

## REAL ESTATE

# Appealing Party Must File Bond to Protect Property Interest

BY ALAN NOCHUMSON

*Special to the Legal*

In two recent decisions, Pennsylvania courts have cautioned litigants who have failed to protect their property interests during the appeal process.

In *Detusche Bank National Company v. Butler*, the Superior Court of Pennsylvania dismissed an appeal of a trial court order setting aside a sheriff's sale based upon mootness because the property was sold at a subsequently scheduled sale.

In *Butler*, the bank foreclosed on the property after its borrowers failed to make the monthly payments due under the promissory note. The bank then scheduled the property for sheriff's sale. At the time of the sheriff's sale, the bank instructed its attorney to bid up to \$240,600, an amount equal to the upset price (total amount of judgment and costs), for the property.

At the sheriff's sale, a third party bid \$25,000 for the property. Since the bank's attorney mistakenly failed to increase the bid, the property was sold to the bidder. Later that day, the bank's attorney filed a motion to set aside the sheriff's sale. Afterward, the trial court entered an order granting the motion and scheduled the property for another sheriff's sale.

After appealing the trial court's ruling, the bidder petitioned the trial court to stay the rescheduled sheriff sale. In his petition, the



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bidder offered to post a bond in the amount of \$25,000, the amount of his original bid, to operate as a supersedeas. The trial court granted the supersedeas on the condition the bidder posted a bond in the amount of \$255,000. Since the bidder never posted the bond, the sheriff's sale was not stayed. The bank purchased the property at the second sale. Subsequently thereafter, the sheriff delivered the deed to the bank.

The bank then filed a motion to dismiss the appeal on the ground of mootness. In granting the motion, the Superior Court found that, since the property was sold at the second sale, an order declaring the first sale valid would have no effect.

The Superior Court said the bidder did not exhaust his remedies in preventing the issue from becoming moot. The Superior Court pointed out that, "while the b[idd]er] now

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### AREA MORTGAGE RATES

Lender	Fixed Rates		Adjustable Rates	Jumbo Rates*	Commercial
	30 yr.	15 yr.	1 yr.	30 yr. fixed	Yes/No**
AA E Mortgage 877-793-1400	5.50/0	5.00/0	N/A	5.75/0	No
Home Finance of America 888-358-5626	5.50/0	5.13/0	5.25/0	6.00/0	No
Lighthouse Mortgage 800-784-1331	5.63/0	5.13/0	N/A	5.88/0	No
Stepping Stone Lending 800-638-2659	5.63/0	5.25/0	N/A	5.88/0	No
Wilmington Mortgage 610-558-3099	5.63/0	5.25/0	N/A	5.88/0	No
Third Federal Savings 215-968-4444	5.88/0	5.50/0	N/A	5.99/0	No
Absolute Mortgage Company 888-904-6637	5.38/0.25	5.00/0	4.50/0	5.75/0	No
Turnstone Mortgage 800-757-7514	5.50/0.25	5.25/0	4.88/0	6.00/0	No
American Federal Mortgage 888-321-4687	5.25/1.25	4.88/1.25	4.00/0	5.75/0	No
Indemac Home Loan 877-839-9829	5.25/1	4.88/1.5	4.25/1	5.50/1.5	No
East Coast Financial 800-353-9440	5.38/1	5.25/0	N/A	N/A	No
American Family Mtg. 610-358-5324	5.13/2	4.63/2	3.99/0	5.38/2	No

\* A "Jumbo" or non-conforming mortgage is a loan amount in excess of \$370,000.

\*\* Indicates if a lender offers mortgage loans for commercial properties. Call to discuss rates and terms.

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complains that the trial court erred in setting the amount of the supersedeas at \$255,000, he never filed a motion with the trial court or the Superior Court ... objecting to the amount of the security. Instead, the [bidder] chose not to file the bond or a motion, and the property was sold."

In a footnote, the Superior Court distinguished *Butler* from its ruling in *Jefferson Bank v. Newton Associates* where it previously denied a claim of mootness where a sheriff's deed was delivered after the appeal was filed.

In *Jefferson Bank*, a condominium association attempted to collect on a judgment for common maintenance expenses by suing the mortgage holder of the delinquent condominium units. In order to extinguish the condominium liens on the units, the mortgage holder filed foreclosure actions against the defaulting unit owners, obtained judgments against the unit owners, and assigned the judgments to third parties, who agreed to resell the units and pay off the mortgage loans with the proceeds. When the third parties purchased the units at the sheriff's sale, the condominium liens were extinguished by operation of law. The condominium association then filed petitions to set aside the sheriff's sale on the basis of fraud. The trial court struck some petitions, and after a hearing, denied others. The condominium association appealed the denied petitions.

The mortgage holder in *Jefferson Bank* then argued the appeal was moot because titles to all of the condominium units at issue were transferred to third parties subsequent to the filing of the appeal. The Superior Court found "[t]his is

a specious argument, for it ignores the essential fact that, in the present appeal, it was appellees who transferred the properties after appellant took its appeal. This is a distinction with a difference, because our courts have never held that an adverse party may create mootness through deliberate factual manipulation."

Distinguishing its ruling in *Jefferson Bank*, the Superior Court in *Butler* noted that, in *Jefferson Bank*, it "did not consider the issue of how an appellant's failure to obtain a supersedeas impacts a determination of whether an issue has become moot due to the subsequent enforcement of the trial court's order." From the language contained in the footnote, it is now clear the Superior Court expects appellants to post a bond in order to protect their property interests.

Notably, the Superior Court in *Butler* did not expressly overrule *Jefferson Bank*. Unlike *Jefferson Bank*, the property transfer in *Butler* was not part of a scheme to defraud the appellant out of his interest in the property. The Superior Court in *Butler* may have thus left the door open in situations involving fraudulent conduct.

In *Federal Home Loan Mortgage Corporation v. Oppong*, the Philadelphia Court of Common Pleas rejected a plea by a former property owner to set aside a sheriff's sale because he failed to seek and obtain a supersedeas.

In *Oppong*, the property was purchased by the Federal Home Loan Mortgage Corp. at a sheriff's sale pursuant to a foreclosure proceeding. After the sheriff's sale, the former owner of the property filed a petition to set aside the sale. The petition was denied by the trial court. The former owner then filed a notice of appeal with the Superior Court.

During the pendency of the appeal, FHLMC received the sheriff's deed for the property.

FHLMC then filed an ejectment action against the former property owner and then moved for summary judgment. FHLMC offered the sheriff's deed in support of the motion. In his response, the former property owner did not contest that FHLMC had completed settlement of its bid or that the sheriff had delivered the deed to FHLMC pursuant to that settlement. Instead, the former property owner argued that the deed was a nullity solely because it was delivered during the pendency of the appeal of the trial court's denial of the petition to set aside.

After the trial court granted the motion for summary judgment, the former property owner appealed that ruling as well to the Superior Court.

Issuing a written opinion recommending affirmance of its order, the trial court emphasized that the former property owner did not file appropriate security with the court or make any attempt to obtain a supersedeas after his petition to set aside was denied. Because the former property owner failed to obtain a supersedeas, the trial court thought granting the motion for summary judgment was appropriate. The trial court also relied on the fact that ownership of the property had already been transferred.

A potentially interesting battle may ensue in *Oppong* based upon the Superior Court's recent ruling in *Butler*. If the former property owner fails to obtain a supersedeas preventing his eviction from the property, the bank in *Oppong* could presumably attempt to dismiss both appeals based upon mootness.

### LESSONS LEARNED

*Oppong* and *Butler* illustrate the importance of obtaining a bond while the appeal is pending in a property dispute. By failing to do so, the appealing party could very well lose his interest in the property.

## The Legal Intelligencer

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 Published daily, except Saturdays, Sundays and holidays  
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