

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

EMERSON TOOL, LLC, et al.

C.A. No. 24673

Appellees

v.

EMERSON FAMILY LIMITED
PARTNERSHP, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2004-02-0628

Appellants

DECISION AND JOURNAL ENTRY

Dated: December 16, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellants, Emerson Family Limited Partnership (“Partnership”) and Edward R. Emerson (“Edward”) appeal from the order of the Summit County Court of Common Pleas confirming the sheriff’s sale of its real property. For the reasons stated in the opinion, this Court dismisses part of the appeal for lack of a final appealable order. The judgment with respect to the denial of their motions to vacate is affirmed.

I

{¶2} The facts giving rise to this appeal have their genesis in an asset purchase agreement executed in October 2000 whereby Emerson Knife Company (“Knife”), the seller, gave Emerson Tool, LLC (“Tool”), the buyer, a mortgage lien to secure Knife’s obligations under the agreement. The mortgage was secured by the property located at 1280-1/2 Starlight Drive in Akron. Partnership was a party to that transaction in that it was the sole stockholder of Knife. Similarly, Edward was also a signatory to the transaction, but as noted under his

signature on the agreement, he was involved “personally, only as to paragraph 8.” Paragraph 8 of the asset purchase agreement was captioned “Additional Covenants” and contained provisions such as a non-compete clause, a confidentiality clause, an indemnification clause, and security and escrow clauses.

{¶3} Shortly thereafter, the aforementioned asset purchase agreement was the subject of litigation between the parties based on several bases, including breach of contract and misappropriation of trade secrets. That litigation concluded with a jury verdict awarding judgment, in part, to both parties. Relevant to this appeal is the portion of the judgment, which was entered in Tool’s favor against Edward for \$200,000, plus half of the court costs (the “2002 award”). See *Emerson Family Limited Partnership, et. al., v. Emerson Tool, LLC, et al.* (May 22, 2002), Summit County Court of Common Pleas No. CV 2001-07-3399.

{¶4} In February 2004, Tool initiated foreclosure proceedings against Partnership, Edward, and Knife based on their default in payment under the mortgage, and to recover on the 2002 award. Over time, Tool amended its foreclosure complaint to include Emerson Rental (“Rental”), a newly formed limited liability corporation. In addition, a tax foreclosure case against the same property was consolidated with Tool’s foreclosure case.

{¶5} Ultimately, the trial court issued a foreclosure decree on the property on February 22, 2006. In that decree, the trial court found that: (1) Tool was the priority lienholder with a \$100,000 mortgage against the Starlight Drive property; (2) American Tax Funding held a Summit County Tax lien in the amount of \$5,076.42; (3) other taxes remained due on the property; and (4) Tool held a judgment lien on the property for \$207,879 based on its 2002 award. Partnership, Edward, and Knife appealed the foreclosure decree to this Court on April 25, 2006. We dismissed their appeal as untimely. See *Emerson Tool, et. al. v. Emerson Family*

Limited Partnership, et. al. (Apr. 25, 2006), 9th Dist. No. 23175. We subsequently denied their four motions for reconsideration as well. See *Emerson Tool, et. al. v. Emerson Family Limited Partnership, et. al.* (May 11, 2006; May 25, 2006; June 14, 2006; and July 11, 2006), 9th Dist. No. 23175.

{¶6} Following our dismissal, the trial court ordered a sheriff's sale of the property. In September 2006, Partnership, Edward and Knife moved under Civ.R. 60(B) to vacate the sale order and the foreclosure decree issued in February 2006. Specifically, they asserted in their motion that that trial court erred by making the following findings: (1) that Tool held the first lien of \$100,000, as mortgagee on the property; (2) that Tool held a \$207,879 interest in the property pursuant to their breach of contract award; (3) that service of the foreclosure complaint was properly made to all lienholders with an interest in the property.

{¶7} As a result of the motion to vacate, in November 2006, the trial court ordered Tool to file a report evidencing all outstanding liens on the Starlight Drive property. In January 2008, Tool filed a status of title report, asserting that it was the priority lienholder with a \$100,000 mortgage on the property. In April 2008, it followed its status of title filing by filing a motion in opposition to Partnership, Edward and Knife's September 2006 motion to vacate the foreclosure decree and sale order. Partnership and Edward¹ filed a supplemental memorandum to their original Civ.R. 60(B) motion, specifically asserting that junior lienholders Rental and Steven Mastrantonio were not properly made parties to the foreclosure action. The trial court denied Partnership and Edward's February 2006 motion to vacate the sale in June 2008.

{¶8} Tool proceeded to execute on the order for a sheriff's sale by filing a praecipe ordering the sale, obtaining a sheriff's deed, having the property appraised, and publishing a

notice of sale. On October 3, 2008, Tool filed the published notice that the sale was to occur on October 24, 2008, and that the property had been appraised at \$27,000. On October 9, 2008, Edward filed notice in the foreclosure action that he had filed a voluntary petition for Chapter 7 bankruptcy relief on May 20, 2008, which Edward argues imposed an automatic stay as to the foreclosure proceedings against the Starlight Drive Property to collect on his debt from the 2002 award.

{¶9} On October 24, 2008, the property was sold at sheriff's sale to Tool for \$68,000. The following week, Tool filed a motion to confirm the sale and order distribution. On November 4, 2008, Partnership and Edward filed a motion to vacate the sheriff's sale under Civ.R. 60(B) and notice of objections to confirmation; a renewed motion to vacate the foreclosure decree under Civ.R. 60(B); and a request for hearing. That same month, Rental and Mastrantonio separately filed a similar motion to vacate the foreclosure decree and sheriff's sale and notice of objections to the sale confirmation, arguing they were never served with the summons or complaint of the foreclosure proceedings. Tool filed motions opposing all of the foregoing motions to vacate and objections to the sale confirmation.

{¶10} On January 9, 2009, the trial court held a hearing on the aforementioned motions, at which counsel for Tool, Partnership, Edward, Rental, and Mastrantonio (acting pro se) were present and heard. Based on the argument and motions of the parties, the trial court denied all outstanding motions to vacate the foreclosure decree and the sale, as well as any objections to confirmation of the sale. The court concluded that the bankruptcy stay of Edward's individual bankruptcy did not stay the underlying foreclosure proceeding, as Tool was acting to collect a debt from Partnership based on its default on its mortgage on the property. Thus, Tool was not

¹ For reasons that are unclear from the record, Knife was not included as a party-defendant after

acting in violation of Edward's bankruptcy stay because the debt upon which the foreclosure was based was not Edward's individual debt, but rather Partnership's debt. The court opined that, to the extent that Edward was a signatory to the asset purchase agreement, he signed only as to the covenants in section 8, and nothing in the asset purchase agreement transformed the mortgage debt of Partnership into an individual debt of Edward. The court further determined that, even if Mastrantonio held a valid lien and was not properly served, such error was harmless error in that the sheriff's sale garnered insufficient funds to cover the debt owed to the priority lienholder, aside from any junior lienholders, and that justice would not be served by reversing the same to comply with such procedural strictures.

{¶11} Partnership and Edward timely appealed from the trial court's confirmation of sale, asserting two assignments of error for our review. We note that Partnership and Edward's brief is captioned as a "joint brief" and appears to include Rental as a co-appellant to this appeal. The order from which the parties have appealed was entered March 2, 2008. The trial court docket reflects Rental as having filed an "Amended Notice of Appeal" on April 6, 2008, in which it sought to correct the contents of the notice of appeal it filed on March 31, 2008. Neither the trial court docket nor the record certified to this Court, however, reflect any such notice of appeal being filed by Rental on March 31, 2008. Even if Rental's April 6, 2008 amended notice of appeal contained the requisite content pursuant to App.R. 3(D) and we were able to construe it as sufficient to constitute a proper notice of appeal, such notice was not filed within the 30-day window permitted under App. R. 4(A) or within the 10-day window permitted under App.R. 4(B)(1) for multiple party appeals. Accordingly, Rental is not a party to this appeal, nor is Mastrantonio, who failed to file any notice of appeal.

February 8, 2008 based on the pleadings filed in the action.

II

Assignment of Error Number One

“THE COURT ERRED IN CONFIRMING THE SHERIFF’S SALE OF THE REAL PROPERTY.”

{¶12} In its first assignment of error, Partnership and Edward allege that the trial court erred in confirming the sheriff’s sale because the automatic stay provisions of Edward’s bankruptcy should have stayed the underlying foreclosure action, given that the debt being foreclosed upon was the debt of Edward individually based on the 2002 award. They further argue that the trial court erred in concluding that Tool had properly asserted a claim against Partnership in its complaint for any debt owed and that the trial court’s conclusion that Tool could foreclose against Partnership on the \$100,000 mortgage is contrary to both fact and law. Emerson maintains, in the alternative, that if we conclude the debt at issue was that of Partnership, we should reverse the order confirming sale in order to permit Partnership to properly litigate the amount of that debt.

{¶13} Initially, we must first determine whether we have jurisdiction to consider this appeal. The Ohio Constitution restricts an appellate court’s jurisdiction to the review of final orders of lower courts. Ohio Const. Art. IV, § 3(B)(2). “An order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met.” *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86. In a foreclosure action, the decree of foreclosure and the order confirming sale are separate and distinct actions, both of which constitute final appealable orders once entered. *Citifinancial, Inc. v. Haller-Lynch*, 9th Dist. No. 06CA008893, 2006-Ohio-6908, at ¶5-6. See, also, *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶14; *Triple F Invests., Inc. v. Pacific Fin. Servs., Inc.* (June 2, 2001), 11th Dist. No. 2000-P-0090, at *3. “The distinction is

not merely academic, but has important procedural implications.” *Smith v. Najjar*, 163 Ohio App.3d 208, 2005-Ohio-4720, at ¶11. Before entering an order confirming the sale, a trial court must determine that all the statutory requirements for the sale have been met. R.C. 2329.31 (requiring that the trial court first determine if “the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code” before issuing an order confirming the sale). See, also, *Najjar* at ¶10; *Tadmor v. Huntington Natl. Bank*, 9th Dist. No. 23021, 2006-Ohio-3818, at ¶5. Because the confirmation of a sheriff’s sale is a special proceeding, it is a final appealable order under R.C. 2505.02(B)(2). *Metro. Bank & Trust Co. v. Roth*, 9th Dist. No. 21174, 2003-Ohio-1138, at ¶12, citing *Citizens Loan & Savings Co. v. Stone* (1965), 1 Ohio App.2d 551, 552-553.

{¶14} Here, the order from which Partnership and Edward have appealed was entered by the trial court on March 2, 2009. It reads, in pertinent part, as follows:

“IT IS ORDERED AND ADJUDGED that Defendant [Partnership] and [Edward’s] Motion to Vacate Sheriff’s Sale and Notice of Objection to Confirmation, and Motion for Relief from Judgment to Vacate Foreclosure Decree and Request for Hearing; *** have all been heard and are all hereby DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that [Tool’s] Motion for Confirmation of Sale is GRANTED.

This is a final appealable order. There is no just cause for delay.”

Our review of the trial court docket reveals that, following the filing of the above quoted March 2, 2009 order and Partnership and Edward’s notice of appeal filed on March 23, 2009, the trial court entered an order on March 27, 2009 captioned “Order of Confirmation and Distribution.” In that order, the court issued the requisite findings that the sale was conducted in compliance with the provisions set forth in R.C. 2329.01 to 2329.61, specifically noting that it complied with the notice requirements set forth in R.C. 2329.27(A), (B)(3)(a)(i), and (B)(3)(a)(ii), and the

minimum price sale price required by R.C. 2329.20. Thus, it is evident that trial court's order of March 2, 2009 merely granted Tool's motion for an order confirming the sale; it did not conclude the special proceeding or incorporate the statutory findings required to confirm the sale under the Revised Code. Therefore, to the extent that the appeal filed by Partnership and Edward on March 23, 2009, challenged the order confirming sale, that appeal was not taken from a final appealable order, as the order confirming the sale was not entered until March 27, 2009.

{¶15} Having concluded that we lack jurisdiction to consider Edward and Partnership's first assignment of error because they have not appealed from a final, appealable order confirming the sale, this portion of the appeal is dismissed. See, e.g., *Robinson v. Robinson*, 9th Dist. No. 21440, 2003-Ohio-5049, at ¶5-7 (concluding that the trial court had not entered a final appealable order with respect to spousal support arrearages and dismissing that portion of the appeal, while simultaneously considering assignments of error with respect to the trial court's order of contempt because it was final and appealable).

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN OVERRULING THE VARIOUS MOTIONS TO VACATE FORECLOSURE DECREE IN THIS CASE.”

{¶16} In their second assignment of error, Partnership and Edward maintain that the trial court erred in denying their motion to vacate the foreclosure decree because the proper parties were never served with a notice and summons of the complaint in the foreclosure action. They allege that Tool's longstanding failure to properly notify junior lienholders of the ongoing foreclosure has resulted in a denial of procedural due process to those parties, specifically, Rental and Mastrantonio, whose motions to vacate the foreclosure were similarly denied by the trial court.

{¶17} We again consider our jurisdiction to determine this assignment of error. Given that the decree of foreclosure was entered on February 22, 2006, and constituted a final appealable order, an appeal to the denial of Partnership and Edward's motion to vacate that order is properly before this court. *Citifinancial, Inc.* at ¶5-6. Having considered the nature of their arguments, however, we conclude that they lack standing to assert the due process claims of junior lienholders such as Rental and Mastrantonio who are not a party to this appeal and have not challenged the denial of their motions to vacate the foreclosure sale. *Tadmor* at ¶8.

{¶18} Based on their lack of standing to assert such claims on behalf of non-parties to this appeal, Partnership and Edward's second assignment of error lacks merit. Accordingly, it is overruled.

III

{¶19} Partnership and Edward's first assignment of error is dismissed for lack of jurisdiction. Their second assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Appeal dismissed in part,
affirmed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CARR, J.
CONCUR

APPEARANCES:

ROBERT M. STEFANCIN, Attorney at Law, for Appellants.

JOHN C. COLLINS, Attorney at Law, for Appellees.