

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

**WELLS FARGO BANK, N.A.,** :  
**TRUSTEE POOLING AND SERVICING**  
**AGREEMENT DATED AS OF NOV. 1,** : **CASE NO. 2011 CVE 01338**  
**2004 ASSET-BACKED PASS-**  
**THROUGH CERTIFICATES, SERIES** :  
**2004-WHQ2** :  
Plaintiff : **Judge McBride**  
vs. :  
**ESTHER EICHELBRENNER, et al.** : **DECISION/ENTRY**  
Defendants :  
:

Dinn, Hochman & Potter, LLC, Benjamin D. Carnahan and Thomas A. Barni, counsel for the plaintiff Wells Fargo Bank, N.A., 5910 Landerbrook Drive, Suite 200, Cleveland, Ohio 44124.

Dever Law Firm, Scott A. Hoberg and Jonathan T. Dever, counsel for the defendant Esther Eichelbrenner, 9146 Cincinnati-Columbus Road, West Chester, Ohio 45069.

This cause is before the court for consideration of a motion for supersedeas bond and stay of execution filed by the defendant Esther Eichelbrenner.

The court scheduled and held a hearing on the motion on November 8, 2013. 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**

The plaintiff Wells Fargo Bank, N.A., Trustee Pooling and Servicing Agreement dated as of November 1, 2004 Asset-Backed Pass-Through Certificates, Series 2004-WHQ2 (hereinafter referred to as “Wells Fargo”) filed its complaint for foreclosure in the present case on August 1, 2011. After obtaining service on Esther Eichelbrenner on August 9, 2011, the plaintiff moved for default judgment on November 15, 2011. Default judgment was granted by the court and the judgment entry was journalized on November 21, 2011.<sup>1</sup>

The property was sold at sheriff’s sale on April 10, 2012.<sup>2</sup> On July 9, 2012, the judgment entry confirming sale and ordering distribution was filed and in that entry it was ordered that the Sheriff convey the deed to the property to the plaintiff (who was the assignee of the successful bidder at the sale) and distribute the proceeds of the sale to the five parties entitled to receive said proceeds.<sup>3</sup> The docket of this case indicates that the amount of \$1,969.31 ordered disbursed to the Clerk of Courts in the judgment entry was received by the Clerk of Courts on August 15, 2012.

The defendant Esther Eichelbrenner filed a motion to vacate the judgment and stay eviction proceedings on March 25, 2013. The court issued a written decision on

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<sup>1</sup> Judgment Entry, filed November 21, 2011.

<sup>2</sup> Order of Sale, filed April 16, 2012.

<sup>3</sup> Judgment Entry Confirming Sale and Ordering Distribution, filed July 9, 2012.

June 10, 2013, denying the motion to vacate the judgment, which rendered the motion to stay eviction proceedings moot.

The defendant now moves the court for the imposition of a supersedeas bond and for a stay of execution of the judgment in the present case.

### **LEGAL ANALYSIS**

Pursuant to Civil Rule 62(B), “[w]hen an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.”

R.C. 2505.09 provides in pertinent part that “[e]xcept as provided in section 2505.11 \* \* \*, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee \* \* \*.” R.C. 2505.11 in turn provides that “[a] conveyance of property may be ordered by a court instead of a supersedeas bond in connection with an appeal \* \* \* .”

The defendant Esther Eichelbrenner asks this court to stay execution of the judgment in this case and asks that the deed to the subject property be held in lieu of a supersedeas bond.

In *Villas at Pointe of Settlers Walk Condominium Assn. v. Coffman Dev. Co.* (June 21, 2010), 12<sup>th</sup> Dist. No. CA2009-12-165, 2010-Ohio-2822, the property at issue

was sold at sheriff's sale and the journal entry confirming sale and ordering distribution of the proceeds was filed.<sup>4</sup> Prior to the sale, RFSTH, which was asserting a competing lien on the property, filed an appeal of the entry granting judgment to Wells Fargo Bank, but RFSTH did not request a stay of the sale or of execution of the judgment.<sup>5</sup>

The appellate court dismissed the appeal as moot, noting that “[i]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action.”<sup>6</sup>

The court discussed two cases where Ohio courts have reached the merits of a foreclosure issue despite a sale and distribution of the proceeds, but noted that those cases were distinguishable because the defendant in the first case was given the opportunity to post a supersedeas bond prior to the sale and disbursement of funds and failed to do so and in the second case there was a lack of clarity of a final judgment due to multiple orders issued by the court and the defendant was also given the opportunity to post a bond but failed to do so.<sup>7</sup> Those two courts found that restitution was a possible means for recovery.<sup>8</sup> The appellate court in *Villas at Pointe of Settlers Walk Condominium Assn.*, noted that “RFSTH did not request a stay and stood idly by as the property was sold and the proceeds distributed.”<sup>9</sup> The court concluded that “the sale and distribution of funds has rendered the matter extinguished through satisfaction of

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<sup>4</sup> *Villas at Pointe of Settlers Walk Condominium Assn.*, supra, at ¶ 5.

<sup>5</sup> Id.

<sup>6</sup> Id. at ¶ 11, citing *Bankers Trust Co. of Cal., N.A. v. Tutin*, Summit App. No. 24329, 2009-Ohio-1333, at ¶ 16; *Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225; *Aurora Loan Serv. v. Kahook*, Summit App. No. 24415, 2009-Ohio-2997, ¶ 7; *Charter One Bank v. Mysyk*, Geauga App. No.2003-G-2528, 2004-Ohio-4391, ¶ 4; and, *Alegis Group v. Allen*, Portage App. No.2002-P-0026, 2003-Ohio-3501, ¶ 10.

<sup>7</sup> Id. at ¶¶ 13-15, discussing *Chase Manhattan v. Locker*, Montgomery App. No. 19904, 2003-Ohio-6665; and *Ameriquet Mortgage v. Wilson*, Ashtabula App. No.2006-A-0032, 2007-Ohio-2576.

<sup>8</sup> Id.

<sup>9</sup> Id. at ¶ 16.

the judgment, and like unpeeling the apple, this court cannot afford relief to the parties in the action.”<sup>10</sup>

The Twelfth District Court of Appeals did note in that case that the issue on appeal was the issue of lien priority brought by a judgment lien holder.<sup>11</sup> The court stated that “[t]he decision regarding who has a superior lien is different from a debtor challenging whether the foreclosure was proper or other issues that may arise between a mortgagor and mortgagee.”<sup>12</sup>

Although that case dealt with the mootness of an appeal, which is not before this court, it is instructive on the issue of whether the court may grant a stay of execution after the sale has been confirmed and the proceeds have been distributed. In the case at bar, the property was sold, the sale was confirmed, the deed to the property was transferred, and the proceeds were ordered distributed prior to the defendant’s motion to vacate and prior to the present motion for stay of execution. The judgment has already been executed upon and the interest in the property has been conveyed.

While the Twelfth District’s discussion in *Villas at Pointe of Settlers Walk Condominium Assn.* of the distinction between a foreclosure appeal brought by a lien holder and an appeal brought by a debtor suggests that it could choose to reach the merits of this case on appeal, that court also noted that the courts that did reach the merits of a foreclosure case after confirmation of the sale and distribution of the proceeds held that restitution was a possible means for recovery, not the return of the property to the defendant.

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<sup>10</sup> Id. at ¶ 18.

<sup>11</sup> Id. at ¶ 17.

<sup>12</sup> Id.

Therefore, it would not provide sufficient security to simply order the deed to the property to be held in lieu of a supersedeas bond. The court also notes that the subject property would not provide sufficient security for satisfaction of the plaintiff's judgment because the amount ordered to the plaintiff in this case was \$141,869.50<sup>13</sup> plus interest, while the property sold at sheriff's sale for on \$63,334.00.<sup>14</sup>

Regardless, and more to the point, as noted above, the judgment entry confirming the sale and ordering distribution of the proceeds has been filed. The interest in the property has been conveyed and the proceeds have been distributed. There is no execution to stay as the judgment in this case has been executed upon. While there are eviction proceedings underway in Clermont County Municipal Court, those proceedings are not under the purview of this court.

Based on the above analysis, the defendant's motion for a stay of execution shall be denied.

## **CONCLUSION**

The defendant Esther Eichelbrenner's motion for a stay of execution is not well-taken and is hereby denied. Therefore, the motion for a supersedeas bond is hereby rendered moot.

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<sup>13</sup> Judgment Entry, filed November 21, 2011.

<sup>14</sup> Order of Sale, filed April 16, 2012.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 2nd day of December 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride