



contends the trial court erred by not considering its offer to purchase the real estate and by not allowing a co-defendant to submit its offer in open court. Second, it claims the ultimate sale of the subject property violated the trial court's judgment entry granting the receiver's motion to sell.

The present appeal involves a foreclosure action filed by plaintiff-appellee Fifth Third Bank against Financial South in October 2007. Fifth Third's complaint also named other defendants who had an interest in the real estate at issue. Two of those defendants, Dean Wertz and Pillar Real Estate Advisors, Inc., personally had guaranteed a portion of a mortgage held by Fifth Third on a commercial office complex owned by Financial South.

Count one of Fifth Third's complaint alleged that Financial South had defaulted on a promissory note still owing more than \$2.2 million. Count two sought to recover \$300,000 from Pillar Real Estate and Wertz on their personal guarantees. Count three requested foreclosure on the mortgage Fifth Third held in Financial South's commercial real estate, which is located at 5335 Far Hills Avenue. Count four sought recovery of attorney fees.

In February 2008, Fifth Third voluntarily dismissed count two of its complaint without prejudice. Fifth Third also voluntarily dismissed Wertz and Pillar Real Estate as parties. (Doc. #32). Thereafter, in May 2008, the trial court filed a judgment entry and decree of foreclosure. Among other things, the trial court determined that Financial South owed Fifth Third \$2,256,421.77 plus interest on the note and that Fifth Third held a valid lien on Financial South's real estate. The trial court also determined that the real estate should be sold with the proceeds divided based on

the priority of liens. (Doc. #40).

In October 2008, Fifth Third moved for the appointment of a receiver to take charge of managing the real estate and to carry out the trial court's foreclosure decree. (Doc. #41). The trial court sustained the motion and appointed Mark Fornes Realty, Inc. to act as the receiver. (Doc. #42). Thereafter, the receiver filed monthly reports, summarizing the financial status and operation of the commercial real estate. (Doc. 47-57).

In October 2009, the receiver moved to sell the property. The motion indicated that the receiver had entered into a contract to sell the real estate to Beaver Creek Commerce Center, Ltd. for \$1.1 million dollars, subject to court approval and subject to the receiver potentially obtaining a higher and better offer at a future court hearing. (Doc. #58).

Thereafter, the trial court held a November 23, 2009 hearing on the matter. Tom Nikolai, an employee of Mark Fornes Realty, testified about his efforts to sell the property and the contract with Beaver Creek Commerce Center. He advised the trial court that the \$1.1 million offer was the "highest and best" that had been received. He also testified that he believed it was "fair and reasonable." Finally, Nikolai testified that he had continued to market the property up through the date of the hearing but had not obtained a higher or better offer. (Hearing transcript at 6-7). No one else testified at the hearing. Following Nikolai's testimony, the trial court sustained the receiver's motion to sell the property to Beaver Creek Commerce Center for \$1.1 million. This timely appeal followed.

In its first assignment of error, Financial South contends the trial court erred by

not considering its offer to purchase the real estate and by not allowing Dean Wertz to submit its offer in open court.

In support, Financial South contends its attorney was unable to appear at the hearing on the receiver's motion to sell the real estate. As a result, Financial South claims Wertz, a general partner of the company, appeared at hearing and attempted to submit an offer of \$1.125 million on its behalf. According to Financial South, the trial court refused to allow Wertz to speak at the hearing or to submit an offer on its behalf because he is not an attorney. Financial South contends the trial court erred in not allowing Wertz to participate in the hearing and submit its offer of \$1.125 million.

Having reviewed the entire record, including a transcript of the hearing at issue, we agree with Fifth Third's argument that the record contains no evidence to support Financial South's claims about Wertz and his attempted offer. We have recognized that a presumption of validity attaches to a trial court's actions, and an appellant bears the "responsibility to provide an adequate record to portray error." *Karns v. Karns* (May 28, 1992), Montgomery App. No. 12964. In the present case, the record is devoid of evidence to support Financial South's claim that Wertz appeared at the hearing and attempted to submit an offer on its behalf. Whatever may have occurred took place off the record. The hearing transcript contains no mention of Wertz, his inability to testify, or his attempt to submit an offer. After noting that Financial South's attorney was not present, the trial court simply heard testimony from Nikolai and sustained the receiver's motion to sell the real estate. Because nothing in the record portrays the error alleged by Financial South, the first assignment of error must be overruled.

We reach a similar conclusion with regard to Financial South's second assignment of error. Therein, Financial South claims the sale of the property violated the trial court's judgment entry granting the receiver's motion to sell. In particular, Financial South asserts that the property was sold to 5335 Far Hills, LLC, not to Beaver Creek Commerce Center, and that the closing occurred seven days after the date set in the real estate contract. In response, Fifth Third argues, among other things, that Beaver Creek Commerce Center properly assigned its rights to 5335 Far Hills, LLC prior to the closing and that Financial South lacks standing to challenge the seven-day closing delay.

Once again, we find ourselves unable to address the merits of Financial South's allegations, which are not supported by the record on appeal. Financial South filed its notice of appeal on December 3, 2009. The appeal was taken from the trial court's November 23, 2009 order sustaining the receiver's motion to sell the property. On December 11, 2009, we granted Financial South's request for an injunction to stop the sale provided that it post a bond or letter of credit in the amount of \$1.1 million. The parties agree that Financial South failed to post the bond and that the property was sold *after* Financial South's December 3, 2009 notice of appeal had been filed. Consequently, the alleged irregularities in the sale about which Financial South complains are not part of the record before us. Nor are they part of the trial court's order on appeal, which merely authorized the receiver to sell the property.

"In reviewing an order of a trial court on appeal, an appellate court is limited to the record made up in the trial court." *Durrstein v. Durrstein* (Oct. 12, 2001),

Montgomery App. No. 18688. Moreover, “appellate review is limited to the record as it existed at the time the trial court rendered judgment.” *Leiby v. Univ. of Akron*, Franklin App. No. 05AP-1281, 2006-Ohio-2831, ¶7. We may not consider acts that occurred or issues that arose after a notice of appeal was filed. *In re Beck*, Belmont App. No. 00 BA 52, 2002-Ohio-3460, ¶21. As a result, Financial South’s second assignment of error is overruled.

The judgment of the Montgomery County Common Pleas Court is affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

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