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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:

Failure to Identify a Signatory by Name in Agreement

The Bank of New York Mellon v. Rhiel, Slip Op. No. 2018-Ohio-5087.

This was an appeal of a certified question to the Ohio Supreme Court regarding whether the failure to identify a signatory by name in a mortgage agreement renders the agreement unenforceable against that individual.

In this case, two homeowners filed bankruptcy. In the bankruptcy the trustee sought to avoid the mortgage encumbering the homeowner's real property, arguing that the mortgage did not attach to one of the homeowner's interests because his name was not included in the definition of "borrower" in the mortgage. The bankruptcy court disagreed and the question was certified to the Ohio Supreme Court.

On appeal, the Ohio Supreme Court held "that the failure to identify a signatory by name in the body of a mortgage agreement does not render the agreement unenforceable as a matter of law against that signatory. It is possible for a person who is not identified in the body of a mortgage, but who has signed and initialed the mortgage, to be a mortgagor of his or her interest."

The Bullet Point: In reaching this conclusion, the Ohio Supreme Court determined that Ohio law does not have strict requirements for executing mortgages. Rather, they are generally governed by the standard rules of contract, which merely require for a contract to exist there must be a meeting of the minds of the parties regarding the contract's essential terms, and those terms must be reasonably certain and clear. Likewise, the Supreme Court noted that under standard rules of contract interpretation,

a contracting party's signature manifests the party's intent to be bound to a contract's terms. Accordingly, "[a]s a matter of general contract interpretation, it is possible for a person who is not identified in the body of a mortgage but who has signed and initialed a mortgage to be a mortgagor of his or her interest."

Laches and Estoppel
U.S. Bank N.A. v. Mitchell, 2d Dist. Montgomery No. 27984, 2018-Ohio-4887.

This was an appeal of a trial court's decision to grant a lender summary judgment in a foreclosure action. The defendant claimed the lender was estopped from foreclosing because it sat on its rights and should not be permitted to foreclose. The trial court disagreed and the defendant appealed.

On appeal, the Second Appellate District affirmed, finding that neither laches nor estoppel defenses were established by the defendant, thus they did not apply in the case to defeat summary judgment.

The Bullet Point: Laches and estoppel are affirmative defenses. To establish laches, a defendant must show: (1) conduct on the part of the defendant * * * giving rise to the situation of which complaint is made and for which the complainant seeks a remedy (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant. Laches is an "acquiescence in the assertion of adverse rights and undue delay on complainant's part in asserting his own, to the prejudice of the adverse party." Further, the party asserting the defense must demonstrate that the prejudice is material to the claim, and it "may not be inferred from a mere lapse of time."

Similarly, in order to prevail on an estoppel defense, a defendant must show (1) that the plaintiff made a factual representation, (2) that the representation was misleading, (3) that defendant acted in good faith reliance on that misrepresentation, and (4) that his reliance had a detrimental result

FHA-HUD "Face-to-Face Interviews"
U.S. Bank Nat'l Assn v. Cavanaugh, 10th Dist. Franklin No. 18AP-358, 2018-Ohio-5365.

This was an appeal of a foreclosure judgment, considering whether the lender established compliance with all conditions precedent prior to foreclosure. The mortgage loan at issue was insured by FHA which requires, among other things, a lender to hold a face-to-face meeting with a homeowner before accelerating a loan. The law provides a number of exceptions to this requirement, including whether a lender made a "reasonable attempt" at a meeting, which requires sending a letter to the homeowner offering a meeting and at least one visit to the property.

Here, the lender put forth evidence that it mailed a letter to the borrowers offering a face-to-face meeting and visited the property. The borrowers claimed the evidence was insufficient to establish compliance with FHA-HUD regulations and the trial court disagreed, granting summary judgment to the lender.

The borrowers appealed and on appeal the Tenth Appellate District affirmed, finding that the lender presented sufficient evidence establishing compliance with FHA guidelines and the borrowers failed to present any evidence to the contrary to create an issue of fact for trial.

The Bullet Point: "Under FHA-HUD regulations, [t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage

are unpaid." However, a face-to-face meeting is not required in certain circumstances. No meeting need occur if "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. 203.604(c)(5). A "reasonable effort" must include (1) "at a minimum one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and (2) "at least one trip to see the mortgagor at the mortgaged property," unless an exception is met. There is a split in authority in Ohio as to whether compliance with this regulation is a condition precedent or an affirmative defense to foreclosure. Likewise, courts are split as to whether the face-to-face meeting must be had before three payments are missed or whether that is a merely aspirational. The majority of courts adopting "a 'common-sense construction' of 24 C.F.R. 203.604 that requires lenders to conduct a face-to- face meeting, or make a reasonable effort to arrange such a meeting, at some point prior to filing for foreclosure."

Loan Servicer that Acquired the Loan via Assignment Subject to the CSPA

Murphy v. Ditech Financial LLC, 8th Dist. Cuyahoga No. 106896, 2018-Ohio-5041.

This appeal involved claims for abuse of process and violation of the Consumer Sales Practices Act (CSPA) brought by a mortgage borrower against her loan servicer for filing an allegedly meritless foreclosure action. The borrower claimed that the loan servicer and its counsel filed a foreclosure action without a legitimate basis to do so because she had discharged her debt in bankruptcy.

The loan servicer moved to dismiss, arguing that there was no allegation that the foreclosure was filed to accomplish some ulterior purpose as required to state an abuse of process claim and, moreover, that it was exempt from the CSPA. The trial court granted the motion and the borrower appealed.

On appeal the Eighth Appellate District affirmed in part and reversed in part, finding that while the borrower failed to please a plausible claim for abuse of process, the loan servicer, who was also the mortgagee of record, was in fact subject to the CSPA.

The Bullet Point: As the Ohio Supreme Court previously held, "[t]he servicing of a borrower's residential mortgage loan is not a 'consumer transaction' as defined in R.C. 1345.01(A)" and "[a]n entity that services a residential mortgage loan is not a 'supplier' as defined in R.C. 1345.01(C)." *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, paragraphs one and two of the syllabus. However, a loan servicer could still be subject to the CSPA if it is a loan officer, mortgage broker, or nonbank mortgage lender. A "nonbank mortgage lender" is defined as, among other things, "any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States[.]" Courts, including the court in *Murphy*, have found that loan servicers that acquired the mortgage loan via assignment fit the definition of a nonbank mortgage lender subject to the CSPA.

Defamation – Doctrine Of Absolute Privilege

Pincus v. Pincus, 8th Dist. Cuyahoga No. 106845, 2018-Ohio-5231.

This appeal involved claims of absolute privilege to bar a defamation lawsuit. The parties were relatives involved in a family owned bakery business. Eventually a dispute between family members arose in the management of the bakery and a lawsuit was filed. The defendant ultimately obtained a judgment in that lawsuit and then engaged in what the plaintiff claimed was a campaign of harassment to pursue and collect on the judgment. Eventually, representatives of defendant sent a copy of a new lawsuit to a local paper, stating that they intended to file against the plaintiff. The paper published the complaint and in response, the plaintiff filed suit asserting a defamation claim.

Defendants filed a motion for judgment on the pleadings. With respect to the defamation claim, defendants claimed absolute privilege. The trial court agreed and dismissed the lawsuit. Plaintiff appealed and on appeal the Eighth Appellate District affirmed, finding that the defamation claim was barred by absolute privilege.

The Bullet Point: Under Ohio law, defamation occurs "when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business, or profession.'" "To establish defamation, the plaintiff must show (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." The doctrine of absolute privilege carves out an exception for allegedly defamatory statements. "'No action will lie of any defamatory statement made by a party to a court proceeding, in a pleading filed in such proceeding, where the defamatory statement is material and relevant to the issue.'" As the Ohio Supreme Court has noted, "the defense of privilege, or immunity, in cases of defamation does not differ essentially from the privileges, such as those of self-defense, protection of property, or legal authority, available as to assault and battery. It rests upon the same idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."

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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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