices of John D. Clunk Co. L.P.A.
4500 Courthouse Boulevard
Suite 400
Stow, Ohio 44224

FOR CLASSIC ROOFING OF SUMMIT COUNTY

John C. Collins
333 S. Main Street
Suite 304
Akron, Ohio 44308

EILEEN A. GALLAGHER, J.:

{¶1} Appellants, James A. and Laura A. Alex, bring the instant appeal challenging the confirmation of sale of real property in a foreclosure action brought by U.S. Bank. Appellants argue that the trial court erred by failing to hold a hearing in order to allow them the opportunity to dispute ancillary fees relating to the sale of the property and that U.S. Bank lacked standing to seek foreclosure due to an allegedly invalid transfer of the subject promissory note and mortgage. For the following reasons, we affirm.

{¶2} U.S. Bank (the "Bank") filed a complaint in foreclosure on August 27, 2009. The Bank alleged that it was the owner in possession of both a promissory note and mortgage and that the note was in default. The Bank sought judgment against the appellants in the amount of $165,558.78 plus interest at the rate of 7% per annum from October 1, 2008. The Bank further sought for the subject premises to be appraised, advertised and sold in order for the debt to be paid. The Bank attached to the complaint documents evidencing the chain of assignment of the note and mortgage from First Franklin, a Division of National City Bank of Indiana to First Franklin Financial Corporation and subsequently to U.S. Bank on August 25, 2009.

{¶3} Appellants failed to respond to the complaint, and the trial court granted default judgment in favor of U.S. Bank on December 9, 2009. A detailed magistrate's decision was issued that the trial court adopted in a decree of foreclosure on January 13, 2010. No appeal was taken from this final appealable order.

{¶4} The record reflects that from February of 2010 to March of 2013, the property was noticed for sale on several occasions but withdrawn without execution at the Bank's request while a modification or settlement was sought with the appellants. The trial court facilitated mediation efforts throughout 2013, but the parties were unable to reach a resolution and the

property was sold at sheriff's sale on March 10, 2014. The trial court issued a confirmation of sale order on March 21, 2014. Appellants filed a common law and Civ.R. 60(B) motion to vacate the judgment of foreclosure and decree of confirmation on April 21, 2014. On the same date, appellants filed the present appeal from the trial court's order confirming the sale.

{¶5} Appellants first assignment of error provides:

> The trial court erred by confirming the sale when the court never held a hearing to determine the specific damage amount of the fees and costs when the Supreme Court of Ohio held in *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140 that confirmation of sale was the time period for those determinations.

{¶6} A trial court has discretion to confirm or refuse to confirm a judicial sale. *Ohio Sav. Bank v. Ambrose*, 56 Ohio St. 3d 53, 563 N.E.2d 1388 (1990). "If the court, after examining the proceedings taken by the officers, finds the sale was made in conformance with R.C. 2329.01 to 2329.61, inclusive, it shall confirm the sale." *Id*. at 55, citing R.C. 2329.31. "While the statute speaks in mandatory terms, it has long been recognized that the trial court has discretion to grant or deny confirmation." *Id*. Therefore, the court's determination will not be reversed absent an abuse of that discretion. Such abuse is connoted by an arbitrary, unreasonable, or unconscionable decision. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶7} The Ohio Supreme Court in *Roznowski*, found that there are two judgments appealable in foreclosure actions: the order of foreclosure and the confirmation of sale. *Id*. at ¶ 39.

The order of foreclosure determines the extent of each lienholder's interest, sets

> forth the priority of the liens, and determines the other rights and responsibilities of each party in the action. On appeal from the order of foreclosure, the parties may challenge the court's decision to grant the decree of foreclosure. Once the order of foreclosure is final and the appeals process has been completed, all rights and responsibilities of the parties have been determined and can no longer be challenged.
>
> The confirmation process is an ancillary one in which the issues present are limited to whether the sale proceedings conformed to law. Because of this limited nature of the confirmation proceedings, the parties have a limited right to appeal the confirmation. For example, on appeal of the order confirming the sale, the parties may challenge the confirmation of the sale itself, including computation of the final total owed by the mortgagor, accrued interest, and actual amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance. The issues appealed from confirmation are wholly distinct from the issues appealed from the order of foreclosure. In other words, if the parties appeal the confirmation proceedings, they do not get a second bite of the apple, but a first bite of a different fruit.

Id. at ¶ 39-40.

{¶8} In regard to the confirmation of sale, the Supreme Court further noted that R.C. 2329.31(A):

> requires the court to carefully examine the proceedings to determine the legality of the sale in all respects. As part of this examination, the court must determine whether the amounts advanced for inspections, appraisals, property protection, and maintenance are accurate. Naturally, the mortgagor must have an opportunity to challenge these amounts and raise the issue on appeal if the mortgagor believes that the amounts the trial court determines are incorrect.

{¶9} Appellants argue that the trial court erred by failing to conduct a hearing in regard to the above expenditures and thus denied them the opportunity to contest such fees. We

disagree. The magistrate's foreclosure order addressed such expenditures prior to the sale and provided:

> The magistrate finds that plaintiff may have advanced or may advance during the pendency of this action, sums for payment of taxes, hazard insurance premiums and protection of the property described herein, the total amount of which is undetermined at the present time, but which amount will be ascertainable at the time of the sheriff's sale, which amount **may** be added to the first mortgage lien of the plaintiff. The magistrate reserves for further order a determination of the exact amount due Plaintiff for said advances.

(Emphasis added.)

{¶10} The trial court's confirmation of sale journal entry does not award any such expenditures in favor of U.S. Bank. As this journal entry is the second, and last, of the two final appealable orders in this foreclosure action there is no further avenue for such expenditures to be assessed against appellants. The Ohio Supreme Court's decision in *Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, plainly contemplates an opportunity for the mortgagor to contest any ancillary fees *after* the sale occurs and *prior to* the trial court's entry confirming the sale. Without an opportunity to dispute such fees at an evidentiary hearing, the appeal contemplated in *Roznowski* would be impossible. However, where, as here, no such fees are sought or assessed after the sale a hearing on the matter is unnecessary.

{¶11} Appellants' first assignment of error is overruled.

{¶12} Appellants' second assignment of error provides:

> The trial court erred by confirming the sale when appellee U.S. Bank lacked standing to invoke the jurisdiction of the court.

{¶13} Appellants argue that U.S. Bank's documentation evidencing the assignment of the note and mortgage to them is deficient such that the Bank lacks standing as the proper party to sue them in foreclosure. Appellants reason that due to this alleged lack of standing, the trial

court was deprived of subject matter jurisdiction over this action and, therefore, the foreclosure and confirmation of sale are void. We disagree and find that appellant's argument is precluded by res judicata.

{¶14} In *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, the Ohio Supreme Court rejected the notion that a party's lack of standing in a foreclosure action renders the judgment void abinitio for lack of subject-matter jurisdiction. *Id*. at ¶ 17. Rather, "a court of common pleas that has subject-matter jurisdiction over an action does not lose that jurisdiction merely because a party to the action lacks standing." *Id*. Because actions in foreclosure are within the subject matter jurisdiction of a court of common pleas, the trial court in this instance possessed subject-matter jurisdiction and any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void. *Id*. at ¶ 19.

{¶15} In *Kuchta*, the Ohio Supreme Court held that lack of standing is an issue that is cognizable on appeal and, therefore, it cannot be used to collaterally attack a judgment in foreclosure. *Id*. at syllabus. The homeowners in *Kuchta* could not rely on a standing argument to vacate an adverse foreclosure judgment pursuant to Civ.R. 60(B)(3) because the rule cannot be used as a substitute for an appeal. *Id*. at ¶ 16.

{¶16} Of particular relevance to our case, we note that in *Kuchta*, the trial court had not yet issued a confirmation of sale order. Despite that fact, the court held that the doctrine of res judicata applied to the Kuchtas' standing argument in their Civ.R. 60(B) motion because they had failed to raise the issue in an appeal from the foreclosure judgment. *Id*. at 16. The court held that "because the issue of standing could have been and in fact was raised during the foreclosure proceedings, res judicata prevents the Kuchtas from using the issue to establish

entitlement to relief." *Kuchta* at ¶ 15.

{¶17} Similarly, in *Deutsche Bank Natl. Co. v. Caldwell*, 8th Dist. Cuyahoga No. 100594, 2014-Ohio-2982, this court found the homeowners standing argument to be barred by res judicata when it was raised in an appeal from the trial court's confirmation of sale. We noted that a voidable judgment may not be attacked at any time and the homeowners had failed to appeal from the trial court's foreclosure judgment that had found standing in favor of the bank. The homeowners in *Caldwell* further failed to appeal from the denial of a motion for relief from judgment where they raised the issue of standing. We concluded that res judicata applied to bar the homeowner's standing challenge because "[t]he only arguments properly before this court [on an appeal from a confirmation of sale] are those related to the procedures employed in the sale and whether the court abused its discretion in confirming the sale." *Id*. at ¶ 18.

{¶18} The sole difference between our decision in *Caldwell* and the present case, is that here, the homeowners, despite being properly served in 2009, never filed an answer or appeared before the trial court to contest standing prior to this appeal and the simultaneously filed motion to vacate. The magistrate's foreclosure decision, issued more than five years ago, on December 11, 2009, directly addressed the question of standing and ruled in favor of U.S. Bank. Appellants chose not to object to that decision or to appeal from the trial court's foreclosure order adopting it. Appellants offer no explanation for their failure to participate in the litigation process or challenge the trial court's final appealable order in foreclosure that decided the question of standing. As such, we find the appellants' present standing argument to be precluded by res judicata. *See e.g., Wells Fargo Bank, N.A. v. Clucas*, 9th Dist. Summit No. 27264, 2015-Ohio-88 (holding that *Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d

1040, precluded a homeowner from raising standing in a Civ.R. 60(B) motion after failing to respond to the complaint or raise the issue of standing and default judgment had been granted).

{¶19} Our holding is consistent with the descriptions of both this court in *Caldwell* and the Ohio Supreme Court in *Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, of the very limited right to appeal from a confirmation of sale entry. The matter of standing was addressed and decided by the trial court at the proper time in its foreclosure entry. Because the appellants elected not to appeal that decision, they are precluded from improperly raising the issue for the first time in a limited appeal from a confirmation of sale.

{¶20} We note that even if we were to hold otherwise, appellant's standing argument is without merit because it challenges the validity of the transfer of the note and mortgage between First Franklin Financial Corporation and U.S. Bank. This court has previously held that a debtor lacks standing to challenge an assignment between an assignor and assignee. *Bank of New York Mellon Trust Co., v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶31-35. Furthermore, appellants have failed to support their standing challenge with admissible evidence and although they question the validity of one of the signatures on the assignment documents based on an article printed from the internet, the documents were signed by *two* executives of First Franklin Financial Corporation and notarized by a third individual.

{¶21} Appellants' second assignment of error is overruled.

{¶22} The judgment of the trial court is 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.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
MELODY J. STEWART, J., CONCUR