[Cite as *PNC Bank, Natl. Assn. v. Roemer*, 2017-Ohio-9391.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

PNC BANK, NATIONAL ASSOCIATION successor by merger to NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK,	:	
Plaintiff-Appellee,	:	Case No. 15CA28
vs.	:	
MARY L. ROEMER, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Grace M. Doberdruk, Beachwood, Ohio, for appellant.

H. Toby Schisler and Alicia Bond-Lewis, Cincinnati, Ohio, and Ellen L. Fornash, Cincinnati, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-15-17
ABELE, J.

{¶ 1} This is an appeal from a Hocking County Common Pleas Court judgment that denied a Civ.R. 60(B) motion for relief from judgment filed by Mary Roemer, plaintiff below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT MARY ROEMER'S MOTION TO

VACATE WHEN THERE WAS EXCUSABLE NEGLECT AND GROUNDS UNDER CIVIL RULE 60(B)(5) FOR RELIEF."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT MARY ROEMER'S MOTION TO VACATE WITHOUT HOLDING A HEARING."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION BY AMENDING THE JULY 14, 2015 ENTRY NUNC PRO TUNC INSTEAD OF VACATING THE INVALID JUDGMENT."

{¶ 2} On August 1, 2014, PNC Bank, National Association Successor by Merger to National City Mortgage, a Division of National City Bank, plaintiff below and appellee herein, filed a foreclosure complaint against Mary L. Roemer and John Doe, name unknown, spouse of Mary L. Roemer. Appellant did not answer the complaint. Instead, she filed a pro se motion to stay the proceedings in order to allow the parties to participate in mediation. The trial court granted appellant's motion.

{¶ 3} On January 7, 2015, the court filed an entry documenting the course of proceedings up to that date. The court noted that the matter had been set for a November 12, 2014 mediation conference, but appellant requested a continuance. The court thus rescheduled the mediation conference to January 7, 2015. On January 7, 2015, appellant called the court's mediator to request another continuance due to "recent snow." The mediator informed appellant that she was expected to appear for the mediation and informed her that she could drive herself or that the sheriff's office could transport her. Appellant stated that she was not going to drive to

the courthouse and that she did not want the sheriff to transport her. The court thus cancelled the mediation hearing and returned the case to its active docket.

{¶ 4} Appellee subsequently filed an amended complaint that requested a declaration of its rights under the mortgage, an equitable lien on appellant's one-half interest in the property, a constructive trust over appellant's interest, a resulting trust, an order that it is entitled to foreclose upon the mortgage, and a $128,103.92 judgment.

{¶ 5} Appellant did not answer the amended complaint, but instead filed a "motion to request review of cancellation of a mediation hearing with PNC Mortgage." Appellant asserted that she has "a recent diagnosis of a serious medical condition * * * that has greatly debilitated [her] with constant pain, and endless worsening symptoms that have been going on, undiagnosed for years. The diagnosis just occurred on March 14, 2015." She alleged that on November 9, 2014, she experienced heart attack symptoms and went to the emergency room, but was released without a diagnosis. Appellant additionally asserted that she previously informed the mediator that she forwarded "40+ documents" via certified mail to appellee's counsel. She claimed that she intended to attend the rescheduled mediation hearing in January, but the snow hampered her efforts. She stated that she would not be able to extricate her vehicle from her driveway and that "no one could get in." She asked the court to order mediation and to assign a new mediator. The court overruled appellant's motion.

{¶ 6} On June 15, 2015, appellee filed a summary judgment motion and asserted that it "is entitled to summary judgment as to the interests of [appellant]." Appellee argued that no genuine issues of material fact remained as to whether it is entitled to (1) an equitable lien on the undivided one-half interest of appellant's interest in the mortgaged property, (2) a constructive

trust as to appellant's interest in the mortgaged property, and (3) judgment against appellant in the amount of the delinquency. To support its motion, appellant attached the affidavit of Ryan Carey, an "authorized signer." Carey attested that on March 6, 2008, Robert E. Roemer, through appellant, his attorney in fact, executed a promissory note in the amount of $140,000, and that appellant signed the mortgage in order "to release her dower rights." Carey's affidavit further asserts that (1) appellee is the holder of the note in the amount of $140,000 with interest at the rate of 5.8750 percent per annum, (2) Robert E. Roemer failed to make the payment due for March 1, 2014, and has not satisfied the payments due thereafter, and (3) as of July 3, 2014, there is due and owing on the note the sum of $128,103.92 with interest at the rate of 5.8750 percent per annum from February 1, 2014. Appellant did not respond to appellee's summary judgment motion.

{¶ 7} On June 25, 2015, appellee filed a motion for default judgment against John Doe, the unknown spouse of Mary L. Roemer, and The Unknown Heirs and Next of Kin of Robert E. Roemer. Appellee alleged that the parties were properly served with a copy of the amended complaint and that they failed to answer or appear. Appellee requested the trial court to enter a "Finding of Default and Decree in Foreclosure (In Rem)" in its favor.

{¶ 8} On July 14, 2015, the trial court filed a "judgment entry" and indicated that the matter was before the court upon appellee's summary judgment and default judgment motions. The court (1) found that appellee is the owner and holder of the mortgage, (2) determined that appellee is entitled to an equitable lien on appellant's undivided one-half interest, as well as a constructive trust, (3) found that appellee "is entitled to judgment against Mary L. Roemer in the amount of $128,103.92 * * *," and (4) additionally determined that the mortgage is a valid and

subsisting first mortgage lien on the property. The court thus entered a $128,103.92 judgment in appellee's favor against appellant.

{¶ 9} On August 7, 2015, appellee filed a praecipe for an order of sale. The clerk subsequently issued an order of sale. On October 28, 2015, appellee filed a notice of sheriff's sale that indicated the sale would occur on November 6, 2015. On November 6, 2015, the sheriff filed a return on the order of sale. The return stated that the property sold for $106,000.

{¶ 10} On November 17, 2015, appellant, through counsel, filed a motion to stay the confirmation of sale and a Civ.R. 60(B) motion for relief from judgment. Appellant argued that (1) she has meritorious defenses to present, (2) she is entitled to relief due to excusable neglect or to prevent the unjust operation of a judgment, and (3) she filed her motion in a timely manner. Appellant alleged that she has the following meritorious defenses: (1) the court incorrectly entered a personal judgment against her, even though she did not sign the note in a personal capacity; (2) the original lender was inexcusably negligent and thus appellee is not entitled to equitable relief; (3) granting foreclosure is inequitable due to her husband's recent death; (4) appellee did not permit her to make payments on the loan, but instead, forced it into default; (5) the trial court did not actually enter a foreclosure decree; and (6) appellee lacks standing. Appellant further asserted that Civ.R. 60(B)(1) or (5) entitled her to relief. She contended that "she had a serious medical condition" and that her failure to respond to appellee's amended complaint thus constitutes excusable neglect. Appellant argued that Civ.R. 60(B)(5) also entitles her to relief because appellee "was not entitled to a final judgment." Appellant alleged that (1) appellee failed to serve the amended complaint upon all parties with an interest in the property, (2) appellee does not own the note and mortgage, and (3) the court did not allow

appellant sufficient time to respond to appellee's motion for leave to file an amended complaint. Appellant additionally argued that she timely filed her motion.

{¶ 11} In response, appellee agreed that the trial court inadvertently and incorrectly entered a personal judgment against appellant. Appellee claimed that the trial court could correct the error via its inherent authority to correct clerical errors. Consequently, on December 1, 2015, the trial court found that its prior decision inadvertently rendered a personal judgment against appellant. The court thus ordered its prior order "amended nunc pro tunc to show that there is due and owing to the plaintiff, upon the subject Note as set forth in the Amended Complaint, the principal balance of $128,103.92 * * *." The court also found that

> [appellee] does not seek a personal judgment as to the borrower, Robert E. Roemer, nor does Plaintiff seek a personal judgment against Mary Roemer, and that the July 14, 2015 Order should be amended nunc pro tunc accordingly to delete the following provision(s):
>
> "The Court further finds that Plaintiff is entitled to judgment against Mary L. Roemer in the amount of $128,103.92 with interest at the rate of 5.8750 percent per annum from February 1, 2014."
>
> "It is further ordered, adjudged and decreed that Plaintiff is granted judgment against Mary L. Roemer in the amount of $128,103.92 with interests * * *."

{¶ 12} The trial court's entry additionally states that "[t]he remaining provisions of the July 14, 2015 Order shall remain." This appeal followed.

A

{¶ 13} We first observe that appellee asserts that we lack jurisdiction to hear appellant's appeal. While we agree with appellee that we lack jurisdiction to hear this appeal, we do so for different reasons.

{¶ 14} Courts of appeals have jurisdiction to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Section 3(B)(2), Article IV, Ohio Constitution. "As a result, '[i]t is well-established that an order [or judgment] must be final before it can be reviewed by an appellate court. If an order [or judgment] is not final, then an appellate court has no jurisdiction.'" *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). "An order is a final, appealable order only if it meets the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶21, citing *Gehm* at ¶15.

{¶ 15} R.C. 2505.02 provides, in part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment.
> * * * *

"A 'substantial right' for purposes of R.C. 2505.02 is a legal right enforced and protected by law." *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 545, 684 N.E.2d 72 (1997), citing *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 430, 619 N.E.2d 412 (1993), and *Noble v. Colwell*, 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (1989). An order "determines the action and prevents a judgment" when it "'dispose[s] of the whole merits of the cause or some separate and distinct branch thereof and leave[s] nothing for the determination of the trial court.'" *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶7, quoting *Hamilton Cty. Bd. of Mental Retardation & Dev.*

Disabilities v. Professionals Guild of Ohio, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989); *accord CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶25.

{¶ 16} "A judgment overruling a Civ.R. 60(B) motion for relief from * * * judgment is a final appealable order." *Colley v. Bazell*, 64 Ohio St.2d 243, 416 N.E.2d 605 (1980), paragraph one of the syllabus; *accord GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976) (stating that an order granting a Civ.R. 60(B) motion to set aside a default judgment is a final order); *Bussa v. Hadsel Chem. Processing, LLC*, 2016-Ohio-5718, 76 N.E.3d 385, ¶9 (4th Dist.); *Fleenor v. Caudill*, 4th Dist. Scioto App. No. 03CA2886, 2003-Ohio-6513, 2003 WL 22880105, ¶12 (stating that a trial court's decision regarding a proper Civ.R. 60(B) motion is final and appealable). The underlying presumption, however, is that the judgment from which the movant seeks relief is, in fact, a final order. *Straquadine v. Crowne Pointe Care Ctr.*, 10th Dist. Franklin No. 10AP–607, 2012-Ohio-1152, 2012 WL 949785, ¶11; *accord Fleenor* at ¶12 ("However, a Civ.R. 60(B) motion is proper only with respect to final judgments."); *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 532, 706 N.E.2d 825 (4th Dist.1997); Civ.R. 60(B) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment * * *.") (emphasis added); *Jarrett v. Dayton Osteopathic Hosp.*, Inc., 20 Ohio St.3d 77, 78, 486 N.E.2d 99 (1985); *accord Hack v. Keller*, 9th Dist. Medina No. 14CA0036–M, 2015-Ohio-4128, 2015 WL 5781642, ¶10 ("Where the underlying order is not itself a final judgment, Civ.R. 60(B) is not a proper procedural mechanism for relief and it cannot be used to convert an otherwise nonfinal judgment into a final appealable order."); *State ex rel. DeWine v. Big Sky Energy*, 11th Dist. Ashtabula No.

2012–A–0042, 2013-Ohio-437, 2013 WL 501627, ¶13 ("We note that the denial of a Civ.R. 60(B) motion is generally a final appealable order. However, in this case, there was no final order in the first place because the trial court had not issued a ruling on damages."); *Close v. Perry*, 5th Dist. Fairfield No. 11CA37, 2012-Ohio-2953, 2012 WL 2476382, ¶20 ("If the judgment is not final, the decision overruling the Civ.R. 60(B) Motion is likewise, not final."); Painter and Pollis, Ohio Appellate Practice, Section 2:17 (2015) (stating that "where there is no underlying final judgment, an order purporting to vacate a judgment is not a final order"). "Thus, logically, 'Civ.R. 60(B) is not the proper procedural device a party should employ when seeking relief from a non-final order.'" *Fleenor* at ¶12, quoting *Vanest*, 124 Ohio App.3d at 533. When the judgment from which relief is sought is not a final, appealable order, "then the motion is properly construed as a motion to reconsider and the court's order granting that motion is interlocutory." *Fleenor* at ¶13 (citations omitted).

{¶ 17} In the case sub judice, appellant sought relief from the trial court's July 2015 decision that found appellee entitled to an equitable lien and a constructive trust over appellant's one-half interest in the property. She additionally asked the court to set aside the sheriff's sale that was conducted on November 6, 2015. As we explain below, however, neither the July 2015 decision as amended in the December 2015 nunc pro tunc entry, nor the sheriff's sale constitutes a final order.

B

{¶ 18} In an action to foreclose against real property, "two judgments are appealable." *CitiMortgage, Inc. v. Roznowski*, *supra*, at ¶35. The first, the foreclosure decree, "determines that damages have occurred and sets forth the parties' rights and liabilities as they are related to

those damages." *Id.* at ¶24. More specifically, the foreclosure decree "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." *Id.* The parties may appeal a foreclosure decree and "challenge the court's decision to grant the decree of foreclosure." *Id.* at ¶39. However, "[o]nce 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." *Id.*

{¶ 19} The second judgment, the order confirming the property sale, "sets forth the specific damage amount and distributes the funds accordingly." *Id.* at ¶24. During the confirmation process "the issues present are limited to whether the sale proceedings conformed to law." *Id.* at ¶40. Thus, "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." *Id.* The parties cannot, however, challenge the foreclosure decree. *Id.*

{¶ 20} Thus, the law is clear that a foreclosure decree and the confirmation of sale both are final orders that a party may appeal. However, in the case sub judice the trial court did not enter a judgment confirming the sale. The court did ostensibly enter a decision concerning appellee's request to foreclose upon the property. The court's July 2015 decision apparently led appellee to believe that the court had entered a foreclosure decree; otherwise, appellee would not have filed a praecipe for an order of sale. The question we therefore must decide is whether the trial court's July 2015 decision, as amended in the December 2015 decision, constitutes a final order from which appellant could seek relief.

C

{¶ 21} A foreclosure decree constitutes a final, appealable order when it "'determine[s] the rights of all the parties in the premises sought to be foreclosed upon.'" *Farmers State Bank v. Sponaugle*, 2nd Dist. Darke No. 2016-CA-4, 2017-Ohio-4322, 2017 WL 2622740, ¶22, modified on reconsideration, 2017-Ohio-7744, 2017 WL 4220068, quoting *Marion Production Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 270, 533 N.E.2d 325 (1988). Furthermore, the decree must order the property to be sold. R.C. 2323.07; Kuehnle, Levey, and Bower, Ohio Real Estate Law (March 2017 Update), Section 38:1 (stating that "when a mortgage is decreed to be foreclosed, [R.C.] 2323.07 requires that the property shall be ordered sold"). R.C. 2323.07 states:

> When a mortgage is foreclosed or a specific lien enforced, a sale of the property, or a transfer of property pursuant to sections 323.28, 323.65 to 323.78, and 5721.19 of the Revised Code, shall be ordered by the court having jurisdiction or the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code.

Courts have thus held that a foreclosure decree is not a final order unless it orders a sale of the property.[1] *Bank of America v. Telerico*, 11th Dist. Portage No. 2016-P-0075, 2017-Ohio-1339, 2017 WL 1319491, ¶19 (determining that trial court's decision that granted bank's motion for summary judgment was not a final order subject to appeal when decision did not include any

[1] *See* Kuehnle, Levey, and Bower, Ohio Real Estate Law (March 2017 Update), Section 56:155, which suggests that courts include the following language in a foreclosure decree:

> The Plaintiff is hereby granted judgment against the Defendants Mr. Defendant, Mrs. Defendant, Prior Owner who sold on loan assumption and Wife of Prior Owner, for the amounts found due it as aforesaid, and it is further adjudged and decreed that unless the Defendant shall within three days from the entry of this decree pay or cause to be paid to the Clerk of this Court the costs of this action and to the Plaintiff herein and to the other Defendants the sums so found due them as aforesaid, the Defendant's equity of redemption be foreclosed and the premises be sold; that an Order of Sale issue therefore to the Sheriff of Franklin County, Ohio, directing him to appraise, advertise and sell the premises as upon execution and report his findings to the Court for further order; and that the purchaser at such foreclosure sale be awarded a writ of possession and

language to proceed with a foreclosure sale and thus, "[a]t most, the trial court was ruling that appellee had a valid lien on the subject premises and was entitled to a future order of foreclosure"); *Hudson City Savs. Bank v. Havener*, 11th Dist. Geauga No. 2015-G-0044, 2016-Ohio-270, 2016 WL 363542, ¶20 (concluding that trial court decision that "does not include any language to proceed with a foreclosure sale * * * is not a final appealable order"); *Acacia on the Green Condo Assn. v. Jefferson*, 8th Dist. Cuyahoga No. 100443, 2014-Ohio-2399, 2014 WL 2566005, ¶5 (determining that final, appealable order did not exist when trial court's decision failed to "expressly enter judgment for foreclosure or order sale of the property"); *Wells Fargo Bank, N.A. v. Dumm*, 4th Dist. Athens No. 13CA5, 2014-Ohio-3124, 2014 WL 3530859, ¶9 (stating that "a judgment that orders the sale of mortgaged land is a final, appealable order in a foreclosure case"); *Century Natl. Bank v. Hines*, 4th Dist. Athens No., 2012-Ohio-4041, 2012 WL 3834780, fn.1 ("Ohio law has always held that a judgment ordering sale of mortgaged land is a final appealable order in a foreclosure case."); *see Roznowski* at ¶25 (explaining that in foreclosure action, final order results "when the court issues the foreclosure decree and all that remains is mathematics, with the court plugging in final amounts due after the property has been sold at a sheriff's sale"); *Oberlin Sav. Bank Co. v. Fairchild*, 175 Ohio St. 311, 312, 194 N.E.2d 580 (1963), citing *Queen City Savings & Loan Co. v. Foley*, 170 Ohio St. 383, 165 N.E.2d 633 (1960) (stating that final order in foreclosure case is the decision that "order[s] a foreclosure sale and find[s] the amounts due the various claimants"); *see generally*, Painter and Pollis, supra, Section 2:8 (footnotes omitted) (explaining that "the bases for a court to find that a foreclosure decree is not final—such as the pendency of unresolved claims, the absence of an order setting

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that all other persons in possession of the premises be evicted.

forth 'the amounts of judgment and priorities of the claimants,' or the failure specifically to include language authorizing the sheriff 'to proceed with a foreclosure sale'—mirror the attributes of nonfinal orders under a typical R.C. 2505.02(B)(1) analysis" and that "a summary-judgment order for the plaintiff is not final if the trial court does not specifically enter a decree of foreclosure"). Accordingly, a foreclosure decree "is not final and appealable unless it resolves all of the issues involved in the foreclosure, including the following: whether an order of sale is to be issued; what other liens must be marshaled before distribution is ordered; the priority of any such liens; and the amounts that are due the various claimants." *Second Nat. Bank of Warren v. Walling*, 7th Dist. Mahoning No. 01CA62, 2002–Ohio–3852, ¶18; *accord Partners for Payment Relief DE, L.L.C. v. Jarvis*, 4th Dist. Scioto No. 15CA3723, 2016-Ohio-7562, 2016 WL 6461785, ¶8.

{¶ 22} In the case sub judice, it appears that the trial court has not entered a judgment that grants appellee the right to foreclose upon the property and that orders a sale of the property. Instead, the court seemingly entered summary judgment in appellee's favor regarding its claims against appellant for the imposition of an equitable lien and a constructive trust and determined that appellee's lien is the first and best lien on the property. The court did not, however, grant appellee the right to foreclose upon the property or order a sale. While we also recognize appellee filed a motion for default judgment and in rem foreclosure, the trial court did not issue a judgment regarding this issue.[2] Instead, with the modifications contained in the court's

[2] We recognize that the court's July 2015 entry indicates that the matter was before the court upon appellee's summary judgment and default judgment motions. The remainder of the entry, however, discusses appellee's claims against appellant and does not issue any ruling concerning appellee's default judgment motion and request for foreclosure of the property. Therefore, even if the court considered appellee's motion for default judgment, the court did not enter a judgment regarding that motion.

December 2015 nunc pro tunc entry, the court's July 14, 2015 order finds (1) appellee "is entitled to an equitable lien on the undivided one half interest of [appellant] in the Property"; (2) appellee "is entitled to the imposition of a constructive trust for its benefit as to the undivided one half interest of [appellant] in the Property." The court's July 14, 2015 order additionally "decreed that the Mortgage is a valid and subsisting first mortgage lien on the Property." The court's language does not, however, decree a foreclosure of the property and order it sold.

{¶ 23} We further observe that although the trial court included a stamp that stated, in part, "This is a Final-Appealable Order," a trial court's purported determination is not binding upon the appellate court. *E.g., In re Estate of Adkins*, 4th Dist. Lawrence No. 16CA22, 2016-Ohio-5602, 2016 WL 4537814, ¶5.

{¶ 24} Thus, because the trial court did not enter a final decree of foreclosure, there is no final judgment from which appellant could seek relief. Therefore, Civ.R. 60(B) does not apply. Consequently, appellant's motion to vacate and set aside the sheriff's sale is more properly construed as a motion to reconsider. The trial court's December 2015 decision that appears to address her motion likewise is not final, but rather, is interlocutory. *Fleenor* at ¶13. We therefore lack jurisdiction to consider appellant's appeal.

{¶ 25} Furthermore, while we note that appellee filed a praecipe for an order of sale, and that the property has been sold, "'"[i]t is axiomatic that a non-final, interlocutory order is not capable of execution."'" *State ex rel. Sponaugle v. Hein*, 2nd Dist. Darke No. 16CA7, 2017-Ohio-1210, 2017 WL 1193816, ¶32, quoting *Aselage v. Lithoprint, Ltd.*, 2d Dist. Montgomery No. 23527, 2009-Ohio-7036, 2009 WL 5199325, ¶28, quoting *Nwabara v. Willacy*, 8th Dist. Cuyahoga No. 71122, 1997 WL 186842, *3 (April 17, 1997). We also point out that

because the sale has not been confirmed, the case is not moot. *E.g.*, *Nationstar Mtge., L.L.C. v. Waisanen*, 9th Dist. Summit No. 16CA01094 2017-Ohio-131, 2017 WL 169097, ¶5 ("when a property subject to foreclosure is sold at sheriff's sale and confirmed by the trial court and the proceeds of sale have been distributed, an appeal is moot."); *Provident Funding Assocs., L.P. v. Turner*, 8th Dist. Cuyahoga No. 100493, 2014-Ohio-2190, 2014 WL 2159035, ¶5 (finding appeal moot when property sold, court confirmed sale, and deed has been recorded); *see Bankers Trust Co. of California, NA. v. Tutin*, 9th Dist. Summit No. 24329, 2009–Ohio–1333, ¶16 ("In foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action.").

{¶ 26} Accordingly, based upon the foregoing reasons, because we do not have jurisdiction to hear this appeal, we hereby dismiss this appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellees recover of appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

TOPICS & ISSUES