

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.	:	Case No. 2013-1163
	:	
Appellee	:	On Appeal from the
	:	Seventh District Court
v.	:	of Appeals, Belmont
	:	County
DALE MICHAEL et al.	:	
	:	
Defendants	:	Court of Appeals No.
	:	12-BE-26
and	:	
	:	
JAMES J. FLEAGANE, et al.	:	
	:	
Appellants	:	

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**MEMORANDUM OF WELLS FARGO BANK, N.A. IN RESPONSE TO  
APPELLANTS JAMES J. FLEAGANE AND NORMA FLEAGANE'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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***EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION***

This case does is not a case of public or great general interest and does not involve a substantial constitutional question. In order for this Court to accept jurisdiction to review this case, there must be an issue of public or great interest or involve a substantial constitutional question. *Noble v. Caldwell*, 44 Ohio St. 3d 92, 94, 549 N.E. 2d 1381 (1989).

James and Norma Fleagane argue:

(1) Wells Fargo lacks standing to challenge the Fourth Defense raised by the Fleaganes in their Answer to the Amended Complaint for Foreclosure. In that defense, the Fleaganes asserted that they hold a right of first refusal and an option to repurchase the subject property. The Fleaganes have not previously raised this standing argument in this case;

(2) That options to purchase and rights of first refusal cannot be extinguished in a judicial foreclosure; and

(3) That a refinancing lender's mortgage is subject to any right of first refusal or an option to purchase that is recorded in the public records.

Despite the Fleagane's attempts to cast this case as one of public interest because of "the current mortgage foreclosure crisis", the Fleaganes' arguments have not, to date, been influenced or affected by the actual or perceived view that there are too many residential mortgage foreclosures in Ohio. Thus this argument is one of convenience, meant to distract this Court into concluding that but for this foreclosure and thousands of others in Ohio, the Fleaganes would have prevailed in the Court of Appeals.

The Fleagane's hold no estate or interest in the subject real estate. Their only claim is a right to buy the property back or force a sale at a stated price. The Fleaganes bargained for the right to buy this property if the Michaels' ever sold the land in an arms length sale. Apparently the Fleaganes did not consider the possibility that the Michaels could lose the property in a foreclosure. Nothing in the record of this case or in the law generally in Ohio indicates, however, that the Court of Appeals' decision places the rights of the citizens of Ohio in jeopardy of losing similar rights in foreclosure cases. This case is simply not *Schwartzwald*-esque in its scope.

The issues raised in this case are primarily of interest to these parties, not the general public. *See Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E. 2d 876 (1970). The issues also do not affect the vast majority of Ohio citizens nor do they conflict with any public policy argument that would disfavor the decision reached by the Court of Appeals.

Given that the issues here are very narrow in their scope and that Ohio courts of appeal are not in conflict as to the application of the law as announced by the Seventh District Court of Appeals, this Court should, respectfully, decline jurisdiction to review that decision.

#### **RESPONSES TO PROPOSITIONS OF LAW**

**Response to Proposition of Law No. I: Wells Fargo has an interest in the subject property by virtue of a recorded mortgage. Wells Fargo has a stake in the outcome of this litigation and has standing to defend against the Fleaganes' challenges.**

The Fleaganes argue that Wells Fargo lacks standing to challenge their claims that the right of first refusal and option to purchase are superior to Wells Fargo's interest in the Michael's property.

Standing relates to a plaintiffs' ability to sue or have a legal claim enforced by a court. *Ohio Pyro. Inc. v. Ohio Dept. of Commerce*, 115 Ohio St. 3d 375, 381, 875 N.E.2d 550 (2007). As this court held in *Ohio Pyro*,

“[T]he question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy \* \* \*” as to ensure that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” ’ ’ *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178–179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.”

Having not raised this issue at any stage of this litigation, the Fleaganes now erroneously argue that Wells Fargo’s interest in the Michael’s property as a lienholder, preempts Wells Fargo’s right to contest the Fleaganes’ right of first refusal and option to purchase. However, the Fleaganes’ defense is based upon their view that they have a superior interest in the Michael’s property. In fact, the Fleaganes have a contract right – the option, and a restriction on the Michael’s sale of the property, the right of first refusal. Neither is an estate or interest in the land.<sup>1</sup>

Moreover, Wells Fargo holds a lien on the Michael’s property that is subject to foreclosure upon condition broken. *Levin v. Carney*, 161 Ohio St. 513, 120 N.E.2d 92 (1954). Contrary to the Fleagane’s legal argument, Ohio is not a strict lien state. The predominate view is that Ohio is partly in the lien theory camp and partly in the title theory camp. Kuehnle, Ohio Real Estate Law § 33:2 (3<sup>rd</sup> ed.) citing *Kerr v. Lydecker*, 51 Ohio St. 240, 248, 37 N.E. 2d 267 (1894). What is more compelling, however, is the

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<sup>1</sup> Black’s Law Dictionary (9<sup>th</sup> ed. 2009) defines a covenant as “A formal agreement or promise, in a contract or a deed, to do or not do a particular act.” A “covenant running with the land” is “a covenant that is connected with the grantor’s land.”

Fleaganes do not hold an estate or interest in the Michael's property. They conveyed and sold the property to the Michaels. In their deed, the Fleaganes included a right to purchase the property for a stated price and a right of first refusal in the event that the Michaels entered into an "arms-length" negotiation to sell the property.

Courts in Ohio have deemed a right of first refusal to be a pre-emptive right that does not obligate the owner to sell to the holder of that right. *The Four Howards, Ltd. v. J & F Wenz Road Investment, L.L.C.*, 179 Ohio App. 3d 399, 410, 2008-Ohio-6174, 902 N.E. 2d 63 (6<sup>th</sup> Dist. 2008). The right of first refusal is a covenant running with the land whereas an option is merely a contractual agreement. *Schafer v. Deszcz*, 120 Ohio App. 3d 410, 414, 698 N.E. 2d 60 (6<sup>th</sup> Dist. 1997); *State of Ohio v. Kuntz*, Case No. 169, 1978 WL 214970 (7<sup>th</sup> Dist. 1978). Thus the option has no effect on Wells Fargo although the Fleaganes could exercise it, buy the property and pay off Wells Fargo's mortgage.

Because a right of first refusal is a covenant running with the land, the Fleaganes have no greater position than does Wells Fargo on the Michael's property. The Fleaganes cannot enforce their right of first refusal unless the Michaels decide to sell voluntarily. Wells Fargo, on the other hand, has the right to foreclose the property subject to the Michael's equity of redemption only. Wells Fargo is not bound by the right of first refusal because it is only triggered if the Michaels negotiate a sale to a third party purchaser at arms length.

The argument that Wells Fargo cannot challenge the covenant held by the Fleaganes is simply wrong. The Fleaganes claim an interest that is adverse to the rights of Wells Fargo. They asserted that right as a defense in the foreclosure. Therefore, Wells

Fargo has standing to invoke the jurisdiction of an Ohio court to determine their stake in the Michael's property.

Proposition of Law No. 1 is not of great public interest in Ohio. The proposition is also legally invalid as an argument seeking jurisdiction to appeal and does not raise a constitutional issue.

**Response to Proposition of Law No. II: The option to purchase is not a covenant running with the land. The right of first refusal is a covenant running with the land. A foreclosure sale is not an event that would trigger that right. The Fleaganes bargained for the position in which they now find themselves. Their reliance on *National City Bank v. Welch*, 188 Ohio App. 3d 641, 936 N.E. 2d 539 (10<sup>th</sup> Dist. 2010) is misplaced.**

The Fleaganes have consistently misinterpreted the Tenth District's holding in *National City Bank v. Welch*, 188 Ohio App. 3d 641, 936 N.E. 2d 539 (10<sup>th</sup> Dist. 2010). *Welch* does not involve an option. There, a son inherited his mother's home. His sister was given a right of first refusal to buy the house if her brother died or the property was offered for sale. The sister tendered the price stated in the covenant, after her brother died, and was able to purchase the property and take it out of the hands of the lender that held a mortgage on the property.

Those facts are distinctly dissimilar from the facts here. The first refusal here specifically permits the Fleaganes to purchase the Michael's property if the Michael's "present to the Sellers any written contract binding all parties for the sale of this property, and resulting from an 'arms-length' negotiation." The Fleaganes have failed to show that a foreclosure sale is such a transaction. What the Fleaganes have, therefore, is a covenant that will be effectively extinguished when the Michael's now longer have title to this property. That fact does not, however, prevent the Fleaganes from exercising the option

to purchase. It also presumes that the Michaels will not redeem the property prior to confirmation, which is a right they hold under Ohio law.

The Court of Appeals correctly concluded that an involuntary foreclosure sale is not an arms length transaction that would trigger the first refusal. Thus, regardless of the deed from the Fleaganes to the Michaels being of record, the extent of Wells Fargo's notice was exactly what the Fleaganes bargained for in that deed, that if there was an arms length sale, the Fleaganes would repurchase the property and pay off the mortgage.

Proposition of Law No. II is not of great public interest in Ohio, is important only to the parties to this litigation and does not present a constitutional question to be decided by this Court.

**Response to Proposition of Law III: The Fleaganes incorrectly argue that Wells Fargo is estopped to deny their right of first refusal. Wells Fargo has not denied that the right exists. The question is whether foreclosure is an event that requires action by the Fleaganes.**

This proposition is the corollary to Proposition II. The Fleaganes act as if Wells Fargo imprudently ignored the right of first refusal when they made a mortgage loan to the Michaels. Here again, their reliance on *Welch* is misplaced. Notably, the Court of Appeals held:

“Our conclusion that foreclosure does not, in this instance, trigger the *right of first refusal* right 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 when Spriggs died or when the property was offered for sale [citation omitted]. Spriggs died. Therefore, the *right of first refusal* was triggered.” [Decision, ¶ 44].

The Fleaganes reliance on *Wargo v. Henderson* is equally defective. Unlike *Welch*, *Wargo* involved an option to purchase where the owner of the property concocted

an intra-family transfer to try to avoid triggering that contract right in the option holder. The Court of Appeals had none of that and enforced the option. Although that property was in foreclosure initially, the foreclosure was not concluded, so the question presented here never came to fruition there.

The problem with the Fleagane's case is that they drafted the deed that contains the option and the first refusal. As the Court of Appeals commented during oral argument, they could have included any language in that deed, including that which would have protected them in the event of a foreclosure sale. Having not done so, they cannot now seek the jurisdiction of this court by arguing intent. The deed is not ambiguous. It is not subject to speculation. It is marvelously clear. The Fleaganes are not precluded from enforcing the option provision in that deed. They can buy the property under the option for \$275,000 plus the cost of improvements. The Michael's still own the property and have the equity of redemption available to them. *See Wargo v. Henderson*, Case No. 08-CO-21, 2009-Ohio-2443, 2009 WL 1458473 at 3 (7<sup>th</sup> Dist. 2009). The notion that Wells Fargo somehow ignored the contents of the Michael's deed is wrong. The Court of Appeals correctly found to the contrary.

Proposition of Law No. III is not of great public interest in Ohio, is important only to the parties to this litigation and does not present a constitutional question to be decided by this Court.

### **CONCLUSION**

Wells Fargo Bank, N.A. respectfully submits that this case does not present a substantial constitutional question or issues of public or great general interest.

Respectfully, therefore, Wells Fargo Bank, N.A. requests that jurisdiction be denied.

Respectfully Submitted,

PLUNKETT COONEY



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**CERTIFICATE OF SERVICE**

This is to certify that a true and exact copy of the foregoing has been served upon all parties or counsel of record by regular US mail this 2nd day of August, 2013 as follows:

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