[Cite as *Grand Arcade Condominium Owners' Assn., Inc. v. GA 120, L.L.C.*, 2019-Ohio-2338.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GRAND ARCADE CONDOMINIUM OWNERS' ASSOCIATION, INC.,	:	
Plaintiff-Appellant,	:	No. 108027
v.	:	
GA 120, L.L.C., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 13, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-16-870901

Appearances:

Kaman & Cusimano, L.L.C., Joseph E. DiBaggio, and Rachel M. Kuhn, *for appellant*.

Powers Friedman Linn, P.L.L., Michael D. Linn, Rachel E. Cohen, and Thomas P. Owen, *for appellee* GA 120, L.L.C.

Thomas M. Horwitz, and Bryan S. Mollohan, *for appellee* GA Storage, L.L.C.

MARY J. BOYLE, P.J.:

{¶ 1} Plaintiff-appellant, Grand Arcade Condominium Owners' Association, Inc. ("the Association") appeals from a judgment denying its motion to appoint a receiver. In its sole assignment of error, the Association asserts:

> The trial court abused its discretion in denying the Association its mandatory, statutory right to the appointment of a receiver, as set forth in R.C. 5311.18(B)(2).

{¶ 2} Finding the appeal to be moot, we affirm the trial court's judgment.

I. Procedural History and Factual Background

{¶ 3} In October 2016, the Association filed a foreclosure complaint against defendants, GA 120, L.L.C. and GA Storage, L.L.C. GA 120 is the owner of a condominium unit located at 408 West St. Clair Avenue, Suite 120, Cleveland, Ohio ("the property"). As a condominium unit owner, GA 120 is a member of the Association pursuant to the Association's declaration and bylaws. As explained more fully below, defendant-appellee, GA Storage, holds the first mortgage on the property as well as a second mortgage.

{¶ 4} The Association recorded a certificate of lien on the property in the Cuyahoga County Recorder's Office on August 19, 2016, for $5,119.49, which it asserted was to secure payment from GA 120 for "maintenance fees, common expenses and assessments." The Association alleged that GA 120 owed it $7,973.08, plus interest at the rate of 10 percent as of October 21, 2016. The Association further alleged that GA 120 owed additional "maintenance fees and assessments incurred subsequent to the filing" of the complaint.

{¶ 5} According to the preliminary judicial report attached to the complaint, a mortgage was recorded on the property on November 3, 2006, from West Sixth Associates Limited Partnership ("West Sixth Associates") to GA Storage in the amount of $1,561,523.23. West Sixth Associates owned the property at that time.

{¶ 6} West Sixth Associates redeveloped 99 condominium units in several historic buildings, including The Grand Arcade, Warning Bloc, and Klein-Marks and Bair-Bloc buildings in downtown Cleveland. The buildings, which were originally built in the 1880s, are on St. Clair Avenue in the city of Cleveland's Warehouse District.

{¶ 7} GA 120 became the property owner in August 2014. A mortgage was recorded on July 21, 2014, from GA 120 to GA Storage in the amount of $ 349,398.08. The report further shows that another mortgage was recorded from GA 120 to GA Storage on August 19, 2016, in the amount of $5,119.49.

{¶ 8} In August 2014, the Association was engaged in litigation with Grand Arcade, Ltd. (who owned five commercial condominium units in The Grand Arcade) over a special assessment levied by the Association to the condominium owners for replacing the windows of the historic buildings. *See Grand Arcade, Ltd. v. Grand Arcade Condominium Owners' Assoc.*, 8th Dist. Cuyahoga No. 104890, 2017-Ohio-2760. This court upheld the trial court's determination that the special assessment was valid and that the unit owners were responsible for paying their proportional

share of the capital improvement cost. Thus, GA 120, which is now the owner of the property, is also responsible for this special assessment.

{¶ 9} When the Association filed its foreclosure complaint, the special assessment matter was still pending in this court. After this court released our opinion, Grand Arcade appealed to the Ohio Supreme Court, which did not accept the case for discretionary review on January 31, 2018. *Grand Arcade, Ltd. v. Grand Arcade Condominium Owners' Assoc.*, 151 Ohio St.3d 1506, 2018-Ohio-365, 90 N.E.3d 948. The Association's foreclosure complaint was stayed until that time.

{¶ 10} On November 7, 2018, the Association filed a motion for the appointment of a receiver pursuant to R.C. 5311.18(B)(2). GA Storage opposed the Association's motion, and the trial court denied it on December 26, 2018. It is from this judgment that the Association now appeals.

II. Law and Analysis

A. Condominium Owner's Association's Lien for Unpaid Common Expenses

{¶ 11} R.C. 5311.18(A)(1) provides that a condominium unit owners' association "has a lien upon the estate or interest of the owner in any unit" for unpaid common expenses, interest, late fees, and other assessments against the unit owner for not timely paying the common expenses.

{¶ 12} A condominium association's lien under R.C. 5311.18(A)(1) takes priority to any other lien *subsequently arising* except "liens for real estate taxes and assessments of political subdivisions" and "liens of first mortgages that have been

filed for record."[1] An association's lien for unpaid common expenses and fees "may be foreclosed in the same manner as a mortgage on real property in an action brought on behalf of the unit owners association[.]" *Id*.

B. Receiver Appointment Under R.C. 5311.18(B)(2)

{¶ 13} The Association argues that the trial court erred when it denied its motion because it has a statutory right under R.C. 5311.18(B)(2) to the appointment of a receiver.

{¶ 14} R.C. 2735.01, covering receiverships in general, provides for a discretionary application of the statute, in which a receiver may be appointed only in several enumerated circumstances. Thus, a trial court's decision to appoint a receiver is generally within its sound discretion and will not be disturbed absent an abuse of that discretion. *Jamestown Village Condominium Owners' Assn. v. Mkt. Media Research*, 96 Ohio App.3d 678, 689, 645 N.E.2d 1265 (8th Dist.1994), citing *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 573 N.E.2d 62 (1991).

{¶ 15} R.C. 5311.18(B)(2) states that when either a condominium association, the holder of a first mortgage, or the holder of another lien commences a foreclosure action against the unit owner, the unit owner (GA 120 in this case) "shall be required to pay a reasonable rental for the unit during the pendency of the action." R.C. 5311.18(B)(2). The statute then provides that the condominium

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[1] It is important to note that the language "subsequently arising" in R.C. 5311.18(A)(1) means that *any* lien recorded *before* a condominium association's lien has priority over an association's lien (not just a tax lien or holder of first mortgage lien as Grand Arcade argues).

association or a lienholder "is entitled to the appointment of a receiver to collect the rental," which shall then "be applied first to the payment of the portion of the common expenses chargeable to the unit during the foreclosure action." *Id.*

C. Analysis

{¶ 16} While this case was pending on appeal, the trial court entered a decree of foreclosure on February 27, 2019, determined the rights of the parties, and set forth the lien priority as follows:

> FIRST: The costs herein, including the sum of $1,287.00 payable to Grand Arcade Condominium Owners' Association for the Judicial Reports filed herein, which sum is taxed as costs;
>
> SECOND: IF THE PLAINTIFF IS THE PURCHASER AND HAS ELECTED TO FORGO THE PAYMENT FROM THE SALE PROCEEDS OF CERTAIN TAXES AS PROVIDED IN R.C. §323.47(B):
>
> To the Treasurer of Cuyahoga County, Ohio, taxes, accrued taxes, assessments, and penalties on the premises hereinafter described, as shown on the County Treasurer's tax duplicate;
>
> OTHERWISE:
>
> To the Cuyahoga County Treasurer, taxes, assessments, interest, and penalties, the lien for which attaches before the date of sale but that are not yet determined, assessed and levied for the year that includes the date of sale, apportioned pro rata to the part of that year that precedes the date of sale, and all other taxes, assessments, penalties, and interest which attached for a prior tax year but have not been paid on or before the date of sale.
>
> THIRD: To defendant GA Storage, LLC, the principal sum of $282,997.09, accrued and unpaid interest of $123,676.20 and further interest on the principal sum at the rate of 8.00% per annum from November 12, 2018;
>
> FOURTH: To the Plaintiff, the sum of $5,119.49 secured by its condominium lien;

> FIFTH: To Plaintiff, additional sums for maintenance fees, legal fees and assessments, etc. that may have accrued during the pendency of this case;
>
> SIXTH: The balance, if any, to the Clerk of Courts to be held pending further order.

{¶ 17} The general rule is that when a notice of appeal is filed, the trial court is divested of jurisdiction except to take action in aid of the appeal. *Columbus v. Adams*, 10 Ohio St.3d 57, 60, 461 N.E.2d 887 (1984). However, the trial court does retain jurisdiction over issues not inconsistent with the appellate court's power to review, affirm, modify, or reverse the appealed judgment, such as a collateral issue like contempt. *State ex rel. Special Prosecutors v. Judges*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978).

{¶ 18} "The appointment of a receiver is an ancillary proceeding." *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, 844 N.E.2d 825, ¶ 26. It is a "separate procedure[] tied to a main action, acting in furtherance of the main action, but with [its] own li[fe]." *Id.* Therefore, Grand Arcade's notice of appeal challenging a matter ancillary to the main action did not divest the trial court of jurisdiction to determine the rights of the parties. Thus, the trial court in this case had jurisdiction to enter the final decree of foreclosure and determine the rights of the parties.

{¶ 19} "A foreclosure action is a two-step process, the first part of which ends with the judgment and decree of foreclosure, which is a final appealable order. * * * The second part of the process involves the sale of the property, culminating in a confirmation of sale and dispersal of the proceeds." *Fifth Third Bank v. Dayton*

Lodge Ltd. Liab. Co., 2d Dist. Montgomery No. 24843, 2012-Ohio-3387, ¶ 18, citing *Mid-State Trust IX v. Davis*, 2d Dist. Champaign No. 07-CA-31, 2008-Ohio-1985; *see also Countrywide Home Loans Servicing, L.P. v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565, ¶ 6.

{¶ 20} A suit for foreclosure of the mortgage "constitutes a proceeding for the legal determination of the existence of a mortgage lien, the ascertainment of its extent, and the subjection to sale of the property pledged for its satisfaction, and no more." *Wells Fargo Bank, N.A. v. Young*, 2d Dist. Darke No. 2009 CA 12, 2011-Ohio-122, ¶ 28, quoting *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 76 N.E.2d 389 (1947). The final judgment in a foreclosure proceeding "will determine the rights of all the parties in the premises sought to be foreclosed upon." *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 270, 533 N.E.2d 325 (1988). And, upon the entry of a judgment of foreclosure, the trial court must order the property to be sold. *See* R.C. 2323.07.

{¶ 21} After review, we find that the issue presented in this appeal is now moot for a number of reasons. First, the unit was foreclosed upon, meaning that GA 120 is no longer required to pay a "reasonable rental for the unit," which, in turn, means that there is nothing to collect. Second, GA 120 was only required to pay a "reasonable rental * * * *during the pendency* of the foreclosure action." (Emphasis added.) R.C. 5311.18(B)(2). Third, R.C. 5311.18(B)(2) provides in pertinent part that the rent collected from the unit owner shall "be applied to the payment of the portion of the common expenses chargeable to the unit during the foreclosure action." *Id.*

The foreclosure action is now over because the trial court entered the final decree of foreclosure and determined the legal rights of the parties. No party filed a notice of appeal from that decision or requested a stay. Therefore, the statute entitling the Association to a receiver is no longer applicable because the foreclosure action is no longer pending.

{¶ 22} A judgment is voluntarily satisfied "where the party fails to seek a stay prior to the satisfaction of judgment." *CommuniCare Health Servs. v. Murvine*, 9th Dist. Summit No. 23557, 2007-Ohio-4651, ¶ 20. *Accord Spencer v. Kiowa Dev. Co.*, 9th Dist. Summit Nos. 19524 and 19532, 2000 Ohio App. LEXIS 2, 3 (Jan. 5, 2000) (determining voluntariness based on defendant's failure "to timely avail itself of the legal remedy of a stay of execution"). In a foreclosure case, satisfaction of judgment occurs when the subject property has been sold and the proceeds of the sheriff's sale have been distributed. *Bayview Loan Servicing v. Salem*, 9th Dist. Summit No. 27460, 2015-Ohio-2615, ¶ 7. Therefore, the Association should have sought a stay of the trial court's judgment entering the final decree of foreclosure. Because it did not, this appeal is moot.

{¶ 23} Accordingly, we overrule the Association's sole assignment of error.

{¶ 24} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
RAYMOND C. HEADEN, J., CONCUR