

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA11-365

PINNACLE POINT PROPERTIES,  
LLC, ET AL.

APPELLANTS

V.

METROPOLITAN NATIONAL BANK  
ET AL.

APPELLEES

Opinion Delivered April 18, 2012

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT,  
[NO. CV 2009-3666-6]

HONORABLE DOUG SCHRANTZ,  
JUDGE

DISMISSED IN PART; AFFIRMED IN  
PART

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**ROBIN F. WYNNE, Judge**

This is an appeal from an order of the court confirming a foreclosure sale and from an order awarding appellee Metropolitan National Bank a judgment in the amount of \$168,044 after appellant Pinnacle Point Properties, LLC (PPP), was found in contempt of court for failing to remit rents it collected during the pendency of the foreclosure proceeding. For reversal, PPP argues that the circuit court abused its discretion in confirming the foreclosure sale because there were irregularities in the sale, the commissioner conducting the sale disqualified a qualified potential buyer, and the price received at the sale was inadequate. PPP further argues that the circuit court erred in awarding Metropolitan a judgment for PPP's civil contempt because the court found that it could not pay to purge the contempt. We affirm in part, and dismiss as moot in part.



In July 2003, PPP, its subsidiaries, and guarantors entered into a loan agreement in which Metropolitan loaned PPP \$41 million.<sup>1</sup> On December 7, 2009, Metropolitan filed a foreclosure action against PPP and others, seeking foreclosure of various mortgages on commercial office space in Rogers, Arkansas. This complaint was later amended.<sup>2</sup> The amended complaint sought the appointment of a receiver to manage the property and collect the rents, which were assigned to Metropolitan by the subsidiaries. On January 20, 2010, the circuit court appointed Dewitt Smith as receiver.

On April 5, 2010, Metropolitan filed a motion for contempt, requesting that Thornhart Venture, LLC, a nonparty company affiliated with PPP, be held in contempt for failing to pay certain rents to the court-appointed receiver.

A hearing was held on September 7, 2010, on the foreclosure complaint, the motion for contempt, and other issues. The circuit court granted foreclosure, and the foreclosure decree was entered later that same day. Metropolitan was awarded judgment of approximately \$38.9 million against PPP, its subsidiaries, and its guarantors. The decree appointed the circuit clerk as commissioner to conduct the sale of the property. It was also provided that any

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<sup>1</sup>The subsidiaries include Stoneybrook Creeks, LLC, Pinnacle Point Holdings, LLC, Pinnacle Point, LLC, Pinnacle Point Partners, LLC, Osage Partners, LLC, Pinnacle Point Plaza, LLC, and Hart & Haynes, LLC. They are the record title owners and executed mortgages in favor of Metropolitan to secure PPP's indebtedness to Metropolitan. Bill W. Schwyhart, Carolyn Schwyhart, Robert B. Thornton, and Frieda V. Thornton were guarantors of the loans. Bill Schwyhart is the managing member of PPP. We refer to PPP as the sole appellant.

<sup>2</sup>The foreclosure suit was later consolidated with a lender-liability suit PPP had earlier filed against Metropolitan. PPP nonsuited the lender-liability suit on September 7, 2010. The order dismissing the lender-liability complaint also dismissed PPP's third-party complaint.



purchaser at the foreclosure sale must execute a bond or letter of credit for 10% of the purchase price, bearing interest of 7% from the date of sale until paid, with a surety to be approved by the commissioner. The receivership was to remain in place until the court entered an order confirming the sale.

On September 16, 2010, the circuit court entered an order finding PPP in contempt for failing to pay \$168,044 in rents to the receiver. PPP was ordered to pay the \$168,044 in rents to the receiver within thirty days to purge the contempt. A hearing was set for the court to determine whether PPP had complied with the order and for further remedies if it failed to purge itself of contempt.

The foreclosure sale was held on September 28, 2010. At the sale, Hunt Ventures, LLC, purchased the property with a high bid of \$24.1 million on behalf of North Pinnacle Properties, LLC. PPP objected to the sale, arguing that (a) the winning bid was grossly inadequate; (b) the commissioner disqualified a valid bidder, Art Edwards, because Edwards's bond or letter of credit was drawn on a foreign bank; (c) the winning bidder was an entity formed by persons controlling entities involved in the case at bar; and (d) the property would bring a better price at resale. The circuit court overruled the objections and confirmed the sale by order entered on October 13, 2010. Specifically, the court found<sup>3</sup> that there was no proof that the sale price of \$24.1 million was an insufficient price or that it shocked the conscience of the court. The court noted that real estate prices can vary drastically over time and that past

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<sup>3</sup>These findings as to the confirmation of the sale were made as part of the order on the contempt citation.



valuations have little relevance as to the fair market value as of the date of sale. The court also found that the commissioner properly exercised her discretion in refusing to accept Edwards's submission of a fax copy of a letter of credit drawn on a foreign bank. Finally, the court found that the commissioner's notice of sale sufficiently complied with statutory requirements and that the entire sales process complied with Arkansas law.

On October 12, 2010, a hearing was held to determine whether PPP had purged itself of contempt and on PPP's objections to the confirmation of the foreclosure sale. PPP stipulated that it had not paid the \$168,044 because it had filed for bankruptcy protection in April 2010. The circuit court found that PPP had failed to purge the civil-contempt citation. Although the court found that PPP could not pay, it entered an order on October 28, 2010, granting judgment to Metropolitan against PPP in the amount of \$168,044. On November 12, 2010, PPP filed its notice of appeal from the order confirming the foreclosure sale and from the order granting judgment to Metropolitan as a contempt sanction.

For its first point on appeal, PPP argues that the circuit court erred in confirming the foreclosure sale. We cannot address the argument because it is moot due to PPP's failure to obtain a supersedeas bond.

When property is sold at a judicial sale to one not a party to the suit, a subsequent reversal of the decree does not affect the purchaser's title. *See Quillen v. Twin City Bank*, 253 Ark. 169, 485 S.W.2d 181 (1972); *Griffin v. Solomon*, 237 Ark. 653, 375 S.W.2d 232 (1964); *Orem v. Moore*, 224 Ark. 146, 272 S.W.2d 60 (1954). In *Fox v. Pinson*, 180 Ark. 68, 20 S.W.2d 645 (1929), it was held that a mortgagor was not entitled to relief where he failed to



obtain a supersedeas bond and the property was purchased by a nonparty in good faith.<sup>4</sup> Once foreclosed property is sold to a bona fide third-party purchaser, a court generally lacks the power to craft an adequate remedy for the debtor. *United States v. Fitzgerald*, 109 F.3d 1339, 1342 (8th Cir. 1997). Therefore, a debtor such as PPP who fails to obtain a stay of the sale has no remedy on appeal, and the appeal is moot. *Id.*; see also *Fox*, *supra*.

PPP's second point is that the circuit court erred in awarding Metropolitan a judgment against PPP when the court found that PPP lacked the ability to pay. PPP argues that inability to pay is a complete defense to contempt and the court should have dismissed the contempt citation.

At the hearing on whether PPP had purged the contempt, it stipulated that it had not paid the approximately \$168,000 as ordered by the circuit court. Bill Schwyhart, PPP's managing member, testified that PPP had filed for bankruptcy protection in April 2010, and all non-operating disbursements must be approved by the bankruptcy court. He said that PPP was unable to secure a loan to pay the \$168,000 without posting cash or a certificate of deposit as collateral. He said that the money went to meet payroll and invoices from November 2009 through entry of the circuit court's order on January 20, 2010. That money came from other companies connected with PPP and managed by Schwyhart. According to Schwyhart, the other companies were supporting PPP and it owed them approximately \$2.5

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<sup>4</sup>PPP recognizes this rule but argues that the purchaser at the foreclosure sale is not a bona fide purchaser because it is an entity formed by former business partners of Bill Schwyhart. There was no proof of this. Moreover, this issue was not presented to the circuit court.



million. He also said that the money from all of the companies ended up in the same bank account.

We first note that we cannot address the initial contempt finding because PPP failed to file a notice of appeal from the September 16, 2010 order finding it in contempt. Generally, a finding of contempt is a final, appealable order. *See Young v. Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). Moreover, PPP did not raise the issue of its inability to pay at the first hearing on contempt; instead, it waited to raise the issue until the hearing to determine whether it had purged itself of the contempt. PPP did file a timely notice of appeal from the October 28, 2010 order granting judgment to Metropolitan.

Judicial sanctions in civil-contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–04 (1947); Terry Crabtree, *Contempt Law in Arkansas*, 51 Ark. L. Rev. 1, 4 (1998). It has long been the rule in Arkansas that, in certain cases, a process for contempt may be used to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct. *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004); *Walker v. Fuller*, 29 Ark. 448, 469 (1874); *Butler v. Comer*, 57 Ark. App. 117, 942 S.W.2d 278 (1997); *Payne v. White*, 1 Ark. App. 271, 614 S.W.2d 684 (1981). In cases of civil contempt, the objective is the enforcement of the rights of the private parties to litigation. *Warren v. Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). Punishment for civil contempt will be upheld by this court unless the circuit



court's order is arbitrary or against the weight of the evidence. *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974).

PPP relies on the supreme court's decision in *Griffith v. Griffith*, 225 Ark. 487, 283 S.W.2d 340 (1955), a postdivorce contempt case, where the supreme court said that the "lack of ability to pay is a complete defense against enforcing payment from the defendant by imprisonment." *Id.* at 490, 283 S.W.2d at 342. The former husband was totally disabled and unable to pay the alimony. *Id.* at 489, 283 S.W.2d at 342. The court in *Griffith* reversed and dismissed the contempt adjudication and jail sentence. *Id.* at 491, 283 S.W.2d at 343. However, the court went on to affirm a judgment for the unpaid alimony arrearages. *Id.* Therefore, contrary to PPP's assertion, *Griffith* does not require that the judgment for the unremitted rental payments be reversed.

Dismissed in part; affirmed in part.

VAUGHT, C.J., and GLADWIN, J., agree.

*Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, by: *Robert K. Rhoads*, for appellants.

*Williams & Anderson PLC*, by: *Jess Askew III* and *Andrew King*, for appellee Metropolitan National Bank.