

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

WELLS FARGO BANK, N.A.,	:	O P I N I O N
Plaintiff,	:	
(MTGLQ INVESTORS, L.P.,	:	CASE NO. 2014-T-0088
Plaintiff-Appellee)	:	
- vs -	:	
ANTHONY S. BUONAVOLONTA, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 08 CV 2687.

Judgment: Affirmed.

Benjamin D. Carnahan and Hunter G. Cavell, Morris Laing Evans Brock & Kennedy, Chtd., 25700 Science Park Drive, Suite 250, Cleveland, OH 44122 (For Plaintiff-Appellee).

Bruce M. Broyles, 5815 Market Street, Suite 2, Youngstown, OH 44512 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Anthony S. and Christina M. Buonavolonta, appeal the judgment of the Trumbull County Court of Common Pleas confirming a sheriff’s sale due to the fact that appellants claim the trial court previously issued an order granting a stay of said sale. For the reasons that follow, we affirm the decision of the trial court.

{¶2} Plaintiff, Wells Fargo Bank, N.A., filed a complaint in foreclosure on September 23, 2008, for property located in Girard, Ohio. Attached to the complaint were both the mortgage and promissory note.

{¶3} Appellants were served with the complaint but never filed an answer or other responsive pleading. On February 3, 2009, plaintiff filed a motion for default judgment, which was granted by the trial court.

{¶4} From 2008 through 2014, plaintiff attempted to sell the property at sheriff's sales approximately ten times. Most of the attempts were voluntarily cancelled by plaintiff due to reviewing various loss mitigation applications submitted by appellants. The eighth time the property was scheduled for sheriff's sale, appellants notified plaintiff that they were applying for a Home Affordable Modification Program (HAMP). Appellants, however, were made aware that their HAMP application was rejected on March 28, 2013, and that another sheriff's sale was scheduled for May 16, 2013.

{¶5} On May 9, 2013, appellants filed a "Motion to Stay Execution Based Upon HAMP Modification Guidelines," which was granted on May 15, 2013. On December 23, 2013, plaintiff filed a motion to reactivate case for post judgment proceedings, which was approved on December 30, 2013. The property was scheduled for sheriff's sale once again for July 24, 2014.

{¶6} Appellants filed another "Motion to Stay Execution Based Upon HAMP Modification Guidelines" on July 10, 2014. In that motion, appellants maintained they had completed a loan modification application but had not received a determination of the loan modification. Plaintiff filed a response stating the following:

The last sale was scheduled for May 16, 2013 and Defendants filed a motion through new counsel Bruce Broyles to stay the May 16,

2013 sale indicating there was a HAMP loan modification pending that had not yet been reviewed. Despite the motion being granted by the Court, the Defendants and their counsel of record at the time, Thomas Michaels, were advised on March 28, 2013 of the HAMP denial for failure to submit the required documents necessary for review and denied again on May 14, 2013 as that was a sale date scheduled within seven (7) days of the application.

{¶7} Plaintiff informed the court that there had not been a new application submitted by appellants since the denial in May 2013.

{¶8} The trial court denied appellants' motion to stay the sale. The sheriff's sale was conducted, and the property was purchased by plaintiff for \$54,000. Plaintiff later assigned its bid to MTGLQ Investors, L.P., appellee herein, on August 27, 2014. Appellants filed objections to the sheriff's sale on September 2, 2014; the trial court filed a "journal entry confirming sale, ordering deed and distributing sale proceeds" on September 4, 2014. The docket reflects that the matter was stayed pending outcome of the instant appeal.

{¶9} Appellants filed a timely appeal and assign the following assignment of error:

{¶10} "The trial court abused its discretion in confirming the Sheriff's Sale after it had previously stayed proceedings pending a HAMP loan modification application in the absence of any evidence that Wells Fargo Bank, N.A. had considered the loan modification application."

{¶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, 55 (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.*, 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.* Therefore, the trial court’s determination will not be reversed unless it abused its discretion.

{¶12} There are thus two judgments appealable in foreclosure actions: the order of foreclosure and the confirmation of sale. The order of foreclosure determines the extent of each lienholder’s interest, sets forth the priority of the liens, and determines the other rights and responsibilities of each party in the action. On appeal from the order of foreclosure, the parties may challenge the court’s decision to grant the decree of foreclosure. Once the order of foreclosure is final and the appeals process has been completed, all rights and responsibilities of the parties have been determined and can no longer be challenged.

The confirmation process is an ancillary one in which the issues present are limited to whether the sale proceedings conformed to law. Because of this limited nature of the confirmation proceedings, the parties have a limited right to appeal the confirmation. For example, on appeal of the order confirming the sale, the parties may challenge the confirmation of the sale itself, including computation of the final total owed by the mortgagor, accrued interest, and actual amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance. The issues appealed from confirmation are wholly distinct from the issues appealed from the order of foreclosure. In other words, if the parties appeal the confirmation proceedings, they do not get a second bite of the apple, but a first bite of a different fruit.

CitiMortgage, Inc. v. Roznowski, 139 Ohio St.3d 299, 2014-Ohio-1984, ¶39-40.

{¶13} Here, appellants failed to appear in this case prior to entry of the decree in foreclosure. Appellants did not file an answer, and thus, plaintiff filed a motion for default judgment. The trial court entered judgment and a decree in foreclosure, which appellants did not appeal. The record reflects that plaintiff did not execute on its judgment because there was “a loss mitigation workout in progress.” As previously stated, the sheriff’s sale in the case was cancelled approximately 10 times. On appeal, appellants argue the trial court erred in denying their motion to stay the sale because

they had submitted an application under the Home Affordable Modification Program (HAMP).

{¶14} ‘HAMP was aimed at helping homeowners who were in or were at immediate risk of being in default on their home loans by reducing monthly payments to sustainable levels.’ *Costigan v. CitiMortgage, Inc.* S.D., NY No. 10 Civ. 8776, 2011 U.S. Dist. LEXIS 84860. ‘* * * HAMP works by providing financial incentives to participating mortgage servicers to modify terms of eligible loans.’ *Marks v. Bank of America, N.A.*, D. Ariz. No. 03:10-cv-08039-PHX-JAT, 2010 U.S. Dist. LEXIS 61489, *5 (June 22, 2010.)

CitiMortgage, Inc. v. Carpenter, 2d Dist. Montgomery No. 24741, 2012-Ohio-1428, ¶12.

{¶15} On appeal, appellee maintains the HAMP guidelines and the Code of Federal Regulations do not govern this loan as neither the mortgage nor the note expressly stated the foreclosure sale was governed by such provisions. We agree.

{¶16} This court, in *Bank of America v. Curtin*, recognized that “compliance with federal regulations is only required when the terms of the note and/or mortgage incorporate such regulations or otherwise mandate that the transaction is subject to them.” *Bank of Am., N.A. v. Curtin*, 11th Dist. Portage No. 2013-P-0082, 2014-Ohio-5379, ¶16. Similarly, with regard to HAMP, the Seventh Appellate District found the appellant’s argument, i.e., that the appellee failed to provide her with a loan modification opportunity in compliance with HAMP, meritless because the appellant’s note and mortgage did not reference HAMP. *PNC Mtge. v. Garland*, 7th Dist. Mahoning No. 12 MA 222, 2014-Ohio-1173, ¶3, ¶48.

{¶17} In the within matter, a review of the mortgage and note at issue reveals that neither one referenced HAMP. Further, “HAMP violations ordinarily cannot constitute a defense to foreclosure; unless there is some evidence the borrower was intended to benefit from the servicing contract or where the HAMP requirements are

incorporated into the borrower's contract." *Id.*, at ¶42 citing *Carpenter, supra*, at ¶23 ("Although the language in the Treasury's Supplemental Directives requires certain procedures to be followed, '[t]he HAMP program itself is not codified as a public law.' * * Nor is it subject to the Treasury's notice and comment rulemaking, or codified within any C.F.R.").

{¶18} Here, the record is undisputed that numerous sheriff's sales have been cancelled. Plaintiff voluntarily cancelled a pending sheriff's sale due to loss mitigation review. In response to appellants' motion to stay the sale after it was subsequently rescheduled, plaintiff informed the trial court that appellants, through their former counsel, notified plaintiff that they would be applying for HAMP. As a result, plaintiff voluntarily cancelled the November 15, 2012 sheriff's sale, as review for the HAMP application was pending. Plaintiff was issued a denial of the application on December 24, 2012, due to incomplete documentation. Another sheriff's sale was scheduled and again appellants, now through new counsel, filed a motion to stay indicating a HAMP modification was pending. Again, the sheriff's sale was stayed. Plaintiff, in its response, notified the trial court that appellants were notified on March 28, 2013, of the denial of the HAMP application for failure to submit the required documentation and denied again on May 14, 2013, as there was a sale scheduled within seven days of the application. The response also informed the trial court that appellants had no current pending HAMP application; a sheriff's sale was scheduled for July 24, 2014; and appellants had not submitted a new HAMP application since the denial in May 2013. Based on the aforementioned, we cannot conclude the trial court erred in denying

appellant's motion to stay execution, allowing the sheriff's sale scheduled for July 24, 2014, to proceed, and then confirming the sale.

{¶19} Appellants' sole assignment of error is without merit. The judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.