[Cite as *PHH Mtge. Corp. v. Prater*, 2011-Ohio-3640.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

PHH MORTGAGE CORPORATION,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-12-095
	:	O P I N I O N
- vs -		7/25/2011
	:	
MICHAEL S. PRATER, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CVE 0781

Felty & Lembright Co., L.P.A., Antonio J. Scarlato, David M. Gauntner, 1500 West Third Street, Suite 400, Cleveland, Ohio 44113, for plaintiff-appellant

John D. Woliver, 204 North Street, Batavia, Ohio 45103, for intervenor-appellee

PIPER, J.

{¶1} Plaintiff-appellant, PHH Mortgage Corporation, appeals a decision of the Clermont County Court of Common Pleas denying its motion to set aside a sheriff's sale.

{¶2} On April 14, 2008, appellant commenced a foreclosure action against defendant-appellee, Michael S. Prater. Appellant thereafter filed a motion for default judgment on September 24, 2008. The trial court granted default judgment in favor of appellant on September 29, 2008.

{¶3} The property was subsequently set for sale through the Clermont County Sheriff's Office. The property was first scheduled to be sold at a sheriff's sale on January 6, 2009. At the request of appellant, this order of sale was withdrawn by order of the court one day before it was to be sold. The property was rescheduled to be sold on June 9, 2009, but was again withdrawn at appellant's request a day beforehand. The sale was rescheduled a third time for November 17, 2009; however, it was once again withdrawn at the request of appellant. Appellant does not dispute that it was mailed notice of the date, time, and location of each of these three sale dates, each time continued by appellant.

{¶4} The property was then scheduled for sale a fourth time, with a date set for April 6, 2010. Appellant claims that it did not receive written notice of the date, time, and location of this fourth sale. As of January 1, 2010, the sheriff's office had instituted a new policy whereby each sale date would be made available via the sheriff's office website. The sheriff's office claims that notice of this policy change was sent to all attorneys involved with foreclosure sales pending in Clermont County between October 1 and December 31, 2009. The property was sold at the April 6, 2010 sale for significantly less than the total debt owed to appellant. Appellant was not present for the actual sale. The order of sale to a third-party purchaser, Scott A. Wolf Trust, was returned to the clerk's office on April 12, 2010.

{¶5} On April 16, 2010, appellant filed a motion to set aside the sale on the grounds that it did not receive notice of the April 6, 2010 sale date from the sheriff's office. Appellant argues that had it been aware of the date of sale, it would have bid substantially more than the amount for which the property was sold. On November 5, 2010, the trial court issued a decision denying appellant's motion to set aside the sale. Appellant now appeals the decision of the trial court, advancing three assignments of error for our review.

{¶6} We begin by noting that foreclosure executions against property are governed by R.C. 2329.01, et seq. Once a sale is complete, R.C. 2329.31 requires the court of

common pleas to confirm the sale, provided the court finds "that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61, inclusive, of the Revised Code[.]" "While the statute speaks in mandatory terms, it has long been recognized that the trial court has discretion to grant or deny confirmation[.]" *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 55. "'Whether a judicial sale should be confirmed or set aside is within the sound discretion of the trial court.'" Id. at 55, quoting *Michigan Mtge. Corp. v. Oakley* (1980), 68 Ohio App.2d 83, at paragraph two of the syllabus. Therefore, we review for an abuse of discretion, which is typically defined as an attitude that is unreasonable, arbitrary, or unconscionable. *AAAA Enterprises, Inc. v. River Place Comm. Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED, IN VIOLATION OF PLAINTIFF-APPELLANT'S DUE PROCESS RIGHTS, BY DENYING PLAINTIFF'S MOTION TO VACATE SHERIFF'S SALE WHEN THE PLAINTIFF DID NOT RECEIVE ACTUAL NOTICE OF THE IMPENDING SHERIFF'S SALE."

{¶9} In appellant's first assignment of error, it claims that the trial court erred by denying its motion to vacate the sale when appellant did not receive actual notice of the sale from the sheriff's office. Within this assignment of error, appellant raises two issues for our review. First, appellant argues that, "[u]nder the Fourteenth Amendment, an interested party to a foreclosure action has the right to due process in receiving actual notice of the date, time, and location of the impending sheriff's sale." Second, appellant argues that, "[m]erely notifying plaintiff of the sheriff's change in policy regarding how notice of sale is to be made does not satisfy the plaintiff's due process rights of receiving actual written notice of the date, time, and place of the judicial sale."

{¶10} In *Central Trust Co. v. Jensen*, 67 Ohio St.3d 140, at 141-2. 1993-Ohio-232, the Ohio Supreme Court has discussed the degree of notice necessary to satisfy the minimum requirements of due process. The Court noted:

{¶11} "In *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, the Supreme Court of the United States held that '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Id. at 314. In *Mullane*, the Central Hanover Bank & Trust Company, under the New York Banking Law, consolidated numerous trust accounts into a common fund. Over a year later, Central Hanover Bank petitioned the Surrogate's Court for settlement of its first account as common trustee. The statute required only publication notice to trust beneficiaries, which was done. The court-appointed special guardian for persons having an interest in the income of the common fund challenged the sufficiency of notice by mere publication. The New York trial and appellate courts overruled his objection. 339 U.S. at 309-311.

{¶12} "The Supreme Court of the United States reversed. In an opinion by Justice Jackson, the court reasoned that the minimum requirement of due process in any judicial deprivation of life, liberty or property is notice and an opportunity to be heard *appropriate to the case*. The court noted that personal service of written notice is always adequate in any proceeding. To determine whether less certain notice is appropriate requires balancing the respective interests of the state and the persons subject to the deprivation. This balancing is case specific and not subject to any formula. Notice that is a 'mere gesture' is insufficient; it must be 'such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' Id. at 313-315.

{¶13} " * * *

{¶14} "In *Mennonite Bd. of Missions v. Adams* (1983), 462 U.S. 791, the court addressed the question of what is adequate notice to a mortgagee of property of its impending tax sale. The court held that notice by mail, or by other means equally reliable, is the minimum constitutional requirement for a proceeding affecting the property interest of a party when that party's name and address are reasonably ascertainable. Id. at 798-800." (Emphasis added.)

{¶15} The United States Supreme Court thus shifted from *Mullane* to a more formulaic rule in *Mennonite* which was acknowledged by the Ohio Supreme Court in *Central Trust*. Under this rule, constructive notice alone is not sufficient to satisfy the minimum requirements of due process. Instead, the notice must be, "by mail, *or by other means equally reliable* * * *." Id. (Emphasis added.) By allowing for "other means equally reliable," the rule in *Mennonite* and *Central Trust*, while more formulaic, is not *so* rigid as to forbid any alternative form of notice beyond mail. The courts have not required *actual notice by mail*, but rather that the procedure be, "*as certain to ensure actual notice* * * *." (Emphasis added.) *Mennonite*, 462 U.S. at 800. Therefore, the question in the present case is whether, in the context of the proceedings below, the means of notice utilized by the Clermont County Sheriff's Office were equally reliable and as certain to ensure actual notice as notice by mail?

{¶16} As stated above, the U.S. Supreme Court has held that all circumstances must be taken into consideration when determining whether notice has been reasonably calculated, "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795, quoting *Mullane*, 339 U.S. at 314. If this has been accomplished in a particular case, minimum requirements of due process have been satisfied. Id.

{¶17} In the instant case, the established sale date of the property was rescheduled on three separate occasions. In each of those instances, appellant was mailed notice of the

date, time, and location of the sale. The trial court found that along with the mailed notice of the third sale date, the sheriff's office provided written notice to appellant that all future notices of the date, time, and location of a sale would be posted on the sheriff's office website. According to the testimony of an employee of the sheriff's office, a notation was made in their software program to indicate when this notice was sent to attorneys involved in foreclosure actions. An employee of appellant's counsel testified that she did not see the letter giving notice of this policy change. She also stated, however, that she would not have opened a letter that was addressed to a specific attorney of the firm. The attorney of record to whom the letters were addressed, Mr. Felty, never testified that he had not received the sheriff's notice of the change. Assuming mail is reliable for delivering notice, it is therefore uncontroverted that said notice was received. Being in the position best suited to consider all of the evidence before it, the trial court found that Mr. Felty did in fact receive notice of this policy change in relation to the present case as well as another. In addition, the court found that Mr. Felty's firm received this notification in relation to at least four other cases in which it was also involved. There is no evidence that the website malfunctioned, was inaccessible, or otherwise did not contain the notice of the sale date. "When a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care." Id. at 809 (O'Connor, dissenting).

{¶18} Given that appellant was notified that the upcoming sale dates would be available on the sheriff's website, the task of opening and reading the website is no more burdensome or less reliable than the act of opening and reading a letter containing the same information. As technology advances, so should the means available to satisfy minimum requirements of due process. Past forms of simple communication have evolved with the use of modern technology, and due process also grows with these trends. Due process is not to be regarded as stagnant or inflexible, but rather as a fundamental principle pliant to the

realities of modern society. This does not mean that parties are entitled to less due process than minimum standards require, only that other equally reliable methods should be available to satisfy those requirements.[1] We find that the trial court could have reasonably determined that the procedure in the present case provided sufficient notice to apprise appellant of the opportunity to participate in the continuing foreclosure action. In addition, we find that within the narrow confines of the specific circumstances sub judice, providing written notice to appellant that future dates, times, and locations of the pending sale would be found on the sheriff's office website is equally reliable and as certain to ensure actual notice as notice by mail.

{¶19} We note that the present case is somewhat distinguishable from *Mennonite* and *Central Trust*. In *Mennonite* and *Central Trust*, the appellants were provided nothing more than notice by publication. 462 U.S. at 794; 67 Ohio St.3d at 141. Without being provided notice sufficient to apprise them of the pendency of the foreclosure actions, the parties were placed in a position where they had no opportunity to take part in the related proceedings. The courts therefore held that notice by publication alone did not meet the minimum requirements of due process. In the present case, however, appellant was aware of the pendency of the sale, had participated actively in its proceedings, and was provided written notice by mail directing it to where the date, time, and location of the sale could be quickly found.

{¶20} Appellant argues that the notice given in the case at bar is similar to *Mennonite* and *Central Trust* as it constitutes notice by publication. The notice in the present case, however, is distinguishable from publication notice such as that of a newspaper listing. First,

1. For example, were the judgment entry to have directed the parties to the sheriff's office website for the date, time, and location of the sale, in conjunction with a local court rule requiring that this information be posted for a reasonable period of time prior to the sale date, this may be deemed equally reliable as notice by mail. Alternatively, emailing notice to the parties, along with a local court rule requiring a return confirmation of its receipt, may also satisfy minimum due process requirements.

in order to obtain a newspaper, a party must either have a subscription to that particular paper or seek out and purchase it, assuming it is available locally. Next, a party would be required to buy this paper daily until it received the notice it was awaiting. Furthermore, the sale listings in a newspaper are buried amongst a mountain of information irrelevant to a party seeking notice of a property sale. The sheriff's office website, on the other hand, provides a dedicated site that is readily available at any home, office, or public computer connected to the internet. It can be viewed from anywhere in the world and around the clock from the day it is posted through the date of sale. Finally, it is accessible directly from the website, without requiring a party to sift through vast amounts of unrelated materials. For the foregoing reasons, we find that a written notification directing appellant to the sheriff's office website for the date, time and location of the sale is not akin to directing it to monitor the newspapers.

{¶21} We also find that this method of notification does not shift the burden to appellant to retrieve the notice himself any more so than requiring appellant to retrieve the mail and open it. Both forms of notice were made available by the sheriff over the course of these sale proceedings. One form is seen by receiving a letter, opening it, and reading it; the other is seen by a few strokes on a keyboard via an electronic link and reading it. Whether an attorney retrieves his notices at a mail box or a keyboard is of little distinction.

{¶22} While even the minimum requirements of due process concerning property rights are to be jealously protected, notice here is not required via personal service or certified mail. Those forms of notice presumably occurred earlier in the litigation. The notice required here involves a duty to apprise interested parties of the opportunity to participate in the proceedings. Such notice occurs within the unique facts of the instant case. We find that the notice provided by the sheriff's office under the totality of these specific circumstances is not notice by publication, but rather it is notice equally reliable and certain to ensure actual

notice as notice by mail, and therefore it is compliant with the demands of minimum due process.

{¶23} Having found no abuse of discretion, appellant's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "BECAUSE PUBLISHING NOTICE OF A SHERIFF'S SALE VIA A WEBSITE CONSTITUTES NOTICE BY PUBLICATION, THE TRIAL COURT ERRED BY CONCLUDING THAT THE SHERIFF'S OFFICE COMPLIED WITH THE MINIMUM DUE PROCESS REQUIREMENTS MANDATED BY *CENTRAL TRUST CO.* AND *MENNONITE*."

{¶26} In appellant's second assignment of error, it claims that notice via website is a form of notice by publication and therefore the trial court erred by concluding that the sheriff's office complied with the due process requirements when it utilized this method. Within this assignment of error, appellant raises two issues for our review. First, appellant argues that, "[p]ublishing legal notice via a website violates the specific statutory requirements governing notice by publication under R.C. §§ 7.10 to 7.12." Second, appellant argues that, "[t]he trial court erred, as a matter of law, in finding that posting notice on a website is equally as reliable as delivering notice by mail."

{¶27} R.C. 7.12 sets forth the requirements for newspaper publication of legal notices. The purpose of this statute in relation to foreclosure actions is to ensure that the general public is apprised of impending sales. Appellant argues in its first issue that the website posting did not satisfy the statutory requirements for notice via publication as set forth in R.C. 7.12. In the present case, however, no argument has been made that the new policy instituted by the sheriff's office is intended to satisfy the publication notice requirements of R.C. 7.12. The sheriff's office states that this policy was adopted as a cost-effective means of providing notice to interested parties involved in a foreclosure action. It was not instituted

as a replacement for the publication requirements of the aforementioned statute whose intended purpose is to notify the general public of the impending sale. In fact, the record shows that the sheriff's office did indeed publish the sale three times in a local newspaper in satisfaction of the statutory requirements. Therefore, for purposes of this assignment of error, it is irrelevant whether the posting on the website complies with R.C. 7.12.

{¶28} In its second issue within this assignment of error, appellant argues that the trial court erred when it found that posting notice to a website is as reliable as delivering notice by mail. However, appellant draws too narrowly upon the facts used by the trial court when making its determination. The issue of the reliability of the notice under the present circumstances was discussed in the first assignment of error. Having held that multiple mailed notices and direction to a website is not notice by publication, but rather is as certain to ensure actual notice as notice by mail, we find that this argument is without merit.

{¶29} Having found no abuse of discretion, appellant's second assignment of error is overruled.

{¶30} Assignment of Error No. 3:

{¶31} "THE SHERIFF DID NOT COMPLY WITH THE TRIAL COURT'S SEPTEMBER 29TH JUDGMENT ENTRY, WHICH EXPRESSLY ORDERED THAT PLAINTIFF'S COUNSEL BE SENT ACTUAL NOTICE OF THE SALE."

{¶32} The judgment entry dated September 29, 2008 stated that, "the Sheriff of Clermont County shall provide counsel for [appellant] with notice of the sale date and appraisal in accordance with ORC 2329.26 by mailing a copy of the first advertisement of sale to counsel for [appellant] within seven (7) days of the date of the first publication."

{¶33} The trial court later found that, "the purpose of the entry was to provide [appellant] with notice of the sale date in order for it to comply with the mandates of R.C.

2329.26."[2] It is undisputed that notice was mailed to appellant in compliance with the entry on each of the first three scheduled sale dates. Along with notice of the third sale, the trial court found that the sheriff's office mailed appellant written notice that the website would be used for notification of any future sale dates. As discussed in the first assignment of error, we have found that this notice satisfied the minimum requirements of due process and was equally reliable and as certain to ensure actual notice as notice by mail. Therefore, because appellant was mailed written notice of the change in policy, it had the opportunity to obtain the April 6, 2010 sale date from the website. As such, we cannot find that the trial court abused its discretion in refusing to set aside the sale after concluding that the purpose of the judgment entry was sufficiently satisfied.

{¶34} Accordingly, the third assignment of error is overruled.

{¶35} Judgment affirmed.

RINGLAND, J., concurs.

POWELL, P.J., dissents.

RINGLAND, J., concurring separately.

{¶36} I concur with the majority's analysis and resolution of appellant's three assignments of error. I write separately, however, to emphasize that this court's decision is based solely on the facts and circumstances of this particular case. Here, notice was first sent by the customary and constitutionally sound method of ordinary mail. The trial court determined in weighing the credibility of witnesses that this mail notice had been received by

2. R.C. 2329.26 requires that a judgment creditor seeking the sale of lands or tenements must provide each party to the action with written notice of the date, time, and location of the sale at least seven days prior to the date of the sale. The trial court aptly observed that while appellant failed to comply with its written notice obligations under R.C. 2329.26, "this failure is without consequence since no other party except [appellant] is complaining." Therefore, the court held, "the only interested party remaining is the plaintiff. It would make no sense to set aside the sale due to the plaintiff's failure to notify itself."

appellant. This is not a case involving service of process or jurisdiction, but instead, a case involving posted notice to the "caretaker" after service and jurisdiction were properly obtained. The United States Supreme Court has clearly opined that, while posting notice may be improper in certain situations, posting is still a constitutionally sound method for notice. See *Greene v. Lindsey* (1982), 456 U.S. 444, 452, 102 S.Ct. 1874; see, also, *Miebach v. Colasurdo* (1983), 25 Wash.App. 803. The sheriff's website, combined with the mail notice of the method of all future postings, is "notice reasonably calculated to apprise the parties."

{¶37} Furthermore, I find no constitutional defect in requiring appellant, after being notified of the sheriff's website, to check the site periodically. There is simply no evidence that the posting provided insufficient time to give fair warning of the sale to appellant.

{¶38} Moreover, while I agree with the majority's finding due process principles must be pliant to the realities of modern society, I caution that even with the advent of new and more efficient methods of communication that such fundamental principles of due process may still be subject to abuse. Therefore, if the sheriff's office intends to continue making the dates of all upcoming sales available solely through its website, the enactment of a local rule outlining this notification procedure may be necessary. See, generally, *Martin v. Stan Grueninger Oldsmobile, Inc.* (Oct. 27, 1982), Hamilton App. No. C-820013, 1982 WL 4789, fn. 1; see, also, *Durell v. Spring Valley Twp. Bd. of Zoning Appeals*, Greene App. No. 2009-CA-69, 2010-Ohio-3241, ¶21 ("counsel is presumed to have constructive notice of the local rules of court").

POWELL, P.J., dissenting.

{¶39} I respectfully dissent from the decision of the majority. While I agree that the law on this issue is as the majority says, I find the factual assumptions as to modern media

are misplaced. The majority says that opening a website is as easy as and similar to opening a letter. Opening a website is more like opening a newspaper. Opening an e-mail is more like opening a letter. I believe that putting the duty on the attorney of record to seek a website, open it and search for information that might affect his/her client is as inadequate as putting the duty on him/her to find a newspaper open it and find information that might affect the client. If publication in a newspaper is inadequate, then publication on a website is inadequate. The majority says that this is acceptable because the Sheriff, charged with giving the parties notice of sale information, sent all the attorneys of record in all foreclosures notice that all future notices of the date, time, and location would be posted on its website. In essence, the policy change notice was telling attorneys to look on the website, periodically, for the sale information for their cases at some point in time in the future. And that worked in other cases with this same plaintiff's attorney. But it did not work in this case. The court order, pursuant to statute, directed the Sheriff to give the required notice to plaintiff's attorney. The Sheriff says he gave the notice with this new policy. Plaintiff's attorney says he did not receive the notice of this sale. The new policy that the majority approves required this plaintiff's attorney to retrieve the notice himself. I believe it is inadequate to shift the notice burden from the party required to give it to the party who is supposed to receive it.

{¶40} This case involves fundamental property rights. As such, we should take great pains to safeguard those rights. Notice is basic to protecting such due process rights. If we are going to abandon regular mail in favor of new electronic media, then e-mail is the better way. For example, it is not that much more burdensome or costly to require the party charged with giving notice to the parties to send an e-mail than it is to post the same information onto a website. Someone sits at a workstation entering the sale information into the system and then posts it to the website. With a few more key strokes that information can be sent to an e-mail list pre-established for the case. At least with the e-mail, you can

obtain an electronic confirmation of delivery to show that notice was sent. Obviously an e-mail notice policy would require a local and possibly state rule change allowing such notice and require the lawyers practicing before the Clermont County Common Pleas Court to provide a valid e-mail address for receiving notice. But they are already required to provide a valid postal address, phone number and attorney registration number. As I said above, opening an e-mail is more like opening a letter. Opening a website is more like opening a newspaper. Websites are great, but they are not the solution for satisfying this duty. Due process means more than the easiest and cheapest way.

{¶41} Lastly, if posting notice information on a website satisfies due process for future litigation, then Caveat Litigant.