[Cite as *First Federal S. & L. Assn. of Newark v. Community Hous. Dev., Inc.*, 2010-Ohio-4280.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
FIRST FEDERAL SAVINGS AND	:	Hon. W. Scott Gwin, P.J.
LOAN ASSOCIATION OF NEWARK	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 10-CA-10
	:	
COMMUNITY HOUSING	:	
DEVELOPMENT, INC., ET AL	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil appeal from the Fairfield County Court of Common Pleas, Case No. 08CV1301
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 1, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. ANDREW CRAWFORD, JR. REESE, PYLE, DRAKE & MEYER, P.L.L. Box 919, 36 North 2d St. Newark, OH 43058-0919	CHARLES E. TAYLOR Box 1730 Buckeye Lake, OH 43008

Gwin, P.J.

{¶1} Defendant-appellant Community Housing Development, Inc. appeals two judgments of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of plaintiff-appellee First Federal Savings & Loan Association of Newark. Appellant assigns five errors to the trial court:

{¶2} "I. DOES IT VIOLATE THE DUE PROCESS CLAUSE REQUIRING 'REASONABLE NOTICE AND AN OPPORTUNITY TO BE HEARD' FOR A PLAINTIFF-MORTGAGEE TO CONTINUE TO USE AN OUT-DATED AND STALE ADDRESS OF A CORPORATE DEFENDANT WHERE A CERTIFIED MAIL PACKAGE WAS 'UNCLAIMED' WHEN SUCH PLAINTIFF HAD ACTUAL KNOWLEDGE OF THE RESIDENT MAILING ADDRESS OF THE CORPORATION'S EXECUTOR DIRECTOR, GENE BROCKMEYER AS SUCH ADDRESS WAS NOT ONLY ON BOTH THE COGNOVIT MORTGAGE NOTE AND CHDI MORTGAGE HE SIGNED PERSONALLY, BUT ALSO ON THE SECOND MORTGAGE ON HIS HOME THAT THE MORTGAGEE DEMANDED HE ENCUMBER AS ADDITIONAL SECURITY.

{¶3} "II. WHEN TWO MORTGAGES ENCUMBERING REAL ESTATE TITLED IN FAIRFIELD AND PERRY COUNTIES ARE EXECUTED SIMULTANEOUSLY WITH A COGNOVIT CONSTRUCTION NOTE SIGNED IN FRANKLIN COUNTY AND THE MORTGAGEE ELECTED TO FILE A COMPLAINT AND OBTAIN A MONEY JUDGMENT ONLY ON THE COGNOVIT CONSTRUCTION NOTE IN THE FRANKLIN COUNTY COMMON PLEAS COURT, AND, THEN FILED A SECOND SUIT SOUNDING IN EQUITY TO FORECLOSE THE EQUITY OF REDEMPTION OF THE REAL ESTATE TITLED IN FAIRFIELD COUNTY AND OBTAINED A DEFAULT

JUDGMENT AND THE SHERIFF CONDUCTED A JUDICIAL SALE WAS SUCH JUDICIAL SALE VOID BECAUSE IT VIOLATED SYLLABUS ONE OF *RETTIG ENTERPRISES VS. KOEHLER* (1994), 68 OHIO ST. 3D 275.

{¶4} "III. BECAUSE FIRST FEDERAL DID NOT SEEK THE EQUITABLE REMEDY OF FORECLOSURE OF ITS TWO MORTGAGES IN FAIRFIELD AND PERRY COUNTIES WHEN THEY WERE EXECUTED SIMULTANEOUSLY WITH THE COGNOVIT CONSTRUCTION NOTE AND ANY COUNTERCLAIM WOULD BE COMPULSORY FOR ARISING OUT OF THE SAME TRANSACTION WAS ITS RIGHT TO SUCH EQUITABLE REMEDIES 'EXTINGUISHED' BY OPERATION OF LAW UNDER THE MODERN APPLICATION OF THE DOCTRINE OF RES JUDICATA.

{¶5} "IV. WAS THE ORDER OF SALE AND FINAL DEFAULT JUDGMENT ENTRY A NULLITY VOID AB INITIO BECAUSE PLAINTIFF'S COUNSEL INCLUDED IN THE DEFAULT JUDGMENT ENTRY A FINDING OF FACT THAT THE PRIORITY OF THE EVERRITT MECHANIC'S LIEN WAS HEARD ON THE EVIDENCE AND THAT THE PRIORITY OF LIENS WAS AN ISSUE BEFORE THE COURT WHEN THE SOLE NOTICE OF HEARING WAS THE MOTION FOR DEFAULT JUDGMENT AND NO HEARING WAS HELD NOR EVIDENCE PRESENTED ON THE PRIORITY ISSUE THEREFORE MAKING THE RULE 54 (B) FINDING THAT ALL ISSUES TO ALL PARTIES HAD BEEN ADJUDICATED SO A SHERIFF'S SALE COULD BE IMMEDIATELY ORDERED WAS A FRAUD ON THE COURT?

{¶6} "V. DID THE LOWER COURT'S FAILURE TO GRANT THE DEFENDANT-APPELLANT'S VARIOUS MOTIONS TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON, OR OVER THE SUBJECT MATTER AND/OR

FRAUDULENTLY CERTIFYING RULE 54 (B) FINALITY RENDER THE SALE A NULLITY AND VOID AB INITIO?"

{¶7} The record indicates on or about October 10, 2008, appellee obtained a cognovit judgment against appellant in Franklin County, Ohio. *First Federal Savings and Loan Association v*. *Community Housing Development, Inc.,* Franklin Common Pleas No. 08-CVH-10-14502. Two mortgages secured the cognovit note; the present case concerns one of the mortgages.

{¶8} Appellee filed its foreclosure complaint on October 21, 2008. The clerk of court served appellant at its business address by certified mail, which was returned "unclaimed". On December 1, 2008, the clerk served appellant by ordinary mail at the same address, and appellee asserts the regular mail was not returned for failure of delivery.

{¶9} Appellant failed to timely answer or otherwise respond, and appellee filed a motion for default judgment on January 6, 2009. The trial court sustained appellee's motion on February 4, 2009, and entered a default judgment and foreclosure decree. The parties were notified that a final appealable order had been filed. The court entered an order of sale on February 17, 2009, scheduling the Sheriff's sale of the mortgaged property for April 17, 2009. Appellant did not appeal the default judgment of foreclosure, nor did it ask for a stay of execution.

{¶10} The day before the Sheriff's sale, appellant moved to dismiss the matter for lack of subject matter jurisdiction. Appellant also moved to quash service for lack of personal jurisdiction and insufficiency of process. The property was sold as scheduled.

On May 12, 2009, appellant filed a motion to deny confirmation of the sale of the real estate, and a motion under Civ. R. 60 (B) to vacate the default judgment.

{¶11} The trial court conducted a hearing on all the pending motions on July 6, 2009, at which it took evidence and heard arguments of counsel. On February 1, 2010, the court overruled appellant's motions to dismiss and to vacate the default judgment. On February 16, 2010, the court confirmed the sale. Appellant filed its notice of appeal on March 3, 2010.

{¶12} The notice of appeal is timely only as to the judgments entered on February 1, and February 16 of 2010. It is not timely with regard to the default judgment. In a foreclosure action, the decree of foreclosure and the order confirming the sale are separate and distinct actions, both of which constitute final appealable orders. R.C. 2329.27; *Sky Bank v. Mamone,* 182 Ohio App. 3d 323, 2009-Ohio-2265, 912 N.E. 2d 668.

{¶13} The appellant did not seek a stay of the order confirming the sale and ordinarily this would render the case moot. *Meadow Wind Health Care Center v. McInnes,* Stark App. No. 2002 CA 00319, 2003-Ohio-979. However, because appellant argues the proceedings were void ab initio, we will address the merits of this case.

I & V

{¶14} In its first assignment of error, appellant argues the proceeding violated its right to due process because appellee had actual knowledge the address to which it directed service of process was "stale".

{¶15} In its fifth assignment of error, appellant reiterates its argument it was not properly served with the complaint, and therefore, the judgment entry was void ab initio.

Appellant argues that because the default judgment was void, the court could not confirm the subsequent Sheriff's sale.

{¶16} The trial court took evidence on the issue of service, but the appellant did not provide us with a full transcript of the hearing. The partial transcript contains only a portion of the hearing and does not support appellant's arguments. When the record is incomplete, this court must presume the regularity the trial court's proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 400 N.E. 2d 384. Appellant bears the burden of supplying those portions of the record that demonstrate the error on appeal. *DeCato v. Goughnour* (2000), 136 Ohio App. 3d 795, 737 N.E. 2d 1042.

{¶17} The first and fifth assignments of error are overruled.

II. & III.

{¶18} In its second and third assignments of error, appellant argues appellee could not bring the foreclosure action in Fairfield County after taking a separate judgment on the cognovit note in Franklin County.

{¶19} Appellant cites us to *Rettig Enterprises, Inc. v. Koehler* (1994), 68 Ohio St. 3d 274, 1994 -Ohio- 127, 626 N.E.2d 99, as authority for the proposition Civ. R. 13 (A) required appellee to bring its action for foreclosure of the property in the same suit as the complaint on the note.

{¶20} In *Rettig,* the Supreme Court held:

{¶21} "1. All existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ. R. 13 (A), no matter which party initiates the action.

{¶22} "2. The 'logical relation' test, which provides that a compulsory counterclaim is one which is logically related to opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts, can be used to determine whether claims between opposing parties arise out of the same transaction and/or occurrence." Syllabus by the court.

{¶23} *Rettig* dealt with three lawsuits arising out of business disputes between the same parties. The Supreme Court found regardless of whether the claims were complaints or counterclaims, all these existing claims arose out of the same business relationship and must be litigated in a single lawsuit.

{¶24} Appellee notes appellant never filed a counterclaim or any other response to the complaint, although it appears a co-defendant did file a cross-claim and a counterclaim. The co-defendant eventually dismissed his claims and is not a party to this appeal.

{¶25} Appellant further argues the doctrine of res judicata prevented appellee from filing suit on the note and foreclosing on the mortgage in two separate actions. As appellee correctly points out, an action on a cognovit note does not necessarily also involve or require a foreclosure action and an action on a note does not involve the property securing the note.

{¶26} The doctrine of res judicata involves two concepts: (1) claim preclusion, or estoppel by judgment, and (2) issue preclusion, or collateral estoppel, *Krahn v. Kenney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, citing *Whitehead v. General Tel. Co.* (1969), 20 Ohio St.2d 108, 254 N.E.2d 10.

{¶27} It is well-settled that "res judicata demands an identity of issues in the proceedings under examination." *State ex rel. Dixon v. Airborne Express, Inc*., 108 Ohio St.3d 200, 2006-Ohio-660, 842 N.E.2d 502, paragraph 17, citing *State ex rel. B.O.C. Group, General Motors Corp. v. Industrial Commission* (1991), 58 Ohio St.3d 199, 569 N.E. 2d 496. The collateral estoppel aspect of res judicata "precludes the re-litigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action." *Whitehead*, supra at 112.

{¶28} Because we find supra, a foreclosure action is a separate and distinct action from a complaint on a note, res judicata and/or collateral estoppel does not apply, and a plaintiff need not include both in a single complaint in order to preserve all issues.

{¶29} The second and third assignments of error are overruled.

IV.

{¶30} In its fourth assignment of error, appellant argues the default judgment was not final because it failed to address the co-defendant's counterclaim and cross-claim. Appellant again asserts because appellee did not properly serve the complaint, the court should have dismissed the action.

{¶31} The trial court's order contains a statement pursuant to Civ. R. 54 (B) that there is no just cause or reason for delay during final judgment in the action. Civ. R. 54 (B) provides: "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only

upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

{¶32} In *Wisintainer v. Elcen Power Strut Company,* 67 Ohio St. 3d 352, 1993-Ohio-120, 617 N.E. 2d 1136, the Ohio Supreme Court stated: "In deciding that there is no just reason for delay, the trial judge makes what is essentially a *factual* determination whether an interlocutory appeal is consistent with the interests of sound judicial administration, i.e., whether it leads to judicial economy. Trial judges are granted the discretion to make such a determination because they stand in an unmatched position to determine whether an appeal of a final order dealing with fewer than all of the parties in a multiparty case is most efficiently heard prior to trial on the merits. ***More important than the avoidance of piecemeal appeals is the avoidance of piecemeal trials.

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{¶33} "In making its factual determination that the interest of sound judicial administration is best served by allowing an immediate appeal, the trial court is entitled to the same presumption of correctness that it is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings. Likewise, regarding Civ. R. 54 (B) certification, where the record indicates that the

interests of sound judicial administration could be served by a finding of "no just reason for delay," the trial court's certification determination must stand. An appellate court need not find that the trial court's certification is the most likely route to judicial economy, but that it is one route which might lead there. ***"*Wisintainer* at 354-355, citation deleted.

{¶34} The inclusion of Civ. R. 54(B) language renders the default judgment entry a final appealable order as to appellant, who did not file any counterclaim or cross-claim. Because we find the court had personal jurisdiction over appellant, we find the court did not err.

{¶35} The fourth assignment of error is overruled.

{¶36} For the foregoing the judgments of the Court of Common Pleas of Fairfield County, Ohio are affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY

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[Cite as *First Federal S. & L. Assn. of Newark v. Community Hous. Dev., Inc.*, 2010-Ohio-4280.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEWARK	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
COMMUNITY HOUSING DEVELOPMENT, INC., ET AL	:	
Defendant-Appellant	:	CASE NO. 10-CA-10

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Court of Common Pleas of Fairfield County, Ohio, are affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY