[Cite as *C&W Asset Acquisition, L.L.C. v. Forster*, 2009-Ohio-4247.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

C&W ASSET ACQUISITION, LLC

Plaintiff-Appellant

-vs-

FREDERICK T. FORSTER, et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAE 01 0003

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 02 CVE 10 0578
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 20, 2009

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} This is an appeal by Plaintiff-Appellant C&W Asset Acquisition from the December 15, 2008, Judgment Entry of the Delaware County Common Pleas Court granting Appellee Deloras Forster's Motion for Order Withdrawing Property from Sheriff's Sale.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts are as follows:

{¶3} On February 26, 1988, Frederick and Deloras Forster, executed a note and accompanying mortgage in the amount of $30,000 with State Savings Bank. On February 9, 1989, the Forsters executed a second note and accompanying mortgage with State Savings Bank. The 1989 note was in the amount of $60,000. Both mortgages were placed on the Forsters' property located on Macewen Court, Dublin, Ohio.

{¶4} On February 23, 1998, Huntington National Bank filed a certificate of judgment against the Forsters in the Franklin County Municipal Court. Same was filed in the Court of Common Pleas for Delaware County, Ohio, on April 28, 1998.

{¶5} Sometime in 1998, Deloras Forster filed for bankruptcy. She was discharged from bankruptcy on June 11, 1999. Frederick Forster had filed for bankruptcy in 1995. He was discharged from bankruptcy on October 23, 1995.

{¶6} On June 12, 2001, the Forsters refinanced their property with Mortgage Corporation of Ohio. The title company involved in the refinancing was Pure Title Agency. Pure Title determined the 1988 note and mortgage had a zero balance and were apparently "charged off," and the 1989 mortgage had been released.

{¶7} On February 15, 2002, the Forsters again refinanced the property with Mortgage Corporation. The Huntington Mortgage Company provided the necessary funding for the 2001 and 2002 notes.

{¶8} On October 17, 2002, Fifth Third Bank, as successor in interest to State Savings, filed a foreclosure action against the Forsters regarding the 1988 note and mortgage. Huntington, as a lien holder, was named in the complaint.

{¶9} On April 25, 2003, Fifth Third Bank filed an amended complaint seeking foreclosure on the 1989 note and mortgage. The amended complaint prayed for "an in rem judgment", inter alia.

{¶10} On July 8, 2003, Huntington filed a cross-claim against all other defendants, claiming its February 23, 1998/April 28, 1998 certificate of judgment was the first and best lien on the property.

{¶11} On February 12, 2004, Appellant C&W Asset Acquisition, L.L.C. was substituted for Fifth Third Bank as it had acquired Fifth Third's interest in the notes and mortgages

{¶12} On January 24, 2005, Huntington filed a motion for summary judgment. The Forsters also filed a motion for summary judgment on Huntington's claims. By decision and entry filed March 22, 2006, the trial court granted Huntington's motion, finding it had a valid and subsisting judgment lien against the Forsters.

{¶13} On April 18, 2006, a bench trial was held before a magistrate. By judgment entry filed May 15, 2006, the magistrate issued a decision, finding in favor of C&W and against the Forsters but further finding that C&W did not have priority over the Clerk of Court, the County Treasurer, Huntington Mortgage Company and Mortgage

Electronic Registration Systems, Inc. The trial court approved and adopted the magistrate's decision on August 17, 2006.

{¶14} The Forsters appealed to this Court which, in an Opinion filed April 30, 2007, affirmed the trial court in finding in favor of C&W and against Frederick Forster on the 1989 note.

{¶15} On or about April 12, 2007, Frederick Forster died.

{¶16} On November 5, 2008, C&W filed a Praecipe for Order of Sale after learning that the parties with priorities ahead of it had been satisfied. The Clerk of Court issued an Order of Sale on the same day.

{¶17} On November 17, 2008, counsel for Deloras Forster filed a Motion for Order Withdrawing Property from Sheriff's Sale, arguing that C&W did not have "a valid judgment or any other creditor type interest in the real property" and that C&W "is barred by the bankruptcy court injunction from filing a judgment lien or seeking a foreclosure sale on the judgment."

{¶18} On December 10, 2008, C&W filed a Memorandum in Opposition stating that it was "seeking to enforce its right to foreclose upon the property."

{¶19} By Judgment Entry filed December 15, 2008, the trial court granted Ms. Forster's Motion.

{¶20} Appellant C&W Asset Acquisition now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶21} "I. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN GRANTING A MOTION TO WITHDRAW REAL ESTATE FROM FORECLOSURE AND A

SHERIFF'S SALE WHERE THE TRIAL COURT HAD PREVIOUSLY FOUND THAT THE "REAL ESTATE SHALL BE FORECLOSED AND THE REAL ESTATE SOLD" AND THAT THE "BALANCE OF THE SALE PROCEEDS, IF ANY, SHALL BE PAID BY THE SHERIFF TO SATISFY THE JUDGMENT OBTAINED BY PLAINTIFF C & W ASSET ACQUISITION, L.L.C."

I.

{¶22} In its sole assignment of error Appellant argues that the trial court erred in granting Appellee's Motion to Withdraw Real Estate from Foreclosure and Sheriff's Sale in this matter. We agree.

{¶23} Upon review of the record in the case sub judice, we find that in its December 15, 2008, Judgment Entry, the trial court held that the "real estate shall be foreclosed and the real estate sold" and the "balance of the sale proceeds, if any, shall be paid by the Sheriff to satisfy the judgment obtained by Plaintiff C&W Asset Acquisition, L.L.C."

{¶24} As set forth above, this decision was appealed to and affirmed by this Court. In said prior appeal, the Forsters assigned as error the trial court's finding of personal liability on the 1989 note and mortgage held by C&W. This Court found said assignment not well-taken, finding:

{¶25} "As the magistrate indicted [sic], on April 25, 2003, Fifth Third filed an amended complaint against appellants seeking foreclosure on the 1989 note and mortgage. Because Fifth Third erroneously thought appellant Frederick Forster was immune from personally liability on the note and mortgage because of his 1995 bankruptcy, Fifth Third sought an in rem judgment. During discovery, appellee C&W

discovered appellant Frederick Forster executed a Reaffirmation Agreement during his bankruptcy proceeding. In the agreement, attached to appellee C&W's brief as Exhibit B, appellant Frederick Forster reaffirmed the 1989 debt owed to appellee C&W's predecessor, State Savings. Appellant Frederick Forster acknowledged the agreement in his deposition at 14 and in his admissions. As noted by the magistrate, the amount due and owing on the 1989 note was discussed during the trial. Appellants had the opportunity to cross-exam on the issue.

{¶26} "Although appellee C&W did not specifically plead personal liability on the 1989 note and mortgage, a trial court may rule on an issue that was not included in the pleadings, but was express or implied during the trial:

{¶27} " 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues.' Civ.R. 15(B).

{¶28} "In *State ex rel. Evans v. Bainbridge Township Trustees* (1983), 5 Ohio St.3d 41, paragraph one of the syllabus, the Supreme Court of Ohio held the following:

{¶29} " 'An implied amendment of the pleadings under Civ.R. 15(B) will not be permitted where it results in substantial prejudice to a party. Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer

additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue.'

{¶30} "We find appellants had notice that they may be personally liable on the 1989 note and mortgage, they had ample opportunity to address the issue, during discovery, admissions, a summary judgment motion, and the trial, and had the opportunity to cross-exam witnesses.

{¶31} "Upon review, we find the trial court did not err in finding in favor of appellee C&W as against appellant Frederick Forster on the 1989 note." (See *C&W Asset Acquisition, LLC v. Frederick T. Forster, et al*. (April 30, 2007), Delaware App. No. 06CAE090063.

{¶32} Appellee did not argue before the magistrate or in the prior appeal that her bankruptcy discharge prohibited C&W from foreclosing on the real estate. She therefore raised a new argument at trial that could have been raised in the prior appeal, and that argument is now precluded by the law-of-the-case doctrine. See *Neiswinter v. Nationwide Mut. Fire Ins. Co.,* Summit App. No. 23648, 2008-Ohio-37, at ¶ 14 (holding that the appellee's failure to raise an argument in support of the trial court's judgment precludes it from raising that argument on remand and on subsequent appeal).

{¶33} The law-of-the-case doctrine "precludes a litigant from attempting to rely on arguments at retrial which were fully litigated, or could have been fully litigated, in a first appeal." *State ex rel. Danziger v. Yarbrough,* 114 Ohio St.3d 261, 264, 871 N.E.2d 593, 2007-Ohio-4009, at ¶ 16, quoting *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781. "[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved

for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan,* 11 Ohio St.3d 1, 3, 462 N.E.2d 410. " 'The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.' " *Acuity, Inc. v. Trimat Constr.,* Gallia App. No. 07CA2, 2007-Ohio-6894, at ¶ 12, quoting *Water Works Supplies, Inc. v. Grooms Construction, Co.,* Highland App. No. 04CA12, 2005-Ohio-1292, at ¶ 12.

{¶34} The law-of-the-case doctrine precluded Deloras Forster from "attempting to rely on new arguments on retrial which could have been pursued in a first appeal * * *." *Pipe Fitters Union Local No. 392 v. Kokosing Const. Co., Inc.,* 81 Ohio St.3d 214, 218, 1998-Ohio-465, 690 N.E.2d 515.

{¶35} Our prior decision affirming the trial court's foreclosure judgment became the law of the case for all subsequent proceedings in the case.

{¶36} Accordingly, we find the trial court erred in granting Appellee's Motion to Withdraw Real Estate from Foreclosure and Sheriff's Sale.

{¶37} Appellant's sole assignment of error is sustained.

{¶38} The judgment of the Court of Common Pleas, Delaware County, Ohio, is reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.
Farmer, P. J., and
Delaney, J., concur.

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JUDGES

JWW/d 804

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

C & W ASSET ACQUISITION, LLC	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
FREDERICK T. FORSTER, et al.	:	
Defendants-Appellees	:	Case No. 09 CAE 01 0003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellant.

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JUDGES