

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 10-856

NOCK INVESTMENTS, LLC; JOHN &
JILL NOCK; and HANK BROYLES
APPELLANTS

V.

FIRST NATIONAL BANK OF FORT
SMITH

APPELLEE

Opinion Delivered March 2, 2011

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CV-09-2567-6]

HONORABLE MARK LINDSAY,
JUDGE

DISMISSED

WAYMOND M. BROWN, Judge

This is an appeal from the denial of a motion to set aside a commissioner's sale. Nock Investments, LLC; John and Jill Nock; and Hank Broyles (the Nocks) asked the court to set aside the sale in light of the low price of the sale and irregularities in the notice of the foreclosure sale. The circuit court, however, found that the purchase price of the subject property did not shock the conscience of the court and that the irregularities in the notice for the sale of the property did not result in any person being confused as to the date of the sale. While not raised by the parties, we have discovered a jurisdictional issue. The Nocks failed to file a timely notice of appeal. We dismiss.

Background

In March 2006, the Nocks borrowed \$4.5 million from the First National Bank of Fort Smith. In return, they gave the Bank a two-year note, secured by a mortgage on the subject

property. Despite being given a couple of extensions, the Nocks were unable to pay the note when the balloon payment became due. The Bank filed a foreclosure complaint in July 2009, and the court entered a foreclosure decree in December 2009.

On January 12, 2010, the commissioner of the circuit court issued a notice of commissioner's sale on March 8. The Bank's attorney contacted the clerk's office and asked if the sale could take place on a different date. Three days later, the clerk agreed to move the date of the sale, and the commissioner issued another notice, listing February 23 as the date of the sale. On January 20, the *Arkansas Democrat-Gazette* published notice of the sale. That same date, Northwest Arkansas Newspapers, LLC, filed an affidavit of publication, but the notice in that affidavit listed the March 8 sale date. Counsel for the Nocks contacted the Bank's attorney and notified him of the error. The Bank's attorney replied that the first affidavit of publication was incorrect and that the sale would happen on February 23. Northwest Arkansas Newspapers later filed a second affidavit of publication, stating that it was replacing the previous affidavit with the incorrect sale date and attaching to it a notice with the correct date. Notice of the sale was also posted at the Washington County Courthouse and five other public places in Fayetteville, including at the subject property. The *Arkansas Democrat-Gazette* published a second notice of the foreclosure sale, containing the correct sale date.

Before the sale, the Bank had the subject property appraised. The appraiser concluded that the "as is" value of the property as of February 13, 2009, was \$1.35 million. The sale was

held as scheduled on February 23, and the Bank purchased the property for \$945,000. The court approved the foreclosure sale and Commissioner's deed and entered a deficiency judgment against the Nocks.

The Nocks filed a motion to have the sale and the Commissioner's deed set aside. They filed affidavits stating that they conducted an online search for foreclosure notices published in the *Morning News* and that notice of the sale listed the March 8 sale date. They alleged that they reviewed the case file at the clerk's office on February 22 and that the only notice of the Commissioner's sale in the file listed the March 8 sale date. The Nocks also presented a "Purchase Agreement," dated February 23, 2010, whereby another company agreed to buy the subject property for \$3.75 million. The sale was conditioned upon the buyer finding proper financing and the Nocks being able to obtain a release with no deficiency from the Bank.

The circuit court held a hearing on the Nocks' motions in April 2010. Three days later, it entered an order refusing to set aside the Commissioner's sale or deed. The court acknowledged that, according to the Nocks, the subject property had an appraised value of more than \$5.6 million in 2006, but it also noted that the Nocks did not dispute that the most recent appraisal valued it at only \$1.35 million. Thus, it found that the \$945,000 sale price did not shock the conscience of the court. The court also noted the irregularity in the publication of the notice of sale, but it found that the Nocks could not show excusable neglect on their part or any confusion on the part of any prospective purchaser. Finally, the court concluded

that the purchase agreement could not be used as proof of the fair market value of the property, as that sale did not close and as the sale was conditioned upon several events. After the circuit court entered its order, the Nocks filed a notice of appeal.

Analysis

The Nocks present two points on appeal. First, they argue that the Commissioner's sale should have been set aside because the purchase price was so low as to shock the conscience of the court. As evidence of the low purchase price, they rely on the value of the original note (\$4.5 million) and the written offer to purchase the property for \$3.75 million. Second, they argue that the extremely low price, combined with the irregularities in the publications of the notice of foreclosure sale, resulted in an inherently unjust and unfair sale.

We have no jurisdiction to consider this appeal due to the Nocks' failure to file a timely notice of appeal. The timely filing of a notice of appeal is jurisdictional, and we are required to raise the issue of subject-matter jurisdiction on our own motion.¹ An order or decree confirming a foreclosure sale is a separate, final, and appealable order, and a notice of an appeal must be given within thirty days of that order.² A motion to set aside a foreclosure sale is a post-trial motion that operates to extend the time for filing a notice of appeal.³ But

¹ *E.g.*, *Weems v. Garth*, 338 Ark. 437, 993 S.W.2d 926 (1999).

² *Seay v. C.A.R. Transp. Brokerage Co.*, 366 Ark. 527, 237 S.W.3d 48 (2006).

³ *Id.*

such motions are deemed denied if the circuit court fails to rule on them within thirty days, and a notice of appeal is due within thirty days of that date.⁴

Here, the circuit court entered the order approving of the foreclosure sale and Commissioner's deed on February 25, 2010. The Nocks filed a motion to set aside the deed the day before, and they filed an objection to the entry of order approving foreclosure sale and Commissioner's deed on February 25. Though the circuit court entered an order denying the Nocks' motion and objection on April 23, they were deemed denied by operation of law on March 29 (March 27 was a Saturday). The Nocks' notice of appeal was due thirty days after that date (April 29). The Nocks did not file a notice of appeal until May 24. Despite the fact that they filed a notice of appeal within thirty days of the order explicitly denying their motion to set aside and objection to the entry of the confirmation order, their notice of appeal is untimely. We have no choice but to dismiss this appeal.

Dismissed.

HART and WYNNE, JJ., agree.

⁴ *Id.*; see also Ark. R. App. P.—Civ. 4(b)(1).