

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 Trust,	:	
	:	Case No. 2014-0485
Plaintiff-Appellee,	:	
	:	On Appeal from the Butler County
vs.	:	Court of Appeals, 12th Appellate District
	:	
Shari Lewis, et al.,	:	Court of Appeals Case Nos. CA201-11-239
	:	and CA2013-05-068
Defendant- Appellant.	:	

**APPELLEE SRMOF 2009-1 TRUST'S MEMORANDUM IN RESPONSE TO MOTION
TO RECONSIDER FILED APRIL 22, 2015**

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Appellee SRMOF 2009-1 Trust (“Trust”) respectfully requests that the Court deny the Motion to Reconsider (“Motion”) that Appellant Shari Lewis filed on April 22, 2015. The Motion does not present anything new. There is no reason to reconsider the Court’s judgment.

I. Facts

Ms. Lewis signed a Note. (Compl., Ex. A, Supp. S-4 to S-6.) Ms. Lewis also executed a Mortgage. (Compl., Ex. B, Supp. S-7.)

In Paragraph 1 of the Mortgage, Ms. Lewis promised to pay the debt evidenced by the Note. (*Id.* at S-10.) If Ms. Lewis broke that promise, and did not cure the default, then Paragraph 22 of the Mortgage provided that a foreclosure proceeding could be filed. (*Id.* at S-19.)

The Mortgage imposes obligations on Ms. Lewis independent from, and in addition to, her promises under the Note. For example, under the Mortgage, Ms. Lewis promised that the property was unencumbered except for encumbrances of record, and that she had the right to mortgage, grant and convey the property. (*Id.* at S-9.) Ms. Lewis promised to maintain hazard insurance and agreed that if she did not, then the mortgagee could purchase insurance and charge her for it. (*Id.* S-12.) Ms. Lewis made promises about how the proceeds of eminent domain proceedings would be treated. (*Id.* S-15.) Ms. Lewis promised not to cause or permit the presence, use, disposal, or storage of hazardous substances at the property. (*Id.* S-18.) Ms. Lewis also promised to pay taxes and assessments attributable to the property, and agreed that if she did not, that the mortgagee could pay those and charge those amounts to her. (*Id.* S-11.) None of these obligations are imposed by the Note. (Compl., Ex. A., Supp. S-4 to S-6.)

On June 18, 2008, Ms. Lewis filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Ohio. (Am. Motion for Summary Judgment, Ex.

A, Supp. S-61.) On October 14, 2008, she received a discharge, and her bankruptcy case was terminated on September 22, 2009. (*Id.* See also Compl., ¶ 4, Supp. S-2.)

On August 31, 2011, the Trust filed the foreclosure Complaint. The Complaint could not seek a personal judgment against Ms. Lewis on a claim on the Note because her personal liability thereunder had been discharged in bankruptcy. (Compl., ¶ 4, Supp. S-2.) The Complaint sought judicial findings that the Note was in default and that there were amounts still unpaid under the Note, but those findings were relevant to the claim under the Mortgage. A judgment finding those matters was not sought for a claim on the Note.

On October 19, 2012, the Trial Court entered summary judgment in favor of the Trust. (Decision And Entry Granting Plaintiff's Motion For Summary Judgment.) On October 31, 2012, the Trial Court entered the final judgment. (In Rem Judgment Entry And Decree Of Foreclosure.)

On November 28, 2012, Ms. Lewis appealed to the Twelfth District. (Notice Of Appeal.) On February 1, 2013, Ms. Lewis moved in the Trial Court to vacate the judgment. (Motion To Vacate Judgment.) The Trial Court denied that motion on April 5, 2013, and Ms. Lewis appealed that decision. (Decision And Entry Denying Defendant's Motion To Vacate.) The Twelfth District consolidated the appeals and affirmed. (Appellate Decision, Appellant's Appx. A-2.)

On January 23, 2014, Ms. Lewis moved the Twelfth District to certify a conflict with the Ninth District's decision in *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228. On March 12, 2014, the Twelfth District certified a conflict.

On July 26, 2014, Ms. Lewis filed her Merit Brief in this Court. On September 16, 2014, the Trust filed its Merit Brief, which argued, among other things, that the case should be

dismissed as having been improvidently certified. On October 6, 2014, Ms. Lewis filed her Reply Brief.

On February 25, 2015, the Court heard oral argument. On April 22, 2015, the Court dismissed the case, sua sponte, as having been improvidently certified.

On May 4, 2015, Ms. Lewis filed her Motion to Reconsider.

II. Argument

This Court correctly decided there was no conflict. This case presents different facts and a different legal question than that which the Ninth District addressed in *McFerren*. In *McFerren*, the plaintiff sought a judgment under both the note and mortgage but only showed standing under the mortgage; here, because Ms. Lewis' personal liability for the debt under the Note was discharged in bankruptcy, the Trust could only enforce the Mortgage.

To answer a certified conflict: (1) the asserted conflict must be on the same question; (2) the alleged conflict must be on a rule of law (not facts); and (3) the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by another district court of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1993-Ohio-223.

This Court may dismiss a case “as having been improvidently certified” where there is no conflict. S.Ct.Prac.R. 8.04. The Court may find there is no conflict where resolution of another point of law could determine the action. *See Brown v. Borchers Ford, Inc.*, 50 Ohio St.2d 38, 40, 361 N.E.2d 1063 (1977) (“There is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals where, as here, the point upon which conflict exists has no arguable effect upon the judgment of the certifying court.”), quoting *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St.2d 41, 44, 213 N.E.2d 356 (1966).

Here, there was no need for this Court to answer the question that had been certified. First, in *McFerren*, the plaintiff relied on an assignment of *mortgage* to show standing to enforce the *note*. *McFerren*, 2013-Ohio-3228, ¶ 12. Here, that issue is not presented. The Trust could not seek to enforce the Note against Ms. Lewis, and therefore does not need to rely on the Assignments to show any ability to do so.

This case thus presents a different legal question than what was presented to the Ninth District. In *McFerren*, the legal issue was whether an assignment of the *mortgage* gave the plaintiff standing to enforce the *note*; in this case, the legal issue is whether an assignment of a *mortgage* gives the plaintiff the right to enforce the *mortgage*. There is no conflict.

Ms. Lewis argues that the Complaint sought a judgment finding that there were amounts still unpaid under the Note and that Ms. Lewis had failed to pay according to the terms of the Note. (Motion at 3-4.) But that does not mean that the Trust was pursuing a claim on the Note. Rather, the Trust was only seeking findings about the Note debt which were relevant to the Trust's claim under the Mortgage.

Notes and mortgages are separate contracts. *Cranberry Fin., LLC v. S&V Partnership*, 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623, ¶ 29, citing *Hurd v. Robinson*, 11 Ohio St. 232, 234 (1860); *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, ¶ 16 (9th Dist. Ct. App.). They have different remedies: an action on a note is a proceeding against the maker personally for the balance due; an action on a mortgage seeks to terminate the owner's interests in property. See *Spence v. Insurance Co.*, 40 Ohio St. 517, 520-21 (1884) ("separate actions may therefore be maintained, one to foreclose and the other for a personal judgment").

Note and mortgage interests may be enforced at the same time, or they can be enforced independently and separately in different, and even successive, actions. *Doyle v. West*, 60 Ohio

St. 438, 444, 54 N.E. 469 (1899) (foreclosure of a mortgage may be had without pursuing a claim on the note; determination in a foreclosure action of the question of fact about the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note); *Bank of New York Mellon v. Frey*, 6th Dist. Sandusky No. S-12-044, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only); *Hopkins*, 2008-Ohio-2959, ¶ 18 (claims on mortgage and note may be brought independently); *The Broadview Savings & Loan Co. v. Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, 45002, 1982 Ohio App. LEXIS 12139, *7 (Dec. 30, 1982) (because they are distinct causes of action that may be pursued separately, a dismissal with prejudice of a prior foreclosure action did not bar a subsequent action filed to enforce the note).

A person with an interest in the mortgage may enforce it, even when the note is not enforceable. *Bradfield v. Hale*, 67 Ohio St. 316, 321-24, 65 N.E. 1008 (1902) (mortgagee can bring action to enforce the mortgage, even where the note is barred); *Fisher v. Mossman*, 11 Ohio St. 42, 45-46 (1860) (where an action can no longer be brought upon the note, the mortgage may be enforced if brought within the statute of limitations for enforcing mortgages); *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, ¶¶ 9, 14 (*in rem* action to proceed on mortgage may proceed even if the *in personam* claim on the note is barred). For example, if a debtor's obligation on a note is discharged in bankruptcy (like Ms. Lewis's Note obligation—see Compl. ¶ 4, Supp. S-2), the mortgage survives and may be enforced. *First Place Bank v. Blythe*, 7th Dist. Columbiana No. 12-CO-27, 2013-Ohio-2550, ¶ 35.

It is true that a bankruptcy discharge does not extinguish the fact that there are amounts still unpaid under the Note, and thus if there were multiple makers, those who had not received a bankruptcy discharge could still have a claim under the Note brought against them. *E.g. In re*

Western Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990) (cited by Ms. Lewis in the Motion for the proposition that “[t]he debt still exists, however, and can be collected from any other entity that may be liable”). Strictly speaking, a bankruptcy discharge does not adjudicate that the debt never existed or that the debt has been satisfied. But, a bankruptcy discharge does prevent a creditor from bringing claims on a note *against the discharged debtor*, since the action on a note is a proceeding against the particular maker for a personal money judgment for the balance due. *See Spence v. Insurance Co.*, 40 Ohio St. 517, 520-21 (1884) (a note claim is “for a personal judgment”). There is no other type of claim on a note. A note is a personal promise to pay. A bankruptcy discharge enjoins the creditor from enforcing that personal promise to pay which is reified in the note.

Separately, a mortgage is a contract in its own right. *Cranberry Fin., LLC*, 2010-Ohio-464, 927 N.E.2d 623, ¶ 29; *Fifth Third Bank*, 2008-Ohio-2959, ¶ 16. Facts about a note secured by the mortgage may be relevant to adjudicating a claim under the mortgage, but the mortgage lien against the property is created by the separate mortgage contract and the lien is enforceable by the terms of the separate mortgage contract. As noted in the facts stated above, most mortgages contain many other promises that are not enforceable by the note, but rather only by the mortgage itself.

Thus, while a judgment on a claim to enforce a mortgage may (and often does) include judicial *findings* about a note secured by the mortgage (which findings may be the basis of res judicata as to a separate claim on the note), the action is nevertheless brought on a claim to enforce the mortgage; the action is not brought to enforce the personal promise to pay against the maker under the note. *Doyle*, 60 Ohio St. at 444 (foreclosure of a mortgage may be had without pursuing a claim on the note; determination in a foreclosure action of the question of fact about

the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note). *See also Bank of New York Mellon*, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only); *Hopkins*, 2008-Ohio-2959, ¶ 18 (claims on mortgage and note may be brought independently); *The Broadview Savings & Loan Co.*, 1982 Ohio App. LEXIS 12139, *7 (because they are distinct causes of action that may be pursued separately, a dismissal with prejudice of a prior foreclosure action did not bar a subsequent action filed to enforce the note).

A claim on a note is different from a claim on a mortgage. That is why there is no conflict between the Twelfth District's decision in this case and the Ninth District's decision in *McFerren*. The Ninth District had to consider whether proof of assignment of the mortgage was sufficient to show standing to pursue a claim *on the note*. Here, in contrast, the Twelfth District only had to decide whether proof of an assignment of the mortgage was sufficient to show standing to pursue a claim *on the mortgage*.

III. Conclusion

This Court correctly decided that there was no conflict. There is no reason for the Court to reconsider its judgment. The Trust respectfully requests that the Court overrule Ms. Lewis' Motion.

Respectfully submitted,

/s John B. Kopf

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, I served a copy of the foregoing *Memorandum in Response to Motion to Reconsider* by ordinary U.S. Mail, postage prepaid, upon Andrew M. Engel, Esq., Kendo, Alexander, Cooper & Engle LLP, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, counsel for Defendant-Appellee Shari Lewis.

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