

[Cite as *Aurora Bank F.S.B. v. Gordon*, 2016-Ohio-938.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103138

AURORA BANK F.S.B.

PLAINTIFF-APPELLEE

vs.

DANIELLE PAUER GORDON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-773416

BEFORE: Boyle, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2016

ATTORNEY FOR APPELLANT

Jay F. Crook
Shryock, Crook & Associates, L.L.P.
30601 Euclid Avenue
Wickliffe, Ohio 44092

ATTORNEYS FOR APPELLEES

For Nationstar Mortgage, L.L.C.

David B. Bokor
Manley, Deas & Kochalski, L.L.C.
P.O. Box 165028
Columbus, Ohio 43216

John B. Kopf
Todd Seaman
Thompson Hine, L.L.P.
41 South High Street
Suite 1700
Columbus, Ohio 43215

For Citibank, NA

Citibank, N.A.
Legal Department
701 East 60th Street, North
Sioux Falls, South Dakota 57117

For Cleveland One, L.L.P.

Cleveland One, L.L.P.
Legal Department
3645 Warrensville Center Road
Suite 224
Shaker Heights, Ohio 44122

For First Southwestern Financial

First Southwestern Financial
Legal Department
1845 West 4400 South Street
Suite A1
Roy, Utah 84067

For Home Savings & Loan Company of Youngstown

Thomas M. Gacse
P.O. Box 1111
Youngstown, Ohio 44501-1111

For Ohio City Property Management, Inc.

c/o Jeffery J. Higerd
Moriarty & Jaros, P.L.L.
30000 Chagrin Boulevard, Suite 200
Pepper Pike, Ohio 44124

For Sherwin-Williams Company

Legal Department
c/o CSC Lawyers, Inc. Service R/A
50 West Broad Street, Suite 1800
Columbus, Ohio 43215

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Danielle Pauer Gordon¹ (“Gordon”), appeals from the trial court’s decision confirming a sheriff’s sale upon a foreclosed property. She raises the following single assignment of error:

I. The trial court committed reversible error by ordered [sic] the preparation, filing and presentation of the deed granting title to the purchaser prior without evidence of payment by said purchaser being present on the docket.

{¶2} Finding no merit to the appeal, we affirm.

A. Procedural History and Facts

{¶3} In January 2012, Aurora Bank, F.S.B. (“Aurora”) filed the underlying foreclosure action against Gordon, as heir of John S. Gordon and Jon S. Gordon,² deceased, seeking the balance due on a promissory note and to foreclose a mortgage, which secured its payment. In December 2012, upon motion, the trial court substituted appellee Nationstar Mortgage L.L.C. (“Nationstar”) as the plaintiff. Approximately two years later, in November 2014, the trial court entered its final judgment and decree of foreclosure in favor of Nationstar and against the defendants. Gordon did not appeal the final order of foreclosure.

{¶4} On December 2, 2014, the trial court issued an entry providing notice that the sale of the property was scheduled for January 5, 2015, at 9:00 a.m. at the Cuyahoga

¹The complaint and subsequently filed pleadings misspelled Ms. Gordon’s name as Danielle Power Gordon. The correct spelling of her name is Danielle Pauer Gordon.

²The complaint also misspelled Mr. Gordon’s name as Jon Gordon, when the correct spelling of his name is John S. Gordon.

County Justice Center Auditorium. On December 4, 2014, Nationstar provided notice to all the named parties in the action, including Gordon, of the January 5, 2015 sale date and the time, location, and appraised value of the property.

{¶5} On December 30, 2014, Gordon filed a motion for relief from judgment. The next day, she filed a motion to stay, asking the trial court to stay the matter, including the sale date, until its resolution of her motion for relief from judgment.

{¶6} The sale proceeded on January 5, 2015, and the sheriff filed his return for the order of sale on January 7, 2015.

{¶7} On January 14, 2015, the magistrate issued an order granting Gordon's motion to stay in part, stating that the "confirmation of sheriff's sale is held in abeyance pending a ruling on Gordon's motion for relief from judgment."

{¶8} On May 1, 2015, the trial court denied Gordon's motion for relief from judgment, finding that a Civ.R. 60(B) motion cannot be a substitute for a direct appeal. Gordon has separately appealed that ruling, which has been heard by another panel of this court and set to be released on March 10, 2016. *See Aurora Bank F.S.B. v. Danielle Pauer Gordon, et al.*, 8th Dist. Cuyahoga No. 103074 (Mar. 10, 2016).

{¶9} On May 15, 2015, the trial court entered an order confirming the sale of the property.

{¶10} Gordon now appeals that order, asking this court to vacate the order confirming the sale and remand for further proceedings.

B. Standard of Review

{¶11} 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.* A trial court’s determination, therefore, will not be reversed absent an abuse of that discretion. *Deutsche Bank Natl. Co. v. Caldwell*, 8th Dist. Cuyahoga No. 100594, 2014-Ohio-2982, ¶ 13. Such abuse is connoted by an arbitrary, unreasonable, or unconscionable decision. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶12} “[T]he primary purpose of the judicial sale is to protect the interest of the mortgagor-debtor and to promote a general policy which provides judicial sales with a certain degree of finality.” *Soc. Natl. Bank v. Wolff*, 6th Dist. Sandusky No. S-90-13, 1991 Ohio App. LEXIS 1821 (Apr. 26, 1991), citing *Ambrose* at 56. Recognizing this purpose, Ohio courts have consistently held that the confirmation of a judicial sale cannot be set aside except for “‘fraud, mistake or some other cause, for which equity would avoid a like mistake between private parties.’” *Horvath v. Packo*, 6th Dist. Lucas No. L-11-1318, 2013-Ohio-56, ¶ 50, quoting *Dairymens’ Coop. Sales Co. v. Frederick Dairy, Inc.*, 7th Dist. Mahoning, 1934 Ohio Misc. LEXIS 1272 (Apr. 6, 1934); *see also Fed. Home Loan Mtge. Corp. v. Langdon*, 4th Dist. Hocking No. 07AP12, 2008-Ohio-776, ¶

17; *Chase Manhattan Mtge. Corp. v. Edney*, 10th Dist. Franklin No. 06AP-1015, 2007-Ohio-4590, ¶ 12.

{¶13} With this standard of review in mind, we turn to Gordon's sole assignment of error.

C. Confirmation of Sale

1. Application of Loc.R. 27 and R.C. 2329.31

{¶14} Gordon argues that the trial court should not have confirmed the underlying sale of the property because there is no evidence in the record that the sheriff complied with Loc.R. 27 of the Court of Common Pleas of Cuyahoga County, General Division, or R.C. 2329.31 regarding payment. Specifically, Gordon argues that the trial court ordered the transfer of the deed despite failing to ensure that the prerequisites for confirmation had been met, including the payment of a deposit by the purchaser. This argument, however, lacks merit.

{¶15} First, there is no dispute that the purchaser made the required deposit. Gordon's argument takes issue with the timing of the deposit and the alleged failure to properly reflect payment through the court's docketing system. According to Gordon, the deposit was not timely paid (because the docket fails to reflect the payment at the time of sale), and therefore the sheriff should have disregarded the bid as required under Loc.R. 27. Gordon, however, fails to cite any authority in support of her claim that (1) the sheriff must docket notice of the deposit *immediately* upon receipt, and (2) the failure

to do so precludes the trial court from later confirming the sale. Nor do we read Loc.R. 27 or R.C. 2329.31 to stand for such a proposition.

{¶16} R.C. 2329.31 provides as follows:

(A) 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. Nothing in this section prevents the court of common pleas from staying the confirmation of the sale to permit a property owner time to redeem the property or for any other reason that it determines is appropriate. In those instances, the sale shall be confirmed within thirty days after the termination of any stay of confirmation.

(B) The officer making the sale shall require the purchaser, including a lienholder, to pay within thirty days of the confirmation of the sale the balance due on the purchase price of the lands and tenements.

{¶17} We find no support for Gordon's argument under this statute.

{¶18} Gordon further relies on the following section of Loc.R. 27, which provides as follows:

In the event that a party shall register a bid at a Sheriff's sale and such bid is accepted by the Sheriff as the successful bid, and the party offering the bid fails to deposit in cash or by certified check payable to the Sheriff ten percent (10%) of the amount of the accepted bid, the Sheriff shall disregard the bid, and shall immediately re-offer the property for sale as before.

{¶19} Notably, there is no requirement under Loc.R. 27 for the sheriff to file notice of the payment *immediately upon receipt* with the trial court. Loc.R. 27 is

likewise silent as to specific grounds preventing the trial court from confirming a sale except for the following instance:

The Court will not confirm any sheriff's sale until such time as the party ordering the sale has filed a certificate of service of notice of the sale stating that the notice of the sale has been sent to all parties who have appeared in the action, by ordinary mail to their last known address or attorney of record.

Here, the record reveals that Nationstar fully complied with this requirement, filing a notice of sale on December 4, 2014. Gordon does not dispute this fact.

{¶20} We further note that, even if the procedures set forth in Loc.R. 27 were not strictly followed, this court has previously found that noncompliance is not grounds for reversal absent a showing of prejudice to the appellant. *Polivchak v. Polivchak Co.*, 8th Dist. Cuyahoga No. 99560, 2013-Ohio-4918, ¶ 13, 14. Similarly, Ohio courts have also recognized that failure to strictly comply with a statutory provision governing the sale of a foreclosed property does not necessarily require a sheriff's sale to be set aside or preclude the confirmation of a sale when the opponent of the sale has not suffered any harm or prejudice. *See, e.g., Fifth Third Mtge. Co. v. Rankin*, 4th Dist. Pickaway No. 11CA8, 2012-Ohio-2806, ¶ 24 ; *Ohio Farm Bur. Fedn., Inc. v. Amos*, 5th Dist. Ashland No. 07-COA-006, 2008-Ohio-459, ¶ 41 (“although compliance with the written notice requirement did not occur, the failure to provide such written notice did not prejudice appellants”). Here, Gordon never even moved the court to set aside the sale prior to the trial court's confirmation of the sale. She raises her claim of prejudice for the first time on appeal. But based on the record before us, we find no prejudice.

{¶21} We likewise find no merit to Gordon’s argument presented in her reply brief as to noncompliance with R.C. 2329.28. Aside from Gordon improperly raising this argument for the first time in a reply brief, her argument has no merit. *See In re Kendall*, 2d Dist. Montgomery No. 21702, 2007-Ohio-3809, ¶ 17 (matters not raised in appellant’s brief or the appellee’s brief are not proper matters presented in a reply brief under App.R. 16(C)). R.C. 2329.28 provides as follows:

The sheriff shall indorse on the writ of execution his proceedings thereon, and the clerk of the court of common pleas, upon the return thereof, immediately shall record all such indorsements at length, in the execution docket, or other docket provided for that purpose. That record shall be a part of the record of the court of common pleas.

{¶22} Although Gordon acknowledges that the sheriff ultimately complied with this requirement, she contends that the docket does not contain such a filing until after the trial court confirmed the sale, thereby rendering the confirmation invalid. Gordon, however, cites no authority in support of this proposition. *See App.R. 16(A)(7)*. But even if we agreed that the sheriff failed to strictly comply with R.C. 2329.28 by not filing this information at the time of the order of sale on January 7, 2015, Gordon has failed to demonstrate any prejudice.

2. No Prejudice to Gordon

{¶23} According to Gordon, “had she been provided any notice that any payment had been made, [she] could have filed a motion to stay the confirmation, or taken other action to prevent the sale and transfer or title to her residence, including exercising her

right of redemption.” Gordon relies on this rationale in support of her claim that she has been prejudiced. We find her argument unpersuasive.

{¶24} Under foreclosure law, mortgagors have an equitable right of redemption, which allows the mortgagor to pay the debt, interest, and court costs to prevent the sale of the property. *JDI Murray Hill, L.L.C. v. Flynn Props., L.L.C.*, 8th Dist. Cuyahoga No. 94259, 2011-Ohio-301, ¶ 39. A homeowner’s equity of redemption, however, is typically cut off when a decree of foreclosure is issued. *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 653 N.E.2d 1190 (1995). Courts generally provide a three-day grace period following the decree to exercise the equity of redemption. *Id.* Additionally, Ohio law provides for a statutory right of redemption under R.C. 2329.33, which exists independently of the equitable right and allows a mortgagor, at any time prior to the confirmation of the sale, to redeem the property by depositing the “amount of the judgment” with all costs in the common pleas court. *Flynn Props.* at ¶ 39. If a mortgagor exercises the statutory right of redemption prior to the confirmation of the sale, the court must set aside the sale, apply the deposit to the judgment, and award the interest to the purchaser. *Abroms v. Synergy Bldg. Sys.*, 2d Dist. Montgomery No. 23944, 2011-Ohio-2180, ¶ 50, citing R.C. 2329.33.

{¶25} The foreclosure order was entered in November 2014. The sale of property was held on January 5, 2015. There is no dispute that Gordon properly received notice of the sale. Less than a week before the sale, Gordon moved the trial court for a stay of the sale. Although the trial court allowed the sale to go forward, the trial court

specifically agreed to hold in abeyance any order regarding the confirmation of the sale until the trial court ruled on Gordon's motion for relief from judgment from the foreclosure. The docket reflects that the order of sale was returned on January 7, 2015. Nearly four months later, the trial court ruled on Gordon's motion for relief from judgment and denied it. Two weeks later, the trial court confirmed the sale.

{¶26} Despite having nearly two years from the filing of the foreclosure action and four additional months from the sale of the property, Gordon never made any attempt to exercise her equitable or statutory right to redemption. Gordon never even petitioned the court to set aside the sale, even after the court denied her motion for relief from judgment and prior to the court confirming the sale. We therefore find her argument of prejudice disingenuous. Gordon's protracted litigation and failure to make any offer of payment belie her claim that timely notice of the purchaser's deposit would have prompted her to exercise her right to redemption.

{¶27} Based on the record before us, we find no basis to conclude that the trial court abused its discretion in confirming the sale of the property. Nor do we find any grounds to set the sale aside.

{¶28} Gordon's sole assignment of error is overruled.

{¶29} Judgment affirmed.

It is ordered that appellees recover from appellant the 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.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR