

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re:	:	Case No. 2014-2036
	:	
Daren A. Messer and Angela Messer	:	
	:	
Petitioners	:	On Order of Certifications and Questions
	:	of State Law
v.	:	
	:	
JP Morgan Chase Bank NA	:	United States Bankruptcy Court for the
	:	Southern District of Ohio, Case No. 13-
	:	57467, Adversary Proceeding No. 13-2448
Respondent	:	

PRELIMINARY MEMORANDUM OF PETITIONERS DAREN A. MESSER AND ANGELA MESSER

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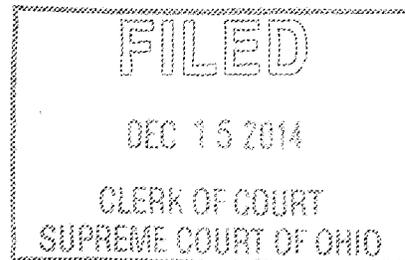
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PRELIMINARY MEMORANDUM

I. INTRODUCTION AND FACTUAL AND PROCEDURAL HISTORY

On September 19, 2013, Petitioners Daren A. Messer and Angela Messer (collectively “Petitioners”) filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio, which petition was assigned Case Number 13-57467. On December 20, 2013, Petitioners filed a “Complaint to Determine Validity and Extent of Lien, to Avoid the Mortgage Lien, to Recover Money Judgment and to Disallow Claim” (“Complaint”) against Respondent JP Morgan Chase Bank NA (“Respondent”) in the United States Bankruptcy Court for the Southern District of Ohio, thereby commencing an adversary proceeding captioned *Daren A. Messer, et al. v. JP Morgan Chase Bank NA* and assigned Case Number 13-2448.

The crux of Petitioner’s Complaint involves a mortgage that Respondent holds on Petitioners’ residence located at 359 West Waterloo Street, Canal Winchester, Ohio 43110. The Mortgage was signed by Petitioner Angela L. Messer individually and as attorney-in-fact for Petitioner Daren A. Messer. The Mortgage, however, was not acknowledged by Petitioners before a notary public that certified the acknowledgement and subscribed his or her name to the certificate of the acknowledgement as required by Ohio law. Thus, Petitioners sought to exercise derivative standing on behalf of the Chapter 13 Trustee and avoid the mortgage by virtue of the Chapter 13 Trustee’s avoidance powers (a) as a judicial lien creditor pursuant to 11 U.S.C. § 544(a)(1) and (b) as a bona fide purchaser pursuant to 11 U.S.C. § 544(a)(3).

On March 14, 2014, Respondent filed its “Motion of JP Morgan Chase Bank NA to Dismiss and/or for Judgment on the Pleadings” (“Motion”). That Motion was briefed and a hearing was conducted before the United States Bankruptcy Court. Thereafter, on September 26,

2014, this Court rendered its “Scheduling Order Directing the Submission of Memoranda and Setting Hearing Date Regarding Certified Question to the Supreme Court of Ohio” (“Scheduling Order”). The Scheduling Order directed the parties to file briefs as to whether this Court should certify to the Supreme Court of Ohio the question of its interpretation of Ohio Revised Code § 1301.401.

On November 21, 2014, an “Order of Certification to the Supreme Court of Ohio” (“Certification Order”) was rendered by the United States Bankruptcy Court. The Certification Order certified two questions to this Court for review:

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

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

For the reasons set forth herein, Petitioners submit that both questions should be answered in the negative.

II. DISCUSSION

A. O.R.C. § 1301.401 does not apply to recorded mortgages in Ohio.

O.R.C. § 1301.401 became effective on March 27, 2013 and is part of Ohio’s Uniform Commercial Code set forth in Chapters 1301 through 1310 of the Ohio Revised Code. The statute reads as follows:

- (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.

Ohio Rev. Code § 1301.401.

Although O.R.C. § 327(A)(19) identifies mortgages among the multiple types of documents that shall be recorded with a county recorder, O.R.C. § 1301.401 is contained within Ohio's Uniform Commercial Code. The general provisions of the Uniform Commercial Code, such as those set forth in O.R.C. §§ 1301.101-310, apply to transactions to the extent that the transaction is governed by Chapters 1302 through 1310 of the Ohio Revised Code. *See* Ohio Rev. Code § 1301.102.

Like the other statutes contained within Chapter 1301 of the Ohio Revised Code, O.R.C. § 1301.401 is also a general provision of the Uniform Commercial Code. Although reference is not made to O.R.C. § 1301.401 as being applicable to a transaction to the extent that it is governed by those Chapters, it should be noted that the scope of Chapter 1301 as set forth in O.R.C. § 1301.102 preceded the enactment of O.R.C. § 1301.401. Furthermore, the Official Comment to O.R.C. § 1301.102 evidences an intention to limit such general provisions to transactions governed by the Uniform Commercial Code as it provides as follows:

This section is intended to resolve confusion that has occasionally arisen as to the applicability of the substantive rules in this article. This section makes clear what has always been the case – the rules in Article 1 apply to transactions to the extent

that those transactions are governed by one of the other articles of the Uniform Commercial Code.

A mortgage is a contract and is governed by Ohio contract law. *See First Federal Savings & Loan Assoc. of Toledo v. Perry's Landing, Inc.* (6th Dist. 1983), 11 Ohio App. 3d 135, 143. The priority and validity of a mortgage is governed by Chapter 5301 of the Ohio Revised Code. There is no aspect of a mortgage that is governed by the Uniform Commercial Code.

Moreover, O.R.C. § 1301.401 is inconsistent with other sections of the Ohio Revised Code that govern mortgages. Specifically, it is inconsistent with O.R.C. § 5301.25(A), which states that a mortgage that is not properly executed is fraudulent insofar as it relates to a “subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former [mortgage].” Ohio Rev. Code § 5301.25(A). It is also inconsistent with O.R.C. § 5301.01(B), which provides for constructive notice only for a mortgage executed prior to February 1, 2002 that was “not acknowledged in the presence of, or was not attested by, two witnesses as required” prior to that date. Ohio Rev. Code § 5301.01(B). Clearly, if the Ohio legislature wished to create constructive notice for mortgages that were not properly executed as required by O.R.C. § 5301.01(A), the legislature would have amended that statute or another statute within Chapter 5301 of the Ohio Revised Code. The legislature did not do so, evidencing its clear intent that O.R.C. § 1301.401 was not intended to apply to any transactions other than those governed by Ohio’s Uniform Commercial Code.

The fact that the legislature did not intend for O.R.C. § 1301.401 to apply to mortgages is more compelling upon a review of the history of former O.R.C. § 5301.234, which provided constructive notice for recorded mortgages regardless of whether there was an actual or alleged defect in the witnessing or acknowledgment on the recorded mortgage. *See In re Nowak* (2004), Ohio St.3d 466, 469, 2004-Ohio-6777, ¶ 17. This Court ruled that former O.R.C. § 5301.234

was unconstitutional as having violated the one-subject rule of the Ohio Constitution. *See In re Nowak* (2004), Ohio St.3d 466, 469, 2004-Ohio-6777, ¶ 17. However, the location of former O.R.C. § 5301.234 demonstrates that statutes governing mortgages is properly contained within Chapter 5301 of the Ohio Revised Code. Thus, had the legislature intended for O.R.C. § 1301.401 to apply to mortgages, it would have certainly incorporated a similar statutory provision within Chapter 5301 of the Ohio Revised Code. It chose not to do so.

B. O.R.C. § 1301.401 does not act to provide constructive notice to the world of a recorded mortgage that was deficiently executed under O.R.C. § 5301.01.

As mentioned in the previous section of this memorandum, mortgages are governed by Chapter 5301 of the Ohio Revised Code. O.R.C. § 5301.25(A) provides the effect of a recorded mortgage as upon third persons. That statute reads, in its entirety, as follows:

All deeds, land contracts referred to in division (a)(21) of section 317.08 of the Revised Code, and instruments of writing **properly executed** for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be so recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

Ohio Rev. Code § 5301.25(A) (emphasis added).

Based upon the foregoing statute, a mortgage does not provide constructive notice unless it is properly executed. In order to be properly executed, a mortgage must comply with the four requirements of O.R.C. § 5301.01. Those requirements are that the mortgage (1) must be signed by the mortgagors; (2) the signing of the mortgage must be acknowledged before a notary public; (3) the notary public must certify that acknowledgment; and (4) the notary public must subscribe his name to the certificate of acknowledgment. *See* Ohio Rev. Code § 5301.01. If a mortgage

does not satisfy those four requirements, the mortgage is not entitled to be recorded and is treated as though it has not been recorded. *See Odita*, 159 Ohio App.3d at 5).

O.R.C. § 1301.401, if interpreted to provide constructive notice to the world of a recorded mortgage that was not properly executed as required by O.R.C. § 5301.01, would be entirely inconsistent with Chapter 5301 of the Ohio Revised Code. Chapter 5301 of the Ohio Revised Code is applicable to, and governs, mortgages. According to the plain language of the statutes within that Chapter, a mortgage that is not properly executed is simply not entitled to record, and even if it is recorded, the defective mortgage is treated as though it has not been recorded. *See Mortgage Electronics Registration Systems v. Odita*, 159 Ohio App.3d 1, 5 (10th Dist. Ohio 2004). As an unrecorded mortgage, it does not vest in the mortgagee any interest in the premises, either legal or equitable, as against subsequent purchasers or judgment creditors of the mortgagor and does not provide constructive notice to the world of the recorded mortgage. *See Langmede v. Weaver*, 65 Ohio St. 17, 34 (1901). The only exception crafted by the legislature is contained within O.R.C. § 5301.01(B), which provides for constructive notice only for a mortgage executed prior to February 1, 2002 that was “not acknowledged in the presence of, or was not attested by, two witnesses as required” prior to that date. Ohio Rev. Code § 5301.01(B).

It should be noted that the constructive notice provision contained within O.R.C. § 1301.401 is significantly more broadly drafted than the constructive notice provisions within Chapter 5301 of the Ohio Revised Code. Certainly, had the legislature intended to make such a broadly crafted statute applicable to mortgages, it would have amended Chapter 5301 of the Ohio Revised Code contemporaneously with the enactment of O.R.C. § 1301.401. It elected not to do so, thereby evidencing an intent that O.R.C. § 1301.401 was only intended to be applicable

to transactions governed by the Uniform Commercial Code. Otherwise, the constructive notice provisions of Chapter 5301 of the Ohio Revised Code would be rendered meaningless.

III. CONCLUSION

In conclusion, this Court should answer Certified Questions 1 and 2 in the negative. O.R.C. § 1301.401 applies only to transactions governed by the Uniform Commercial Code. It does not apply to mortgages. Therefore, O.R.C. § 1301.401 does not apply to mortgages and does not act to provide constructive notice to the world of a recorded mortgage that was not properly executed as required by O.R.C. § 5301.01.

Respectfully submitted,

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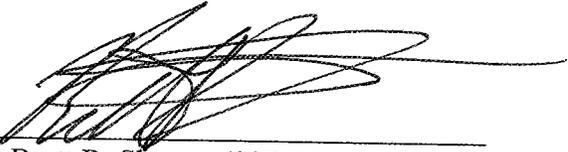
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing PRELIMINARY MEMORANDUM OF PETITIONERS DAREN A. MESSER AND ANGELA MESSER was served upon the following persons via ordinary U.S. Mail, postage prepaid from Columbus, Ohio, this 15th day of December, 2014:

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