



Update and Expansion: Appeals in a Foreclosure Case, an Empty Right in Ohio?

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A few months ago, I posted a [blog article](#) questioning the true economic viability of appellate opportunities of a putative junior lien creditor in Ohio foreclosure cases. In that post, I speculated on the situation that might be faced by an appealing mortgagor if it wanted to appeal from a trial court order granting a decree of foreclosure and directing a sale of the lien property. A new decision addresses that fact pattern.

The prior article was prompted by the *Green Tree Servicing v. Asterino-Starcher, et al.*, 2018–Ohio–977 (Franklin Cty. App., March 15, 2018) decision and the interpretation therein of Ohio Revised Code Section 2329.45. A few months after the *Green Tree Servicing* decision, the Ohio Supreme Court weighed in on appeal by the other common foreclosure defendant, the mortgagor. or better or worse, the answer is the same: a foreclosure case defendant's right to appeal is often, in reality, illusory.

State of Ohio ex rel. Sponaugle v. Hein, Judge, 153 Ohio St. 3d 560 (Aug. 9, 2018) is a writ case against a common pleas court judge. The unusual procedural situation arose from an ordinary residential foreclosure case in Darke County, Ohio initiated by a mortgage lending financial institution. Unlike the *Green Tree Servicing* situation, in *Sponaugle* the mortgagor fought the foreclosure case. Again, a foreclosure decree was granted to the lien creditor plaintiff and a foreclosure sale was held. As in *Green Tree Servicing*, a defendant (here the mortgagors, Mr. and Ms. Sponaugle rather than a junior lien creditor) appealed from the foreclosure decree and sought a stay of the foreclosure sale.

Just as in *Green Tree Servicing*, Judge Hein granted the stay request, if and only if, the Sponaugles posted a bond. As I discussed previously concerning a putative junior lien creditor, requiring a traditional bond in the traditional amount effectively guarantees there will be no stay since there probably would be no foreclosure

case if a borrower/mortgagor had twice the debt amount available. [1] No bond was posted. So, while the appeal was pending, the property was sold to the plaintiff/lender, presumably using a credit bid. After the sheriff's sale but before that sale was confirmed by Judge Hein, the appellate court dismissed the Sponaugles' appeal for lack of a final appealable order because the trial court had not determined "the amounts due on all liens." [2] Over the Sponaugles' objection, the trial court then (i) confirmed the sheriff's sale, and (ii) ordered distribution of the sheriff sale proceeds. In addition, the clerk of court issued a writ of possession to the sheriff removing the Sponaugles from the property. The Sponaugles appealed again and again sought a stay from the trial court. The stay was denied. In a coincidence some might call cruel, the plaintiff/lender's *praecipe* to the clerk of court for the writ of possession was filed the same day the stay was denied.

The Court of Appeals showed consistency when it sustained the Sponaugles' second appeal [now an appeal from the confirmation order not the foreclosure decree]. If the foreclosure decree was not a final order such that it could be appealed because all junior lien issues were not decided; (that is why the Sponaugles could not appeal the foreclosure decree), the plaintiff should not be able to enforce that decree through a sheriff's sale – right?

During this wrangling, the plaintiff/lender sold the mortgaged property to a third-party. While waiting for the appellate action to bear fruit, the trial court issued an order stating that ownership and occupancy of the property "shall remain with" the new owners who acquired title from the plaintiff/lender. This development generated a new set of problems for the Sponaugles: even if they win their appeal from the confirmation order, how do they get their home back?

As noted above, the Ohio Supreme Court case was a writ action against Judge Hein. Facing that unusual situation, the Ohio Supreme Court ruled against the Sponaugles as follows:

Sponaugle did not clearly request a writ of prohibition to vacate the confirmation order. But even if he had sought to undo the confirmation order through a writ of prohibition, that request would be moot, because the court of appeals has already vacated the

confirmation order.

Sponaugle cannot attack the writ of possession directly through a prohibition claim because Judge Hein did not issue the writ of possession, and a sheriff who executes such a writ is not exercising judicial authority. So instead, Sponaugle's present theory of the case is that the writ of possession was issued in reliance on the confirmation order and if Judge Hein lacked jurisdiction to confirm the sale, then he should be responsible for curing all the downstream harm caused thereby. . . .

In order for a writ of prohibition to issue against Judge Hein, Sponaugle must demonstrate that Judge Hein has exercised judicial power or is about to do so, that he lacks authority to exercise that power, and that denying the writ would result in injury for which no adequate remedy exists in the ordinary course of the law. . . .

Sponaugle relies on Sanquily, Adams, and Durrani to support his entitlement to the writ [of prohibition against the trial court]. But for these precedents to be relevant, Sponaugle would have to demonstrate that the statute vesting the common pleas court with jurisdiction to issue a confirmation of [a foreclosure] sale, R.C. 2329.31, makes the existence of a final foreclosure order a *jurisdictional* prerequisite.

R.C. 2329.31(A) requires the court, upon the return of the writ of execution for any relevant sale, to order an entry on the journal confirming the sale "if the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code." The requirements of those sections include, for example, public notice prior to a sale (R.C. 2329.26 and 2329.27), a minimum sale price of two-thirds the amount of the appraised value (R.C. 2329.20), and the submission of identifying information by the purchaser (R.C. 2329.271). Although the statutes logically *assume* the existence of a final foreclosure entry, they do not impose upon the trial court an affirmative duty to confirm the existence of an order prior to entering the confirmation of sale. [italics original, citations omitted]

In short, the confirmed sale sheriff sale can stand without a final appealable foreclosure decree. What is a defendant to do? The

situation has no easy answer since all competing interests have merit: the mortgagor should have meaningful appeal; the foreclosing lienor should not be forced to endure additional risk that accruing interest, potential waste and market prices will cause a loss during the appeal; and a sheriff sale purchaser who has paid money should be able to enjoy the property. Is the best answer that a sheriff can hold a sheriff's sale based on a foreclosure decree that might later be reversed and still have the new property owner get to keep the property? The Ohio Supreme Court believes that to be the current state of Ohio's foreclosure procedure statutes. I feel confident that the Ohio legislature did not realize it was creating that rule since it has tried to preserve appellate rights in foreclosure cases. See, O.R.C. Section 2329.45 and my prior blog article.

As mentioned above and in my prior post, it is common in Ohio for foreclosure sales to proceed without first determining the amount and priority of junior lienors' interests: why use time and money to determine rights that are often worthless? The financial and legal industry recognized that this procedure was at risk in the *Sponaugle* case. An industry^[3] sponsored amicus brief included this:

Because foreclosure and execution procedures are of great interest to Ohio mortgagees and judgment creditors, amici curiae have chosen to participate in this important case to address the conflicts created by the Second Appellate District in the underlying decision, *The Farmers State Bank v. Sponaugle*, 2017-Ohio-4322, 92 N.E.3d 355 (2d Dist.) First, the Second District erroneously held that the foreclosing plaintiff had to wait for the specific amounts owed to junior lienholders to be determined before the property could be sold. Second, the court of appeals wrongly decided that a foreclosure defendant can wait until after a sheriff's sale has occurred to object to issues with the sale that exist before the sale.

Only time will tell if the current common practice continues.

The lesson for appellate rights in Ohio is now for mortgagors the same as discussed previously concerning putative junior lienors. Without a stay your appeal rights are probably worthless, and Ohio's current appeal bond processes almost make a stay an economic impossibility.^[4]

The lesson for plaintiff foreclosure lawyers is that you might reconsider the common practice described above in the amicus brief. Otherwise, you might find a completed sale with its expense and consequences overturned and a new mess created for you, your client^[5] or your title insurer.^[6]

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^[1] In my experience, appellate bonds supporting a stay are often twice the judgment amount. While the court has authority to determine the bond amount, strong Ohio policy is that the bond amount be at least the total judgment amount plus "interest involved." See O.R.C. Section 2505.09.

^[2] This situation is exactly what I described in the prior post as common and part of what makes a junior lienor's supposed appeal rights so problematic; can a rational possible junior lienor post a large bond to appeal in an effort to protect its interest that is yet undetermined in amount and priority amongst other junior liens?

^[3] 2018 WL 2461844 (Ohio) (Appellate Brief) in *Farmers State Bank v. Sponaugle*, Ohio Supreme Court No. 2017-1377 filed by the Independent Community Bankers of America and Community Bankers Association of Ohio, Greenville National Bank, Farmers and Merchants Bank, Osgood State Bank, and Twin Valley Bank Amici Curiae in Support of Appellant the Farmers State Bank.

^[4] I have no obvious immediate answer to this problem. But, there may be guidance in how bankruptcy courts protect a secured lender during the forced delay caused by a bankruptcy case (similar to the delay caused by an appeal). The risks of depreciation, waste and accruing interest are measured against any existing equity and protection is ordered to cover only the risk forced on the secured lender by the delay not the entire debt plus more which is Ohio's usual appeal bond rule. See bankruptcy cases that discuss "adequate protection" for secured lenders.

[\[5\]](#) I have seen credit bidding foreclosing lender later sell the property to a third party using a warranty deed. What happens then if the new owner's title is endangered by a successful appeal by either a mortgagor or a junior lienor?

[\[6\]](#) Foreclosure cases in Ohio start with title work by an agent and title company chosen by the foreclosing counsel or the client. This same agent and company usually issue the title insurance at the end of the sheriff sale and I expect more buyers will opt for this insurance given the now clarified uncertainties.

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