



# Ohio Supreme Court Resolves Some Concerns in Foreclosure Litigation Appeals

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Jan 23, 2020

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In two prior posts, I addressed several questions surrounding appeals in Ohio real estate foreclosure cases including: (i) when can the money judgment and related foreclosure decree be appealed?; (2) what happens if an unstayed foreclosure decree results in a sale of the property while the appeal is pending and the appellant successfully reverses the foreclosure decree?; and (3) is the requirement of a large bond (traditionally twice the judgment amount) appropriate<sup>[1]</sup> in order to stay enforcement of a foreclosure decree if the secured creditor's real risk is merely a partial decline in the collateral's value and accruing interest? See, <https://fbtgibbons.com/update-and-expansion-appeals-in-a-foreclosure-case-an-empty-right-in-ohio/> or at <https://www.lexology.com/library/detail.aspx?g=0e5e1c57-f4fd-4ea1-a144-9fe97e5e0306> and prior post cited therein.

My prior posts used the *Sponaugle* foreclosure litigation as its factual example to discuss the above questions. The Ohio Supreme Court exercised its discretion and accepted the appeal filed by the mortgagee ("Farmers") after the second court of appeals decision discussed in my posts. In September 2019, the Ohio Supreme Court decided *Farmers State Bank v. Sponaugle*, 157 Ohio St.3d 151, 2019-Ohio-2518. In that decision, the Ohio Supreme Court held that a typical foreclosure decree that (i) grants a money judgment against the mortgagor in favor of the mortgagee, and (ii) orders the sale of the mortgage real property is a final appealable order. The Sponaugle money judgment and foreclosure decree was final despite the fact that the order did not determine the amount owed by the mortgagor to either the mortgagee or the junior lienors. Specifically, the Court said:

The order of foreclosure here determined the extent of each lienholder's interest, **set out the priority of the liens**, and determined the rights and responsibilities of each party. 'Liability is fully and finally established 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.' Roznowski, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, at ¶ 25. Because there were no issues remaining to be determined as to the rights and liabilities of the parties, the foreclosure decree was a final, appealable order. (bold added).

The Ohio Supreme Court's *Sponaugle* decision does not address a situation where there are multiple junior lienors who dispute their respective priority; but the implication is that an order is not final unless that determination is made. (see bold above). *M&T Bank v. Wood*, 2020 WL 40007, 2020-Ohio-10 (Clark Cty. App. Jan. 3, 2020) citing *Tax Ease Ohio LLC v. Wells*, 2018 WL 5310277, 2018-Ohio-4346 (Montgomery Cty. App. Oct. 26, 2018) ("We have previously held that a judgment entry ordering a foreclosure sale is not a final, appealable order unless, among other things, it determines the priority of all liens against the property and the corresponding amounts due the lienholders.")

Although arguably inappropriate, it is common for multiple junior lienors to do nothing to determine the amount or priority of their liens until after the lien property is sold and it becomes clear that there will be sale proceeds for the distribution to junior lienors. In this situation, the mortgage / mortgagee judgment entry and foreclosure decree is not a final appealable order. Farmers' appeal to the Ohio Supreme Court in *Sponaugle* specifically asserted a non-final foreclosure decree could be enforced through a sheriff's sale. While the Supreme Court declined to address that issue, there are other cases supporting Farmers' argument. See the concurring opinion in *Sponaugle* signed by two of seven Ohio Supreme Court Justices and the subsequent opinions agreeing with that assertion such as *WBCMT 2007-C33 Office 7870, LLC v. Breakwater Equity Partners, LLC*, 133 N.E.2d 607, 2019-Ohio-3935 (Hamilton Cty. App.). Paragraph 25 of the *WBCMT 2007-C33 Office 7870* includes this:

[Appellant (Farmers) asserted to the Ohio Supreme Court that] 'A sheriff's sale can be confirmed even if the underlying foreclosure decree was a non-final order.' The [*Sponaugle*]

court decided the case on different grounds (concluding the underlying foreclosure had been, contrary to what the Second District had determined, a final order), leaving the question open for another day. The concurring opinion, however, analyzed this point and concluded: '[N]othing in [R.C. 2329.31](#) requires an appealable foreclosure order as a prerequisite to confirming the sale.' [Id. at ¶ 49](#) (DeWine, J., concurring in judgment only). Justice DeWine favorably cites [Mulby](#) and [Falls Sav.](#) and distinguishes [Marion](#): . . . [Id. at ¶ 53](#). While that is only a concurring opinion, it represents the most recent pronouncement from the Ohio Supreme Court and aligns with our analysis above.

The *Sponaugle* and *M&T Bank* decisions cited above both acknowledge the common trial court practice – the amount owed lienors is determined after the lien property is sold when the proceeds are being distributed. This is common because the amount may change. In addition, neither court nor counsel want to spend time determining the amounts owed to lienors who may not receive any proceeds.

The Court's *Sponaugle* decision answers some of the concerns I discussed in the above-cited prior posts: when a mortgagor may appeal the money judgment and lien existence issues now seems clear. The other practical concerns discussed previously, however, remain:

- Under the two earlier *Sponaugle* appellate decisions and *WBCMT 2007-C33 Office 7870, LLC*, a sheriff's sale was held on what was then a non-final and non-appealable foreclosure order and the property might be permanently transferred to a third-party buyer.[\[2\]](#) How does a mortgagor stop this if it cannot appeal the non-final foreclosure decree nor afford the bond required to stay the foreclosure decree?; and
- if the precise amount of prior liens remains undetermined at the time of the foreclosure sale (as permitted by the *Sponaugle* decision), how can a junior lienor rationally decide if it wants to credit bid its lien since the cash it must transfer to pay prior liens is undetermined? It does not help that after the sale is confirmed (meaning the amounts owed have been

determined so that sale proceeds can be distributed), appeal of the confirmation of sale is limited to challenging the confirmation order and issues related to the confirmation proceedings, such as computation of the final total amount owed, including costs, taxes, expenses, and fees. *Sponaugle*, above.

The *Sponaugle* issues were important enough that five *amici curiae*, including the Independent Community Bankers of America and Community Bankers Association of Ohio, made filings supporting the appellant, Farmers State Bank. The Ohio Supreme Court realized that the issues raised in the two prior *Sponaugle* appellate decisions were important so that the Court agreed to take the appeal. I look forward to the Court addressing the remaining issues raised in those decisions and the other common foreclosure procedures that happen in Ohio trial courts.

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[1] Is there an economically viable appellate right for a junior lienor who might want to appeal the amount of the senior creditor's lien if the bond requirement covers the entire judgment, most of which will be collectible from the collateral? Same question for the borrower – if that defendant cannot make the required periodic payment, what chance is there she can post a bond for twice the entire debt? Would not a rational bond amount be (i) the interest that may accrue during the appeal plus (ii) the possible collateral value loss?

[2] The Ohio Supreme Court's decision notes this fact but does not address the problem.

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