

IN THE SUPREME COURT OF OHIO

STATE EX REL. RONALD J. SMITH)
AND NANCY L. SMITH)
1625 Gully Top Lane)
Canfield, OH 44406)

Relators,)

V.)

HONORABLE JOHN M. DURKIN,)
Mahoning County)
Court of Common Pleas)
120 Market Street)
Youngstown, OH 44503)

Respondent.)

Case No.: 2019-0250

**Sheriff's Sale Set for
Tuesday, February 19 at 1:30**

**URGENT UPDATED MOTION FOR
EMERGENCY EXPEDITED ALTERNATIVE WRIT**

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Relators Ronald J. Smith and Nancy L. Smith ("the Smiths") ask this Court to issue an Emergency Expedited Alternative Writ to immediately stay enforcement of the Order of Sale issued by the Mahoning County Court of Common Pleas on November 27, 2018 which is operating illegally under the authority of Respondent Judge John M. Durkin ("Judge Durkin") in

the matter currently pending before him in case no. 2005-CV-03869 until and unless this Court has considered the merits of the Smiths petition for writs of prohibition and mandamus.

The sale of the Smiths home is set for Tuesday, February 19, 2019 at 1:30 p.m.

In a new development, the Plaintiff in the case failed to file a Notice of Sale pursuant to O.R.C. 2329.26.

Judge Durkin violated the Ohio Constitution when he permitted this case to proceed when no justiciable controversy exists, and he and his court have issued orders that are not permitted by law.

The Smiths therefore ask this Court to issue an expedited alternative writ.

Allowing Judge Durkin to continue to exercise jurisdiction in the underlying case will quickly create an unjustified and irreparable hardship—specifically the illegal sale of the Smiths home.

As such, emergency relief is warranted.

Therefore, an immediate stay and expedited alternative writ should issue. This Motion is more fully supported by the attached Memorandum.

Respectfully submitted,

s/Ronald J. Smith
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MEMORANDUM IN SUPPORT

Now come Relators Ronald J. Smith and Nancy L. Smith (“the Smiths”) with an **URGENT** and updated motion for an Emergency Expedited Alternative Writ.

The sale of the Smiths home is set for this Tuesday, February 19, at 1:30 p.m.

In a new development, it is now clear that the alleged Plaintiff in the underlying case – U.S. Bank National Association (“USBANA”) – **failed to comply with Ohio Revised Code 2329.26** since it has not filed and mailed a Notice of Sale to all interested parties seven days prior to the date of the sale as the state law requires.

Given all of the other procedural and jurisdictional defects that the Smiths have already documented in this case, this latest defect is just one more reason that this Court must act now and immediately issue an Expedited Alternative Writ in their pending case before this Court for writs of prohibition and mandamus.

Without immediate action, the Smiths will suffer irreparable harm.

To not issue said writ under the circumstances present in this case will create a manifest injustice to not only the Smiths, but also to the purchasers of their home in what without doubt would be the result of an illegal sale.

This Honorable Court said in *The STATE ex rel. STERN, Pros. Atty., v. MASCIO*, Judge 98–371 (1998) that the *dismissal* of the alternative writ is appropriate **only if it appears ‘beyond doubt’** that the motion will fail, and conversely, the alternative writ **should be granted if the motion ‘may’ succeed.**

The Smiths’ motion for writs of prohibition and mandamus in this case clearly passes the test of whether their allegations **MAY** have merit, and in fact, rises to the level of **‘beyond doubt’** that they have merit.

U.S. Bank, NA Has Abandoned This Case

It is important to note that since it filed the praecipe of sale on October 5, 2018,

USBANA has:

1. Failed to object or reply to the Smiths' NEW Motion for Relief from Judgment based on fraud upon the court filed on September 27, 2018.
2. Failed to object or reply to the Smiths' Motion to Vacate the underlying Summary Judgment pursuant to Civ. 25(A)(1) which they filed on November 1, 2018.
3. Failed to object or reply to the Smiths' Motion to Vacate and Recall Alias Order of Sale filed on November 29, 2018.
4. Failed to object or reply to the Smith NEW Motion to Vacate the underlying case pursuant to Civ. R. 25(A)(1) filed on February 1, 2019.
5. Failed to file the required Notice of Sale pursuant to O.R.C. 2329.26. by February 12, 2019 (See Mahoning County Court docket – case no. 2005 CV 03869)

These failures to act are no mere oversight. U.S. Bank, one of the largest banks in the country, represented by one of the largest law firms in the region, does not 'forget' to take the steps outlined above, nor has it run out money.

Instead, as in thousands of cases around the country over the past several years, it has become common practice for 'pretend' lenders and trustees such as USBANA to take the same 'head for the hills' approach when finally cornered with the truth of its misrepresentations and illegal schemes, and that is exactly what is happening here.

CONCLUSION

The Supreme Court of Ohio said in cases such as this, the alternative writ should issue if the application for writs **may** have merit, and **only be denied if it is beyond doubt** that it lacks merit.

The sale of the Smiths' home clearly creates irreparable harm even if post-sale actions due to the multiple procedural and jurisdictional defects *may* be able to unwind the sale.

The sale of a home itself causes a multitude of harm up to and including emotional distress, public humiliation, and additional expense and effort to litigate the post-sale events. And there is no guarantee any action post-sale will be granted.

Failure to stop the sale would needlessly ensnare a third-party purchaser in an ongoing legal battle.

Given the above, allowing the sale of the Smiths home to go forward is unwarranted.

The underlying case has been ongoing for 14 years. The alleged Plaintiff is nowhere to be found and did not even bother to file a Notice of Sale. Clearly, USBANA will not be prejudiced by stopping the sale that it has literally abandoned.

As such, the Smiths pray that the Expedited Alternative Writ is issued **immediately** to stop the sheriff sale dates of February 19, 2019 and March 5, 2019 and for any other relief that may be appropriate.

As a practical matter, the emergency stay would need to be in place by approximately 11:00 a.m. or sooner on Tuesday, February 19 to allow proper time for the county sheriff to process the request and cancel the sale.

The Stay notice can be faxed to the sheriff's office at 330-480-5088, attn. Tammy.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing was served by First Class U.S. Mail on February 19, 2019 upon:

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Mahoning County Prosecutor Attorney
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s/Ronald J. Smith
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