

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, EX REL.,
VIRGIL H. COLLINS,

:

Relator,

:

No. 110552

v.

:

THE HONORABLE JUDGE ASHLEY
KILBANE,

:

Respondent.

:

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED

DATED: July 9, 2021

Writ of Prohibition
Motion No. 547570
Order No. 547625

Appearances:

Virgil H. Collins, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Nora E. Poore, Assistant Prosecuting
Attorney, *for respondent*.

ANITA LASTER MAYS, P.J.:

{¶ 1} On June 1, 2021, the relator, Virgil Collins, commenced this prohibition action against the respondent, Judge Ashley Kilbane. The underlying

case, *Wells Fargo Bank, N.A. v. Collins*, Cuyahoga C.P. No. CV-18-904354, is a foreclosure case that has proceeded to the confirmation of sale phase. Collins seeks to prevent the respondent judge, who is presiding over the underlying case, from doing the following: (1) delivering the deed to the purchaser and distributing the proceeds of the sale until after a ruling has been made upon Collins's May 6, 2021 motion to vacate the confirmation of sale decree; (2) taking any further action in the confirmation of sale decree before Collins has had the required time to appeal to the Supreme Court of Ohio; and (3) reclaiming jurisdiction of Collins's case and ruling to overturn the appeals court mandate that the requirement for a supersedeas bond is stayed until the final ruling by the Eighth District Court of Appeals. For the following reasons, this court denies the application for a writ of prohibition, sua sponte.

Procedural and Factual Background

{¶ 2} On September 25, 2018, Wells Fargo commenced the underlying case to obtain a money judgment and to foreclose on the residence at 4932 Nan Drive, Richmond Heights, Ohio. Wells Fargo named as defendants, Collins, Collins's wife, any unknown spouses of the wife, New Century Mortgage Corporation, and New Century Liquidating Trust as successor-in-interest to New Century Mortgage. Collins filed an answer, but none of the other parties did.

{¶ 3} On January 15, 2019, Wells Fargo moved for summary judgment against Collins and default judgment against all the other defendants. On March 16, 2019, the court granted the motion for default judgment, but held the motion for

summary judgment in abeyance. Subsequently, Collins obtained leave to file an amended answer and counterclaim. His filings indicated that he accused New Century Mortgage of fraud. Although Collins obtained an extension to file his amended answer and counterclaim through September 13, 2019, he never did.

{¶ 4} On December 11, 2019, the magistrate issued a decision, with findings of fact and conclusions of law, granting Wells Fargo's motion for summary judgment. Collins did not file objections, but moved for a stay to seek resolution with Wells Fargo; the trial court denied that motion on December 30, 2019. On January 7, 2020, the trial court adopted the magistrate's decision, entered judgment against Collins and his wife in the amount of \$126,719.39, and ordered the property sold. The praecipe of order of sale was issued on January 16, 2020.

{¶ 5} In response, Collins filed a motion for relief from judgment and a motion for leave to file an amended answer and counterclaim; the respondent judge denied these motions on February 25, 2020. On February 28, 2020, Collins appealed the denial of his motion for relief from judgment. *Wells Fargo Bank, N.A., v. Collins*, 8th Dist. Cuyahoga No. 109555. He moved the court of appeals to stay confirmation and execution of the property sale on March 3, 2020. The next day, this court denied the motion because stays should first be sought in the trial court pursuant to App.R. 7.

{¶ 6} The property was sold on March 2, 2020. Collins filed a motion to stay in the trial court on March 5, 2020, and the respondent judge denied the motion five days later. Collins moved the appellate court for stay on March 11, 2020. The

next day, this court granted the stay conditioned on the posting of a supersedeas bond in the amount of \$23,984.00. Collins has never posted a bond.

{¶ 7} Nevertheless, through July 31, 2020, Collins was the beneficiary of various stays granted because of the pandemic. On July 28, 2020, in the appellate case, he moved for a 60-day extension on the posting of the supersedeas bond due to the national emergency. This court granted the motion and specified that the bond shall be paid on or before October 1, 2020. On September 28, 2020, Collins moved this court for an emergency injunction to prevent confirmation of sale and request for supersedeas bond, based, inter alia, on the national foreclosure moratorium. On October 9, 2020, this court ruled that the national foreclosure moratorium did not apply in this case, but extended the time to file the bond through December 31, 2020. Facing another deadline, Collins on December 21, 2020, filed an emergency motion for a supersedeas bond extension or to suspend the bond requirement. On December 30, 2020, this court granted the motion as follows: “the time to file the supersedeas bond is extended to February 15, 2020 [2021], or the date upon which the opinion in this case is released.” On February 11, 2021, Collins again moved for further extension of the supersedeas bond requirement. This court granted the extension stating that the appellant has until the court releases the decision to post the “required supersedeas bond.” This court further noted that if Collins appealed to the Supreme Court of Ohio, that court, not the court of appeals, would have jurisdiction to grant a bond.

{¶ 8} On February 25, 2021, this court released its opinion affirming the trial court's decision denying the motion to vacate. On March 2, 2021, Collins filed an emergency motion for reconsideration and an en banc application to review conflicting decisions concerning Civ.R. 60(B) and excusable neglect. This court denied the motion for reconsideration, but the en banc application is still pending.

{¶ 9} On March 3, 2021, the trial court, through its Administrative Judge, issued its standard order that as a result of the court of appeals' judgment, no substantive action is to be taken in this matter until the time for filing any reviewing motion or the time for filing an appeal to the Supreme Court of Ohio has lapsed. This order stated that if appropriate and subsequent to the appellate period expiring, the case may be returned as necessary for further proceedings. The earliest possible date of reinstatement would be April 12, 2021.

{¶ 10} On May 3, 2021, the respondent judge issued the decree of confirmation. In response, Collins filed a motion to vacate in the trial court on May 6, 2021, and commenced this instant prohibition action in this court. He also moved to amend his motion to vacate. The respondent judge on May 29, 2021, issued an entry granting him until June 15, 2021, in which to post the \$23,984.00 bond; upon the filing of the bond, the issuance of the deed and the writ of possession would be stayed pending the remainder of his appeals. On June 4, 2021, the respondent judge granted Collins's emergency motion to vacate and vacated the March 3, 2021 confirmation of sale. The judge further noted that pending the

outcome of the en banc motion, the trial court would reconsider the issue of confirmation.

Principles of Law

{¶ 11} The principles governing prohibition are well established. Its requisites are (1) the respondent against whom it is sought is about to exercise judicial power, (2) the exercise of such power is unauthorized by law, and (3) there is no adequate remedy at law. *State ex rel. Largent v. Fisher*, 43 Ohio St.3d 160, 540 N.E.2d 239 (1989). Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause that it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), paragraph three of the syllabus. “The writ will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction.” *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 65, 90 N.E.2d 598 (1950). Furthermore, it should be used with great caution and not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas*, 137 Ohio St. 273, 28 N.E.2d 641 (1940); and *Reiss v. Columbus Mun. Court*, 76 Ohio Law Abs. 141, 145 N.E.2d 447 (10th Dist.1956). Nevertheless, when a court is patently and unambiguously without jurisdiction to act whatsoever, the availability or adequacy of a remedy is immaterial to the issuance of a writ of prohibition. *State ex rel. Tilford v. Crush*, 39 Ohio St.3d 174, 529 N.E.2d 1245 (1988); and *State ex rel. Csank v. Jaffe*, 107 Ohio App.3d 387, 668 N.E.2d 996 (8th Dist.1995). However, absent such a

patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction. A party challenging the court's jurisdiction has an adequate remedy at law via an appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489, 678 N.E.2d 1365 (1997). Moreover, this court has discretion in issuing the writ of prohibition. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973).

{¶ 12} Collins wants to stop all proceedings on the foreclosure of his house, specifically the confirmation of the sale and the distribution of funds, until his appeal of the denial of his motion to vacate has been resolved; this would include an appeal to the Supreme Court of Ohio. Collins first argues that the transfer-of-jurisdiction principle divests the trial court of jurisdiction to take further action on the case. The Supreme Court of Ohio has ruled that “once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm.” *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 ¶ 13. However, “the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.” *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 1994-Ohio-219, 637 N.E.2d 840. As a corollary, the trial court retains jurisdiction to enforce its judgment absent the trial court or the court

of appeals granting a stay and the posting of a supersedeas bond. R.C. 2505.09, Civ.R. 62, and *State ex rel. Brown v. Bedford Mun. Court*, 8th Dist. Cuyahoga No. 90730, 2008-Ohio-585.

{¶ 13} Specifically, in regards to foreclosure actions, the trial court retains jurisdiction to order the sale of the property, confirm the sale, and distribute the funds, absent the granting of a stay and the posting of a bond. In *Ditech Fin., L.L.C. v. VAT Mgmt., L.L.C.*, 8th Dist. Cuyahoga No. 109209, 2020-Ohio-5000, Ditech filed an in rem complaint for foreclosure against VAT and on a motion for summary judgment obtained a decree of foreclosure. VAT appealed and sought a stay with waiver of bond in both the trial court and this court, but both courts denied the motion. While the appeal was pending, the property was sold at auction and distribution made, causing the first appeal to be dismissed as moot. VAT appealed the confirmation of sale and distribution arguing that the trial court erred by entering the confirmation while the appeal was pending. This court ruled that because VAT never obtained a stay of the confirmation of the sale or the distribution of the proceeds by posting the required bond, the trial court did not err by entering the confirmation order while the first appeal was pending. *Ditech Fin., L.L.C. v. VAT Mgmt., L.L.C.*, 8th Dist. Cuyahoga No. 107546, 2020-Ohio-485, ¶ 11 — a stay is effective when the supersedeas bond is posted. *Chase Manhattan Mtge. Corp. v. Urquhart*, 12th Dist. Butler Nos. CA2004-04-098 and CA2004-10-271, 2005-Ohio-4627, and *CitiMortgage, Inc. v. Snider*, 11th Dist. Geauga No. 2016-G-0072, 2016-Ohio-8111.

{¶ 14} Next, Collins argues that the common pleas administrative judge's March 3, 2021 standard order that no substantive action is to be taken in this matter until the time for filing any reviewing motion or the time for filing an appeal to the Supreme Court of Ohio has lapsed stays the confirmation of the sale. However, the scope of this order applied to the matter appealed, the denial of his 60(B) motion. The scope of the March 3, 2021 order does not otherwise interfere with the jurisdiction of the respondent judge to order the sale of the property, the confirmation of the sale, and the distribution of the proceeds absent a stay and the posting of a bond.

{¶ 15} Collins's final argument is that this court by giving him time to post the bond until the release of its opinion granted him a stay until that time. In other words, specifying the time in which to post bond acts as a stay until the stated time. Collins relies on this court's February 12, 2021 order, which provides that his emergency motion for further extension of supersedeas bond is granted in part. "The appellant has until the court releases the decision to post the required supersedeas bond unless an appeal is filed with the Ohio Supreme Court." Although this court released its opinion on February 25, 2021, Collins asserts that because he filed an en banc application, the decision will not be really released until this court issues its en banc decision. Thus, he concludes that he has a stay in place until that time, and the respondent judge exceeds her authority by confirming the sale.

{¶ 16} This argument is unpersuasive. Civ.R. 62(B) provides that the "stay is effective when the supersedeas bond is approved by the court." In *State ex rel.*

Klein v. Chorpining, 6 Ohio St.3d 3, 450 N.E.2d 1161 (1983), the Supreme Court of Ohio considered a writ of prohibition based on the transfer-of-jurisdiction principle that the trial court lost jurisdiction when the appeal was filed. The Supreme Court rejected that argument. “Until and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same.” 6 Ohio St.3d at 4. In *Garnett v. Sender*, 8th Dist. Cuyahoga No. 50851, 1986 Ohio App. LEXIS 7971 (Aug. 21, 1986), the appellant was facing an eviction order from his office. He appealed and sought an emergency stay. This court at 5:10 p.m. on February 23, 1984, granted the stay of the eviction contingent upon the appellant posting a \$5,000 supersedeas bond on or before February 24, 1984. At 10:15 a.m. on February 24, 1984, it was determined that no bond had been posted, and the appellant’s possessions were removed. This court ruled that the removal was proper because the stay was contingent upon the posting of the required bond.

{¶ 17} So too in this case, the stay is contingent upon the posting of the required bond. Unless the court explicitly states that the stay is in place until a certain date to post bond, specifying the time in which to post the required bond does not act as a stay. Because Collins has not posted the required bond, no stay is in place, and the respondent judge has the jurisdiction to enforce the foreclosure order.

{¶ 18} The court further notes that the respondent judge has granted Collins’s motion to vacate the confirmation order. This satisfies much, if not all, of his requested relief.

{¶ 19} Accordingly, this court, sua sponte, denies the application for a writ of prohibition. Relator to pay costs. The court instructs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶ 20} Application denied.

ANITA LASTER MAYS, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR