

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

BAYVIEW LOAN SERVICING, LLC	:	
Plaintiff	:	CASE NO. 2016 CVE 00028
vs.	:	Judge McBride
UNKNOWN HEIRS AT LAW, DEVISEES, LEGATEES, EXECUTORS, AND ADMINISTRATORS OF BRETT M. PARKER, DECEASED, ET AL.	:	DECISION/ENTRY
Defendants	:	

The Law offices of John D. Clunk Co., L.P.A., Jason A. Whitacre and Laura C. Infante, counsel for the plaintiff Bayview Loan Servicing, Inc., 4500 Courthouse Blvd., Suite 400, Stow, Ohio 44224

Jason A. Fountain, assistant prosecuting attorney and counsel for the defendant Clermont County Treasurer, 101 East Main Street, Batavia, Ohio 45103

Christine L. Kurilic, assistant attorney general and counsel for the State of Ohio Department of Taxation, 150 East Gay Street, 21st Floor, Columbus, Ohio 43215

Austin Thies, *pro se*, 4140 Mt. Carmel Tobasco Road, Apartment 4B, Cincinnati, Ohio 45255

This cause is before the court for consideration of a “motion to withdraw deposit” filed by Austin Thies on June 23, 2016. The court scheduled and held a hearing on the motion on July 29th. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On January 8, 2016, the plaintiff Bayview Loan Servicing, LLC filed a complaint in foreclosure against the defendants Unknown Heirs at Law, Devisees, Legatees, Executors, and Administrators of Brett M. Parker, deceased, the defendant the Department of Taxation for the State of Ohio, and the defendant Treasurer of Clermont County.

The plaintiff is the holder of a promissory note in the sum of \$80,744.24, plus interest at the rate of 9.8796% per annum from November 2011. The decedent, Brett M. Parker, secured the promissory note with a mortgage on his property at 2597 Woodville Pike, Goshen, Ohio 45122. When Mr. Parker defaulted and failed to pay on the promissory note and mortgage, the plaintiff declared the debt immediately due and payable, and filed this action in foreclosure.

On March 31, 2016, the court granted the plaintiff's motion for default judgment. At a sheriff's sale held on June 21st, Austin Thies placed the winning bid of \$34,000 for the property at 2597 Woodville Pike, Goshen, Ohio 45122. Mr. Thies placed a deposit of \$10,000 to secure the bid.

Before the court could confirm the sale, Mr. Thies filed a document with the court the same day that his bid won, which stated he would like to withdraw his deposit as he

no longer wanted the property. He stated that he may have made a bad choice and that he no longer wanted the property because of problems with the septic system and underground fuel tanks. Later that day, Mr. Thies filed a second document stating that he wished to withdraw his motion and wanted to continue with the sale of the property.

Two days later, on June 23rd, the defendant filed a motion styled “motion to withdraw deposit.” In his motion, he explained that he incorrectly believed that the \$10,000 deposit he provided represented the entire purchase price of the home, which was priced at \$34,000 at the time he submitted the successful bid. Mr. Thies requested his entire deposit of \$10,000 be returned. Alternatively, he requested \$6,600 be returned, which is the \$10,000 less \$3,400. Mr. Thies maintains that his deposit was only required to be 10% of the purchase price, which is \$3,400.

The plaintiff filed a brief in opposition to Mr. Thies’ motion to withdraw his deposit on July 7th. The plaintiff argued that the sale was conducted properly and that the court has no choice but to confirm the sale. The plaintiff additionally countered that Mr. Thies did not seek intervention under Civ.R. 24, although the plaintiff did not explicitly state the consequence of Mr. Thies’ failure to intervene. Alternatively, if the court grants Mr. Thies’ motion, the plaintiff requested that it be allowed to keep the deposit and that Mr. Thies be required to pay for the costs of the sale, the sale advertisement, the interest from June 21, 2016 to the next sale date, the costs of the next sale, and attorney’s fees.

The defendant Clermont County Treasurer does not oppose Mr. Thies’ motion. The defendant Department of Taxation for the State of Ohio did not file a brief in response to Mr. Thies’ motion.

On July 29th, the court held a hearing on the motion and took the issues raised under advisement.

LEGAL ANALYSIS

Chapter 2329 of the Ohio Revised Code governs procedures for executing against property.¹ “[T]he primary purpose of the judicial sale is to protect the interest of the mortgagor-debtor and to promote a general policy which provides judicial sales with a certain degree of finality.”² Under R.C. 2329.31(A), once the court receives the sheriff’s return of the writ of execution for the land sold, the court confirms the sale if, upon careful examination of the proceedings, the sale was made in conformity with R.C. 2329.01 to R.C. 2329.31(A).³

Although R.C. 2329.31 “speaks in mandatory terms,” Ohio courts have long recognized that the trial court has the discretion within certain bounds to confirm or set aside a judicial sale.⁴ Thus, if the sale was not made in conformity with R.C. 2329.01 to

¹ *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990).

² *Aurora Bank F.S.B. v. Gordon*, 8th Dist. Cuyahoga No. 103138, 2016-Ohio-938, ¶ 12, quoting *Soc. Natl. Bank v. Wolff*, 6th Dist. Sandusky No. S-90-13, 1991 Ohio App. LEXIS 1821 (Apr. 26, 1991).

³ See R.C. 2329.31(A): “Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer making 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, it shall, within thirty days of the return of the writ, direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale and that the attorney who filed the writ of execution make to the purchaser a deed for the lands and tenements. Nothing in this section prevents the court of common pleas from staying the confirmation of the sale to permit a property owner time to redeem the property or for any other reason that it determines is appropriate. In those instances, the sale shall be confirmed within thirty days after the termination of any stay of confirmation.”

⁴ *Ambrose*, 56 Ohio St. at 55, quoting *Michigan Mortgage Corp. v. Oakley*, 68 Ohio App.2d 83, 426 N.E.2d 1195 (1st Dist. 1980).

R.C. 2329.31(A), the court may set it aside instead of confirming it. Additionally, before confirmation of the sale, the “judicial sale may be set aside for the same reasons a party may rescind a contract, which is fraud, mutual mistake, or unilateral mistake.”⁵

In the instant matter, the purchaser Mr. Thies argues, in essence, that the sale should be set aside because he misunderstood the purchase price and was unaware of problems with the home, such as issues with the septic system and an underground gas leak.

The plaintiff Bayview Loan Servicing, LLC counters that the sale should be confirmed because all of the statutory requirements for a judicial sale are satisfied. The plaintiff also argues in its briefing that it is problematic that Mr. Thies never moved to intervene under Civ.R. 24 to become a party to this case.

Whether Mr. Thies was required to intervene in order to participate in court proceedings in this case is a threshold issue that the court must resolve before considering the merits of Mr. Thies’ motion.

A non-party can intervene as a matter of right under Civ.R. 24(A)(2) or, alternatively, a non-party can ask for permissive intervention under Civ.R. 24(B)(2).⁶ In

⁵ *Brandywine Preserve Cluster Assn., Inc. v. Carter*, 9th Dist. Summit No. 27584, 2015-Ohio-4163, ¶ 8. See *Gordon*, 2016-Ohio-938 at ¶ 12, quoting *Horvath v. Packo*, 6th Dist. Lucas No. L-11-1318, 2013-Ohio-56, ¶ 50 (“* * *Ohio courts have consistently held that the confirmation of a judicial sale cannot be set aside except for “fraud, mistake or some other cause, for which equity would avoid a like mistake between private parties.””).

⁶ Civ.R. 24 provides: “(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

“(B) Permissive intervention Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive

order to intervene, Civ.R. 24(C) provides that the intervenor “shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought.”

On two occasions, the Ohio Supreme Court has discussed the types of rights that third party purchasers have before the court confirms a judicial sale. First, in *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 563 N.E.2d 1388 (1990), the Court explained that the rights of third party purchasers in a judicial sale can vary, depending on whether the court has confirmed the sale. The issue in *Ambrose* was whether the purchasers at a judicial sale had a right to appellate review from a trial court’s denial of confirmation.⁷ The court held that “[p]urchasers at a foreclosure sale have no vested interest in the property prior to confirmation of the sale by the trial court. As a result, the purchasers have no standing to appeal when the trial court denies confirmation.”⁸ At first blush, *Ambrose* would appear to limit the rights of purchasers until the judicial sale is confirmed, providing them with no rights until *after* confirmation.

In the second case, however, the Ohio Supreme Court subsequently clarified its holding in *Ambrose* in *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 664 N.E.2d 931 (1996). It becomes clear in considering *Pontious* that purchasers from a judicial sale do have *some* rights before the judicial sale is confirmed, although

order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

⁷ *Ambrose*, 56 Ohio St. at 54.

⁸ *Id.* at the syllabus.

under *Ambrose* they still cannot appeal a trial court's decision to set aside the sale. Thus, the *Pontious* Court clarified that, before confirmation of a judicial sale, the purchaser has "some type of interest in the *proceedings*," but that interest is insufficient to give the purchaser "standing to appeal" a court's decision to confirm or set aside the judicial sale.⁹ Although a purchaser may not have standing to appeal a confirmation or denial, "*Ambrose* is consistent with a finding that the purchaser's ability to participate in confirmation proceedings as a party, for any purpose, depends on the purchaser's intervention."¹⁰

Following these Ohio Supreme Court opinions, multiple districts have addressed whether a purchaser can participate in proceedings that relate to setting aside a judicial sale or confirming a judicial sale if the purchaser first intervenes. All of them have concluded that a third party purchaser has standing to participate in foreclosure proceedings before confirmation of the sale when the purchaser intervenes.¹¹

⁹ (Emphasis original.) *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 567, 664 N.E.2d 931 (1996), citing to *Ambrose*, 56 Ohio St.3d at 54-55.

¹⁰ (Emphasis added.) *Id.* at 568.

¹¹ Although multiple districts have directly dealt with this issue, the Twelfth District Court of Appeals has not. Since *Pontious*, only one Twelfth District Court of Appeals case has discussed the rights of a purchaser to participate in foreclosure proceedings before the confirmation of a sale. However, because the case did not deal with intervention, it is not particularly insightful for the case at bar. In *Bank of New York v. Rains*, 12th Dist. Butler No. CA2012-04-092, 2013-Ohio-2389, an appellant whose property was foreclosed upon and sold appealed. The appellant argued on appeal, *inter alia*, that the attorney who represented the purchaser of the property should not have been at the hearing on the appellant's objection to the confirmation of the sale. *Id.* at ¶ 25. Specifically, the appellant argued that the attorney should be disciplined for a conflict of interest. *Id.* The court rejected this argument because the appellant failed to show how the presence of the purchaser's attorney would have prejudiced him. *Id.* The court concluded that "Even if Carlson was in the courtroom acting in his capacity as Newmar Properties' attorney, a purchaser of property at a sheriff's sale has no standing regarding the granting or denying of confirmation of the sale." *Id.* at ¶ 27, citing *Ambrose*, 56 Ohio St.3d at 55. The facts in *Rains* do not relay whether the purchaser had intervened before having its counsel present at the confirmation hearing. *Rains*, therefore, is not instructive on whether a purchaser may participate in court proceedings related to the judicial sale before the court confirms the sale when the purchaser first intervenes.

For instance, the Fourth District Court of Appeals has found that “* * * purchasers in foreclosure actions do have the right to intervene and participate to protect their interests incident to the sale prior to confirmation.”¹² Accordingly, third party purchasers have “standing to move the court to intervene and appear in order to protect their acquired interest in their property.”¹³

In reaching the same conclusion, in *Freedom Mortgage Corporation v. Milhoan*, 7th Dist. Columbiana No. 13 CO 15, 2014-Ohio-881, the Seventh District Court of Appeals provided a thorough review of *Ambrose* and *Pontious* to determine whether the purchasers of a foreclosed property could intervene so that they could oppose the mortgage holder’s motion to set aside the sale.¹⁴ Under *Ambrose* and *Pontious*, the court resolved that the purchasers had a legally protectable interest in the property for the purposes of intervention under Civ.R. 24(A)(2).¹⁵ The Sixth, Ninth, and Tenth Districts have also reached conclusions similar to those reached by the Fourth and Seventh Districts.¹⁶

In turning to the instant case, the court must determine whether it can consider Mr. Thies’ motion to “withdraw deposit,” which is essentially a motion to set aside the

¹² *Farm Credit Servs. of Am. v. Pertuset*, 4th Dist. Scioto No. 14CA3659, 2015-Ohio-3558, ¶ 12 quoting *EMC Mtge. Corp. v. Pratt*, 10th Dist. Franklin No. 07AP-214, 2007-Ohio-4669, ¶ 11.

¹³ *Pertuset*, 2015-Ohio-3358 at ¶ 13.

¹⁴ *Freedom Mtge. Corp. v. Milhoan*, 7th Dist. Columbiana No. 13 CO 15, 2014-Ohio-881, ¶ 1.

¹⁵ *Id.* at ¶ 67.

¹⁶ See *Mid-American Nat. Bank v. Heiges*, 6th Dist. Ottawa No. 94OT025, 1994 WL 645780, *2 (Nov. 18, 1994) (holding, upon reviewing *Ambrose*, that the purchaser did have standing in a foreclosure action after intervening before the confirmation of the sale); *Old Kent Mortg. Co. v. Delozier*, 9th Dist. Lorain No. 99CA007463, 2000 WL 1471069, *1 (Oct. 4, 2000) (finding that “it is clear” from reviewing *Ambrose* and *Pontious* that the trial court had the discretion to grant a purchaser’s motion to intervene before the court confirmed the judicial sale so that the purchaser could oppose the mortgagor’s motion to vacate the sale); *Franklin Cty. Treasurer v. Kafele*, 10th Dist. Franklin No. 05AP-252, 2005-Ohio-6618, ¶ 8 (finding that once a third party purchaser became the successful bidder, the purchaser had standing to protect his acquired interest in the property).

sale. At the time Mr. Thies filed his motion, the court had not yet confirmed the sale. The above cases indicate that Mr. Thies has an interest in the foreclosed property as a third party purchaser, and therefore Mr. Thies has standing to intervene. However, Mr. Thies has not, to date, intervened using the procedures set forth in Civ.R. 24(C). As *Pontious* evidences, Mr. Thies' right to participate in these proceedings prior to confirmation is dependent upon whether Mr. Thies intervenes: " * * * [T]he purchaser's ability to participate in confirmation proceedings as a party, for any purpose, depends on the purchaser's intervention."¹⁷ Because Mr. Thies is not a party to this case and has not intervened, the court concludes that it must deny Mr. Thies' motion to withdraw his deposit.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion to withdraw his deposit is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

¹⁷ (Emphasis added.) *Pontious*, 75 Ohio St.3d at 568.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order were sent on this 18th day of August 2016 to Charles V. Gasior and Robert V. Hoose, at requests@johndclunk.com, and Jason A. Whitacre and Laura C. Infante, at notice@johnclunk.com, attorneys for the plaintiff Bayview Loan Servicing LLC, to Christine L. Kurilic, at Christine.Kurilic@ohioattorneygeneral.gov, attorney for the defendant State of Ohio, Department of Taxation, and to Jason A. Fountain, at jfountain@clermontcountyohio.gov, attorney for the defendant Clermont County Treasurer, and by regular U.S. Mail to Austin Thies, movant, at 4140 Mt. Carmel Tobasco Rd., Apt. 4B, Cincinnati, Ohio 45255. A courtesy copy was provided to A.J. Rodenberg, Clermont County Sheriff, 4470 State Route 222, Batavia, Ohio 45103-9777.

Administrative Assistant to Judge McBride