

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	:	

REPLY BRIEF OF PETITIONERS DAREN A. MESSER AND ANGELA MESSER

Brett R. Sheraw (0074130)
 COUNSEL OF RECORD
 John C. Ridge (0086046)
 FISHER, SKROBOT & SHERAW, LLC
 471 East Broad Street, Suite 1810
 Columbus, Ohio 43215
 Telephone: (614) 233-6950
 Facsimile: (614) 233-6960
 E-mail: bsheraw@fisherskrobot.com
 jridge@fisherskrobot.com

Danielle R. Weinzimmer (0082119)
 Thomas M. Fesenmeyer (0073901)
 Courtney A. Cousino
 FESENMAYER LAW OFFICES, LLC
 1335 Dublin Road, Suite 205C
 Columbus, Ohio 43215
 Telephone: (614) 228-4435
 Facsimile: (614) 228-3882
 E-mail: danielle@fesenmyerlaw.com

Counsel for Petitioners Daren A. Messer and Angela Messer

Co-Counsel for Petitioners Daren A. Messer and Angela Messer

Amelia A. Bower (0013474)
 PLUNKETT COONEY P.C.
 300 East Broad Street, Suite 590
 Columbus, Ohio 43215
 Direct: (614) 629-3004
 Facsimile: (614) 629-3019
 E-mail: abower@plunkettcooney.com

Counsel for Respondent JP Morgan Chase Bank NA

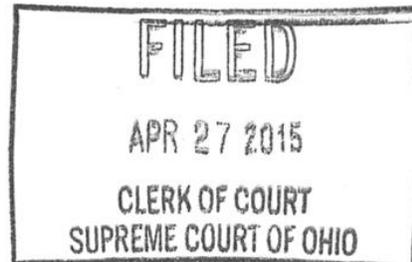


TABLE OF CONTENTS

TABLE OF AUTHORITIES _____	ii
CONCLUSION _____	1
ARGUMENT	
<u>Proposition of Law No. I:</u>	
O.R.C. § 1301.401 does not apply to recorded mortgages in Ohio or act to provide constructive notice to the world of a recorded mortgage that was deficiently executed under O.R.C. § 5301.01 _____	1
<u>Proposition of Law No. I:</u>	
O.R.C. § 1301.401 does not act create a rebuttable presumption that a mortgage is properly executed _____	5
CONCLUSION _____	6
PROOF OF SERVICE _____	7
APPENDIX	<u>Appx. Page</u>
STATUTES:	
Ohio Rev. Code § 5301.23 _____	1

TABLE OF AUTHORITIES

CASES

<i>Langmede v. Weaver</i> , 65 Ohio St. 17, 34 (1901) _____	3
<i>Mortgage Electronics Registration Systems v. Odita</i> , 159 Ohio App.3d 1 (10 th Dist. Ohio 2004) _____	2
<i>In re Nowak</i> (2004), Ohio St.3d 466, 2004-Ohio-6777 _____	4
<i>Shaker Corlett Land Co. v. City of Cleveland</i> (1942), 139 Ohio 536, 542 _____	3

STATUTES

Ohio Rev. Code § 317.08 _____	2
Ohio Rev. Code § 1301.102 _____	1,4
Ohio Rev. Code § 1301.401 _____	1,2,3,4,5,6
Ohio Rev. Code § 5301.01 _____	6
Ohio Rev. Code § 5301.01(A) _____	3,6
Ohio Rev. Code § 5301.01(B) _____	2
Ohio Rev. Code § 5301.23(A) _____	4
Ohio Rev. Code § 5301.23(B) _____	2
Ohio Rev. Code § 5301.25(A) _____	3,4

I. INTRODUCTION

Respondent JP Morgan Chase Bank NA (“Respondent”) and The Ohio Land Title Association (“Amicus”) have each filed merit briefs in the case *sub judice*. Essentially, the arguments of both Respondent and Amicus are that the plain language of O.R.C. § 1301.401 applies to all mortgages in Ohio, regardless of whether the mortgage was defectively executed. In support of this argument, Respondent and Amicus claim that O.R.C. § 1301.401 is inconsistent with the recording statutes that govern interests in real property, including mortgages.

Respondent also argues that O.R.C. § 1301.401 creates a rebuttable presumption that any recorded mortgage is properly executed.

II. LAW AND ARGUMENT

Proposition of Law No. I

O.R.C. § 1301.401 does not apply to recorded mortgages in Ohio or 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 Petitioner’s merit brief, O.R.C. § 1301.401 is contained within Ohio’s Uniform Commercial Code and, like the other statutes contained within Chapter 1301 of the Ohio Revised Code, is a general provision of the 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.

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.

The fact that O.R.C. § 1301.401 refers to any document described or referred to in O.R.C. § 317.08, which includes mortgages and other documents, does not indicate an intent to apply to transactions that are not governed by the Uniform Commercial Code. This is especially true considering that O.R.C. § 1301.401, despite Respondent's and Amicus' contentions to the contrary, is entirely inconsistent with Chapter 53 of the Ohio Revised Code. That section applies to mortgages and other interests in real property. In fact, Respondent's own merit brief even admits that, in Ohio, constructive notice is created under the conveyancing and recording statutes contained within Chapter 53 of the Ohio Revised Code. *See* Respondent's merit brief, p. 8.

First, O.R.C. § 1301.401 is inconsistent with O.R.C. § 5301.01(B), which **only** provides for constructive notice 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 is also inconsistent with O.R.C. § 5301.23(B), which **only** provides for constructive notice for a mortgage that omits the address of a mortgagee or contains an incorrect address of a mortgagee. *See* Ohio Rev. Code § 5301.23(B). Conversely, and based upon the plain language of those statutes, any other defects in a mortgage must not provide constructive notice for that mortgage. Instead, such other defects render the mortgage to not be entitled to be recorded and such a mortgage is treated as though it has not been recorded. *See Mortgage Electronics Registration Systems v. Odita* (10th Dist. 2004), 159 Ohio App.3d 1, 5.

The mortgage would be treated as an unrecorded mortgage and would not vest in the mortgagee any legal or equitable interest in the real property. *See Langmede v. Weaver* (1901), 65 Ohio St. 17, 34.

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 and certainly not transactions involving mortgages on real property.

Second, O.R.C. § 1301.401 is inconsistent with O.R.C. § 5301.25(A), which provides 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). The language of the statute, in its entirety, is 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). A bona fide purchaser is defined under Ohio law as one who takes in good faith, for value, and without actual or constructive notice of a defect in a mortgage. *See Shaker Corlett Land Co. v. City of Cleveland* (1942), 139 Ohio 536, 542. Based on that definition, and the plain language of O.R.C. § 5301.25(A), a mortgage that is

not properly executed does not provide constructive notice of the mortgage. If fraudulent under O.R.C. § 5301.25(A), a mortgage simply cannot provide constructive notice to a third-party.

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, also demonstrates that the legislature did not intend for O.R.C. § 1301.401 to apply to mortgages. *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 was contained within Chapter 5301 of the Ohio Revised Code, which demonstrated that the legislature believed that a statutory provision addressing mortgages and constructive notice of mortgages is properly contained within that Chapter. Thus, had the legislature intended for O.R.C. § 1301.401 to apply to mortgages on real property, it would have certainly incorporated a similar statutory provision within Chapter 5301 of the Ohio Revised Code. It chose not to do so and did not make a corresponding revision to the statutes contained within Chapter 5301 of the Ohio Revised Code that are inconsistent with O.R.C. § 1301.401.

In sum, O.R.C. § 1301.401 does not govern mortgages on real property or act to provide constructive notice to the world of a recorded mortgage that was deficiently executed under O.R.C. § 5301.01 as the statute is entirely inconsistent with Chapter 53 of the Ohio Revised Code. Respondent's brief, in addition to admitting that constructive notice is created under the conveyancing and recording statutes contained within Chapter 53 of the Ohio Revised Code, even admits that O.R.C. §§ 5301.23(A) and 5301.25(A), if strictly enforced according to the language contained in those statutes, would prevent a facially defective mortgage from creating

constructive notice when the mortgage was filed. O.R.C. § 1301.401 merely applies to transactions governed by the Uniform Commercial Code.

Proposition of Law No. II

O.R.C. § 1301.401 does not create a rebuttable presumption that a mortgage is properly executed.

Respondent argues that O.R.C. § 1301.401 creates a rebuttable presumption that a mortgage is properly executed. However, that interpretation of the statute is not supported by a reading of the statute itself. The statute merely addresses constructive notice. It does not address validity or effectiveness with the exception of stating that in any contest regarding the validity or effectiveness of any transaction referred to in a public record the person asserting the contest is charged with notice of the public record.

Thus, the statute does not create a presumption that a public record is valid or effective. At most, O.R.C. § 1301.401 merely provides that a person contesting the validity or effectiveness of a public record cannot disavow knowledge of the public record in that contest. However, it does not create a presumption that an otherwise facially defective public record is valid or effective.

In short, O.R.C. § 1301.401 does not create a presumption that a public record is valid or effective merely because the public record has been filed for record. More importantly, however, and for the reasons stated in the preceding section of this memorandum, O.R.C. § 1301.401 does not apply to mortgages. Therefore, O.R.C. § 1301.401 certain does not create a presumption that a mortgage is valid or effective even when an examination of the mortgage shows that it is facially defective.

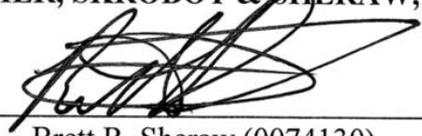
III. CONCLUSION

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 recorded mortgages at all nor does it 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.

It should also be noted that Respondent assumes that O.R.C. § 1301.401 is intended to prevent a bankruptcy trustee or competing mortgagee from getting a windfall when a mortgage is defectively executed. Such a concern is unfounded. First, a mortgagee (or its closing agent or title agency) can easily avoid a “windfall” from occurring by merely complying with the requirements of a mortgage set forth in O.R.C. § 5301.01(A). Second, neither a bankruptcy trustee, nor a mortgagor, receive a windfall when a mortgage is defectively executed because a bankruptcy trustee continues to collect, and a mortgagor must pay, the amount due on the defective mortgage and the funds are disbursed on account of the claims of unsecured creditors of the mortgagor, which may include the mortgagee. Third, a competing creditor does not receive a “windfall” because, if a mortgage fails to comply with the mortgage requirements, the mortgage is invalid as against the competing creditor’s lien on the mortgaged property. Notice is only relevant to the claims of a *bona fide* purchaser. Notice is irrelevant for purposes of the priority of liens between two creditors. Thus, a potential “windfall” to third-parties in the absence of O.R.C. § 1301.401 should not influence this Court’s decision regarding Certified Questions 1 and 2.

Respectfully submitted,

FISHER, SKROBOT & SHERAW, LLC

By: 

Brett R. Sheraw (0074130)

John C. Ridge (0086046)

471 East Broad Street, Suite 1810

Columbus, Ohio 43215

Telephone: (614) 233-6950

Facsimile: (614) 233-6960

E-mail: bsheraw@fisherskrobot.com

jridge@fisherskrobot.com

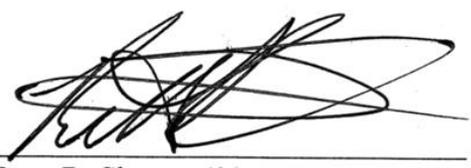
*Counsel for Petitioners Daren A. Messer and
Angela Messer*

PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing REPLY BRIEF 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 27th day of April, 2015:

Amelia A. Bower
Plunkett Cooney
300 East Broad Street, Suite 590
Columbus, Ohio 43215

Donald P. McFadden
Monica E. Russell
McFadden & Freeburg Co., LPA
6690 Beta Drive, Suite 320
Mayfield Village, Ohio 44143

By: 

Brett R. Sheraw (0074130)

John C. Ridge (0086046)

APPENDIX

5301.23 Mortgage effective dates.

(A) All properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference.

(B) A mortgage that is presented for record shall contain the then current mailing address of the mortgagee. The omission of this address or the inclusion of an incorrect address shall not affect the validity of the instrument or render it ineffective for purposes of constructive notice.

Effective Date: 01-01-1994