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LITIGATION UPDATE

McGlinchey Stafford and the Ohio Mortgage Bankers Association are pleased to bring you the OMBA Litigation Update. With content prepared by McGlinchey Stafford's nationally-recognized financial services team, the update is a quarterly report of recent, unique, and impactful cases in Ohio state and federal courts in the area of mortgage litigation.

In this report:

Final, Appealable Order

TD Reo Fund, LLC v. Citadel Analytics Group, LLC, 7th Dist. Mahoning No. 18 MA 0072, 2019-Ohio-939.

This case was a challenge to the finality of a foreclosure judgment. The appellant claimed that the judgment entry was not a final, appealable order because the order did not spell out the various advances made by the appellee for taxes and insurance, and instead included a clause that it was entitled to damages for "the advances of taxes, insurance, or otherwise expended to protect the property."

The Seventh Appellate District disagreed, and held that the foreclosure judgment was a final, appealable order, as the calculations for these advances were merely "mechanical or ministerial damage calculations."

The Bullet Point: A foreclosure order which leaves merely mechanical or ministerial damage calculations for the confirmation stage is a final order. While a foreclosure order that does not identify the number, priority, and value of outstanding liens might not be a final, appealable order, an order that leaves for another day the value of certain advances for the protection of the property is. This is especially true because there are two final, appealable orders in a foreclosure action: the judgment entry and decree of foreclosure, and the confirmation of sale order. These type of advances are usually spelled out more fully in the confirmation order, which can be appealed. Thus, "a judgment decree in foreclosure that allows as part of recoverable damages unspecified amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance is a final, appealable order pursuant to R.C. 2505.02(B)(1)."

Caveat Emptor – Real Estate

AE Property Servs., LLC v. Sotonji, 8th Dist. Cuyahoga No. 106967, 2019-Ohio-786.

This appeal centered around a real estate deal gone wrong. The parties had entered into a real estate transaction to purchase a home. A property disclosure form was provided that indicated while the seller knew of water damage, she had no knowledge of any termites or wood destroying insects. It turns out the property did in fact have termite damage and the buyer sued, alleging that the seller knew of this and fraudulently concealed the damage. The trial court ultimately granted the seller summary judgment and on appeal, the Eighth Appellate District affirmed based on the doctrine of caveat emptor.

The Bullet Point: Caveat emptor applies to "as is" residential real estate sales when: (1) the condition complained of is open to observation or discoverable upon reasonable inspection; (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor. An "as is" sale indicates that the buyer is "accepting the risk" associated with purchasing the property. In those situations, caveat emptor applies unless the seller has engaged in fraud. While Ohio law now has statutory requirements for disclosure of latent defects in residential property sales, caveat emptor still applies. Only a showing of actual knowledge on the seller's part of the defect without disclosing it will suffice to avoid the doctrine.

CFPB's "Ability to Repay" Rule

Elliot v. First Fed. Comm. Bank of Bucyrus, S.D. Ohio No. 17-cv-00042 (Mar. 26, 2019).

This case involved the first substantive analysis of the Consumer Financial Protection Bureau's (CFPB) amendments to the Truth-in-Lending Act's (TILA) "ability to pay"/qualified mortgage rule. Here, the United States District Court for the Southern District of Ohio granted summary judgment to the lender, finding that events that reduced the plaintiff's income were not foreseeable by the lender and not subject to the ability to repay rule.

The Bullet Point: TILA's "ability to repay rule," codified at 15 USC 1639c(a)(1), prohibits a creditor from making a residential mortgage loan "unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms… ." As this case demonstrates, whether a creditor made a reasonable and good faith determination is a fact-intensive inquiry. Factors that a court will consider in determining whether a lender violated the Ability to Repay Rule include the past relationship with the borrower, including the borrower's payment and credit history, the borrower's employment history, and sources of income.

Online Defamation

Maddox Defense, Inc. v. Geodata Systems Management, Inc., 8th Dist. Cuyahoga No. 107559, 2019-Ohio-1778.

This was an appeal of the trial court's decision to grant summary judgment to the plaintiff in a breach of contract dispute. Both companies in the lawsuit specialized in manufacturing products to the military. The plaintiff entered into an agreement with the defendant to purchase a number of gunnery targets that would then be sold to the military. Defendant required the sale price up front. After plaintiff paid, defendant failed to deliver the gunnery targets in a timely manner and the plaintiff cancelled its order and demanded its money back. When it was not paid back, plaintiff sued for breach of contract. Defendant filed various counterclaims, including for tortious interference with a contract and business relationship, and a defamation claim related to online postings made about the defendant. Ultimately plaintiff was awarded summary judgment and defendant appealed. On appeal, the Eighth District affirmed, finding that the plaintiff's online postings about its business dealings with the defendant were opinion and not fact, and thus not actionable defamation.

The Bullet Point: The elements of a defamation claim are: "(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement. If a statement is defamatory per se, in that it tends to injure a person in his or her trade or occupation, damages are generally presumed. Truth is a defense to defamation. Moreover, when confronted with a statement published online, an opinion (as opposed to a fact statement) is typically protected from such a claim. In making this determination, courts consider the totality of the circumstances, including (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.

Homeowners' Association Receivership

Grand Arcade Condominium Owners Assn v. GA 130 LLC, 8th Dist. Cuyahoga No. 107733, 2019-Ohio-2003.

This was an appeal of a trial court's decision to deny a Homeowners' Association's request to appoint a receiver in a foreclosure proceeding. A first lien mortgage holder had objected to the request on the basis that its lien had "priority" and the trial court agreed. On appeal, the Eighth Appellate District reversed, finding that appointment of a receiver in this situation was mandatory and a lien holder's priority was immaterial.

The Bullet Point: Unlike Ohio's general receivership statute, the Home Owner Association statutes indicate that a condo association is entitled to the appointment of a receiver. Courts have found this language to be mandatory. The fact that a first lien mortgage might have priority over a Home Owner Association lien does not matter with respect to appointment of a receiver. In fact, the appointment of a receiver in these cases does not impact the first lien holder's mortgage priority.

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Jim represents mortgage servicing companies, national banks, auto finance companies, and small businesses in cases involving federal and state regulatory matters, appeals in both state and federal court, consumer complaints filed with the CFPB, and single-plaintiff lawsuits.

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About Ohio Mortgage Bankers Association

The Ohio Mortgage Bankers Association, founded in 1961, is a statewide organization devoted exclusively to the field of residential and commercial real estate finance. OMBA's membership comprises of mortgage originators and servicers, as well as investors, and a wide variety of mortgage industry-related firms. OMBA is dedicated to the maintenance of a strong housing, residential and commercial, real estate finance system. This involves support for a strong economy; a public-private partnership for the production and maintenance of single and multi-family homeownership opportunities; a strong secondary mortgage credit delivery system; equitable tax laws; suitable shelter for low income families and the disadvantaged; housing opportunities for the nation's veterans; appropriate environmental measures; and fair and equitable bankruptcy laws. **Learn more: www.ohiomba.org**

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