

**In the
Supreme Court of Ohio**

In re: Daren A. Messer, Angela Messer)	Case No. 2014-2036
)	
Petitioners,)	
)	On Order of Certification and Questions of
v.)	State Law
)	
JP Morgan Chase Bank, N.A.)	United States Bankruptcy Court for the
)	Southern District of Ohio, Case No. 13-
Respondent.)	57467, Adv. Proceeding No. 13-2448

**MERIT BRIEF OF AMICUS CURIAE OHIO LAND TITLE ASSOCIATION
IN SUPPORT OF RESPONDENT JP MORGAN CHASE BANK, N.A.**

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STATEMENT OF AMICUS INTEREST

The Ohio Land Title Association (OLTA), is a non-profit Ohio corporation that represents the interests of approximately 700 title insurance agents, underwriters, abstractors and real estate attorneys. The mission of the OLTA is to advocate for and promote the legislative, educational, ethical, and professional interests of its members. The OLTA strives to benefit the public by promoting product quality and integrity in real estate transactions.

INTRODUCTION

In Ohio, it has been common practice for bankruptcy trustees to file adversary actions in Chapter 7 and Chapter 13 bankruptcy proceedings against mortgagees when the mortgage at issue contains an acknowledgment that is not in strict compliance with R.C. §5301.01. This statute requires that a mortgage be signed by the mortgagor and that the signing be “acknowledged” by the mortgagor “before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.”

Usually in these cases, there is no allegation of fraud in the transaction. Further, the bankruptcy trustees generally do not dispute that the mortgagor, now bankrupt, signed the note and mortgage, that the mortgagor received the loan proceeds, that the mortgage was recorded and easily found by searching the county recorder’s records, or that the transaction was disclosed on the bankruptcy schedules.

The trustees rely on R.C. §5301.25(A) which requires that mortgages “shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract,

or instrument.” The trustee’s argument is that a recorded mortgage which is defectively executed is not, under Ohio law as it existed prior to the enactment of R.C. §1301.401, entitled to be recorded and therefore does not give constructive notice of its existence to the trustee, who enjoys the status of a hypothetical bona fide purchaser pursuant to 11 U.S.C. §544. This is a perfect storm of federal and state law.

Many mortgages have been declared void for this reason. The end result is that the mortgagor/debtor loses his or her house because the property is sold by the trustee free of the mortgage and the proceeds are distributed among the unsecured creditors of the mortgagor/debtor. See *Hardesty v. Mortgage Electronic Registration Systems, Inc. (In re Boothe)*, 510 B.R. 154 (Bankr. S.D. Ohio 2013), *Logan v. Universal Credit Union, Inc. (In re Bozman)*, 365 B.R. 824 (Bankr. S.D. Ohio 2007), *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d. 1020 (6th Cir. 2000), *Helbling v. Cleary (In re Cleary)*, N. D. Ohio Bankr. Adv. No. 09-1285, 2010 WL 2649949 (June 1, 2010), *Simon v. Citimortgage, Inc. (In re Doubov)*, 423 B.R. 505 (Bankr. N.D. Ohio 2010).

Ohio House Bill 479, also referred to as the Ohio Asset Management Modernization Act of 2012, was signed into law by Governor Kasich on December 20, 2012 and was effective as of March 27, 2013. H.B. 479 includes Chapter 5816, et al., Ohio’s Legacy Trust Act, and a broad range of statutory provisions that are, taken as a whole, meant to provide Ohio citizens with greater asset protection. H.B. 479 also includes R.C. §1301.401, the interpretation of which is the subject of this case.

R.C. §1301.401 states:

(A) For purposes of this section, “public record” means either of the following:

(1) Any document described or referred to in section 317.08 of the Revised Code;

(2) Any document the filing or recording of which is required or allowed under any provision of Chapter 1309 of the Revised Code.

(B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

(C) Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.

This Court has agreed to answer the following questions:

- (1) Does R.C. §1301.401 apply to all recorded mortgages in Ohio?
- (2) Does R.C. §1301.401 act to provide constructive notice to the world of a recorded mortgage that was deficiently executed under O.R.C. §5301.01?

The OLTA urges this Court to answer both of these questions in the affirmative.

ARGUMENT

(1) R.C. §1301.401 applies to all recorded mortgages in Ohio.

(a) R.C. §1301.401 is clear and unambiguous and should be applied as written.

When interpreting a statute, the Court must first “examine the plain language and apply the statute as written when its meaning is clear and unambiguous.” *State v. Coburn*, 121 Ohio St.3d 310, 2009-Ohio-834, 903 N.E.2d 1204 at ¶ 8, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9.

The definition of a “public record” in R.C. §1301.401(A) includes “(1) [a]ny document described or referred to in section 317.08 of the Revised Code.” R.C. §317.08(A) states “[t]he county recorder shall record in the official records all of the following instruments that are presented for recording, upon payment of the fees prescribed by law,” and then the statute

identifies twenty-eight subsections describing various documents that may be recorded. R.C. §317.08(A)(19) specifically identifies “[m]ortgages, including amendments, supplements, modifications, and extensions of mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected or encumbered.” Mortgages, since they are documents referred to in R.C. §317.08, are public records under R.C. §1301.401(A).

Petitioners Daren and Angela Messer argue that, despite the clear language of the two statutes (R.C. §1301.401(A) and R.C. §317.08(A)(19)), the legislature did not really intend for R.C. §1301.401 to apply to mortgages because R.C. §1301.401 is part of the Uniform Commercial Code.

The court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act, and in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

Wachendorf v. Shaver, 149 Ohio St. 231, 232, 78 N.E.2d 370, 372 (1948) at Paragraph 5 of the Syllabus.

R.C. §1301.401(A)(1) very clearly defines a “public record” as “[a]ny document described or referred to in section 317.08 of the Revised Code.” R.C. §317.08(A) describes many documents, none of which appear to be directly subject to the UCC. For example, R.C. §317.08(A) describes: deeds, notices recorded under the Ohio Marketable Title Act, judgments issued in a quiet title action, condominium declarations and bylaws, affidavits of fact relating to title, articles dedicating nature preserves, conservation easements, instruments extinguishing agricultural easements, environmental covenants, memoranda of trust, options to purchase real estate, tax certificates, powers of attorney, plats of town lots, leases, durable powers of attorney for health care, and

unemployment compensation liens. None of these documents appear to directly relate to a transaction that would be subject to the UCC.

If the legislature only intended for R.C. §1301.401 to apply to transactions subject to the UCC, then it would not have referred to R.C. §317.08 in the statute at all as R.C. §317.08(A) does not appear to apply to any transactions specifically covered by the UCC. Instead, R.C. §1301.401(A)(1) broadly states that it applies to the recording of any document described in R.C. §317.08, which includes mortgages.

The Court's role "is to evaluate a statute 'as a whole and give such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.'" *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 513, 2010-Ohio-2550929 N.E.2d 448, 451-52, citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917). The Messers are asking this Court to find that the language in R.C. §1301.401(A)(1) is entirely meaningless. The OLTA asks this Court to reject that argument and apply the statute as written.

(b) R.C. §1301.102 does not apply to R.C. §1301.401.

In support of their theory that a public record as defined in R.C. §1301.401(A)(1) cannot include a mortgage because the statute is part of the UCC, the Messers cite the official comment to R.C. §1301.102 for the proposition that "the rules in Article 1 apply to transactions to the extent that those transactions are governed by one of the other articles of the Uniform Commercial Code. See also Comment 1 to Section 1-301."

The Messers fail to cite the actual language of R.C. §1301.102, which states: "[s]ections 1301.101 to 1301.310 of the Revised Code apply to a transaction to the extent that it is governed

by Chapter 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code.” By the clear and unambiguous language of R.C. §1301.102, the statute does not apply to R.C. §1301.401.

- (c) Notes secured by real estate mortgages are subject to the Uniform Commercial Code and therefore it is not unreasonable that the legislature chose to include R.C. §1301.401 in the UCC.

It is well settled Ohio law that a mortgage on real estate is merely security for payment of a debt, which is typically evidenced by a note. *Swartz's Ex'rs v. Leist*, 13 Ohio St. 419 (1862), syllabus at 1. Ohio courts have “generally held that a note secured by a mortgage is a negotiable instrument” and subject to the UCC. See *Bank of Am., N.A. v. Pasqualone*, 10th Dist. No. 13AP-87, 2013-Ohio-5795, ¶ 29, citing *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 23 (“Ohio's version of the Uniform Commercial Code (‘UCC’), governs the creation, transfer, and enforceability of negotiable instruments, including notes secured by mortgages on real estate.”); *Wright-Patt Credit Union, Inc. v. Byington*, 6th Dist. No. E-12-002, 2013-Ohio-3963, ¶ 11 (“Ohio's version of the Uniform Commercial Code governs who may enforce negotiable instruments, including promissory notes secured by mortgages on real estate.”); *U.S. Bank, N.A. v. Bennett*, 7th Dist. No. 11 MA 40, 2012-Ohio-2700, ¶ 19 (“First and foremost, a note secured by a mortgage is widely considered to be a negotiable instrument.”). It is not unusual then that R.C. §1301.401 is found within the UCC as it applies to mortgages given to secure a promissory note, which is itself subject to the UCC.

- (d) R.C. §1301.401 is not inconsistent with other provisions of the Revised Code pertaining to mortgages.

The Messers allege that R.C. §1301.401 is inconsistent with other provisions of the Revised Code. They cite R.C. §5301.25(A) which, they claim, states that a mortgage that is not properly executed is fraudulent as to subsequent bona fide purchasers. This interpretation of the statute is incorrect. The statute actually states that mortgages must be recorded and “until so recorded or

filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser...” R.C. §1301.401 is not inconsistent with this provision as it does not change the requirement that a mortgage be recorded in order to be effective. In fact, recording is a prerequisite to the application of R.C. §1301.401(B), which states “[t]he recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.” There is no inconsistency.

The Messers also cite R.C. §5301.01(A) and (B). R.C. §5301.01(A) requires that a deed, mortgage, land contract, lease of an interest in real property and a memorandum of a trust must be signed by the respective grantor, mortgagor, vendor, lessee or trustee and the signature must be acknowledged. R.C. §5301.01(B) provides for constructive notice of a mortgage that was executed prior to February 1, 2002 but was defective because it failed to meet the two witness requirement in effect at that time. The Messers argue that, if the legislature intended to provide constructive notice of all recorded mortgages, the legislature would have changed R.C. §5301.01 to provide for the same.

The Messers ignore the fact that R.C. §1301.401 does not just apply to mortgages. It applies to all documents identified in R.C. §317.08 and it applies to all documents filed pursuant to Chapter 1309 of the Revised Code. Many of these documents are not subject to the requirements of R.C. §5301.01 so it would not have made sense to include this statute within R.C. §5301.01.

For example:

- R.C. §317.08(A)(2) refers to notices filed pursuant to Ohio’s Marketable Title Act. Such notices must be in the form of an affidavit and an acknowledgment is not required. See R.C. §5301.52.
- R.C. §317.08(A)(3) refers to judgments in actions brought under R.C. §5303.01, which refers to quiet title actions. Judgments simply need to be certified by the clerk of courts before they are recorded.
- R.C. §317.08(A)(5) refers to affidavits of fact relating to title as provided for in R.C. §5301.252, which also do not require an acknowledgment.
- R.C. §317.08(A)(13) refers to covenants not to sue issued under R.C. §3746.12. This statute requires a letter with a verification, but does not require an acknowledgment.
- R.C. §317.08(A)(22) refers to tax certificates sold under R.C. §5721.33. R.C. §5721.36 requires that a transferor of a tax certificate must endorse the same and swear to the endorsement before a notary public, however, there is no specific requirement for an acknowledgment.
- R.C. §317.08(A)(27) refers to unemployment compensation liens (R.C. §4141.23(D)), internal revenue liens, and corrupt activity lien notices. Liens do not need to contain an acknowledgement clause.

Furthermore, under R.C. §1301.401(A)(2), the definition of a public record also includes documents “the filing or recording of which is required or allowed under any provision of Chapter 1309 of the Revised Code.” R.C. Chapter 1309, et al. is part of the UCC so inclusion of this statute in Chapter 13 is just as logical as including it in Chapter 53 would be. The language in R.C. §1301.401 is broad and applies to all documents described in R.C. §317.08 (primarily non-UCC

transactions) and R.C. Chapter 1309, et al. (UCC transactions). If the legislature had intended to limit the application of the statute to only UCC transactions, it would not have referred to R.C. §317.08 at all. The statute should be applied as written.

(2) R.C. §1301.401 provides constructive notice to the world of a recorded mortgage that was deficiently executed under R.C. §5301.01.

R.C. §1301.401(B) states:

(B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

This statute essentially strips away the legal fiction that a document which is recorded, and thus readily found by searching a county recorder's index, does not provide constructive notice simply because there is a defect in its execution.

The Messers argue that R.C. §5301.25 requires a document to be “properly executed” before it can be recorded and that a document which is not properly executed is not entitled to be recorded and cannot provide constructive notice, regardless of the language in R.C. §1301.401(B). It appears that the legislature already considered this issue when they drafted R.C. §1301.401(C), which defines the point at which constructive notice under R.C. §1301.401(B) attaches. According to R.C. §1301.401(C), “[a]ny person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.” (emphasis added). The statute does not state that notice attaches at the time of recording. Instead, it attaches at the time the document is

“tendered” to the recorder. A deficiently executed mortgage therefore need only be tendered to the county recorder for recording in order to provide constructive notice.

In any event, R.C. §1301.401 does not change the execution requirements of R.C. §5301.01 or the recording requirements of R.C. §5301.25(A). R.C. §1301.401 can coexist with both statutes.

R.C. §5301.234, which was deemed unconstitutional by this Court in 2004 as being in violation of the one-subject provision of the Ohio Constitution, contained a provision similar to R.C. §1301.401(B). R.C. §5301.234(C) stated that the “recording of a mortgage is constructive notice of the mortgage to all persons, including without limitation, a subsequent bona fide purchaser or any other subsequent holder of an interest in the property.” This Court previously found that R.C. §5301.234 “solved the avoidance problem by allowing the recording of a defectively executed mortgage to serve as constructive notice to subsequent bona fide purchasers. It did not, however, repeal or change the execution requirements under former R.C. 5301.01. Instead, former R.C. §5301.01 and R.C. §5301.234 coexisted....” *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335 at ¶ 18 (emphasis added). The same logic should apply in this case. R.C. §1301.401 does not change the fact that a mortgage must still be executed and recorded. It simply provides that tendering the document for recording provides constructive notice of the document.

CONCLUSION

The overriding goal of H.B. 479 was to provide greater asset protection to Ohio citizens. R.C. §1301.401 helps to achieve that goal by providing for constructive notice of all public records tendered to the county recorder for recording or filed with the secretary of state.

R.C. §1301.401, without limitation, clearly identifies a “public record” as including any document described in R.C. §317.08. That statute, at section (A)(19) specifically identifies

mortgages. The only logical conclusion then is that R.C. §1301.401 applies to mortgages. Further, according to R.C. §1301.401(B) and (C), constructive notice of recorded documents is effective upon “tendering” of the document to be recorded to the county recorder.

The OLTA requests that this Court apply the statute as written and answer the certified questions in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing document upon the individuals identified below by electronic mail on April 2, 2015.

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