

IN THE SUPREME COURT OF OHIO

ORIGINAL

Wells Fargo Bank, N.A.,	:	
	:	
Plaintiff-Appellee,	:	On Appeal from the Belmont
	:	County Court of Appeals,
v.	:	Seventh Appellate District
	:	
Dale Michael, et al.,	:	
	:	
Defendants,	:	Court of Appeals
	:	Case No. 12-BE-26
and	:	
	:	13-1163
James J. and Norma Fleagane,	:	
	:	
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS JAMES J. AND NORMA FLEAGANE

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT INTEREST

This case is of public or great interest because the Seventh District Court of Appeals decision wrongly recognizes a mortgagee has an interest in land rather than just a lien. It changes Ohio from following a lien theory of mortgages to a title theory. Contrary to this Court's recent decision in *Fed. Home Loan Mtge, Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012 Ohio 5017, 979 N.E.2d 1214, it gives a mortgagee standing to terminate land title interests. The current mortgage foreclosure crisis is national. It has neither escaped the attention of the Ohio legislature nor this Court. Recently, this Court decided a mortgage foreclosure standing issue in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*. Precisely because of its holding regarding standing in *Fed. Home Mtge. Corp.*, this Court should hear this case.

This case is also of public or great interest because it rewrites Ohio law as to the validity and enforceability of restrictive covenants in foreclosure actions under R.C. § 2329.20, et seq. In this case, the Seventh District Court of Appeals held the repurchase option at issue does not run with the land and survive a foreclosure sale. The Court of Appeals further held that foreclosure, under the right of first refusal in Grantor Fleagane's deed, was not a triggering event for the preemptive rights retained by Appellants. *Wells Fargo Bank, N.A. v. Michael*, 2013 Ohio 2545 *50 (7th App. Dist., 2013).

The decision of the Court of Appeals undermines the validity of restrictive covenants in foreclosure actions when the financial institution has record notice of the preemptive rights, and further conflicts with the Tenth District Court of Appeals' well reasoned decision and holding in *National City Bank v. Welch*, 188 Ohio App. 3d 641 (10th App. Dist., 2010). It also is contrary to Ohio's long-standing position as a "lien theory" state, as opposed to a "title theory" jurisdiction.

Therefore, this Court should not allow the decision of the Seventh District Court of Appeals to remain a valid legal precedent.

As warned by the Tenth District Court of Appeals in its *National City Bank* decision, the Seventh District's holding sets a precedent which effectively extinguishes preemptive rights. To circumvent the intent of the Grantor to the preemptive right, a third-party buyer would simply need to take a mortgage from the present owner and foreclose (or take a deed in lieu of foreclosure) to take free of the restrictive covenant. *National City Bank*, at 647. In conforming with the equitable concepts of fair play and substantial justice, the Tenth District Court of Appeals determined: "[W]hen a purchaser has notice of a restrictive covenant or servitude, it will be enforced against them." *Id.* at 648.

In order for the Court to clarify the law on a mortgagee's standing to challenge the validity and enforceability of restrictive covenants and other muniments of title in foreclosure actions, and to rationalize the recent decisions by the Tenth Appellate District and the Seventh Appellate District, this Honorable Court must grant jurisdiction to hear this case and review the erroneous decision of the Seventh District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

The present case involves the right of deed Grantors to exercise preemptive rights of first refusal and/or a purchase option on land subsequently mortgaged and foreclosed by a financial institution who had record notice of the restrictive covenants.

On or about February 20, 2002, James J. Fleagane and Norma Fleagane, Co-Trustees for JNJ Trust No. 1 and JNJ Trust No. 2, executed and delivered a General Warranty Deed (hereinafter the "Deed") conveying the subject real property located at 55022 High Ridge Road,

Bellaire, Ohio, to Defendants Dale Michael and Deborah Michael. The General Warranty Deed was filed for record on February 22, 2002 and recorded in Volume 774, Page 897 of the Belmont County Record of Deeds. A certified copy of the deed is attached to and incorporated as "Exhibit 1" in the Affidavit of James J. Fleagane (hereinafter the "Fleagane Affidavit") filed with the Fleaganes' Response Brief to Plaintiff's Motion for Summary Judgment.

The deed made the conveyance subject, in pertinent part, to two (2) restrictive covenants whereby the Grantors kept both an absolute right to purchase the property (i.e., a "right of first refusal") and a purchase option, which state as follows:

1. The Sellers shall have the prior right to purchase or repurchase this property for the sale price of \$275,000.00, plus the verifiable cost of improvements made to the premises by purchasers; in no event shall the total repurchase price exceed the sum of \$425,000.00 unless mutually agreed to by the parties. Sellers shall have the right for a period of 50 years to the date of this deed, and this right shall be enforceable by the Sellers, or their direct descendants, or assigns. Sellers shall give Purchasers 120 days notice of their intention to exercise this right.
2. Sellers shall also have the right of first refusal; the Purchasers shall present to the Sellers any written contract binding all parties for the sale of this property, and resulting from an "arms-length" negotiation, which Purchasers receive for the sale of this property, and for which the Sellers shall have 30 days within which to elect to purchase the property at the price offered by the prospective buyer. They shall then have an additional 30 days to close the transaction.

Subsequently on April 29, 2003, Defendants Dale Michael and Deborah Michael, husband and wife, executed and delivered to Novastar Mortgage, Inc. (hereinafter "Novastar") a mortgage (hereinafter the "Mortgage") of the subject real property in the principal amount of \$166,500.00 dated April 29, 2003, filed for record June 4, 2003 and recorded in Volume 904, Page 340 of the Belmont County Record of Mortgages (a certified copy of this Mortgage is attached to and incorporated as "Exhibit 2" to the Fleagane Affidavit).

On or about September 10, 2010, Mortgage Electronic Registration Systems, Inc. "MERS," acting solely as nominee for Novastar Mortgage, Inc., assigned the mortgage to Plaintiff-Appellee Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), by Assignment (hereinafter the "Assignment") dated September 10, 2010, filed for record September 16, 2010, and recorded in Book 241, Page 447 of the Belmont County Official Records. A certified copy of the Assignment is attached to and incorporated as "Exhibit 3" to the Fleagane Affidavit.

It is undisputed both Novastar, as the Mortgage's Mortgagee and Assignor, and Wells Fargo, as the Mortgage's Assignee, had notice by the deed of the restrictive covenants whereby the Grantors Fleagane retained the "right of first refusal" to purchase the property before the Michaels mortgaged it to Novastar and before Wells Fargo became the assignee of the Mortgage from Novastar. *Wells Fargo*, at *33. It is further undisputed neither Novastar nor Wells Fargo inquired with deed Grantors Fleagane whether either of them would exercise their preemptive rights under "the right of first refusal" restrictive covenant upon ripeness. See Fleagane Affidavit, ¶ 8, 11.

On September 7, 2010, Wells Fargo filed the Complaint herein against Dale Michael and others seeking to foreclose upon the Mortgage, in the Belmont County Court of Common Pleas as Case No. 10-CV-0399. On April 16, 2011, Wells Fargo amended the Complaint herein to add the Fleaganes as party defendants due to the Grantors' restrictive covenants of retained rights (repurchase option and right of first refusal) in the deed.

On April 20, 2011 the Fleaganes filed their Answer to the Amended Complaint defending in pertinent part, that the "re-purchase rights and the right of first refusal retained by the Grantors [in the deed] . . . has priority over Plaintiff's mortgage and shall not be extinguished either by an

order of sale issued in this case or by the foreclosure sale in this case of the subject estate.”

On or about December 13, 2011, Wells Fargo moved the Court for Summary Judgment on all claims of the Amended Complaint. On June 15, 2012, the Trial Court overruled in part and sustained in part Wells Fargo’s motion for summary judgment, holding the foreclosure sale was the “triggering event” for the preemptive rights retained by the Fleaganes. In its Judgment Entry, the trial court stated, in pertinent part:

The Court finds that, Plaintiffs are entitled to foreclosure of the real estate, *subject to the preemptive rights of Defendants*, Fleagane, because Plaintiff is entitled to exercise its rights against Defendants, Michael, for their failure to pay their obligation pursuant to the terms of the mortgage. Therefore, foreclosure shall proceed in accord with the law. However, since Plaintiff is not a good faith purchaser for value, in the event Plaintiff would purchase the real estate at the foreclosure sale, Defendants, Fleagane, shall exercise their right of first refusal, or such right shall be deemed to have been forfeited, in accord with the finding of this Court that *the foreclosure sale constitutes the triggering event compelling the exercise of the right of first refusal*. See “Exhibit C.” (Emphasis added).

On July 16, 2012, Wells Fargo timely filed its Notice of Appeal to the Seventh Appellate District of the trial court’s summary judgment decision. The Seventh Appellate District reversed and remanded the decision of the trial court, holding the repurchase option in the General Warranty Deed did not “run with the land” and survive foreclosure, and that foreclosure did not constitute a “triggering event” for the right of first refusal pursuant to the language of the restrictive covenant. See “Exhibit A,” ¶ 3, 50.

The Court of Appeals erred in its holding by recognizing Wells Fargo had standing, by ignoring the clear intent of the Grantors, by ignoring Ohio’s status as a “lien theory” jurisdiction, by refusing to acknowledge the foreclosure sale by Wells Fargo as a “triggering event” for the retained preemptive rights of the Fleaganes, and by failing to apply the equitable doctrine of estoppel due to Wells Fargo’s notice of the restrictive covenants.

Since there are no disputed material facts, the only issue for this Court to determine under Civ. R. 56(C) is whether Wells Fargo is entitled to judgment as a matter of law. This Court should determine Wells Fargo was not entitled to judgment as a matter of law, because of its lack of standing under R.C. § 2329.20, et. seq., the common law, the well reasoned Judgment Entry of the trial court, the rationale of the Tenth Appellate District in its *National City Bank* decision, and the following reasons:

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: As a matter of law a mortgagee has no standing to challenge a “Right of First Refusal,” a “Purchase Option” or a “Restrictive Covenant” which burdens a mortgagor’s title because a mortgagee has no interest in the mortgaged land. Ohio follows the lien theory of mortgages.

From the inception of Ohio law to date, Ohio has followed the lien theory of mortgages. *Ely v. McGuire*, 2 Ohio 223, 1826 LEXIS 60 (1826); (A mortgage of real estate is regarded in equity, as a mere security for the performance of its condition of defeasance). *Swartz v. Leist*, 13 Ohio St. 419, 423, 1862 Ohio LEXIS 128; *Martin v. Alter*, 42 Ohio St. 94 syllabus 2, 1884 Ohio LEXIS 226, (1884) (The legal title remains in the grantor or mortgagor in possession after default, subject to the right of the trustee or creditor to enforce the condition of the mortgage); *James Financial Corp. v. Country Club Villages of America, Inc.*, 1975 Ohio App LEXIS 8026 p. 3 (Ninth App. Dist. 1975); *Hunter Sav. Ass'n v. Georgetown of Kettering, Ltd.*, 14 B.R. 72, 80, 1981 Bankr, LEXIS 3032 (S.D. Ohio 1981) (Ohio has adopted the “lien theory” of mortgages.) . In Ohio, a mortgage is characterized by statute as a “lien.” R.C. §§ 5301.31, 5301.39-5301.41. In sum, under the lien theory of mortgages a mortgagee only has a lien on the land not a vested title interest. Accordingly, under the mortgage foreclosure statutes of R.C. § 2329.20, et. seq. and the common law, a mortgagee only has standing to foreclose on its lien (to marshal liens and to sell

the property). Neither R.C. § 2329.20, et. seq. nor the common law gives a mortgagee standing to alter the mortgagor's title in a foreclosure action. Land title challenges must be brought under the quiet title statute, R.C. § 5303.01, not the foreclosure statutes. Since a mortgagee has no vested title interest in the land, a mortgagee does not have standing to bring suit to challenge a "Right of First Refusal," "Purchase Option," or a "Restrictive Covenant" which burdens the mortgaged land.

Standing is a jurisdictional requirement in which this Court has held, "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, *some real interest in the subject matter of the action.*" *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 18 (2012) (emphasis added); *see also New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218 (1987) ("The issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings"). Because standing to sue is required to invoke the jurisdiction of the common pleas court, "standing is to be determined as of the commencement of suit." *Fed. Home Loan Mtge. Corp.*, at 19, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571 (1992). An action must be prosecuted in the name of the real party in interest. *Shealy v. Campbell*, 1984 Ohio App. LEXIS 11885 *6 (3rd App. Dist., 1984); *citing Cleveland Paint & Color Co. v. The Bauer Manufacturing*, 155 Ohio St. 17 (1951). Standing to sue is part of the common sense understanding of what it takes to make a justiciable case. *Fed. Home Loan Mtge. Corp. v. Rufo*, 2012 Ohio 5930 *17 (11th App. Dist., 2012); *citing Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). Standing involves a determination of whether a party has alleged a personal stake in the outcome of the controversy to ensure the dispute will be presented

in an adversarial context. *Id.*, citing *Mortgage Elec. Registration Sys. v. Petry*, 2008 Ohio 5323 *18 (11th App. Dist., 2008). A personal stake requires an injury to the plaintiff. *Id.*

Consequently, Wells Fargo had no standing as a mortgagee to bring suit against the Fleaganes to challenge their title interests and this Court should hear this case to correct the Seventh District Court of Appeals' error.

Proposition of Law No. II: As a matter of law, a “Right of First Refusal” or a “Purchase Option” in a prior deed are not liens or encumbrances on land subject to extinguishment by a mortgage foreclosure action under R.C. § 2329.20, et. seq.

As a matter of law, a “right of first refusal” or a “purchase option” in a deed are restrictive covenants which run with the land and bind subsequent purchasers and mortgagees of real property, so long as the subsequent purchaser or mortgagee had notice of the covenant. See *National City Bank*, at 646; *Wargo v. Henderson*, 2009 Ohio 2443 *33 (7th App. Dist., 2009). In the present case, it is undisputed both Novastar, as the Mortgage’s Mortgagee and Assignor, and Wells Fargo, as the Mortgage’s Assignee, had notice by the deed of the restrictive covenants whereby the Grantors Fleagane retained the “right of first refusal” to purchase the property before the Michaels mortgaged it to Novastar and before Wells Fargo became the assignee of the Mortgage from Novastar. *Wells Fargo*, at *33.

As a matter of law, a “right of first refusal” or a “purchase option” on the public record are not extinguished by the foreclosure of a subsequently recorded mortgage. See *National City Bank*, at 647; *James Fin. Corp. v. Country Club Villages of Am. Inc.*, 1975 Ohio App. LEXIS 8026 *4 (9th App. Dist., 1975) (“Ohio follows the lien theory of mortgages[.]”). Even if a “right of first refusal” or a “purchase option” were liens instead of restrictive covenants, under R.C. § 2329.20, the “right of first refusal” or a “purchase option” in this case would be a prior lien

which would not be affected by the foreclosure of the mortgage.

As a matter of law, only a lien or encumbrance on land is subject to extinguishment in a mortgage foreclosure action. A foreclosure action cannot be used as a quiet title action under R.C. § 5303.01 et seq., to terminate either a “right of first refusal” or a “purchase option” on the public record before the lien being foreclosed was recorded. Accordingly, the Fleaganes preemptive rights are not extinguished by the foreclosure of a subsequently recorded mortgage, said rights “run with the land” due to Novastar and Wells Fargo’s notice of the restrictive covenants affecting the property at issue, and the foreclosure by Wells Fargo acts as the triggering event for the Fleaganes’ preemptive rights. *National City Bank*, at 646.

Proposition of Law No. III: A financial institution which has record notice of restrictive covenants in a deed, and proceeds to issue a mortgage loan on the real property, is estopped from denying the validity or enforceability of the preemptive rights of the prior deed Grantors.

It is undisputed both Novastar, as the Mortgage’s Mortgagee and Assignor, and Wells Fargo, as the Mortgage’s Assignee, had notice by the deed of the restrictive covenants whereby the Grantors Fleagane retained the “right of first refusal” to purchase the property before the Michaels mortgaged it to Novastar and before Wells Fargo became the assignee of the Mortgage from Novastar. *Wells Fargo*, at *33; Fleagane Affidavit ¶’s 4, 6, 9. It was also undisputed neither Novastar nor Wells Fargo inquired with Deed Grantors Fleagane whether either of them would ever exercise their preemptive rights under the restrictive covenants upon ripeness. See Fleagane Affidavit ¶ 8, 11.

Therefore, as a matter of law, Wells Fargo was not a bona fide purchaser for value because it was undisputed Wells Fargo knew about the Fleagane Trustees’ purchase option and right of first refusal, yet did nothing, then failed to make inquiry to ascertain whether the

Fleagane Trustees would be exercising their repurchase rights while Defendants Michael were still owners of the property. *National City Bank*, at 648. Even if Wells Fargo was a bona fide purchaser for value, it is bound by the restrictive covenants because notice thereof was contained in a property executed and recorded deed. See R.C. § 5301.25(A).

Recently, the Tenth District Court of Appeals addressed the issue at bar in *National City Bank v. Welch*, where the sole issue before the Court was “whether the bank is bound by the language in the deed, which purports to grant appellant an absolute right to purchase the property.” *National City Bank*, at 646.

The financial institution in *National City Bank* filed a mortgage foreclosure action on real property whose title was held under a deed which granted a “right of first refusal.” *The National City Bank* trial court granted summary judgment to the bank, and upon appeal the Tenth District Court of Appeals reversed, opining in pertinent part:

In this case, it is undisputed that the bank had notice of the restrictive covenant granting appellant’s class a right of first refusal to purchase the property. Thus, whether the right of first refusal was a personal covenant or one that runs with the land is moot. *There is no injustice done by enforcing a valid deed restriction against a subsequent purchaser, when that purchaser had knowledge of the restriction.* The outcome is unchanged by the fact that the subsequent purchaser happens to be a financial institution.

* * *

We can see no reason why Gullett’s preemptive rights should not be enforced against National City Bank, which took a mortgage on the subject property having actual knowledge of Gullett’s right. Based on the undisputed fact that the bank knew about the right of first refusal, yet did nothing—nor made an inquiry with the class members to ascertain whether any of them would be exercising their preemptive rights upon ripeness— we hold that the bank is not a bona fide purchaser.

* * *

Given the bank's willingness to loan money to Spriggs in spite of the right of first refusal, of which the bank had knowledge, *the bank should be estopped from denying the validity or enforceability of the preemptive right.* (Emphasis added). *Id.* at 647-49.

Similarly, in *Wargo v. Henderson*, the Seventh District Court of Appeals affirmed the trial court's decision which, in effect, held a mortgage foreclosure action neither trumped nor terminated the appellee's contractual right under an option agreement executed simultaneously with the mortgage being foreclosed. *Wargo*, at *22, 50. The instant case is one step removed from the *Wargo* case. In the instant case, the Trustee's option agreement was executed prior to and recorded before the mortgage was executed and recorded. Moreover, the Fleagane Trustees' option agreement herein was contained in the Mortgagor's deed to the property.

Wells Fargo is further estopped herein by it and its assignor's willingness to mortgage the property to Defendants Michael and to loan them money in spite of the purchase option and right of first refusal which they had knowledge. *Wells Fargo*, at *33; *National City Bank*, at 649. As set forth by the *National City Bank* Court, "There is no injustice done by enforcing a valid deed restriction against a subsequent purchaser, when that purchaser had knowledge of the restriction . . . Given the bank's willingness to loan money to [Grantee] in spite of the right of first refusal, of which the bank had knowledge, *the bank should be estopped from denying the validity or enforceability of the preemptive right.*" *National City Bank*, at 648-49 (emphasis added).

The Seventh District's decision is contrary to the Grantor Fleaganes' intent, and acts to circumvent the very purpose of the restrictive covenants. The Seventh District's decision sets a precedent which effectively extinguishes preemptive rights. To bypass the intent of the Grantor to the preemptive right, a third-party buyer would simply need to take a mortgage from the

present owner and foreclose (or take a deed in lieu of foreclosure) to take free of the restrictive covenant. *Id.*, at 647.

To conform with the equitable concepts of fair play and substantial justice, the Tenth District Court of Appeals recently determined: “[W]hen a purchaser has notice of a restrictive covenant or servitude, it will be enforced against them.” *Id.* at 648. Accordingly, Wells Fargo should be estopped from denying the validity or enforceability of the preemptive rights retained by the Fleaganes due to their undisputed notice of the restrictive covenants at issue.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Defendant-Appellant Fleaganes respectfully request this Court to accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Michael P. McCormick, Counsel of Record



Michael P. McCormick

COUNSEL FOR APPELLANTS,
JAMES J. AND NORMA FLEAGANE

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee, David L. VanSlyke, Esq., and Amelia A. Bower, Esq., Plunkett Cooney, 300 E. Broad Street, Suite 590, Columbus, OH 43215, and upon David Hanson, Esq., Manley Deas Kochalski, LLC, P.O. Box 165028, Columbus, OH 43216-5028; Dale Michael & Deborah Michael, 55022 High Ridge Road, Bellaire, OH 43906; Chase Manhattan Bank, USA, NA, c/o Legal Department, 200 White Clay Center Drive, Newark, DE 19711; and David K. Liberati, Esq., Assistant Belmont County Prosecuting Attorney, 147A W. Main Street, St. Clairsville, OH 43950, on July 22nd, 2013.



Michael P. McCormick

COUNSEL FOR APPELLANTS,
JAMES J. AND NORMA FLEAGANE

FILED
COURT OF APPEALS

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

NO. 12-BE-26
CYNTHIA K. MCGEE
CLERK OF COURTS, BELMONT COU

JUN 10 2013

WELLS FARGO BANK, N.A.,)
)
 PLAINTIFF-APPELLANT,)
)
 VS.)
)
 DALE AND DEBORAH MICHAEL,)
)
 DEFENDANTS,)
)
 JAMES AND NORMA FLEAGANE,)
)
 DEFENDANTS-APPELLEES.)

CASE NO. 12 BE 26

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,
Case No. 10CV399.

JUDGMENT:

Reversed and Remanded.

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 10, 2013

EXHIBIT A

VUKOVICH, J.

{11} Plaintiff-appellant Wells Fargo Bank, N.A., appeals the decision of the Belmont County Common Pleas Court that denied in part its motion for summary judgment against defendants-appellees James and Norma Fleagane. The decision to grant in part and deny in part the motion for summary judgment permitted Wells Fargo to foreclose on the real estate located at 55022 Ridge Road, Bellaire, Ohio, which was owned by Dale and Debra Michael. However, the trial court determined that the right to foreclose was subject to the Fleaganes' *repurchase option* and the *right of first refusal* that they acquired when they sold the property to Dale and Debra Michael.

{12} Two issues are raised in this case. The first is whether the *repurchase option* runs with the land and can be invoked by the Fleaganes following foreclosure. The second issue is whether the *right of first refusal* can be invoked following foreclosure at the Sheriff's sale to acquire the property for the same amount as the highest bidder.

{13} For the reasons discussed below, we hold that the *repurchase option* does not run with the land. As for the *right of first refusal*, given the specific language used in the covenant, foreclosure is not a triggering event. Or in other words, the Fleaganes do not have a *right of first refusal* at the Sheriff's sale. Therefore, the trial court erred when it did not grant Wells Fargo's motion for summary judgment in its entirety. The decision of the trial court is hereby reversed and the cause is remanded.

Statement of the Case

{14} The Michaels purchased real property located at 55022 Ridge Road, Bellaire, Ohio, from the Fleaganes on February 20, 2002. The deed contains two covenants – a *repurchase option* and a *right of first refusal*.

{15} In April 2003, the Michaels took out a mortgage with Novastar Mortgage that was secured by the property located at 55022 Ridge Road, Bellaire, Ohio. That mortgage was later assigned to Wells Fargo. Thus, Wells Fargo had knowledge of the *repurchase option* and the *right of first refusal* when it acquired the mortgage.

{¶16} The Michaels eventually defaulted on the mortgage and Wells Fargo initiated foreclosure proceedings. The original complaint did not name the Fleaganes as defendants.

{¶17} The Michaels did not file an answer to the complaint, which resulted in Wells Fargo moving for default judgment. The trial court granted this motion, however, in March 2011, Wells Fargo moved to vacate the default judgment award. Wells Fargo asked for vacation because all parties in interest had not been named in the original complaint. The trial court granted the motion. 03/15/11 J.E.

{¶18} Thereafter, Wells Fargo filed an amended complaint and added the Fleaganes as defendants. The Fleaganes filed an answer asserting the *repurchase option* and the *right of first refusal* as affirmative defenses to the action.

{¶19} Wells Fargo then filed a motion for summary judgment against the Fleaganes and the Michaels. It claimed that the Michaels are in default on the loan and it has the right to foreclose. As to the Fleaganes, Wells Fargo claimed that the *repurchase option* and *right of first refusal* did not run with the land and were not enforceable in the context of foreclosure.

{¶110} The Fleaganes filed an answer brief arguing that the right of first refusal was not extinguished by foreclosure. It cited an Ohio case, *National City Bank v. Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981, 936 N.E.2d 539 (10th Dist.), in support of its position. Wells Fargo replied once again asserting that the *right of first refusal* was not enforceable and did not run with the land.

{¶111} After reviewing the parties' arguments, the trial court granted Wells Fargo's motion for summary judgment against the Michaels. However, as to Wells Fargo's motion for summary judgment against the Fleaganes, it granted the motion in part and denied it in part. The trial court explained that while Wells Fargo is entitled to foreclosure on the real estate, that entitlement is subject to the preemptive rights of the Fleaganes. Thus, the trial court held that both the *repurchase option* and the *right of first refusal* survived foreclosure. Therefore, it determined that if Wells Fargo purchased the property at the foreclosure sale it would not be a bona fide purchaser and the Fleaganes at that point could invoke either their *repurchase option* or the *right of first refusal*. 06/15/12 J.E.

{¶12} Wells Fargo appeals from that decision claiming that the right of repurchase does not survive the foreclosure and that the *right of first refusal* is not invoked in the foreclosure setting.

Standard of Review

{¶13} Both assignments of error address the trial court's summary judgment decision and thus, the same standard of review is used. In reviewing a summary judgment award, we apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we apply the same test as the trial court. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994).

{¶14} Both issues raised here are legal issues. There is no dispute as to the facts.

REPURCHASE OPTION
First Assignment of Error

{¶15} "The trial court erred in denying appellant's motion for summary judgment as to the rights of appellees to repurchase the property."

{¶16} Wells Fargo presents four arguments as to why the *repurchase option* is not enforceable against it. The first three arguments that will be addressed are procedural in nature. The last argument to address is a merit argument as to why the *repurchase option* does not survive foreclosure.

{¶17} The first procedural argument is that the Fleaganes should have filed a cross-claim against the Michaels to enforce the *repurchase option*.

{¶18} This argument lacks merit. The language of the *repurchase option* permits the Fleaganes to force the Michaels to sell them the property for a given amount and with the proper notice. The record is devoid of any indication that the Fleaganes have attempted to exercise their option. Without evidence of an attempt to invoke the option, a finding that the Michaels breached the option would not be

warranted; the Michaels only obligation is to sell the property to the Fleaganes when they provide the Michaels with 120 days notice of their intent to repurchase the property. There is no breach for failure to resell the property until that triggering event occurs. Accordingly, if the Fleaganes invoked the option and the Michaels refused to sell the property to the Fleaganes in accordance with those terms, then a cross-claim could be warranted. However, Civ.R. 13(G) provides that cross-claims are permissive, not compulsory. *Fifth Third Bank v. Hopkins*, 177 Ohio App. 3d 114, 2008-Ohio-2959, 894 N.E.2d 65, ¶ 12 (9th Dist.). Therefore, the Fleaganes were not required in this suit to file the cross-claim against the Michaels. They could have brought another suit. Thus, for those reasons, Wells Fargo's claim that the Fleaganes have waived their *repurchase option* because the Fleaganes have not filed a cross-claim against the Michaels fails.

{¶19} The next procedural issue is the trial court's determination that the *repurchase option* is not subject to the statute of frauds.

{¶20} The statute of frauds is codified in R.C. 1335.04, which states:

No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law.

{¶21} The *repurchase option* is found in the deed to the real property. The Fleaganes (sellers) signed the deed, but the Michaels (buyers) did not. The Michaels are the grantors of the right and the Fleaganes are the grantees. Since the Michaels did not sign the deed, Wells Fargo claims that the statute of frauds has not been met.

{¶22} The trial court, in concluding that the statute of frauds is not applicable, stated that there had been no legal issues raised as to whether a written contract exists between the Michaels and the Fleaganes, the original parties to the agreement. The court concluded that the language in the deed is notice to the world that such original agreement exists and that the right of repurchase exists. 06/15/12 J.E.

{¶23} The trial court's reasoning is adequate. No one is disputing that the Fleaganes conveyed the property to the Michaels. As the above quoted statute concerning the statute of frauds indicates such conveyance was required to be in writing. Both parties would have signed that conveyance since each would be under an obligation to perform a certain act, i.e. the Fleaganes convey the land and the Michaels pay "valuable consideration". (General Warranty Deed states "valuable consideration" was given for the property). Thus, such contract for the conveyance of the real estate would have met the statute of frauds. It has been explained that in order to satisfy the statute of frauds a writing may consist of one document or a series of related and integrated documents. *Internatl. Bhd. of Elec. Workers, Local Union No. 8 v. Gromnicki*, 139 Ohio App.3d 641, 645, 745 N.E.2d 449 (6th Dist.2000). The contract for the conveyance of real property taken in conjunction with the deed indicating that the Fleaganes conveyed the property to the Michaels would satisfy the statute of frauds for purposes of the *repurchase option* being valid and enforceable under the statute of frauds. Those two documents are related and logically integrated by identifying the same property.

{¶24} Therefore, for those reasons the statute of frauds argument fails.

{¶25} The last procedural argument concerns Wells Fargo's assertion that the Fleaganes should have filed a counterclaim against it asserting the *repurchase option*. Instead, the Fleaganes answered and asserted the *repurchase option* as an affirmative defense. Wells Fargo claims that since it was not properly asserted as a counterclaim and was instead improperly asserted as an affirmative defense, the trial court should have found that the Fleaganes waived their right to assert that they could repurchase the property according to the terms of the covenant.

{¶26} We disagree. Civ.R. 8(C) states, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation." Therefore, it does not matter whether the *repurchase option* should have been raised as a counterclaim or an affirmative defense. The trial court was permitted to consider the option regardless of its designation. Any argument to the contrary fails.

{¶27} Consequently, given all the above, all procedural arguments fail. Thus, our attention turns to the merit argument, whether, considering the language of the repurchase option, the option runs with the land and survives foreclosure.

{¶28} The repurchase option in the deed reads as follows:

1. The Sellers [the Fleaganes] shall have the prior right to purchase or repurchase this property for the sale price of \$275,000.00, plus the verifiable cost of improvements made to the premises by the purchasers; in no event shall the total repurchase price exceed the sum of \$425,000.00 unless mutually agreed to by the parties. Sellers shall have this right for a period of 50 years to the date of this deed, and this right shall be enforceable by the Sellers, or their direct descendants, or assigns. Sellers shall give Purchasers 120 days notice of their intention to exercise this right.

02/22/02 Deed, Exhibit B.

{¶29} This repurchase option, although based in contract, was memorialized in a deed and thus, acts as a deed restriction or covenant. See *Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981, at ¶ 13-14. Covenants are either restrictive or personal in nature. *Id.* at ¶ 14. Restrictive covenants run with the land and bind subsequent purchasers, if the purchaser had notice of the covenant. *Id.* Personal covenants, on the other hand, typically do not run with the land. *Id.*

{¶30} In order for a restrictive covenant to run with the land, three factors must be met. *Id.* at ¶ 13-14. The first is that there must be an intent for the covenant to run with the land. *Id.* at ¶ 14. The second is that the covenant must touch and concern the land. *Id.* And the third is that the parties are in privity in contract. *Id.*

{¶31} Here, the *repurchase option* is not a restrictive covenant that runs with the land; rather it is a personal covenant. This is evident by the fact that the language of the *repurchase option* does not show an intent for the covenant to run with the land. The language of the repurchase option gives that right to the Fleaganes, their descendants, or assigns. However, it does not state that the option is to be exercised against anyone other than the Michaels. The language employed shows a knowledge of how to extend the right to the Fleaganes' descendants or

assigns, however, language to extend this right to anyone the Michaels may sell this property to was not used. Thus, the first factor used to determine whether a covenant runs with the land is not met. Consequently, this covenant does not run with the land, but rather is a personal covenant.

{¶32} That said, our sister district in *Welch*, relying on a common pleas court decision, stated that in some instances personal covenants can be enforceable against subsequent purchasers, provided that the purchaser had notice of the covenant. *Id.* at ¶ 14, citing *Gillen-Crow Pharmacies*, 8 Ohio Misc. 47, 220 N.E.2d 852 (1964) (Personal covenants are enforceable, in equity, if the subsequent purchaser had notice of the covenant.). The Tenth Appellate District reasoned that no injustice results by "enforcing a valid deed restriction against a subsequent purchaser when that purchaser had knowledge of the restriction." *Id.* at ¶ 15.

{¶33} In this instance, it is undisputed that Wells Fargo had notice of the *repurchase option*. Based on that fact and the reasoning in the *Welch* decision, the trial court concluded that the *repurchase option* is enforceable against Wells Fargo.

{¶34} We cannot agree with the trial court's conclusion. While in some instances a personal covenant may be enforceable against a subsequent purchaser that has notice of the covenant, in this instance that is not the case. The *Welch* decision specifically demonstrates that it is the language used in the covenant that specifies when the covenant is triggered. See also *Wargo v. Henderson*, 7th Dist. No. 08CO21, 2009-Ohio-2443. *Welch* addresses a *right of first refusal* and not a *repurchase option*. However, it is still instructive, because both are based in contract and thus, are governed by the language used in the covenant.

{¶35} In *Welch*, the deed at issue contained a *right of first refusal* that gave Gullet, the appellant, the *right of first refusal* to purchase the family home in Grove City, Ohio from her relative, Bob Spriggs, if he ever decided to sell or from his estate after his death. Spriggs had a mortgage on the property, which was not paid off prior to his death. The bank filed a foreclosure against Spriggs' estate and joined Gullet to the action. Until the foreclosure action, Gullet had no knowledge of her interest in the property, but upon learning of her right to purchase, she attempted to purchase the property by tendering the specified amount to the bank. The bank, however, refused

to sell to her. The bank argued that the *right of first refusal* was not invoked because the estate had not offered the property for sale. The appellate court disagreed, first stating that offering the property for sale is irrelevant given the certainty and inevitability of an estate sale. Secondly, it concluded that Gullet had notified the estate and the bank of her intention to exercise her right to purchase the property. The appellate court found that the triggering event for the *right of first refusal* in the language used in that covenant was Spriggs' death; it was not an offer for the sale of the property that triggered the right of first refusal. *Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981.

{¶36} Here, for the same reasons discussed above as to why the *repurchase option* does not run with the land, we conclude that it also does not apply to any subsequent purchasers, even purchasers with knowledge of the covenant. While the *repurchase option* does extend to the Fleagane's direct descendants and assigns, the language of the covenant only applies to the Michaels, not to their assigns. Subsequent purchasers with knowledge of the covenant would not anticipate that they would be bound by the covenant because of the language of the covenant. Therefore, if the property is sold, the new buyers are not bound by that covenant; the specific language of this covenant indicates that it does not apply to subsequent purchasers.

{¶37} Furthermore, we also note that given the language of the *repurchase option* in the case sub judice, foreclosure is not a triggering event. Rather, the triggering event is the Fleaganes' desire to repurchase the property and 120 days notice of their intention to exercise this right. There is nothing in the record to suggest that these factors have been met. However, as Wells Fargo admits, the Fleaganes could exercise this option, even at this point, and avoid foreclosure, provided they deal with the Michaels' mortgage. *Wargo*, 2009-Ohio-2443. That said, as explained above, the *repurchase option* does not extend past the foreclosure.

{¶38} In conclusion, this assignment of error has merit. While Wells Fargo's statute of frauds, cross-claim and counterclaim arguments fail, its argument that the trial court incorrectly determined that the *repurchase option* is enforceable against it following foreclosure has merit. Accordingly the trial court's decision regarding the

repurchase option is reversed. Once foreclosure has been granted, the Fleaganes cannot exercise their option to repurchase the property.

Right of First Refusal
Second Assignment of Error

{¶39} "The trial court erred in denying appellant's motion for summary judgment as to appellees right of first refusal to purchase the subject property."

{¶40} As discussed above, in determining whether a covenant runs with the land and what event triggers that covenant we must look to the language of the covenant.

{¶41} The right of first refusal in the deed provides:

2. Sellers [the Fleagane's] shall also have the right of first refusal; the Purchasers [the Michael's] shall present to the Sellers any written contract binding all parties for the sale of this property, and resulting from an "arms-length" negotiation, which Purchasers receive for the sale of this property, and for which the Sellers shall have 30 days within which to elect to purchase the property at the price offered by the prospective buyer. They shall then have an additional 30 days to close the transaction.

02/22/02 Deed, Exhibit B.

{¶42} Regardless of whether this covenant runs with the land, the language of the covenant indicates that foreclosure is not an event that triggers the Fleaganes *right of first refusal*. While the "any written contract" language used in this covenant, when considered by itself, may indicate that a foreclosure sale would invoke the *right of first refusal*, this *right of first refusal* also requires an "arms-length" negotiation. A foreclosure sale is not derived from an "arms-length" negotiation because it is a forced sale, not a voluntary sale:

A judicial sale of property upon foreclosure occurs only when the owner has defaulted on the debt. The owner has the option of selling this or other property to pay the moneys due. In the instant case, the owner did not make her own sale. And because she has made a legally binding agreement that the realty should secure the debt, she is

subject to the statutory foreclosure and sale procedure. That procedure is designed to protect her interests as well as the creditor's. One respect in which it does so is by its limitations on the acceptable sale price. A forced sale by its very nature is less likely to bring the full value of realty than an arms-length transaction. The statute prevents the sale from becoming a sacrifice, by requiring that it return at least two thirds of the appraised value, R.C. 2329.20.

Advance Mortgage Corp. v. Novak., 8th Dist. No. 36267, 1977 WL 201469 (June 9, 1977).

{¶43} Therefore, foreclosure is not a triggering event for this *right of first refusal*.

{¶44} Our conclusion that foreclosure does not, in this instance, trigger the *right of first refusal* is not in direct conflict with the *Welch* decision. The *Welch* court did not summarily hold that foreclosure triggers any *right of first refusal*. Rather, the court indicated that considering the language of the covenant at issue in that case, the covenant would be triggered either when Spriggs died or when the property was offered for sale. *Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981, ¶ 16. Spriggs died. Therefore, the *right of first refusal* was triggered. *Id.* at ¶ 17. The court did not determine whether foreclosure is an offer for sale that triggered the *right of first refusal* as was written in that deed.

{¶45} Furthermore, decisions from other states support our conclusion that when a *right of first refusal* contains language requiring an arms-length negotiation and/or voluntary sale, foreclosure is not a triggering event. *Tadros v. Middlebury Medical Center, Inc.*, 263 Conn. 235, 820 A.2d 230 (2003) (Foreclosure was not an event that triggered the *right of first refusal* because the language used in the covenant required the grantee to "form the intention" to sell the property and to accept a bona fide offer to purchase. Those requirements were deemed to require a voluntary sale, not an involuntary sale); *Huntington National Bank v. Cornelius*, 80 A.D.3d 245, 914 N.Y.S.2d 327 (N.Y.App.Div.2010) (*Right of first refusal* required the grantee to "offer" the property for sale. "Offer," as used in the covenant, was intended to cover a conscious and voluntary choice by the grantee to make the

property available for sale. Thus, since foreclosure is an involuntary process, the *right of first refusal* could not be invoked during foreclosure); *Benefit Realty Corp. v. City of Carrollton*, 141 S.W.3d 346 (Tex.App.2004) (*Right of first refusal* only applied to a voluntary sale and taking of property by condemnation is involuntary; therefore, *right of first refusal* not triggered); *Pearson v. Schubach*, 52 Wash.App. 716, 763 P.2d 834 (1988) (Court-ordered sale of property to satisfy judgment against lessor was involuntary sale and did not trigger lessee's *right of first refusal* since agreement required that lessor be a "willing" seller of the property); *Henderson v. Millis*, 373 N.W.2d 497 (Iowa 1985) (Given language in agreement, *right of first refusal* could not be exercised in context of foreclosure sale).

{¶46} Although we hold that, in this case, foreclosure was not a triggering event for this *right of first refusal*, our decision does not stand for the proposition that foreclosure can never be a triggering event for a *right of first refusal*. The covenant could be drafted in a manner that renders foreclosure a triggering event for the *right of first refusal*. See also *Cornelius*, 80 A.D.3d at 249. However, in this instance the covenant was not drafted in that manner.

{¶47} That said, the language of the covenant was not the only reasoning the *Welch* court considered when it held that the *right of first refusal* was triggered. It also acknowledged that the bank had notice of the covenant and the effect that of not allowing the *right of first refusal* in such situation would have on preemptive rights:

The trial court's analysis and reasoning must also be rejected because it would set a precedent that in effect extinguishes preemptive rights altogether: Anytime a person wanted to buy a property that was subject to preemptive rights held by another, the interested buyer could simply take a mortgage from the present owner and then foreclose (or take a deed in lieu of foreclosure), which would circumvent the original grantor's intent.

Welch, 188 Ohio App.3d 641, 2010-Ohio-2981, at ¶ 18.

{¶48} While the above may be a valid point, we cannot ignore the plain language of the covenant. The Michaels and the Fleaganes were the parties that agreed to that language. If they wished for foreclosure to be a triggering event for

the *right of first refusal* they could have drafted it in a manner that allowed for that situation. However, it was not drafted in that manner and it would be unjust to read words into the covenant that are not there.

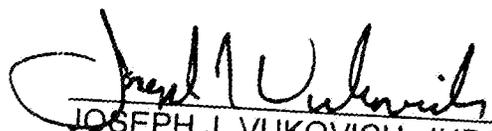
{149} Consequently, for the above stated reasons this assignment has merit. The trial court erred in determining that the *right of first refusal* survives foreclosure.

Conclusion

{150} In conclusion both assignments of error have merit. The *repurchase option* does not run with the land and does not survive foreclosure. That said, prior to foreclosure the Fleaganes can exercise this option as long as they deal with the Michaels' mortgage. As for the *right of first refusal*, given the specific language used in covenant, foreclosure is not a triggering event. Therefore, the Fleaganes cannot invoke their right of first refusal at the Sheriff's sale. Consequently, the trial court erred when it did not grant Wells Fargo's motion for summary judgment in its entirety. The decision of the trial court is hereby reversed and the cause is remanded.

Donofrio, J., concurs.
Waite, J., concurs.

APPROVED:



JOSEPH J. VUKOVICH, JUDGE

Court of Appeals of Ohio



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YOUNGSTOWN, OHIO 44503

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FILED

COURT OF APPEALS

NO. 12 BE 26
CYNTHIA K. MCGEE
CLERK OF COURTS, BELMONT COUNTY

JUN 10 2013

COURT ADMINISTRATOR
ROBERT BUDINSKY, ESQ.

Seventh Appellate District

June 7th, 2013

Cynthia McGee
Clerk of Courts
Belmont County Courthouse
St. Clairsville, Ohio 43950

**RE: WELLS FARGO BANK, N.A., PLAINTIFF-APPELLANT, VS.
MICHAEL, DEFENDANTS, and FLEAGANE, DEFENDANTS-APPELLEES.
CASE NO. 12 BE 26**

TO THE CLERK:

By direction of the Court, you are hereby authorized to enter on the docket (not journal) of the Court of Appeals the decision of this court in the above-captioned case as evidenced by the following entry:

"June 10, 2013. Judgment of the Common Pleas Court, Belmont County, Ohio is reversed and the cause is remanded. Costs taxed against appellees. See Opinion and Judgment Entry."

You are hereby authorized to file and spread upon the journal of this court the enclosed journal entry in the above-captioned case.

Very truly yours,

Renee A. Rockwood-Suri,
Judicial Secretary

Enclosures

cc (w/encl.): Judge John Solovan, II
Attorney Amelia Bowser
Attorney Michael McCormick

FILED
COURT OF APPEALS

NO. 12-BE-26
CYNTHIA K. MCGEE
CLERK OF COURTS, BELMONT COUNTY

JUN 10 2013

IN THE COURT OF APPEALS OF OHIO

STATE OF OHIO)
)
BELMONT COUNTY) SS:

SEVENTH DISTRICT

WELLS FARGO BANK, N.A.,)
)
PLAINTIFF-APPELLANT,)
)
VS.)
)
DALE AND DEBORAH MICHAEL,)
)
DEFENDANTS,)
)
JAMES AND NORMA FLEAGANE,)
)
DEFENDANTS-APPELLEES.)

CASE NO. 12 BE 26

JUDGMENT ENTRY

For the reasons stated in the Opinion rendered herein, the assignments of error are with merit and are sustained. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Belmont County, Ohio is hereby reversed and the cause is remanded. Costs taxed against appellees.

Joseph W. Unruh

Michael J. ...

John ...
JUDGES.

JOURNALIZED

BE SERVED COPIES ON
ALL THE PARTIES OR
THEIR ATTORNEYS

ENDED

10-263 EXHIBIT B

STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS

Wells Fargo Bank NA

Plaintiff

Vs.

Dale Michael, et al.,

Defendants

Case No.: 10 CV 0399

JUDGMENT ENTRY

FILED
COMMON PLEAS
BELMONT CO., OH.
22 JUN 15 PM 3
CLERK OF COURT

Plaintiff's Motion for Summary Judgment, filed December 13, 2011, came before the Court on the Motion and Memorandum in Support; the Response of Defendants, Fleagane, filed December 27, 2011; Plaintiff's Reply, filed January 3, 2012; accompanying attachments; Affidavit; and the record herein.

Plaintiff's Motion for Summary Judgment against Defendants, Dale Michael and Debra Michael, is Sustained. Judgment is rendered for Plaintiff against Defendants, Michael, in the amount of \$148,224.88, plus interest on the outstanding balance at the rate of 5.625% per annum from May 1, 2010, plus late charges and advances. Further, the Court finds that Plaintiff is entitled to foreclose upon said real estate.

Plaintiff's Motion for Summary Judgment against Defendants, Fleagane, is Overruled in part and Sustained in part, as follows: The Court finds that, Plaintiffs are entitled to foreclosure of the real estate, subject to the preemptive rights of Defendants, Fleagane, because Plaintiff is entitled to exercise its rights against Defendants, Michael, for their failure to pay their obligation pursuant to the terms of the mortgage. Therefore, foreclosure shall proceed in accord with law. However, since Plaintiff is not a good faith purchaser for value, in the event Plaintiff would purchase the real estate at the foreclosure sale, Defendants, Fleagane, shall exercise their right of first refusal, or such right shall be deemed to have been forfeited, in accord with the finding of this Court that the foreclosure sale constitutes the triggering event compelling the exercise of the right of first refusal.

This is a Final Appealable Order.

FINDINGS OF COURT

The facts in this case are not in dispute and, therefore, the Court will not repeat them except to state, as follows:

On or about February 20, 2002, James J. Fleagane and Norma Fleagane, Co-Trustees for JNJ Trust No. 1 and JNJ Trust No. 2, executed and delivered a **General Warranty Deed** conveying the subject real property to Defendants, Dale Michael and Deborah Michael, which was filed for record on February 22, 2002 and **recorded in Volume 774, Page 897 of the Belmont County Record of Deeds**. The deed instrument, itself, contains express language that places third parties on notice that the conveyance is subject, in pertinent part, to certain restrictive covenants, whereby Grantors, Fleagane, retained both a right to purchase the property for a fixed amount and a "right of first refusal" in the event of an attempted sale by Defendants, Michael, to a third party. The express language recites, as follows:

"1. The Sellers shall have the prior right to purchase or repurchase this property for the sale price of \$275,000.00, plus the verifiable cost of improvements made to the premises by purchasers; in no event shall the total repurchase price exceed the sum of \$425,000.00 unless mutually agreed to by the parties. Sellers shall have the right for a period of 50 years to the date of this deed, and this right shall be enforceable by the Sellers, or their direct descendants, or assigns. Sellers shall give Purchasers 120 days notice of their intention to exercise this right.

2. Sellers shall also have the right of first refusal; the Purchasers shall present to the Sellers any written contract binding all parties for the sale of this property, and resulting from an "arms-length" negotiation, which Purchasers receive for the sale of this property, and for which the Sellers shall have 30 days within which to elect to purchase the property at the price offered by the prospective buyer. They shall then have an additional 30 days to close the transaction."

On April 29, 2003, Defendants, Dale Michael and Deborah Michael, husband and wife, executed and delivered to Novastar Mortgage, Inc. a **Mortgage for the subject real property** in the principal amount of \$166,500.00, dated April 29, 2003, filed for record June 4, 2003 and recorded in **Volume 904, Page 340 of the Belmont County Record of Mortgages**.

Said mortgage was assigned to Wells Fargo, by assignment dated September 10 2010, filed for record September 16, 2010 and **recorded in Book 241, Page 447 of the Belmont County Official Records**. The evidence is undisputed that both Novastar and Wells Fargo had notice, as the result of the language contained in the deed, of the restrictive covenant whereby the Grantors, Fleagane, retained the right to repurchase the property and the "right of first refusal" in the event of an attempted sale to a third party, before Defendants, Michael, mortgaged it to Novastar and before Wells Fargo became the assignee of the Mortgage.

The evidence is uncontroverted that Wells Fargo has failed to inquire with Defendants and Grantors, Fleagane, as to whether they have chosen to exercise their preemptive rights in accord with the "right of first refusal" restrictive covenant. Finally, although Defendants, Michael, remain the title-holders of the real estate (important because the agreement containing the restrictive covenants is between Fleagane and Michael), it is also uncontroverted that Defendants, Michael, have defaulted on their mortgage obligation to Plaintiff and, therefore, Plaintiff is entitled to foreclose upon the real estate, even though Plaintiff is not a bona fide purchaser for value. Likewise the Court finds that Defendants, Fleagane, are not entitled to sit upon their preemptive rights to prevent an otherwise legal and appropriate foreclosure sale to Plaintiff, thus requiring Defendants, Fleagane, to exercise their right of first refusal at the time of the foreclosure sale.

CONCLUSIONS OF LAW

Although this Court has Sustained Plaintiff's Motion for Summary Judgment against Defendants, Michael, the Court must deny, in part, the Motion for Summary Judgment, filed by Wells Fargo, against Defendants, Fleagane, **because the Court finds that Plaintiff is bound by the language contained in the deed instrument, notifying of the restrictive covenants between Michael and Fleagane. Therefore, though the Court will allow the foreclosure to proceed, the right of first refusal shall survive the foreclosure action, except that such right must be exercised by Defendants, Fleagane, at the time of the foreclosure sale.**

The Court disagrees with Plaintiff's assertion, in its Memorandum in Support, that Defendants, Fleagane, cannot enforce the option to repurchase or the right of first refusal. The Court specifically finds that the statute of frauds is not applicable to this situation. No legal issue has been raised as to whether a written contract exists between Defendants, Michael and Fleagane, who are the original parties to the contract. Rather, the language in the deed instrument, itself, evidences notice to the world (all third-parties) that such original agreement, in fact, exists and that the right of repurchase would be in existence for a period of fifty (50) years.

The Court also finds that Plaintiff's argument that the option to repurchase and/or right of first refusal are not vested interests fails to consider the correct definition of a "right of first refusal" as a preemptive right that gives the holder of the right the first opportunity to purchase property if and when it is sold. **Four Howards Ltd. v. J & F Wenz Rd. Invest., L.L.C., 179 Ohio App. 3d 399, 2008 Ohio 6174.** Preemptive rights differ from "purchase options", insofar as the holder of an option to purchase has a right to compel the sale of the property, whereas the holder of a preemptive right does not have the option to purchase the property unless or until the property is offered for sale. **Id.** **A purchase option is commonly referred to as a unilateral contract because it binds one party without binding the other.** **Four Howards Supra (citing Bahner's Auto Parts v. Behner (June 23, 1998), 4th Dist. No. 97CA-2538, 1998 Ohio App. LEXIS 3453** Although based in contract, a right of first refusal is usually memorialized in the deed to the subject property so it effectively acts as a type of deed restriction, or deed covenant. See, **E.G., Treinen v. Collasch-Schlueter, 179 Ohio App. 3d 527** It should be noted, at this juncture, that a majority of jurisdictions, including Ohio, who have addressed the issue have concluded that preemptive rights constitute a property interest, rather than a contractual obligation. **National City Bank v. Mary Welsh, Court of Appeals of Ohio 10th Appellate District Franklin County, 188 Ohio App. 3d 641; Ferrero Constr., Co. v. Dennis Rourke Corp., (Md. 1988), 311 Md. 560**

Generally speaking, restrictive covenants "run with the land" i.e., they bind subsequent purchasers of real property, so long as the subsequent purchaser had notice of the covenant. **Emrick v. Multicon Builders, Inc., (1991), 57 Ohio St. 3d 107, 109** A bona fide purchaser for value is bound by an encumbrance upon land if he has constructive or actual knowledge of the encumbrance. **Id.**; See, also **Abood v. Winegarten (1956), 74 Ohio Law Abs. 326; Kuebler v. Cleveland Shortline Ry., (Cuyahoga C.P. 1910), 20 Ohio Dec. 525.**

There are also "personal covenants" which do not run with the land, and are enforceable only against the covenantor. **Gillen-Crow Pharmacies, Inc. v. Mandzak (1964), 8 Ohio Misc. 47** In order for a restrictive covenant to run with the land, the following three (3) factors must be met: (1) intent for the restrictive covenant to run with the land; (2) touches and concerns the land; and (3) the parties are in privity of contract. **Capital City Community Urban Redev. Corp. v. City of Columbus, 10th Dist. No. 08AP-769, 2009 Ohio 6935** However, personal covenants may also be enforceable against subsequent purchasers, provided that the purchaser had notice of the covenant. See, **Gillen-Crow Pharmacies at 859.**

In this case it is undisputed that Plaintiff, Wells Fargo, had notice of the restrictive covenant granting Defendants, Fleagane, a prior right to repurchase upon one hundred twenty (120) days notice and a right of first refusal to purchase the property in the event of an attempted sale to a third party. Thus, whether the right of first refusal was a personal covenant, as strenuously argued by Plaintiff, or one that runs with the land, is moot. **There is no injustice done by enforcing a valid deed restriction against a subsequent purchaser when that purchaser had knowledge of the restriction.** The outcome is unchanged by the fact that the subsequent purchaser happens to be a financial institution, which is foreclosing upon its valid real estate mortgage. **(See, Welsh.)**

Therefore, this Court finds that the cases relied upon by Plaintiff are unpersuasive and the right to repurchase and the right of first refusal are nonetheless enforceable. Although the bank has argued that no triggering device has been initiated by Defendants, Michael and Fleagane, the Court finds that Defendants, Michael, remain the title holders of the property and, therefore, could otherwise be compelled, in accord with the language contained in the deed instrument, to allow Defendants, Fleagane, to repurchase the property, in accord with the terms of the covenant, for a price exceeding the balance due and owing on the mortgage. If, however, Defendants, Fleagane, had exercised their right to repurchase, such decision would have been subject to the mortgage to Plaintiff and, therefore, Plaintiff would have been paid in full.

Likewise, the right of first refusal also remains enforceable. Therefore, Plaintiff has two (2) options: (1) provide Defendants, Fleagane, with the ability to repurchase the real estate in accord with the terms of the covenant, but subject to the mortgage to Plaintiff; or (2) allow the real estate to be sold in foreclosure, subject to the right of first refusal (whether personal or running with the land), because Plaintiff is not a bona fide purchaser for value, but, rather an entity which mortgaged the real estate with notice of the restrictive covenant. **However, in the event the real estate is sold at foreclosure, the Court finds that the foreclosure sale constitutes a triggering event compelling Defendants, Fleagane, to exercise their right of first refusal, with the Court acting as the vendor of the real estate, as opposed to the fee title holders (Defendants, Michael, who have forfeited their right to sell to a third party by defaulting on the mortgage and allowing this matter to proceed to foreclosure), which triggering event requires Defendants, Fleagane, to exercise their right of first refusal or forfeit such right. Ohio Dept. of Taxation v. Toledo Sports Enterprises, Inc., 62 Ohio Misc. 2d 172 (Lucas App. 1991).**

Our legal system, and this nation, are founded on principles of due process, fair play and substantial justice. **Burnham v. Superior Court of California (1990), 495 U.S. 604** Personal jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice. **Worldwide Volkswagen Corp. v. Woodson (1980), 444 U.S. 286, 299.** The fundamental requisite of due process of law is notice. **Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, 314**

Although the above-mentioned cases directly pertain to the appropriateness of exercising personal jurisdiction over a non-resident defendant, the concepts of due process and fair play and substantial justice impact many areas of law. With regard to real property, restrictive covenants and servitudes cannot bind subsequent purchasers who did not have notice of them. That is why most states (including Ohio) have recording statutes. **Conversely, when a purchaser has notice of a restrictive covenant or servitude, it will be enforced against them. See, National City Bank v. Welsh.**

This Court can find no reason why the preemptive rights of Defendants, Fleagane should not be enforced against Wells Fargo, which took a mortgage on the subject property, having actual knowledge of Fleaganes' pre-emptive rights. Based upon the undisputed fact that Wells Fargo knew about the rights of repurchase and first refusal, yet did nothing, then failed to make inquiry to ascertain whether Fleaganes would be excising their preemptive rights while Defendants, Michael, were still the owners of the property, **this Court holds that Wells Fargo is not a bona fide purchaser for value.** Therefore, the holder of a preemptive right may enforce the right against a subsequent purchaser with notice, but would not have been able to enforce the right against a purchaser in good faith for value. **See, National City Bank v. Welch; Greenfield County Estates Tenants Assn., Inc. v. Deep (1996), 423 Mass. 81.**

Since Plaintiff is not a good faith purchaser for value, in the event the bank would succeed to purchase the property in foreclosure, such purchase is subject to the preemptive rights of Defendants, Fleagane, to repurchase the property. A buyer with notice at an involuntary sale stands in the shoes of the prior owner and is subject to a prior preemptive right. Henderson v. Millis (Supreme Court of Iowa) 373 N.W. 2d 497; 1985 Iowa Sup. LEXIS 1114 (Aug. 21, 1985).

The rights at issue here are rights belonging to Defendants, Fleagane, as opposed to Defendants, Michael, and Plaintiff, Wells Fargo Bank. The fact that Defendants, Michael, and Wells Fargo consummated a transaction that jeopardized the rights of Defendants, Fleagane, cannot be used to deprive Fleagane of those property rights or interests.

Additionally, the Court notes that "estoppel" is also applicable in this case. "Estoppel" is a legal doctrine that precludes a person from denying a fact that has become settled by a prior act of the person himself. **State ex rel. Wilson v. Preston (1962), 173 Ohio St. 203.** Given the bank's willingness to loan money to Defendants, Michael, in spite of the right to repurchase and/or first refusal, of which the bank had knowledge, the bank must be estopped from denying the validity or enforceability of the preemptive rights.

At the same time, the Court further that finds that this ruling does not extinguish the mortgage to Wells Fargo Bank, nor does it excuse Defendants, Michael, from complying with their mortgage obligation to pay the balance due or to suffer a foreclosure on said real estate as the result of their failure to pay. Likewise, the fact that Defendants, Michael, have permitted the foreclosure to proceed does not entitle Defendants, Fleagane, to prevent the sale of the real estate at foreclosure, as such is required by law to occur. **This Court specifically finds that the foreclosure sale constitutes the triggering event, which compels Defendants, Fleagane, to exercise their right of first refusal or to forfeit such right.** Because this Court has assumed the role of title holder of the property, as opposed to Defendants, Michael, when the real estate is sold at foreclosure, this process **allows for appropriate notice to be given to Defendants, Fleagane (due process), to exercise their preemptory rights up to the time of the sale of the real estate to a third party,** which sale this Court construes to be an arms-length transaction between the Court and said third-party purchaser. **See, Department of Taxation v. Toledo Sports Enterprises, Inc.** This resolution assures that each party has been provided appropriate and reasonable notice (due process) of their respective rights and responsibilities to each other as the result of this foreclosure sale.

This is a Final Appealable Order.

Dated: June 15, 2012

JOHN M SOLOVAN, II

JOHN M. SOLOVAN, II - JUDGE

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STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS
DOCKET AND JOURNAL ENTRY

FILED
JUN 15 PM 3 13
BELMONT CO., OHIO

Wells Fargo Bank NA

Plaintiff

Case No.: 10 CC 0399

Dated: June 15, 2012

Vs.

Dale Michael, et al.,

Defendants

Plaintiff's Motion for Summary Judgment, filed December 13, 2011, came before the Court on the Motion and Memorandum in Support; the Response of Defendants, Fleagane, filed December 27, 2011; Plaintiff's Reply, filed January 3, 2012; accompanying attachments; Affidavit; and the record herein.

Plaintiff's Motion for Summary Judgment against Defendants, Dale Michael and Debra Michael, is Sustained. Judgment is rendered for Plaintiff against Defendants, Michael, in the amount of \$148,224.88, plus interest on the outstanding balance at the rate of 5.625% per annum from May 1, 2010, plus late charges and advances. Further, the Court finds that Plaintiff is entitled to foreclose upon said real estate.

Plaintiff's Motion for Summary Judgment against Defendants, Fleagane, is Overruled in part and Sustained in part, as follows: The Court finds that, Plaintiffs are entitled to foreclosure of the real estate, subject to the preemptive rights of Defendants, Fleagane, because Plaintiff is entitled to exercise its rights against Defendants, Michael, for their failure to pay their obligation pursuant to the terms of the mortgage. Therefore, foreclosure shall proceed in accord with law. However, since Plaintiff is not a good faith purchaser for value, in the event Plaintiff would purchase the real estate at the foreclosure sale, Defendants, Fleagane, shall exercise their right of first refusal, or such right shall be deemed to have been forfeited, in accord with the finding of this Court that the foreclosure sale constitutes the triggering event compelling the exercise of the right of first refusal.

This is a Final Appealable Order.

"Special Entry"

JOHN M SOLOVAN, II

JOHN M. SOLOVAN, II - JUDGE

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