[Cite as *State ex rel. US Bank Trust Natl. Assn. v. Cuyahoga Cty.*, 2021-Ohio-2524.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE EX REL., US BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF AMERICAN HOME-OWNER PRESERVATION TRUST SERIES, 2015A+,	:	
Relator,	:	No. 110297
v.	:	
CUYAHOGA COUNTY, OHIO	:	
Respondent.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DISMISSED
DATED: July 19, 2021

Writ of Mandamus
Motion No. 545845
Order No. 547581

Appearances:

Andrew M. Engel and Marc D. Dann, Advocate Attorneys, LLP, *for relator*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Janeane R. Cappara and Adam D. Jutte, Assistant Prosecuting Attorneys, *for respondent*.

Roetzel & Andress, LPA, and Stephen W. Funk, *for respondent*.

EMANUELLA D. GROVES, J.:

{¶ 1} Relator, US Bank Trust, N.A., as trustee of American Homeowner Preservation Trust Series 2015A+ ("US Bank"), seeks a writ of mandamus directing respondent, Cuyahoga County, Ohio, to institute appropriation proceedings pursuant to R.C. Chapter 163 for the taking of US Bank's interest in a property that was the subject of foreclosure proceedings for vacant or abandoned land before the Cuyahoga County Board of Revision ("BOR"). These proceedings ultimately resulted in the subject property being transferred to the Cuyahoga County Land Bank (the "Land Bank"), a land reutilization corporation established by the Cuyahoga County Treasurer and authorized by the Cuyahoga County Board of Commissioners pursuant to R.C 1724.10. Relator claims that the transfer of the subject property to the Land Bank without public sale constitutes a taking of relator's property interest without just compensation. For the reasons that follow, we dismiss the complaint.

Factual and Procedural History

{¶ 2} US Bank filed a complaint for writ of mandamus on February 12, 2021. It alleged that it had an interest in a certain real property by virtue of a 2007 note and mortgage executed by Richard Kurman, the owner of record, in the amount of $52,500. Attachments to the complaint include a 2014 recorded assignment of mortgage indicating that Biltmore Funding L.L.C. ("Biltmore") received all rights, title, and interest in the mortgage executed by Kurman. A further assignment evidences that Biltmore assigned its interest in the mortgage to 3 Star Properties,

L.L.C. on August 31, 2017. This assignment was not recorded until November 13, 2017. A third assignment, also recorded November 13, 2017, showed that 3 Star Properties, L.L.C. assigned its interest in the mortgage to US Bank on September 6, 2017.

{¶ 3} On June 28, 2017, a complaint was filed subjecting the property to a tax lien foreclosure proceeding before the BOR. In that foreclosure action, relator's predecessor in interest, Biltmore, was named as a defendant. Apart from the complaint, Biltmore was also served with a notice of hearing on September 13, 2017. The notice, in large, bold type, informed the defendants that their interest in the subject property could be extinguished and strongly encouraged them to participate in the hearing scheduled for October 11, 2017. US Bank does not allege that service was not properly made, but only states that Biltmore did not take part in the tax foreclosure action, even though it was named as a party and was informed by the complaint that its interest in the property could be extinguished. An adjudication of foreclosure, filed October 16, 2017, indicates that unless a party paid the amount due in the action, the property would be transferred to the Land Bank free and clear of all liens without public auction. There is no indication in the instant complaint that Biltmore or anyone else redeemed the property by paying the amount due for taxes, penalties, and interest. The property was ultimately transferred to the Land Bank free and clear of US Bank's lien and other encumbrances.

{¶ 4} US Bank now asserts, more than three years later, that the appraised value of the property at the time of the foreclosure action, $22,300, was more than

the then delinquent real estate taxes, penalties, and interest, $6,804.07, such that the transfer of the property without sale constituted a taking of its property. US Bank claims that the transfer of the property to the Land Bank deprived it of its interest without just compensation, whether through the extinguishment of its interest in the property as a result of the mortgage lien or through its contractual right to any proceeds owed to Kurman as a result of any condemnation or appropriation action. As a result, relator now seeks to compel respondent to initiate proceedings to compensate relator for the interest that was improperly extinguished by the transfer of the subject property to the Land Bank without holding a public auction and without paying compensation for any excess in value.

{¶ 5} The federal district court for the Northern District of Ohio has outlined the statutory procedures at issue here that provides for the transfer of property to a county land reutilization corporation without regard to whether the amount of taxes owed exceeds the fair market value of the property:

> [U]nder the relevant statutes, a property owner has been granted a statutory right of redemption, which terminates upon the filing of the confirmation of sale for abandoned land sold at public auction pursuant to [Section] 323.73 of the Revised Code, or upon the filing of the county board of revision's order to the sheriff to transfer the abandoned land to an electing subdivision, such as a county land reutilization corporation, under Sections 323.73(G) or 323.74 of the Revised Code. *See* [R.C.] 323.76. If the County Treasurer invokes the alternative redemption period under section [R.C.] 323.78, however, then [R.C.] 323.65(J) provides that the property owner shall have an additional twenty [sic] (28) days after the Order of Foreclosure to exercise the statutory right of redemption. *See* [R.C.] 323.65(J). Thus, for "abandoned" lands ordered transferred under [R.C.] 323.78, the statute provides the property owner or other interested party with an additional 28-day period to redeem their interest in the property by

paying their taxes before any direct transfer of land to an electing subdivision can occur. *See* [R.C.] 323.78. If the property owner does not exercise the statutory right of redemption, however, then [R.C.] 323.76(C)(2) provides that any common law or statutory right of redemption shall terminate "upon the expiration of such alternative redemption period." *Id*.

In this regard, this statutory right to transfer tax delinquent land to an "electing subdivision" under [R.C.] 323.78 is only applicable to "abandoned" lands, as defined by [R.C.] 323.65(A). A property owner can prevent the direct transfer of land under [R.C.] 323.78 by showing that the land is not abandoned, by paying the outstanding taxes and impositions (or entering into a payment plan), or by exercising their statutory right of redemption before the expiration of the 28-day alternative redemption period. But, if the property is "abandoned land" and the property owner fails to pay the outstanding taxes owed before the expiration of the 28-day alternative redemption period, then [R.C.] 323.78 provides that "* * * any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged." *Id*. Moreover, [R.C.] 323.78 provides that "[t]he court or board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel," and that "[n]o further act of confirmation or other order shall be required for such a transfer, or for the extinguishment of any statutory or common law right of redemption." *Id*. Thus, once a foreclosure order has been issued and the 28-day alternative redemption period has expired, then the property owner loses all right, title or interest in the abandoned, tax delinquent property. *See* [R.C.] 323.76(C)(2) and [R.C.] 323.78.

Finally, the statutory scheme provides an aggrieved party with the right to file an administrative appeal of a final order of foreclosure under Chapters 2505 and 2506 of the Revised Code. *See* [R.C.] 323.79 ("Any party to any proceeding instituted pursuant to sections 323.65 to 323.79 of the Revised Code who is aggrieved in any of the proceedings of the county board of revision under those sections may file an appeal

> in the court of common pleas pursuant to Chapters 2505 and 2506 of the Revised Code upon a final order of foreclosure and forfeiture by the board"). An administrative appeal under [R.C.] 323.79 differs from a traditional [R.C. Chapter] 2506 appeal, however, because the appeal under [R.C.] 323.79 "shall proceed as an appeal de novo and may include issues raised or adjudicated in the proceedings before the county board of revision, as well as other issues that are raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings." *Id.* Thus, [R.C.] 323.79 appears to allow an aggrieved party to file new, constitutional claims arising from the tax foreclosure proceedings.

(Emphasis deleted.) *Harrison v. Montgomery Cty.*, 482 F.Supp.3d 652, 656-658 (S.D.Ohio 2020), *overruled on other grounds*, *Harrison v. Montgomery Cty.*, 997 F.3d 643 (6th Cir.2021).

Law and Analysis

{¶ 6} This case is before the court on respondent's motion to dismiss for failure to state a claim. Pursuant to Civ.R. 12(B)(6), "'[a] court can dismiss a mandamus action * * * if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the relator's favor, it appears beyond doubt that he [or she] can prove no set of facts entitling him to the requested writ of mandamus.'" *State ex rel. Nyamusevya v. Hawkins*, Slip Opinion No. 2021-Ohio-1122, ¶ 10, quoting *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. Further, "'[w]hen entertaining a motion to dismiss a writ complaint, a court may take notice of the docket and record in a closely related case to determine whether the current complaint states a claim for relief." *Id.* at ¶ 13, quoting *State ex rel. Neguse v. McIntosh*, 161 Ohio St.3d 125, 2020-Ohio-3533, 161 N.E.3d 571, ¶ 18.

{¶ 7} Extraordinary relief in mandamus is only appropriate when relators establish a clear legal right to the requested relief, that respondents have a clear legal duty to provide the requested relief, and relator has no other adequate remedy in the ordinary course of the law. *State ex rel. Cuyahoga Lakefront Land, L.L.C. v. Cleveland*, 148 Ohio St.3d 531, 2016-Ohio-7640, 71 N.E.3d 1016, ¶ 12, citing *Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6.

> The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St.3d [529], 533, 751 N.E.2d 1032 [(2001)]. Relators have the burden of proving their entitlement to the requested extraordinary relief in mandamus. *Id.*

State ex rel. Shemo v. Mayfield Hts., 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002). Generally, relators are required to show, by clear and convincing evidence, a compensable taking of their property. "The purpose of the takings clauses in the Ohio and United States constitutions is 'to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."'" *Cuyahoga Lakefront Land* at ¶ 14, quoting *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998, ¶ 33, quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). However, mandamus will not issue in the doubtful case. *State ex rel. St. Clair Twp. Bd. of Trustees v. Hamilton*, 156 Ohio St.3d 272, 2019-Ohio-717, 125

N.E.3d 863, ¶ 29-30; *State ex rel. Gerspacher v. Coffinberry*, 157 Ohio St. 32, 37, 104 N.E.2d 1 (1952).

{¶ 8} Respondent raises a standing argument that we must address.

> At a minimum, common-law standing requires the litigant to demonstrate that he or she has suffered (1) an injury (2) that is fairly traceable to the defendant's allegedly unlawful conduct and (3) is likely to be redressed by the requested relief. *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Standing does not turn on the merits of the plaintiffs' claims but rather on "whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case." *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7.

Ohioans for Concealed Carry, Inc. v. Columbus, Slip Opinion No. 2020-Ohio-6724, ¶ 12. Respondent argues that US Bank does not have standing to pursue this action. Respondent argues that because any interest held by Biltmore was extinguished prior to the recording of the assignment of mortgage, that means that US Bank had no interest at the time it was extinguished and could not have received an interest after it was extinguished. However, as noted earlier, the assignment from Biltmore to an intermediary and then to US Bank occurred on September 6, 2017. While not recorded until after the property was transferred to the Land Bank, the assignment is dated prior to the decree of foreclosure in this case. The failure to immediately record the document does not impact its efficacy to transfer an interest in the mortgage as between the parties to the assignment, but goes to notice to third parties.

{¶ 9} The doctrine of lis pendens, codified in R.C. 2703.26, as it applies here, means that "one who acquires an interest in the property during the pending lawsuit 'takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset.'" *Fantozz v. Cordle*, 6th Dist. Erie No. E-14-130, 2015-Ohio-4057, ¶ 26, quoting *Cook v. Mozer*, 108 Ohio St. 30, 36, 140 N.E. 590 (1923). Biltmore could alienate its interest in the property to another, but the other party takes subject to the pending action and is bound by the results. US Bank was assigned its interest in the property prior to the extinguishment of that interest.

{¶ 10} US Bank first claims an interest in the subject property by virtue of its mortgage lien. This is a property interest. In order to assert a takings claim, "a claimant must first establish a vested property right under state law. 'Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law.'" (Citations omitted.) *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 455, 952 N.W.2d 434 (2020), quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

{¶ 11} However, a mortgage lien constitutes a lien subordinate to that of a tax lien. *S. Ohio Savs. Bank & Trust Co. v. Bolce*, 165 Ohio St. 201, 135 N.E.2d 382 (1956). A junior lienholder's interest may be extinguished in foreclosure proceedings initiated by a senior lienholder. *Hembree v. Mid-America Fed. S. & L.*

Assn., 64 Ohio App.3d 144, 152, 580 N.E.2d 1103 (2d Dist.1989). *See also* Restatement 3d of Property: Mortgages, Section 7.1 (1997). But, ""“in order to foreclose or cut off [a property] right * * * the party holding the right must be joined in the action.”"" *Citimortgage, Inc. v. Bocock*, 2d Dist. Montgomery No. 26366, 2015-Ohio-341, ¶ 5, quoting *UAP-Columbus JV326132 v. Young*, 10th Dist. Franklin No. 11AP-926, 2012-Ohio-2471, ¶ 19, quoting *Hembree* at 152. A junior lienholder who defaults for want of answer in such a proceeding cannot be surprised when its interest is extinguished. A defaulting junior lienholder is not entitled to share in any proceeds realized from a foreclosure sale because, in the absence of other indications in the complaint, its default can be construed as a disclaimer of interest in the property. *Zukerman, Daiker & Lear Co. L.P.A. v. Signer*, 186 Ohio App.3d 686, 2009-Ohio-968, 930 N.E.2d 336, ¶ 34 (8th Dist.); *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014-Ohio-335, ¶ 31; *Lexington Ridge Homeowners Assn. v. Schlueter*, 9th Dist. Medina No. 10CA0087-M, 2013-Ohio-1601, ¶ 20-21; *Provident Bank v. Murray*, 2d Dist. Greene No. 84-CA-25, 1984 Ohio App. LEXIS 12010, 1984 WL 3261 (Dec. 11, 1984); *Deutsche Bank Natl. Trust Co. v. Richardson*, 2d Dist. Darke No. 2010-CA-3, 2011-Ohio-1123, ¶ 19.

{¶ 12} US Bank, in its complaint, claims that respondent is liable to it "for the fair market value of the mortgage, plus interest from the date of the taking." But, as noted above, its mortgage lien was extinguished through the foreclosure action and its own inaction or the inaction of its predecessor in interest. Its failure to answer and establish its interest constitutes a disclaimer of that interest as to any

proceeds of sale that may have resulted in the foreclosure action. Therefore, US Bank has a problem satisfying the second and third prongs of the standing requirement: an injury fairly traceable to the defendant's allegedly unlawful conduct that could be redressed in this action. If the property were sold at sheriff's sale, US Bank would not be entitled to any proceeds, and thus has no injury fairly traceable to respondent's actions that could be remedied when, instead, the property was transferred without sale — the supposed wrongful action that resulted in a taking of property.

{¶ 13} Whether the property was sold at sheriff's sale or transferred without sale is immaterial because US Bank would not be entitled to share in any proceeds of sale. US Bank and the assignors of its interest in the property remained silent as the property, in its abandoned state, went through the statutory procedures dedicated to expeditiously remedying that blighted condition. US Bank's complaint admits that neither it nor Biltmore participated in the foreclosure proceedings before the BOR. Through inaction, the mortgage lien interest possessed by US Bank was extinguished in a valid foreclosure action. As a result, it no longer possesses an interest in the property.

{¶ 14} US Bank also argues that its interest arises by way of contract because, under the "miscellaneous proceeds" clause, any proceeds from a condemnation, appropriation, eminent domain, or similar proceeding owed to Kurman was assigned to US Bank. Its interest, it posits, flows from the right to receive any money that is due because of a governmental taking of the property.

{¶ 15} The assignment of a cause of action is distinct from the assignment of proceeds or the right to funds that results from a cause of action. *See Three-C Body Shops, Inc. v. Francois*, 10th Dist. Franklin No. 19AP-471, 2020-Ohio-4710. The mortgage only assigned the right to any proceeds emanating from condemnation or other similar actions. "[W]here assignment is at issue, courts – both before and after the founding — have always permitted the party with legal title alone to bring suit * * *." *Sprint Communications Co., L.P. v. APCC Servs.*, 554 U.S. 269, 271, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008), paragraph a of the syllabus. The right assigned in the mortgage was a contractual right to funds between the mortgagee and mortgagor. However, the property right inherent in the mortgage was extinguished by the foreclosure action. It is a dubious proposition that the assignment of a right to miscellaneous proceeds provides sufficient standing to initiate a suit. Even if provisions of the mortgage are still enforceable as between the parties to the mortgage after foreclosure, the assignment of proceeds does not necessarily lead to the conclusion that US Bank has a possessory interest in the property at issue or even a contingent interest. *See Wilson v. Trustees Union Twp.*, 12th Dist. Clermont No. CA98-06-036, 1998 Ohio App. LEXIS 5025, *13 (Oct. 26, 1998), discussing *Zeltig Land Dev. v. Bambridge Twp.*, 75 Ohio App.3d 302, 599 N.E.2d 383 (11th Dist.1991); and *Arlington Hts. v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977).

{¶ 16} But as discussed below, even if US Bank has standing to fill in Kurman's shoes, it attempts to do so without being burdened by the ramifications

owners face when they fail to avail themselves of the remedies in the statutory scheme that could provide complete and timely relief.

{¶ 17} Mandamus requires a clear legal right and a clear legal duty on the part of the respondent to provide the relief to which relator claims he or she is entitled.

{¶ 18} Here, in the absence of a statute or constitutional provision providing otherwise, it is not an unconstitutional taking of property when a government retains proceeds above the amount of delinquent taxes, penalties, and interest in a tax foreclosure proceeding. *See Nelson v. New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), paragraph three of the syllabus ("Appellants not having taken timely action to secure the relief available under the statute although adequate steps were taken to notify them of the charges due and the foreclosure proceedings, * * * nor was their property taken without just compensation by reason of the City's retention * * * of the proceeds of sale * * *.").

> Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest. In *Spurgias v. Morrissette*, 109 N.H. 275, 249 A.2d 685, 687 (N.H.1969), for example, the New Hampshire Supreme Court stated, "In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute so that a town is free from either legal or equitable claims by the taxpayer to any surplus realized." (Citations omitted.) In *Nelson*[], the United States Supreme Court rejected a claim under the Takings Clause when the municipality sold the plaintiff's property for $ 7000 — to satisfy a $ 65 tax delinquency — and retained the proceeds. [Nelson] 352 U.S. at 105-06. The Court concluded that "nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure

> proceedings." *Id*. at 110; *see Coleman v. Scheve*, 367 A.2d 135 (D.C.1976); *Kelly v. City of Boston*, 348 Mass. 385, 204 N.E.2d 123 (Mass.1965); *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me.1974).
>
> Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements.

Ritter v. Ross, 207 Wis.2d 476, 485-486, 558 N.W.2d 909 (App.1996).

{¶ 19} US Bank has not alerted this court to any statute or Ohio Constitutional provision that protects this interest in the present case. It cites to R.C. 5721.20, which provides for the excess proceeds realized from a sale to be distributed to the former owner or lien holders, but the statute specifically exempts direct transfers under R.C. 323.78. R.C. 323.78 is also not the exact cause of US Bank's alleged injury. As explained above, any interest US Bank possessed was extinguished through a valid foreclosure proceeding, and, as a defaulting junior lienholder, it likely would not be entitled to any relief as a result of its mortgage lien even if the property was sold at sheriff's sale.

{¶ 20} US Bank claims this case is analogous to *Armstrong*, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), where the United States confiscated goods after a party breached a contract with the United States for the building of ships. Any liens that were validly placed on these goods were extinguished as a result of the government's action. The court held that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible

element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." *Id*. at 48.

{¶ 21} The present situation is more analogous to *Nelson*, where a taxing authority retained excess proceeds from a sale of tax delinquent property after providing notice sufficient to meet due process requirements. US Bank does not take issue with the notice received by Biltmore or argue that notice was insufficient to meet due process requirements. Further, the holding in *Nelson* is equally applicable to US Bank's claim based on its theory of assignment of the right to proceeds.

{¶ 22} Relator claims that there is no way to raise the issue of an unremunerated property interest above the amount of taxes owed, and therefore, no other adequate remedy at law – thus entitling it to relief in mandamus. However, mandamus may not be used as a substitute for appeal or to correct an error in a case. *State ex rel. Pruitt v. Donnelly*, 8th Dist. Cuyahoga No. 95518, 2011-Ohio-1252, ¶ 9. "[I]f the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded." *Id.*, citing *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997), and *State ex rel. Boardwalk Shopping Ctr., Inc. v. Cuyahoga Cty. Court of Appeals*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990) ("appeal is not an inadequate remedy because relator has allowed the time for appeal to expire.").

{¶ 23} In 2006, Ohio enacted a system of procedures that could be used to streamline the foreclosure process for certain tax delinquent properties. *State ex*

rel. Feltner v. Cuyahoga Cty. Bd. of Revision, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 68, ¶ 2. For instance, R.C. Chapter 323 gives county boards of revision authority to conduct foreclosure proceedings. If a county treasurer's complaint alleges that property is delinquent vacant land, abandoned land, and

> the value of the taxes, assessments, penalties, interest, and all other charges and costs of the action exceed the auditor's fair market value of the parcel, then the court or board of revision having jurisdiction over the matter on motion of the plaintiff, or on the court's or board's own motion, shall, upon any adjudication of foreclosure, order, without appraisal and without sale, the fee simple title of the property to be transferred to and vested in an electing subdivision * * *.

R.C. 323.28(E). The statutory scheme goes further, however, in R.C. 323.78. The alternative redemption period codified there, allows for the transfer of certain property to a "requesting municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property." R.C. 323.78(B). This is true "regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel." *Id*.

{¶ 24} However, parties aggrieved by such a threatened transfer during a foreclosure case before a board of revision are not left merely to gnash their teeth. R.C. 323.79 provides a right to appeal:

> Any party to any proceeding instituted pursuant to sections 323.65 to 323.79 of the Revised Code who is aggrieved in any of the proceedings of the county board of revision under those sections may file an appeal in the court of common pleas * * * upon a final order of foreclosure and forfeiture by the board. A final order of foreclosure and forfeiture

> occurs upon * * * confirmation of any conveyance or transfer to a certificate holder, community development organization, county land reutilization corporation organized under Chapter 1724. of the Revised Code * * *. An appeal as provided in this section shall proceed as *an appeal de novo and may include issues raised or adjudicated in the proceedings before the county board of revision, as well as other issues that are raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings.*

(Emphasis added.) Pursuant to this section, constitutional claims, or whether compensation for an unremunerated property interest was due could be raised in an appeal from the final decree of foreclosure.

{¶ 25} Where a statutory scheme would obviate the need for a takings claim, a party may not ignore that scheme in favor of instituting a takings claim. This is in line with decisions from at least one other state. *See Dallas v. VSC, LLC*, 347 S.W.3d 231, 237 (Tex.2011), citing *Hays v. Port of Seattle*, 251 U.S. 233, 40 S.Ct. 125, 64 L.Ed. 243 (1920). Biltmore or US Bank had an opportunity to litigate these issues without resorting to the extraordinary relief that is available in mandamus, making mandamus inappropriate. *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, ¶ 5.

{¶ 26} Respondent argues that the Supreme Court of Ohio rejected an argument similar to the one US Bank now raises in *State ex rel. Feltner*, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 689. There, the court denied extraordinary relief in prohibition and mandamus, which included similar takings claims to the one raised here. *Id*. at ¶ 29 (Fisher, J., concurring in judgment only), citing *State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision*, 155 Ohio St.3d 1403, 2019-Ohio-943,

119 N.E.3d 431. However, the takings claims were dismissed without opinion. Therefore, the decision dismissing these claims without opinion does not provide the precedential value respondent asserts.

{¶ 27} However, a review of the Supreme Court of Ohio's decision in *Kerns* supports the above analysis. In *Kerns*, a group of landowners initiated a mandamus action seeking to compel the Ohio Department of Natural Resources to commence appropriations proceedings to compensate them for the value of their property interests that were included in an oil-and-gas drilling unit order. *Id*. at ¶ 1. The chief of the Ohio Department of Nature Resources, Division of Oil and Gas issued an order requiring that a reservoir of oil and gas underlying multiple tracts of land be operated as a unit. *Id*. The landowners claimed this amounted to a taking of their property. Prior to the initiation of the mandamus action, the owners appealed the unitization order to the Ohio Oil and Gas Commission (the "commission"). *Id*. at ¶ 3. The appeal was dismissed because the commission stated that it did not have jurisdiction to decide a constitutional issue raised by the landowners. *Id*. The owners did not, pursuant to R.C. 1509.37, appeal this decision on "questions of law and fact" to the common pleas court. *Id*. at ¶ 8. The *Kerns* Court found that the owners could have and should have challenged the constitutionality of the act in an appeal to the common pleas court, which could decide that issue. If they were successful, no taking would occur and there would be no need for a writ. *Id*. at ¶ 12.

{¶ 28} The appeal remedy enshrined in R.C. 323.79 allows for a de novo review on any issues related to the property, whether raised before the BOR or not.

This is broader than the review provided for in the appeal statute in *Kerns*, R.C. 1509.37, which limits an appeal to the record before the commission, and whether the commission order was "'lawful and reasonable.'" *Id*. at ¶ 13, quoting R.C. 1509.37.

{¶ 29} Similar to *Kerns*, US Bank, its predecessor in interest, or Kurman could have appealed the foreclosure order to the common pleas court, and challenged the extinguishment of its property interest without sale. If successful, then no taking would have occurred because the common pleas court could have determined issues surrounding whether a party was entitled to compensation as a result of the transfer without sale.

{¶ 30} US Bank points to a federal Sixth Circuit case that stands for the proposition that a takings claim only becomes ripe once a final disposition of the property occurs, arguing an appeal does not constitute an adequate remedy at law. *Harrison*, 997 F.3d 643 (6th Cir.2021).[1] US Bank's assertion that it lacks an adequate remedy at law because its claim only arose after the transfer of property became final, long after the time for appeal had passed, is unavailing.

{¶ 31} It was reasonably certain at the time of the foreclosure confirmation of conveyance or transfer[2] that the property would be transferred to the landbank.

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[1] US Bank filed a notice of supplemental authority on June 28, 2021, citing to another federal case similar to *Harrison*, *Dorce v. City of New York*, 2d Cir. No. 20-1809-cv, 2021 U.S. App. LEXIS 18670 (June 23, 2021). Nothing in that case changes the above analysis.

[2] R.C. 323.79 provides that "[a] final order of foreclosure and forfeiture occurs upon confirmation of any sale or upon confirmation of any conveyance or transfer to a certificate

This is the time the present claim arose, *State ex rel. A WMS Water Solutions, L.L.C. v. Mertz*, 162 Ohio St.3d 400, 2020-Ohio-5482, 165 N.E.3d 1167, and could have been litigated in an appeal from that determination. US Bank disputes this, relying on *Harrison*, which decided when a takings claim arises for purposes of a federal action under 42 U.S.C. 1983. But the *Harrison* Court still acknowledged "the requirement that there must be a 'final decision' to take property, [*Knick v. Twp. Of Scott*, 139 S.Ct. 2162, 2169, 204 L.Ed. 2d 558 (2019)], meaning that it is 'known to a reasonable degree of certainty' what will happen to the property, *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed. 2d 592 (2001)." *Harrison* at 649.

{¶ 32} The *Harrison* Court discussed the defenses that would be required to be raised prior to any indication that a property would be transferred to a landbank without sale and the untenability of those remedies raised by the appellee in that appeal. *Id*. at 650-651. The court acknowledged that the statutory scheme provides a right of appeal where these claims could be raised, including constitutional challenges, but found that did not mean that the appellant had to pursue an appeal through that venue, rather than filing a claim in federal court. *Id*. at 651. The court acknowledged that Harrison could have resolved her claim in an administrative appeal, but because of a recent shift in federal law, she did not have to exhaust her

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holder, community development organization, county land reutilization corporation organized under Chapter 1724. of the Revised Code, municipal corporation, county, or township pursuant to sections 323.65 to 323.79 of the Revised Code."

state-law remedies before seeking relief: "Our decision as a result holds only that, if a plaintiff chooses to pursue an administrative appeal, claim preclusion may bar a later attempt to seek the same relief." *Id.*

{¶ 33} But an action for writ of mandamus does require a person to seek relief through other, adequate remedies. US Bank, its predecessor in interest, or Kerman, had an opportunity to appeal the final order issued in the foreclosure case ordering the property transferred to a county land reutilization corporation without sale. By not participating in the foreclosure proceeding and appealing the final determination, US Bank's interest in the property was extinguished, and Kurman's interest in the property above the taxes owed, to which US Bank now claims a right, could have been fully litigated and determined in an appeal to the common pleas court. Therefore, this court declines to issue a writ of mandamus to belatedly address these issues.

{¶ 34} Respondent asserts that no taking has occurred here because it was acting under its taxing authority, rather than its eminent domain authority, when adjudicating the disposition of the real property in question. When so acting, no taking occurs. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶ 14. This court does not need to address the argument, given that US Bank possessed an adequate remedy at law to fully resolve its claim before a court of law, precluding relief in mandamus.

{¶ 35} For all these reasons, respondent's motion to dismiss is granted. The complaint is dismissed. Costs to relator. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶ 36} Writ dismissed.

EMANUELLA D. GROVES, JUDGE

MARY J. BOYLE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR