

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

JAMES ROKAKIS, AS TREASURER)	CASE NOS.: CV 10 729690 and
)	CV 10 729846
Plaintiff,)	
)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
CIRCLE DEVELOPMENT GROUP, INC., et al.)	
)	
Defendants.)	

John P. O'Donnell, J.:

SUMMARY

These consolidated cases are administrative appeals by the mortgagee (Park View Federal Savings Bank in case number 729690) and fee owner (Circle Development Group, Inc., in case number 729846) of a Solon property that was ordered by the Cuyahoga County Board of Revision to be transferred directly to the Cuyahoga County Land Reutilization Corporation because of an unpaid property tax bill. The appellants – particularly Park View¹ – claim the board violated the direct transfer statute by ignoring its liens and transferring an \$887,000 parcel to the Land Bank to satisfy a \$37,889.90 tax lien.

FORECLOSURES, TAX FORECLOSURES AND THE LAND BANK

A mortgage is security for a debt.² The borrower is the mortgagor and the lender is the mortgagee. When the borrower defaults on the repayment of the debt the mortgagee can file an action for foreclosure. The same applies where property taxes are delinquent. In that situation, known as a tax foreclosure, the county treasurer is the plaintiff. Foreclosure is an equitable

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² *Hausman v. Dayton* (1995), 3 Ohio St.3d 671, 679.

cause of action and is usually accompanied by a cause of action for a money judgment in the amount of unpaid taxes or the note secured by the mortgage.³ An ordinary successful foreclosure lawsuit includes pleadings, discovery and, in most cases, a dispositive motion since there are often no genuine issues of material fact. Upon entering a judgment of foreclosure, a court typically identifies the amount due, forecloses (*i.e.*, cuts off or excludes) the equity of redemption (usually providing the mortgagor with a three day grace period to redeem the property), and orders the property to be sold by sheriff's sale, pursuant to the procedures set forth in Ohio Revised Code chapter 2329 (governing execution against property).⁴

The mortgagor's equitable right of redemption is the property owner's right to keep the property by paying off the balance due.⁵ That right is not extinguished until three days after a court decree of foreclosure.⁶ Any time during the proceedings to that point the mortgagor can exercise the equitable right of redemption and avoid foreclosure and a sheriff's sale. A property owner also has a statutory right of redemption: R. C. section 2329.33 provides that the owner may redeem the property after a sale, but before it is confirmed by the court, by depositing the amount of the money judgment plus interest.

In addition to the owner's equitable and statutory rights of redemption, another salient feature of a foreclosure lawsuit is the sheriff's sale. The primary purpose of a sheriff's sale is to protect the interests of the mortgagor-debtor while, at the same time, ensuring that the secured creditors receive payment for unpaid debts.⁷ Consistent with these interests, the procedures spelled out in R.C. chapter 2329 are designed to obtain the maximum amount of

³ See, *e.g.*, *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App.3d 228, 234.

⁴ *Wells Fargo Bank, N.A. v. Young*, 2011-Ohio-122, 2d Dist. App. No. 2009 CA 12, ¶ 29.

⁵ *Abroms v. Synergy Building Systems*, 2011-Ohio-2180, 2d Dist. App. No. 23944, ¶ 50.

⁶ *Id.*, ¶ 49.

⁷ *Wells Fargo Bank, N.A.*, *supra*, ¶ 30.

money from the foreclosure sale.⁸ Toward that end, R. C. §2329.20 provides that property cannot be sold for less than two-thirds of its appraised value. Once it is sold, unpaid taxes are satisfied first and the remaining proceeds are distributed among the lienholders according to their priority.

It is commonly acknowledged that the number of foreclosure actions in the country generally and Ohio specifically rose precipitously during the last several years. Cuyahoga County itself has been described as the epicenter of the foreclosure crisis.⁹ One of the maladies to come from that crisis is a substantial increase in the number of properties abandoned by owners who, owing more than their property was worth and unable to pay their taxes and mortgage, had no incentive to live at the property and maintain it until evicted after a sheriff's sale. When properties are abandoned and fall into a state of desuetude they tend to blight the whole neighborhood, particularly where they are concentrated in densely developed areas. The blight is exacerbated by the time it takes to litigate the foreclosure lawsuit and conduct a sheriff's sale.

As one way to remedy this problem, the Ohio legislature made changes to hasten the disposition of tax foreclosure cases. First, in 2006, House Bill 294 allowed tax foreclosure proceedings on distressed properties to proceed administratively, before a county board of revision, instead of judicially. Then, effective in early 2009, Senate Bill 353, known as the land bank bill, became law. The provisions of the bill related to tax foreclosures are found at R.C. §§323.65 through 323.78.

The statute allows a tax lien on abandoned land to be foreclosed through proceedings before a board of revision either upon the board's own initiative or by the complaint of the

⁸ *Id.*

⁹ *Understanding Ohio's Land Bank Legislation*
Policy Discussion Papers, Volume 25, January 2009, p. 1.

treasurer, a tax certificate holder or county land bank.¹⁰ To be considered abandoned the property must be unoccupied and delinquent on real estate taxes.¹¹ The Ohio Rules of Civil Procedure do not apply to the board's proceedings, except for Civil Rules 4 and 5 pertaining to service and notice.¹² But the board is free to follow the civil rules or may promulgate its own.¹³ Upon a decree of foreclosure the board of revision may order the property transferred without payment directly to a land bank instead of ordering a sheriff's sale.¹⁴

However, the law protects the interests of owners and lienholders in several ways. R.C. §§323.69(B)(2) and 323.70(B) require the board to dismiss the complaint upon request by the owner within 20 days of service of the complaint, even without good cause. Thereafter, the tax lien foreclosure can only proceed judicially, *i.e.* toward a sheriff's sale. Additionally, the owner's statutory right of redemption remains intact and may be exercised even after it is sold, but before a confirmation of the sale or transfer, by paying the overdue taxes.¹⁵ Most notably, a lienholder, to preserve its security interest, may have the action dismissed at any time before confirmation of sale or transfer by producing evidence that the impositions¹⁶ do not exceed the fair market value of the land.¹⁷ That provision is corroborative of a legislative intent that direct transfers to land banks are meant for situations where the property is worth less than the taxes owed and no private economic interests will be impaired by the transfer.

¹⁰ R.C. 323.66(A) and 323.69(A). "Land bank" is the colloquial appellation for a county land reutilization corporation.

¹¹ R.C. 323.65(A).

¹² R.C. 323.69(C).

¹³ *Id.*

¹⁴ R.C. 323.73(G) and 323.74(D).

¹⁵ R.C. 323.69(B)(1) and 323.76.

¹⁶ R.C. 323.65(F): "Impositions" means delinquent taxes, assessments, penalties, interest, costs, reasonable certificate holder, applicable and permissible costs of the prosecuting attorney of a county, and other permissible charges against abandoned land.

¹⁷ R.C. 323.72(C).

Finally, likely because of the glut of foreclosures here, the statute includes a section applicable only to Cuyahoga County. R.C. §323.78 gives the complainant in a tax foreclosure before the board of revision the option to invoke the “alternative redemption period.” That period is defined at R.C. 323.65 as follows:

(K) “Alternative redemption period,” in any action to foreclose the state’s lien for unpaid delinquent taxes. . . means *forty-five days after an adjudication of foreclosure of the parcel is journalized* by a court or county board of revision having jurisdiction over the foreclosure proceedings. Upon the expiration of the alternative redemption period, the right and equity of redemption of any owner or party shall terminate without further order of the court or board of revision. (Emphasis added.)

Under this section the right of redemption terminates 45 days after the entry of foreclosure instead of upon judicial confirmation of a sheriff’s sale. The result is a narrower opportunity to redeem. Presumably because the alternative redemption period is inimical to the interests of an owner or lienholder, R.C. §323.78 mandates: 1) that the complaint explicitly invoke the alternative redemption period and 2) that any notice of final hearing must describe the alternative redemption period and its effect.

STATEMENT OF FACTS

The property at 7365 Royal Port Rush Drive was transferred by a deed to the Circle Development Group, Inc. that was recorded on September 16, 2005. At the same time, Park View recorded a \$660,000 open-end mortgage in its favor. Park View then recorded another open-end mortgage, this one for \$100,000, on September 29, 2008.¹⁸

In the meantime, Circle stopped paying real estate tax and the Cuyahoga County Treasurer, James Rokakis,¹⁹ commenced a tax foreclosure proceeding under R. C. §323.65 *et*

¹⁸ Two mechanics’ liens and a homeowners’ association lien, totaling \$16,097.50, were recorded between the two Park View mortgages.

¹⁹ Since then, Cuyahoga County has changed to an executive form of government and the separate office of substituted as the nominal plaintiff in these cases.

seq. before the Cuyahoga County Board of Revision on May 20, 2009. The preliminary judicial report filed with that complaint shows unpaid taxes of \$16,511.32 on a market value of \$550,100.00 and the complaint did not invoke the alternative redemption period.

Park View received service of the complaint and filed a pleading on July 29. Circle never filed a responsive pleading or otherwise participated in the proceedings before the board of revision. On August 10, the city of Solon filed an affidavit disclaiming its priority interest under R.C. §5722.02 to purchase the land through its land reutilization program, making the property eligible for transfer to the county land bank.

A final hearing was first set for October 23, 2009. The notice of that hearing did not include any mention of the R.C. §323.78 alternative right of redemption because the treasurer's complaint did not seek that remedy. The notice did include a warning that if the impositions exceed the auditor's valuation of the property then the property could be transferred to a land bank without a sheriff's sale. The board continued that final hearing *sua sponte*.²⁰ After two more continuances the hearing was ultimately held on April 9, 2010. Meanwhile, on January 26, 2010, the treasurer filed an amended complaint identical in all respects to the original complaint except that it included among the remedies sought the alternative right of redemption. There is no evidence in the record that the board granted leave to file an amended complaint and Park View never filed a response to the amended complaint. The board never issued a notice of hearing that included the language required by R.C. §323.78(A) that upon foreclosure and after the expiration of the alternative redemption period the property could be transferred to a land bank free of Park View's liens.

²⁰ The first continuance demonstrates a pitfall of using one form for all occasions. The record includes an order of continuance dated October 23, 2009. A check mark is on the line next to the words "on the board's own motion for a continuance" and then another check mark is used to indicate that the board "grants petitioner's

After the final hearing, which Park View did not attend, the board on April 12 journalized an entry captioned “adjudication of foreclosure (direct transfer).” By that entry, the board found that the alternative right of redemption applied and that the property qualified for direct transfer to a land bank without appraisal or a public auction despite a supplemental final judicial report showing impositions of \$37,889.90 on a market value of \$887,000.00.

Consistent with its decision at the final hearing, the board simultaneously journalized an order to the Cuyahoga County Sheriff to transfer the property directly to the land bank “unless previously redeemed by law.” The sheriff’s deed was executed on April 15 and eventually recorded on June 8, 2010.²¹

Park View now appeals the board of revision’s actions to this court. As grounds for an appeal Park View claims, among other things, that:

- 1) The board’s order of transfer violated its notice of hearing; and
- 2) The board’s notice of final hearing was defective for not complying with R.C. 323.78 by omitting reference to the alternative right of redemption.

Since this court’s appeal is de novo, issues not raised administratively may be considered here.²²

LAW AND ANALYSIS

Timeliness of the appeal

As an initial matter, the treasurer and the land bank argue that the common pleas court is without jurisdiction to consider these appeals because Park View and Circle Development filed them too late.

R.C. §323.79 provides, in pertinent part:

²¹ The administrative record does not contain evidence of when the deed was delivered to the land bank, although

However, that affidavit cannot be considered on appeal. See R.C. §2506.03.

²² R.C. 323.79.

323.79 Appeal by aggrieved party in court of common pleas.

Any party to any proceeding instituted pursuant to sections 323.65 to 323.79 . . . who is aggrieved . . . may file an appeal in the court of common pleas . . . upon a final order of foreclosure and forfeiture by the board. A final order of foreclosure and forfeiture occurs upon confirmation of any . . . transfer to a . . . county land reutilization corporation . . .

An appeal shall be filed not later than fourteen days after the date on which the order of confirmation of . . . transfer to a . . . county land reutilization corporation . . . is filed with and journalized by the clerk of court. The court does not have jurisdiction to hear any appeal filed after the expiration of that fourteen-day period. (Emphasis added.)

The treasurer and the land bank argue that the appeal time began on April 12 – the date of the foreclosure adjudication and order to the sheriff to transfer the parcel – and ran out on April 26, well before Park View’s June 18 filing of its appeal. Park View’s position is that the April 12 order cannot constitute a final order because the transfer could not be confirmed until the expiration of the alternative redemption period.

If the April 12 adjudication and order constitutes a confirmation of transfer, then the 45-day redemption period is illusory since there would be no interest to redeem, the transfer to the land bank having been confirmed. Because the alternative redemption period has to have meaning, the adjudication of foreclosure cannot include a confirmation of transfer and is thus not the final order that begins the appeal time. The land bank’s other argument to the contrary – that the expiration of the right of redemption is “time-based,” not “confirmation-based”²³ – is unavailing because it misses the point by focusing on when the right to *redemption* begins and ends. It is agreed that under R.C. §323.78 the right of redemption is extinguished 45 days after the adjudication of foreclosure, but that has nothing to do with the confirmation of transfer, which is the event that begins the appeal time.

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It appears that the board of revision created the uncertainty by using a process that is bureaucratic in the most pejorative sense. The board issued two one-size-fits-all check-the-box orders at the same time instead of first adjudicating the foreclosure with an order to the sheriff to transfer and then, after waiting 45 days to allow for the possibility of redemption, to make a separate entry confirming the order of transfer and ordering the sheriff to issue a deed. While it might be easier for the board to push through a single generic form and then forget about the case, common sense, not to mention due process, dictates that the transfer cannot be confirmed until the 45-day redemption period ends.

So neither the adjudication of foreclosure nor the order to the sheriff to transfer the parcel constitutes an order of confirmation of transfer to the land bank and the 14-day appeal time did not start on April 12. This still leaves three possibilities for when the appeal time did start. The first is 45 days from April 12, *i.e.*, the expiration of the redemption period. Second is June 8, the date the deed was recorded. Last, there is an argument that the appeal time has yet to begin because no order confirming the transfer has been “filed with and journalized by the clerk of court.”²⁴

Until the board of revision adopts a procedure using a separate order of confirmation, the date of recordation will have to suffice. To use the end of the 45-day redemption period would require actual knowledge by an aggrieved party about whether the property was redeemed without a reliable way to know that since the statute does not call for the fact of redemption to be docketed. To find that the appeal time never started would mean the dismissal of these cases for lack of a final appealable order and leave the property, and every other similar piece of real estate in the county, in legal limbo. But the date of recordation is the

²⁴ R.C. 323.79.

first date of notice to the public that the transfer ordered on April 12 was finally consummated.²⁵

Having found that the 14-day statutory appeal period began on June 8, 2010, the court finds that the appeals of Park View (filed June 18) and Circle Development (filed June 21) are timely.

The amended complaint

The treasurer's first request that the alternative redemption period apply in this case was in the amended complaint filed January 26, about ten weeks before the final hearing. Although the treasurer claims to have made an oral motion on October 23, 2009, for leave to amend the complaint to add a remedy under the alternative redemption period,²⁶ there is no journal entry that such a motion was made, much less granted.

While it is true that the rules of civil procedure are not applicable to the proceedings of the board, there is no evidence that the board has adopted any rules of procedure as encouraged by R.C. §323.66. This void means that board proceedings are not conducted under any consistent, identifiable rules. The absence of any standard procedures leaves the board with unlimited discretion, and that can lead to unfairness because the parties have no idea what they need to do to vindicate their rights even if, unlike Park View, they do attend a hearing.

As the land bank has argued, "these are statutory proceedings governed by specific laws."²⁷ Because the board has not adopted any rules of procedure, particularly regarding pleadings, it should be held to the strict terms of the authorizing statute. That statute, at R.C. §323.69(A), allows only a "complaint." Even though the law refers to "subsequent

²⁵ Even this result is imperfect since the "confirmation" cannot be ascertained by reference to the case docket.

²⁶ Treasurer's brief, p. 4.

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pleadings,”²⁸ nowhere does it mention the possibility of an amended complaint. Indeed, the reference to subsequent “pleadings” appears to be to the owner’s motion authorized by R.C. §323.70(B) requesting a dismissal of the complaint, or to the answer in which only limited issues could be raised as described in R.C. §323.72(A). As a result, the board abused its discretion by ordering a remedy not prayed for in the only pleading allowed under its minimal procedural rules.

This matters because, under the original complaint, Park View, knowing that the impositions were far less than the auditor’s valuation, had every reason to be confident that the property would be sold at a public auction since the statute prohibits a direct transfer by the board of revision under those circumstances where the alternative redemption period has not been invoked. This is also why Park View’s failure to attend a hearing is of no consequence: Park View should have been able to rely on the board to follow the last sentence of R.C. §323.71(A)(1) and order the land to a sheriff’s sale.

The board’s notice of final hearing

The board’s failure to include a description of the alternative redemption period in its only final notice of hearing is a consequential omission for the same reasons. The board’s duty is set forth at R.C. §323.78 as follows:

(A)ny notice of final hearing shall include, that upon foreclosure of the parcel, the equity of redemption in any parcel by its owner shall be forever terminated after the expiration of the alternative redemption period, that the parcel thereafter may be sold at sheriff’s sale either by itself or together with other parcels as permitted by law; or that the parcel may, by order of the court or board of revision, be transferred directly to a municipal corporation, township, county, school district, or county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged. (Emphasis added.)

²⁸ R.C. 323.69(c).

This statute does not give the board of revision the discretion to ignore its imperative, and for good reason, since it is only by this notice that a lienholder would learn that, even where the impositions are far less than the auditor's appraised value, the board could transfer the property directly to a land bank without the protection afforded to that lienholder by a sheriff's sale. Indeed, the notice of final hearing the board sent includes an advisement that the property is eligible for direct transfer without a sheriff's sale only if the impositions exceed the auditor's valuation. By issuing that notice the board induced Park View's complacency and its decision not to attend a hearing; a decision, by the way, which is not uncommon in a judicial foreclosure setting where a court will protect the interests of the owner and lienholders regardless of how much or little they participate in the litigation.

CONCLUSION

The board of revision decided the case before it on an amended complaint that is not authorized by the statute governing tax foreclosures before the board and in the absence of any rules of procedure that allow an amended complaint. The board also failed to comply with the provision of R.C. §323.78 requiring a notice of final hearing that describes the availability of the alternative redemption period as a remedy and the possibility that the property will be ordered directly transferred, free and clear of all liens, to a land bank. These were abuses of the board's discretion and deprived the appellants of due process.

To undo the abuse of discretion the parties should be returned to where they were before the error was made. That point is October 23, 2009, just before the board continued the final hearing on the complaint.

Therefore, pursuant to R.C. §2506.04, the court hereby vacates all of the board of
reclosure and the

order to the sheriff of direct transfer. The court further orders that the amended complaint be stricken from the record before the board and remands the treasurer's complaint to the board of revision to be adjudicated in accordance with all applicable statutes.

Finally, because the adjudication of foreclosure is vacated, the court finds that the deed from the sheriff to the Cuyahoga County Land Reutilization Corporation, recorded June 16, 2008 as instrument number 201006080284, is void and of no legal effect. The office of the fiscal officer of Cuyahoga County is ordered to record, without fee, a time-stamped copy of this journal entry in connection with permanent parcel number 956-33-017 upon presentation by Park View, Circle Development, or any other interested party.

IT IS SO ORDERED:

Date: _____

SERVICE

A copy of this journal entry was sent by e-mail, this _____ day of October, 2011, to the following:

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