

[Cite as *Whipps v. Ryan*, 2011-Ohio-3300.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Edward F. Whipps, Trustee,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-167
James M. Ryan,	:	(C.P.C. No. 05CVH-10-11685)
Defendant-Appellant.	:	(REGULAR CALENDAR)
Sky Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-168
Michael F. Colley et al.,	:	(C.P.C. No. 06CVH-01-1244)
Defendants-Appellees,	:	(REGULAR CALENDAR)
(James M. Ryan,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on June 30, 2011

Weltman, Weinberg & Reis Co., L.P.A., Stephen A. Santangelo and Angela Coriell, for appellee DB Midwest LLC.

James M. Ryan, pro se.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, James M. Ryan ("appellant"), appeals from three orders entered by the Franklin County Court of Common Pleas in an ongoing foreclosure action that has already been before this court on two occasions.

{¶2} The underlying dispute has been extensively examined by our prior decisions and will not be unnecessarily recapitulated here in detail. *Whipps v. Ryan*, 10th Dist. No. 08AP-838, 2009-Ohio-2228; and *Whipps v. Ryan*, 10th Dist. No. 07AP-231, 2008-Ohio-1216. The matter began as a complaint for partition of the subject property brought by plaintiff-appellee, Edward F. Whipps as Trustee, against James M. Ryan in his personal capacity and as Trustee. Plaintiff-appellee Sky Bank, later succeeded in this action by Huntington National Bank as a successor by merger, intervened by means of a complaint for foreclosure against the subject property. DB Midwest LLC ("appellee") has become the successor in interest to Sky Bank/Huntington.

{¶3} The trial court granted foreclosure in favor of Sky Bank and this court affirmed on appeal. Appellant then filed a Civ.R. 60(B) motion for relief from the foreclosure judgment, which was denied by the trial court; again we affirmed on appeal to this court. Sky Bank sought and received appointment of a receiver. That order of the court was also contested and affirmed in the second appeal to this court.

{¶4} In subsequent proceedings appellee requested and received an order for sheriff's sale. The property was appraised at \$975,000 and bidding thus began at \$648,000, or two-thirds of the appraised value, but attracted no bids. Appellee then sought an order permitting sheriff's sale at a reduced bid pursuant to R.C. 2329.52, based upon the prior unsuccessful sales and a new valuation provided by the receiver,

requesting a starting price of \$400,000. Appellant now appeals from this order of the court, additionally assigning as orders appealed from an order setting forth the authority and duties of the receiver, and an order approving the receiver's first report, inventory, and appraisal.

{¶5} Appellant brings the following assignments of error:

Assignment of Error I

The Trial Court Erred in failing to comply with Civil Rule 58(B) exhibit P by the Trial Court's and Clerk of Courts failure to notify the parties of a Final Appealable Order in its entering the October 1, 2008 Order Appointing Receiver[,] thereby tolling the time for Appellant right to appeal[.]

Assignment of Error II

The Trial Court Erred in entering the October 1, 2008 Order Appointing Receiver-Exhibit A-for the reason that a Degree of Foreclosure and Order of Sale dated April 19, 2007 placed 185 thru 203 E. Main Street, Columbus[,] Ohio with the Sheriff of Franklin County with the Order that he shall sell the property at public sale, as upon execution and according to law, free and clear of all interest of all parties to this action.

The Order Appointing Receiver materially conflicts, interferes with and vacates the Trial Court[']s April 19, 2007 Decree of Foreclosure and Order of Sale and the duties of the Sheriff of Franklin County[,] Ohio set forth therein by enjoining and staying the Sheriff from doing any act or thing whatsoever to interfere with the Order Appointing Receiver which Order specifically directs the Receiver to liquidate the 185 thru 203 E. Main Street Property. The Order Appointing Receiver den[ies] the Sheriff the ability to comply with the Decree of Foreclosure and Order of Sale, to perform his statutory duties to sell the properties and convey clear title to the purchaser denying Appellant a timely and commercially reasonable sale as well as his right to Redemption set forth in Section 2329.33[,] Ohio Revised Code, Exhibit H and the Order was not served upon Appellant and the proceedings were held ex parte.

Assignment of Error III

The Trial Court Erred in entering its Order Approving Receiver's First Report, Inventory and Appraisal Exhibit B for the reason that it did not contain an accounting of income and expenses for the period commencing with the Receiver[']s appointment by the Trial Court[']s Decision and Entry dated August 27, 2008 thru and including the date of the First Report of May 15, 2009 Exhibit U, it did not contain an Appraisal as represented, it did not comply with Loc Rule 93 et seq. Exhibit S of the Franklin County Common Pleas Court and the Receiver[']s First Report, Inventory and Appraisal was not served upon Appellant or his counsel prior to its Submission to the Trial Court and its approval.

Assignment of Error IV

The Trial Court Erred by entering its January 27, 2010 Entry For Order Permitting Sheriff's Sale At a Reduced Bid, Exhibit C[,] as the Trial Court failed to provide due process to Appellant by failing to permit Appellant to appear before the Court to present his objections prior to the Court's exparte Decision/Order, as movant DB Midwest LLC failed to serve Appellant timely and the Court signed its Entry the same day DB Midwest LLC's motion was submitted to the Court, given the fact that the Court is aware that movant DB Midwest LLC is a conflicting potential purchasing party placing in question its cause and information being provided to the Court in its Motion for Order Permitting Sale at a Reduced Bid, given the fact that the DB Midwest LLC requested minimum bid of \$400,000 places the two thirds of the appraised value of the land and tenements being sold below the sums needed to satisfy the execution, with costs, which operates as a lien on the residue of debtors Colley and Ryan estate to the prejudice of any other creditor there by securing DB Midwest LLC's debt without Appellant's benefit of further proceedings (Section 2329.19 [of the] Ohio Revised Code[,] Exhibit F), that the Court failed to determine the value of all junior liens and claims against the E. Main Properties and after their consideration, then setting the minimum bid in accordance with Section 2329.20 [of the] Ohio Revised Code, Exhibit G and that the previous Sheriff Sale on January 22, 2010 was wrongfully Ordered by Plaintiff Edward F. Whipps Trustee, Exhibit V and for the reason that the information provided to the Court as set forth in assignment of Error III sufficiently places in question the valuations presented by DB Midwest

LLC of the subject property and that there is good cause for the Court to verify its valuation by the Sheriff of Franklin County in formulation of its minimum bid of \$400,000[.]

Assignment of Error V

The Trial Court Erred in permitting attorney Rhett A. Plank to withdraw as counsel for defendant James M. Ryan with out complying with Local Rule 18.01.

{¶6} We dismiss this appeal for lack of a final appealable order. This court's jurisdiction extends only to the review of final, appealable orders. Section 3(B)(2), Article IV, Ohio Constitution, and R.C. 2505.031(A). If an order is not final and appealable, then an appellate court has no jurisdiction and the appeal must be dismissed. In determining whether a judgment is final and appealable, we engage in a two-step analysis. First we determine if the order is final in the sense defined by R.C. 2505.02. If so, we then turn to the requirements of Civ.R. 54(B) to assess whether the order is postured as final with respect to a judgment upon multiple claims or involving multiple parties. We reach only the first step in the present case. As applied to the present case, R.C. 2505.02(B) defines a final order as one that affects a substantial right in an action and that in effect determines the action and prevents a judgment, or an order made in a special proceeding that affects a substantial right. R.C. 2505.02(B)(1) and (2). In addition, R.C. 2505.02(B)(4) makes appealable an order granting a provisional remedy that "in effect determines the action with respect to the provisional remedy" if the aggrieved party would not be afforded a meaningful remedy by an appeal after final judgment.

{¶7} R.C. 2505.02(A)(1) defines substantial right as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." Thus, "[a] substantial right is a legal

right that is entitled to enforcement and protection by law." *Browder v Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶13, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86.

{¶8} Addressing under the above standard the entries at issue in this case, appellant first challenges the trial court's October 1, 2008 order setting forth the authority and duties of the receiver. This is not a final appealable order. While the Supreme Court of Ohio has held that "[a]n order appointing a receiver is an order affecting a substantial right made in a special proceeding and is a 'final order.' " *Mandalaywala v. Zaleski* (1997), 124 Ohio App.3d 321, 329, quoting *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, paragraph one of the syllabus, the order actually appointing the receiver in the present matter was reviewed and affirmed in a prior appeal. Likewise, an order approving the final sale of assets by a receiver is appealable. *Mandalaywala*, at 330. But appellant presents neither authority nor rationale for the proposition that he may here appeal an interlocutory order that merely confirms a previous order appointing a receiver and sets forth the duties thereof under R.C. 2735.04, the pertinent statute. The October 1, 2008 order is not a final appealable order.

{¶9} Next, appellant challenges the trial court's May 29, 2009 order approving the receiver's first report, inventory, and appraisal. Again, this order is interlocutory by definition and does not present any basis for appeal. While an order approving a receiver's final report and approving the definitive disposition of assets is a final appealable order, *Mandalaywala*, an interim report setting values or otherwise covering ongoing administration of the assets is not. *Bailey v. Bailey* (Apr. 5, 1989), 9th Dist. No. 88CA004371; *Bailey v. Bailey* (Dec. 6, 2000), 9th Dist. No. 99CA007364. The trial court

order approving the first report in this case does not determine the action with respect to the assets concerned, nor is a remedy foreclosed upon appeal from an eventual confirmation of sale, which would be the final order in the case.

{¶10} Lastly, appellant asserts error in the trial court's January 27, 2010 order granting appellee's motion to set a reduced bid under R.C. 2329.52, which allows a new appraisal after a judicial sale fails for want of bidders. The appealability of such an order appears to be a question of first impression in Ohio.

{¶11} The motion requesting a reduced bid sets the start of the bidding process for an eventual sheriff's sale. It does not mean that the property will sell for a given amount nor that the property will sell at all. In light of the absence of bids at prior auction, the property may well sell for less than the original minimum bid. That outcome, however, is neither irrevocably determined by the trial court's order nor inconsistent with the trial court's discretion. It would be no more appropriate to accept an appeal from an order allowing a reduced bid than to accept an appeal contesting a low appraisal amount. These are matters for which a remedy lies in an appeal from the final order, which in this case would be the order of confirmation of sale if a sale in fact occurs in conformity with the trial court's interlocutory orders. The trial court's January 27, 2010 order granting appellee's motion under R.C. 2329.52 is not a final appealable order.

{¶12} Finally, we turn to appellant's assertion that the trial court erred in allowing appellant's own counsel to withdraw from the case. The court's action or inaction on this withdrawal of counsel is not reflected in any of the orders from which the appeal purports to be taken, nor, in fact, in any formal order found in the record at all. Assuming, *arguendo*, that there were some irregularity in the manner in which counsel withdrew from

representation and that the court's action in adopting or sanctioning the withdrawal were immediately appealable, there is simply no record of any action by the court in this respect and thus nothing in the record to support error. The issue is thus not properly before us.

{¶13} In accordance with the foregoing, these appeals are dismissed for lack of a final appealable order.

Appeals dismissed.

BRYANT, P.J., and TYACK, J., concur.
