

PRELIMINARY MEMORANDUM

A. Introduction

Daren Messer and Angela Messer (“Messer”) filed a Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the Southern District of Ohio on September 19, 2013 in Case No. 13-57467. After filing their petition, the Messers filed a lawsuit against JP Morgan Chase Bank NA (“Chase”) in United States Bankruptcy Court Case No. 13-02448 (“Lawsuit”). At issue in the Lawsuit is a mortgage executed by the Messers on November 26, 2007 which was, the Messers allege, not properly notarized. The Messer Mortgage was recorded in Instrument Number 20071204208188 of Franklin County Records on December 4, 2007 (“Messer Mortgage”). The Messer Mortgage was granted as a lien on their home at 359 W. Waterloo Street, Canal Winchester, Ohio.

Chase filed a Motion to Dismiss the Lawsuit on the basis that R.C. § 1301.401 provided notice to the Plaintiffs of the Messer Mortgage¹. Under 11 U.S.C. § 544, a bankruptcy trustee acts as a hypothetical purchaser without notice (i.e. of a defectively executed mortgage) unless notice is otherwise provided. Chase believes that R.C. § 1301.401 provides that notice.

The bankruptcy court certified two questions to this Court for review:

Certified Question #1: Does O.R.C. § 1301.401 apply to all recorded mortgages in Ohio?

Certified Question #2: Does O.R.C. § 1301.401 act to provide constructive notice to the world of a recorded mortgage that was defectively executed under O.R.C. § 5301.01?

For the reasons stated herein, Chase believes that Question #1 should be answered in the affirmative. Chase also believes that Question #2 need not be answered because an affirmative

¹ Petitioners allege in the Lawsuit that they have standing to challenge Chases’ mortgage as if they were the bankruptcy trustee. Chase’s Motion to Dismiss also sought dismissal for lack of standing. That issue is not before this court, however. For purposes of this brief, Chase presumes that Petitioners can challenge their mortgage.

response to that question would impose a limitation on R.C. § 1301.401 that does not exist in the statute. Thus, preliminarily, Chase requests review and consideration of Certified Question #1 only.

B. Discussion

(1) R.C. § 1301.401 applies to all mortgages filed in Ohio

On March 27, 2013 R.C. § 1301.401 became law in Ohio. The statute creates constructive notice for any document filed in the public record:

- (A) For purposes of this section, “public record” means either of the following:
 - (1) Any document described or referred to in section 317.08 of the Revised Code;
 - (2) Any document the filing or recording of which is required or allowed under any provision of Chapter 1309. of the Revised Code.
- (B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.
- (C) Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.

Prior to the enactment of R.C. § 1301.401, defectively executed mortgages were interpreted by Ohio bankruptcy courts not to provide constructive notice to bankruptcy trustees even though the mortgages were recorded. *See Rhiel v. The Huntington National Bank (In re Phalen)*, 445 B.R. 830 (Bankr. S.D. Ohio 2011). The new statute dispenses with the notion that a recorded mortgage is deemed not to be recorded if there is a defect in execution of that mortgage.

Petitioners argued in the bankruptcy court that because R.C. § 1301.401 is part of Chapter 13 of the Code, it does not apply to their mortgage. In response, Chase showed that Ohio mortgages are, themselves, financing statements under R.C. § 1309.502(C). *See Mason v. PNC Bank (In re Szerwinski)*, 467 B.R. 893, 901 (6th Cir. BAP 2012) citing *Teaff v. Hewitt*, 1 Ohio St. 511, 527 (1853). Therefore, placement of the new statute in Chapter 13 of the Code (as opposed to Chapter 53) does not mean that the law applies only to personal property or other matters covered by the Uniform Commercial Code, to the exclusion of real property.

(2) This court has discretion to accept or reject one or both Certified Questions

Certified Question #1 may be answered by this court under S.Ct. Rule 9.01(A).

Consideration of Certified Question #2 is also permitted by that rule, however, the second question is distinctly different from the first. Certified Question #2 proposes to qualify the statute to exclude a class of recorded documents – those alleged to be defectively executed. Thus, if Certified Question #1 is answered in the affirmative while Certified Question #2 is answered in the negative, the statute would effectively be rewritten to exclude from its provisions defectively executed mortgages.² Question #2 could also require a consideration of specific facts, since not all errors in the acknowledgment of mortgages render those instruments invalid.³

Certification should address pure legal questions and not fact specific questions. Cochran,

Federal Court Certification of Questions of State Law to State Courts: A Theoretical and

² The new statute would not apply to mortgages obtained by fraudulent means or as a result of forgery. The fact of recording does not relieve either, it merely provides notice.

³ For instance: (1) a missing stamp, seal or the printed name of the notary does not invalidate a mortgage. *Stubbins v. Chase Home Fin., LLC (In re Robinson)*, 403 B.R. 497 (Bankr. S.D. Ohio 2008); (2) the failure of the notary to sign her name to the acknowledgment did not render the mortgage void. *Logan v. CIT Group/Consumer Finance, Inc. (In re Cooperman)*, No. 06-2353, 2008 Bankr. LEXIS 2343 (Bankr. S.D. Ohio 2008); (3) lack of a date in the acknowledgment is not fatal. *Helbling v. Zabor (In re Zabor)*, No. 08-1312, 2009 WL 2256911 (Bankr. N.D. Ohio 2009); and (4) where an identifier such as “mortgagor” was used instead of the names of the mortgagors, the mortgage was upheld. *Corzin v. Bank of New York (In re Swartz)*, No. 08-52789 (Bankr. N.D. Ohio 2009).

Empirical Study, 29 J. Legis, 157 (2003); *Copper v. Buckeye Steel Castings*, 67 Ohio St. 3d 563, 621 N.E. 2d 396 (1993). R.C. § 1301.401 must apply as the legislature intended it to apply – to all mortgages.

C. Conclusion

S. Ct. Prac. R. 9.01(A) is permissive on the issue of certification. Certification should not be influenced by any particular fact(s) that pertain to this or any other case. Thus, Certified Question #1 should be answered affirmatively and Certified Question #2 should be rejected.

Respectfully, therefore, JP Morgan Chase Bank NA requests that this Court accept Certified Question #1 for review and decline to consider Certified Question #2.

Respectfully Submitted,

PLUNKETT COONEY



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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has been served by regular US Mail this 10th day of December, 2014 as follows:

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