[Cite as *Fifth Third Bank v. Farrell*, 2010-Ohio-4839.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FIFTH THIRD BANK	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAE 11 0095
MICHAEL FARRELL, et al.	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 07 CV E 10 1186
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 28, 2010

APPEARANCES:

For Defendant-Appellant:

AMELIA A. BOWER
300 E. Broad St., Suite 590
Columbus, OH 43215

For Plaintiff-Appellee:

PATRICIA L. HILL
900 Fifth Third Center
1 S. Main St.
Dayton, OH 45402

Delaney, J.

{¶1} Appellant, Countrywide Home Loans, Inc. appeals the November 4, 2009 judgment entry of the Delaware County Court of Common Pleas granting summary judgment in favor of Appellee, Fifth Third Bank.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On March 18, 2004, Michael Farrell executed a Note payable to Countrywide Home Loans, Inc. ("Countrywide"). The Note was secured by a Mortgage executed by Michael Farrell on March 18, 2004 that conveyed an interest in real property located at 8853 Bakircay Lane in Powell, Ohio to Mortgage Electronic Registration Systems ("MERS") as nominee for Countrywide.

{¶3} Michael Farrell signed his name to the mortgage in his individual capacity and initialed the pages of the mortgage. The certificate of acknowledgement is on a separate page of the mortgage. The acknowledgement reads,

{¶4} "STATE OF OHIO, Franklin County ss:

{¶5} "This instrument was acknowledged before me this 18th of March, 2004, by _____."

{¶6} Missing from the acknowledgement is the name of the person acknowledged, Michael Farrell. The notary public's signature and notary seal is on the certificate of acknowledgement. Michael Farrell's initials are on the bottom of the acknowledgement page.

{¶7} The Countrywide mortgage was recorded with the Delaware County Recorder on March 24, 2004 at Book 483 at Page 378.

{¶8} On November 12, 2004, Farrell executed a mortgage that conveyed an interest to mortgagee Fifth Third Bank, Central Ohio ("Fifth Third") in real property located at 8853 Bakircay Lane. The mortgage was to secure indebtedness incurred by Farrell Salons Systems Polaris Ltd. The mortgage was recorded with the Delaware County Recorder on November 23, 2004 at Book 563 at Page 233.

{¶9} Farrell executed a Home Equity Line of Credit ("HELOC") agreement with Countrywide on February 13, 2006. The HELOC was secured by an Open-End Mortgage conveying an interest in real property located at 8853 Bakircay Lane to the mortgagee, MERS which was acting as nominee for Countrywide. The mortgage was recorded with the Delaware County Recorder on March 8, 2006 at Book 692 at Page 1309.

{¶10} On October 4, 2007, Fifth Third filed a Complaint in Foreclosure on its November 2004 mortgage. Fifth Third named Michael Farrell and MERS as two of the defendants. Neither defendant answered the complaint. The trial court granted Fifth Third default judgment on November 27, 2007. An amended default judgment was granted on January 2, 2008 to correct clerical errors.

{¶11} At this time, Countrywide received notice of Fifth Third's complaint in foreclosure. Countrywide moved to intervene in the case, which the trial court granted and Countrywide's answer was filed on January 23, 2008.

{¶12} On April 1, 2009, Countrywide filed an amended answer, cross-claim, and counterclaim alleging that it had a valid and first lien on the property. Countrywide filed its motion for summary judgment on May 13, 2009. Michael Farrell filed a response to the motion to allege that his personal liability on the mortgage had been discharged by

bankruptcy. Fifth Third did not file a response to the motion. The trial court granted the motion for summary judgment on June 9, 2009.

{¶13} When Fifth Third realized that the trial court had granted summary judgment in favor of Countrywide, Fifth Third moved to vacate the judgment on July 8, 2009. The trial court granted Fifth Third's motion and allowed Fifth Third to respond to Countrywide's pleadings and Countrywide's motion for summary judgment.

{¶14} On August 3, 2009, Fifth Third filed its response to Countrywide's motion for summary judgment and filed its own motion for summary judgment. In Fifth Third's motion for summary judgment, Fifth Third argued that the certificate of acknowledgement in the Countrywide mortgage was defective because the notary failed to certify that Michael Farrell acknowledged the mortgage. Because the acknowledgement was defective, Fifth Third argued that mortgage was improperly executed and therefore was not entitled to be recorded. Fifth Third asserted that an improperly executed mortgage, even if recorded, could not serve as notice of priority to subsequent creditors.

{¶15} In response, Countrywide filed the affidavit of the notary public who completed the certificate of acknowledgement. She stated in her affidavit that Michael Farrell appeared before her on March 18, 2004 and acknowledged to her that he executed the Countrywide mortgage. She stated it was a clerical error when she failed to reference Michael Farrell in the acknowledgement clause of the mortgage as the person whose acknowledgement she was taking.

{¶16} The trial court granted Fifth Third's motion for summary judgment and denied Countrywide's motion for summary judgment on November 4, 2009. The trial

court determined that the certificate of acknowledgement was defective, therefore rendering the Countrywide mortgage improperly executed. As such, the trial court held that the improperly executed mortgage was not entitled to be recorded and did not establish a priority over Fifth Third's subsequent, and properly executed, mortgage.

{¶17} It is from this decision Countrywide now appeals.

ASSIGNMENT OF ERROR

{¶18} Countrywide raises one Assignment of Error:

{¶19} "THE TRIAL COURT ERRED IN GRANTING FIFTH THIRD BANK'S MOTION FOR SUMMARY JUDGMENT."

{¶20} This matter comes before us upon the trial court's granting of summary judgment in favor of Fifth Third. Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶21} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶22} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶23} The controversy in this case involves the rights among creditors and does not involve any disagreement between the mortgagor and the makers of these mortgages. *Citizens Natl. Bank in Zanesville v. Denison* (1956), 165 Ohio St. 89, 133 N.E.2d 329. In these times of record number of foreclosure filings, the issues presented in this case will be increasingly relevant and contested. The first issue to be determined is whether the certificate of acknowledgement in the Countrywide mortgage was defective. If we find that there is no genuine issue of material fact that the certificate of acknowledgement substantially complied with statutory requirements, our analysis ends there. However, if we find the acknowledgement to be defective, we must then determine if the Countrywide mortgage has priority over the subsequently, properly recorded mortgage by Fifth Third. We begin our analysis with a review of the statutes applicable to the execution of mortgages and the recording thereof. *Citizens Natl. Bank*, supra.

{¶24} The statute of conveyances, R.C. 5301.01(A), provides:

{¶25} "A * * * mortgage * * * shall be signed by the * * * mortgagor * * *. The signing shall 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."

{¶26} R.C. 5301.25(A) provides:

{¶27} "All deeds, land contracts * * * and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments * * * shall be recorded in the office of the county recorder of the county in which the premises are situated, and until so recorded or filed for record, they are fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or land contract or instrument."

{¶28} The Ohio Supreme Court in *Citizens Natl. Bank*, supra, discussed the purpose and effect of acknowledgements:

{¶29} "The purpose and effect of acknowledgements in general are well stated as follows in 7 Thompson on Real Property (Perm.Ed.), 416:

{¶30} "'The acknowledgement of a deed is required by statute chiefly for the purpose of affording proof of the due execution of the deed by the grantor, sufficient to authorize the register of deeds to record it. The statutes in general declare that a deed shall not be admitted of record unless it is acknowledged or proved by attesting witnesses in the mode prescribed. A deed without acknowledgement, or defectively acknowledged, passes the title equally with one acknowledged, as against the grantor and his heirs; but without an effectual acknowledgement a deed can not be recorded so as to afford notice of the conveyance to all the world. Acknowledgement has reference, therefore, to the proof of execution, and not to the force, effect, or validity of the instrument. A defect in the instrument is not cured by acknowledgement. Acknowledgement is a prerequisite to recording the deed and making it constructive notice of all the facts set forth in it. The record of a deed without acknowledgement or

proof as prescribed by statute does not afford constructive notice of it. In like manner, the record of a deed defectively acknowledged by the parties does not impart constructive notice. The validity of a deed at common law did not depend on its acknowledgement; and where acknowledgement is required, its object is the protection of creditors and purchasers.'"

{¶31} R.C. 147.53 requires the notary public to certify that:

{¶32} "(A) The person acknowledging appeared before him and acknowledged he executed the instrument; (B) The person acknowledging was known to the person taking the acknowledgement, or that the person taking the acknowledgement had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument."

{¶33} R.C. 147.54 states that the acknowledgement certification may either be "in a form prescribed by Ohio law" or contain the words " 'acknowledged before me/ or their substantial equivalent."

{¶34} R.C. 147.541 provides a broad definition of "acknowledged before me" and states that the words "acknowledged before me" mean that:

{¶35} "(A) The person acknowledging appeared before the person taking the acknowledgement; (B) He acknowledged he executed the instrument; (C) In the case of: (1) A natural person, he executed the instrument for the purposes therein stated; * * * * (D) The person taking the acknowledgement either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.

{¶36} R.C.147.55 provides the "statutory short form" for acknowledgement clauses and states, in relevant part, that:

{¶37} "The forms of acknowledgement set forth in this section may be used and are sufficient for their respective purposes under any section of the Revised Code. The forms shall be known as 'statutory short forms of acknowledgement' and may be referred to by that name. The authorization of the forms in this section does not preclude the use of other forms.

{¶38} "(A) 'For an individual acting in his own right:

{¶39} "State of _____

{¶40} "County of _____

{¶41} "The foregoing instrument was acknowledged before me this (date) by **(name of person acknowledged.)**

{¶42} "(Signature of person taking acknowledgement) (Title or rank) (Serial number, if any)." (Emphasis added).

{¶43} There is no question in this case that the notary public omitted the name of the person acknowledged, Michael Farrell, on the Countrywide certificate of acknowledgement. The question then is whether the certificate of acknowledgement is in compliance with the requirements of the above statutes. The relevant case law on this issue dates from the 1800's to the present and has been significantly discussed within the Bankruptcy Courts. See *In re Burns*, (S.D. Ohio 2010), -- B.R --, 2010 WL 3081338.

{¶44} The first, and still controlling, case on this issue is *Smith's Lessee v. Hunt* (1844), 13 Ohio 260. In that case, the Supreme Court of Ohio held that an acknowledgement that omitted the name of the mortgagor was defective. The Court stated,

{¶45} "Does the certificate in this case furnish any evidence of a compliance with the law? This must depend solely on the fact whether blank, and Ezekiel Folsom, the grantor, are synonymous. If Folsom is blank, and blank is Folsom, the execution of the mortgage is complete; but as no evidence is adduced to prove these facts, we know of no rule of law which will authorize us to inter that Ezekiel Folsom, the grantor, is just nobody at all * * *."

{¶46} The Supreme Court of Ohio addressed a similar issue in *Dodd v. Bartholomew* (1886), 44 Ohio St. 171, 5 N.E. 866. In that case, the mortgage was granted by Charles A. Clark and his wife, Sara, but the acknowledgement clause referred to "Charles B. Clark" and "Mary Clark." Id. The Court applied the concept of "substantial compliance" to find the acknowledgement was not defective. The Court stated:

{¶47} "Where an error occurs in the name of a party to a written instrument, apparent upon its face, and, from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument."

{¶48} However, in finding substantial compliance, the Court did not overrule *Smith's Lessee* but differentiated the facts in *Dodd* from *Smith's Lessee*, where the name of the grantor was left blank in the certificate of acknowledgement.

{¶49} The substantial compliance doctrine developed in *Dodd* has been applied by other courts to find mortgages valid and enforceable. In *Mid-American Natl. Bank & Trust Co. v. Gymnastics Intl., Inc*. (1982), 6 Ohio App.3d 11, 451 N.E.2d 1243, the acknowledgement clause at issue in the case included the name of the corporation, instead of the officers of the corporation who signed the mortgage. The Tenth District

Court of Appeals found the mortgage to be in substantial compliance. Id. It held, "[w]here an error occurs in the name of a party to a written instrument, apparent upon its face, and, from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument." Id. See also, *Citifinancial, Inc. v. Howard*, 175 Ohio App.3d 130, 2008-Ohio-603, 885 N.E.2d 314, (mortgage is in substantial compliance when the mortgagor signed the mortgage in his individual capacity, but the acknowledgement clause named the individual in his corporate capacity, even thought the corporation did not own the property in question).

{¶50} Whether a mortgage substantially complies with the statutory regulations, however, is determined on a case-by-case basis. In *Mid-American Natl. Bank*, supra, the Tenth District looked to the facts of the case to determine whether the principles of *Smith's Lessee* or *Dodd* applied, i.e., whether there was substantial compliance.

{¶51} "Appellant relies on the case of *Smith's Lessee v. Hunt* (1844), 13 Ohio 260, where the court held that an acknowledgement which omits the name of the mortgagor is defective. We do not find *Smith's Lessee, supra,* determinative in the case *sub judice,* which involves an incomplete description of the grantor and not the total omission as in *Smith's Lessee.* We find persuasive the principle enunciated in *Dodd v. Bartholomew* (1886), 44 Ohio St. 171, 5 N.E. 866, where the acknowledgement recited that Charles B. Clark and Mary Clark were the grantors, when, in fact, the instrument was signed by Charles A. Clark and Sarah Clark, as grantors."

{¶52} The court found,

{¶53} "Applying these principles to the case *sub judice,* we find that although the recital is to some extent incomplete, the certificate of acknowledgement substantially

complies with the essential requisites of R.C. 5301.01. It is apparent from the face of the instrument that 'the above named * * * mortgagors, Gymnastics International Inc.' appeared through its officers, the president and secretary-treasurer. The notary public was also a witness; she, therefore, saw the officers sign and acknowledge the instrument. It is also apparent that the notary public's certification, that the corporation acknowledged the signing of the foregoing conveyance voluntarily for the uses and purposes therein expressed, refers to the officers' actions of acknowledgement. See Annotation, Sufficiency of Certificate of Acknowledgement, 25 A.L.R.2d 1124; see, also, *Sheldon v. Farinacci* (Tex.Civ.App.1976), 535 S.W.2d 938."

{¶54} The case law recited above "requires identification of the mortgagor within the acknowledgement clause or sufficient information within the acknowledgement clause so that the person whose signature was acknowledged can be identified through a review of the remainder of the mortgage." *In re Burns*, supra. Applying the facts of the present case to the principles outlined above, we find that the law presented in *Smith's Lessee* to be determinative of the issue of whether the certificate of acknowledgement substantially complied with R.C. 5301.01.

{¶55} In the case sub judice, the acknowledgement clause, in which the notary was to give the name of the person whose signature was acknowledged, was left blank. There is no other identifying information within the acknowledgement clause to show that it was the signature of Michael Farrell, the mortgagor, that the notary public was acknowledging. Countrywide has provided the affidavit of the notary public to support its argument of substantial compliance and to create a genuine issue of material fact as to the validity of the acknowledgement.

{¶56} While the doctrine of substantial compliance allows the court to consider the totality of the mortgage documents to determine if the acknowledgement was valid, including an affidavit from the notary public[1], the cases cited show that there was some information about the mortgagor, albeit incorrect, within the acknowledgement clause itself to allow the finding of "substantial" compliance. In the present case, there is no such information relating to Michael Farrell in the acknowledgement clause. It is blank. As such, we find that the affidavit of the notary public does not create a genuine issue of material fact so as to abrogate our finding that *Smith's Lessee* controls the disposition of this matter.

{¶57} We therefore find, pursuant to *Smith's Lessee*, the certificate of acknowledgement in the present case does not substantially comply with R.C. 5301.01 because it was left blank.

{¶58} As stated above, because we find the Countrywide certificate of acknowledgement to be defective, the next issue to be determined is whether the Countrywide mortgage has priority over the Fifth Third mortgage. In our case, Countrywide recorded its mortgage prior to Fifth Third and Fifth Third had notice of the prior Countrywide mortgage.

[1] *Administrator of Veterans Affairs v. City Loan* (May 7, 1985), 3rd Dist. No. 17-83-12 (the court found the stipulated evidence in the form of affidavits and depositions supported the conclusion that the acknowledgment clause that listed the mortgagee instead of the mortgagor was a clerical mistake).

{¶59} A defectively executed mortgage is not entitled to record. R.C. 5301.25; *Citizens Natl. Bank*, supra; *Mortgage Electronic Registration Systems v. Odita*, 159 Ohio App.3d 1, 2004-Ohio-5546, 822 N.E.2d 821. The Ohio Supreme Court further limited the effectiveness of a defectively recorded mortgage to hold in *Citizens Natl. Bank,* supra, that under R.C. 5301.25, the recording of a defectively executed mortgage does not establish a lien with priority over subsequently recorded mortgages properly executed and that the rule is applicable to situations in which, by evidence, the defective condition of the conveyance is disclosed as well as to instances in which the instrument is defective on its face. *Mortgage Electronic Registration Systems*, supra, at ¶ 11 citing *Citizens Natl. Bank*, supra, at paragraph one of the syllabus.

{¶60} We find therefore, pursuant to *Citizens Natl. Bank*, supra, that a defectively executed mortgage without proper acknowledgement of the mortgagor by a notary will not be entitled to priority over a subsequent, properly recorded mortgage. *Mortgage Electronic Registration Systems*, supra, at ¶ 11. In our case, we found that Countrywide's mortgage was not properly acknowledged pursuant to R.C. 5301.01 and R.C. 5301.25. Thus, Countrywide's defectively executed mortgage could not take priority over the Fifth Third's subsequent, validly recorded mortgage.

{¶61} Countrywide attempts to argue for the first time on appeal the validity of Fifth Third's mortgage. We decline to address Countrywide's arguments that (1) Fifth Third's Note was not secured by the 2004 mortgage and (2) an affidavit submitted by Fifth Third in support of its summary judgment motion on its complaint for foreclosure did not comply with Civ.R. 56. A review of Countrywide's underlying motions for summary judgment shows that Countrywide is impermissibly raising these arguments

for the first time on appeal and therefore, this Court will not rule on the merits of these issues. *Deutsche Natl. Trust Co. v. Pagani*, Knox App. No. 09CA000013, 2009-Ohio-5665, ¶ 29.

{¶62} Countrywide next asserts the proposition that because Fifth Third had actual knowledge of Countrywide's prior mortgage, they did not take their mortgage without notice and therefore the subsequent mortgage cannot have priority over the first. The issue of actual knowledge of a defectively executed prior mortgage was thoroughly examined by the Tenth District Court of Appeals in *Mortgage Electronic Registration Systems*, supra. In that case, Mortgage Electronic Registration Systems ("MERS") defectively executed and recorded a mortgage prior to a subsequent mortgagee. While agreeing that the MERS mortgage was defectively acknowledged, MERS argued that the subsequent mortgagees had actual knowledge of the prior recorded MERS mortgage. The court found that while it may seem inequitable or unfair, there was significant authority supporting the ruling that a defectively executed but recorded mortgage could not take priority over a subsequent, validly recorded mortgage, despite actual knowledge of the first mortgage:

{¶63} "This court's research reveals significant authority for the proposition that a defectively executed mortgage is invalid as to a subsequent mortgagee or lienholder, even if the subsequent mortgagee/lienholder had actual knowledge of the prior defectively executed mortgage. One recent commentator succinctly summarized Ohio law on this subject as follows: 'In Ohio, * * * a defectively executed mortgage will be afforded no priority over subsequent legal interests or liens, even where the subsequent legal interests or liens were acquired with actual notice of the mortgage.' Dunaway, Law

of Distressed Real Estate (2004), Section 78:3, Effect of Defectively Executed Mortgage. Numerous cases support this interpretation of the state of Ohio law on the subject. See, e.g., *Langmede v. Weaver* (1901), 65 Ohio St. 17, 34, 60 N.E. 992 (Ohio case law indisputably establishes the principle that a recorded mortgage that lacks some requisite of legal execution is not available for any purpose against a third person who subsequently acquires the title to or an interest in the property and that actual notice by the subsequent acquirer at the time, however complete it may be, of the existence and record of the prior defectively executed mortgage imparts no value or efficacy to it); *Strang v. Beach* (1860), 11 Ohio St. 283, 288-289, 1860 WL 51 (defectively executed mortgages are not entitled to be recorded, and any such mortgages recorded have no effect whatsoever, either at law or in equity, as to third parties, whether the third parties had notice of the defectively executed mortgage or not); *Priority Mortgage & Inv. Co. v. Flesariu* (1924), 2 Ohio Law Abs. 760, 1924 WL 2791 (a mortgage not being executed according to the requirements of the statute cannot be properly recorded and, therefore, is not effective as to third parties who acquire an interest in or lien upon the real estate, even though the third parties have full knowledge of the mortgage and knew that the parties would regard the transaction as creating a mortgage); *Regan v. Walsh* (1901), 11 Ohio Dec. 611, 8 Ohio N.P. 691, 1901 WL 852 (a mortgage defectively executed is not entitled to record and, if recorded, the unauthorized record will not give it any priority over later liens or purchases, even though the subsequent purchaser or mortgagee had actual notice of the former mortgage); *Kane v. Moulton* (1900), 1 Ohio Dec. 410, 1900 WL 1194 (a mortgage defectively executed is invalid as to subsequent purchasers of the land, even if the

subsequent purchasers had notice of the existence of the prior mortgage both by the record and the recital)."

{¶64} "Further, contrary to MERS's contention that the holding in paragraph one of *Citizens Natl. Bank* does not apply to a subsequent mortgagee who takes with actual notice of the prior defectively executed mortgage, a relatively recent case has applied *Citizens Natl. Bank* to find that a subsequent mortgagee with actual knowledge of a prior defectively executed mortgage is entitled to priority over the prior mortgage. In *Majestic Homes, Inc. v. Figgers* (Nov. 27, 1985), Lorain App. No. 3831, 1985 WL 3998, a married couple lived in a home and entered into a contract with a homebuilder to build a new home. As a result of a series of transactions completed to finance the new home, a lender ("bank one") received first mortgages on both the new and old homes. In addition, the couple owed the homebuilder money for extra work done on the new home. The couple signed blank note and blank mortgage forms covering both the new and old homes for the homebuilder. The notary was not present when the couple signed the blank forms, and he notarized them at a later date. The homebuilder's note and mortgages on both properties were then assigned to another bank ("bank two").

{¶65} "The couple filed a petition in bankruptcy some time after the construction of the new home. Bank one, the holder of the first mortgages on both the new and old homes, foreclosed on the new home, and the house was ordered sold. Bank two received no part of the proceeds of this sale. Through a series of assignments, bank two's note and mortgage on the old home eventually came into the possession of an investment company.

{¶66} “The couple eventually sold the old home to a second couple, who obtained financing from a mortgage company. The mortgage company's title agent uncovered the prior mortgages in favor of bank one and the homebuilder. The sale price agreed upon, however, was only sufficient to pay off bank one's mortgage. The title agent then contacted the homebuilder to see if it would be willing to release its mortgage on the old home, but the homebuilder never did so. The title agent proceeded to close the sale of the old property and paid the debt owed to bank one. The title agency insured that the title was clear and that the mortgage company's mortgage was a first lien. The mortgage company then assigned its mortgage to a third bank (“bank three”). The homebuilder then filed an action to foreclose on the old home, seeking a determination that its mortgage was entitled to priority over the mortgage company's subsequent mortgage. The trial court found that the homebuilder's mortgage was defective and ordered that it be canceled as of record.

{¶67} “In affirming the trial court, the court of appeals concluded that the homebuilder's mortgage was improperly notarized and, therefore, defective pursuant to R.C. 5301.01. Therefore, the court of appeals agreed with the trial court that the homebuilder's defective mortgage was not entitled to be recorded and, although recorded, it could have no priority over later properly executed and recorded mortgages. Id., citing *Wayne Bldg. & Loan Co. v. Hoover* (1967), 12 Ohio St.2d 62, 41 O.O.2d 279, 231 N.E.2d 873, and *Citizens Natl. Bank,* supra. It is apparent from the facts in *Majestic Homes* that the mortgage company that recorded its valid mortgage subsequent to the homebuilder's mortgage had actual notice of the homebuilder's prior mortgage, as the mortgage company's title agent uncovered the mortgage in favor of the homebuilder.

Thus, despite the mortgage company's actual notice of the homebuilder's prior mortgage, the court of appeals still found that the homebuilder's defectively executed mortgage, though recorded, was not entitled to priority over the mortgage company's subsequently recorded mortgage.

{¶68} “In the present case, there is no dispute that the MERS mortgage was defectively executed because Odita failed to properly notarize his signature on it. Further, there is no dispute that appellants had actual notice of the prior defectively executed mortgage, as evidenced by the HUD settlement statement. Applying the line of precedents outlined above to the present case, we find that Odita and Tempest's defectively executed mortgage to MERS was not entitled to record and, though recorded, did not have priority over appellants' properly executed and recorded mortgage, despite appellants' actual knowledge of MERS's prior mortgage at the time of recordation.

{¶69} “It would seem that, as a matter of principle, a defectively executed mortgage should be superior to a subsequent legal interest if the subsequent legal interest was acquired with notice of the prior defectively executed mortgage. See 69 Ohio Jurisprudence 3d, Mortgages and Deeds of Trust, Section 103, supra. However, “[w]hile this is the rule in many jurisdictions, the rule is otherwise in Ohio because of the recording statutes.” Id. Notwithstanding, with property rights it is not necessary that the outcome be the best outcome possible in each case; only that the outcome be consistent across every case so as to provide reliability and predictability. In addressing an issue similar to that in the present case, the Ohio Supreme Court noted that it was constrained by cases that had been affirmed and adhered to by subsequent legal

authority for many years. See *White v. Denman* (1853), 1 Ohio St. 110, 115, 1853 WL 2. The court was also mindful that its decision was based on the construction given to a statute, had relation to rights of property, and had become a rule of property in determining priorities among creditors. Id. The court then explained:

{¶70} "'Stability and certainty in the law, are of the very first importance. Hardships may sometimes result from a stern adherence to general rules. This is unavoidable under any system of jurisprudence. Some barrier is essential to guard against uncertainty. If judicial decisions are subject to frequent change, it would disturb and unsettle the great landmarks of property. The certainty of a rule is often more important than the reason of it; and in the case now before us, we think that the maxim, *stare decisis et non quieta movere,* is the safe and judicial policy, and should be adhered to. If the law, as heretofore pronounced by the court, in giving a construction to the statute, ought not to stand, it is in the power of the Legislature to amend it without impairing rights acquired under it.' Id. at 115.

{¶71} "Therefore, although this court recognizes that the current ruling may seem intuitively unfair or inequitable to some observers, because there exists a significant line of authority supporting the ruling, we follow these precedents based upon stare decisis and to lend stability to future property transactions. For these reasons, appellants' first and second assignments of error are sustained." *Mortgage Electronic Registration Systems*, supra, at ¶15-22.

{¶72} Upon the above established precedent, we find that while Fifth Third had actual knowledge of the Countrywide mortgage, because the Countrywide mortgage

was defectively executed, it was not entitled to record and therefore can have no priority.

{¶73} In summary, we find Countrywide's March 2004 mortgage to be defectively executed due to the omission of the mortgagor's name in the certificate of acknowledgement. Because the mortgage was defectively executed, it was not entitled to record and has no priority over the subsequently filed Fifth Third mortgage.

{¶74} Accordingly, we find Countrywide's Assignment of Error to be not well taken and we overrule the same.

{¶75} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

Wise, J., concurring

{¶76} I concur with the decision of the majority to affirm the trial court. I write separately in order to caution that while we have strictly applied the pertinent recording statutes in this instance, various equitable doctrines remain viable in Ohio in these types of cases. For example, in *ABN AMRO Mortgage Group, Inc. v. Kangah*, --- N.E.2d ---, 2010-Ohio-3779, the Ohio Supreme Court analyzed equitable subrogation, noting that its application "depends upon the facts and circumstances of each case and is largely concerned with the prevention of frauds and relief against mistakes." Id. at ¶ 11, citing *State v. Jones* (1980), 61 Ohio St.2d 99, 102, 15 O.O.3d 132, 399 N.E.2d 1215. As long as such equitable case-by-case remedies remain available to mortgagees in the midst of the current propagation of foreclosure-related litigation, I question whether "consistency across every case" is a realistic expectation. See Majority Opinion at ¶ 69.

_____

HON. JOHN W. WISE

[Cite as *Fifth Third Bank v. Farrell*, 2010-Ohio-4839.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FIFTH THIRD BANK	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MICHAEL FARRELL, et al.	:	
	:	
	:	Case No. 09 CAE 11 0095
Defendants-Appellants	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Delaware County Court of Common Pleas is AFFIRMED. Costs assessed to Appellant, Countrywide Home Loans, Inc.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE