The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

***Acosta v. Cathedral Buffet,* 6th Cir. No. 17-3427 (April 16, 2018).**

The defendant was an Ohio for-profit corporation but does not generate a profit. The U.S. Department of Labor (DOL) began an investigation into the buffet's employment practices. The buffet separated its workers into "employees" and "volunteers." Volunteers performed many of the same tasks as employees. Employees received an hourly wage; volunteers did not. The volunteers were recruited from weekly church services and were coerced into volunteering at the buffet. Eventually the DOL filed a lawsuit against the buffet for violating the Fair Labor Standards Act (FLSA) by

how it classified employees versus volunteers. The lower court held that the buffet was not exempt from the FLSA as a religious institution and that the volunteers were actually employees that should have received pay. The buffet appealed, and on appeal, the Sixth Circuit Court of Appeals reversed.

The Sixth Circuit found that to be considered an employee under the FLSA, the individual must have an expectation that he or she will actually receive pay for the work provided. Here, there was no evidence of this; in fact, the evidence established that the volunteers did not depend economically on the buffet.

The Bullet Point: The FLSA mandates that "[e]very employer shall pay to each of his employees who . . . is employed in an enterprise engaged in commerce or in the production of goods for commerce" a minimum wage set by Congress. What constitutes an "employee" under the FLSA has a broad, wide-ranging meaning and is typically determined on a case-by-case basis. As such, to determine whether a worker is an FLSA employee, courts typically look to the economic realities of the business relationship in light of all the relevant factors. However, a threshold question under the FSLA is whether a volunteer expected compensation for the work done. If not, then the person cannot be considered an "employee" within the meaning of the FLSA. As the Sixth Circuit cautioned, however, in some circumstances, a showing of economic coercion might be sufficient to overcome a volunteer's lack of expected compensation and bring her within the protections of the FLSA. Economic coercion could include the employer using its superior bargaining power to its advantage, or whether the volunteer work is being done for a church-affiliated enterprise, as opposed to a for-profit corporation. Spiritual coercion alone cannot substitute for economic coercion in this regard.

Arbor Grove Properties v. Clear Sky Realty, Inc., **5th Dist. Stark No. 2017 CA 00124, 2018-Ohio-1467.**

This was an appeal of a denial of a motion to compel arbitration. Plaintiffs initially filed suit against Defendant for allegedly breaching an agreement to manage a number of residential properties. Plaintiffs claimed that Defendant overcharged for maintenance work and failed to properly manage various properties.

Defendant moved to compel arbitration based on an arbitration clause contained in the contract, but the trial court denied the motion and Defendant appealed. On appeal, the Fifth Appellate District affirmed the trial court's decision. In so ruling, the court found that the claims alleged were outside of the scope of the arbitration agreement and that the parties had no contracted to arbitrate the specific claims.

The Bullet Point: Ohio law favors arbitration. However, there is no duty to arbitrate particular disputes where there has been no agreement between parties requiring such disputes to be submitted to

arbitration. That being the case, under the doctrine of severability, an arbitration agreement is treated as an independent contract that does not necessarily fail if the remainder of the contract is found invalid. Moreover, courts will sometimes strike a discrete provision of an arbitration provision and enforce the arbitration clause when the claim falls within the scope of the provision and reflects the intent of the parties to arbitrate their claims.

***Wells Fargo Bank, N.A. v. Mayo,* 6th Dist. Erie No. E-16-007, 2018-Ohio-1432.**

This case is an appeal of a foreclosure judgment. The loan required the lender to provide notice of default prior to initiating a foreclosure. Here, the defendant claimed that the notice requirement was not complied with. The trial court disagreed and granted the lender's motion for summary judgment. The defendant appealed, and on appeal, the Sixth Appellate District affirmed, finding that a prior lender's notice of default was sufficient notice for the current lender to foreclose.

The Bullet Point: Under Ohio law, notices of default required by residential loan agreements are considered conditions precedent to foreclosure, meaning the notice must be sent before a foreclosure can be filed. The notice does not have to be sent by the lender seeking to foreclose in order to be valid. In fact, most often the notice of default is sent by the lender's loan servicer on its behalf. In this case, the court found that the notice sent by a prior note holder was sufficient as well because the current holder was in privity with the prior holder.

***Wells Fargo Fin. Ohio 1, Inc. v. John Doe*, 10th Dist. Franklin No. 17AP-727, 2018-Ohio-1472.**

This was an appeal of a partial denial of a motion for default judgment in a foreclosure action. After serving the defendants, the lender moved for default judgment. The trial court granted the motion in part, granting judgment on the promissory note but denying the motion on the lender's request to foreclose on the mortgage, finding that the mortgage was not properly acknowledged by a notary and was therefore invalid under Ohio law. The lender appealed and the Tenth Appellate District reversed.

In so ruling, the Tenth Appellate District noted Ohio law was recently changed and that now, if a mortgage has been recorded for four or more years, any defects in its execution or acknowledgement are automatically cured. Because of this, the court reversed.

The Bullet Point: Previously, an instrument with a defective acknowledgement would only be cured by operation of law after it had been recorded for more than 21 years. The Ohio legislature recently amended this rule to dramatically shorten the time frame to four years.

***Mid America Mortgage, Inc. v. Scott*, 8th Dist. Cuyahoga No. 1060099, 2018-Ohio-1403.**

In this appeal, the appellant, the ex-wife of a mortgage loan borrower, appealed a foreclosure judgment entered against her ex-husband. The ex-husband had executed a note and mortgage to purchase a house. The appellant only executed the mortgage. Eventually, the ex-husband defaulted on the loan, and the lender filed a foreclosure action. The ex-husband never appeared. Instead, the appellant attempted to defend the foreclosure on his behalf, arguing, among other things, that the lender lacked standing to foreclose. Eventually, the trial court granted the lender's motion for summary judgment and appellant appealed.

The Eighth Appellate District affirmed. It found that the appellant, who was not a borrower under the promissory note, lacked standing to contest it or raise arguments on behalf of her ex-husband. And that because she did not execute the note, she "cede[d] the right to raise defenses to the foreclosure action the debtor could have raised."

The Bullet Point: Ohio recognizes the general prohibition on a litigant's raising another person's legal rights. Thus, as in this case, when an individual only executes the mortgage, but not the note, he or she has no grounds to contest a lender's ability to enforce the Note. As the Eighth Appellate District noted, "[t]o recognize otherwise would open the door to two inequitable situations. It would encourage creditors to reassess the common proposition that a nonborrowing, co-mortgagor is not liable for the debt under the note — if the nonborrowing co-mortgagor is entitled to raise the abandoned defenses of the debtor that only arise under the terms of the note and mortgage, then a creditor in turn should be permitted to enforce the debt obligation on the nonborrowing spouse under those same terms. It would also permit the nonborrowing spouse to prevent the sale of the property meant to indemnify the debtor, leaving the borrowing spouse in the position of being financially responsible for the property without the benefit of using the property to mitigate the damages."

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0072p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. ALEXANDER ACOSTA, Secretary of Labor,
Plaintiff-Appellee,

v.

CATHEDRAL BUFFET, INC.; ERNEST ANGLEY,
Defendants-Appellants.

No. 17-3427

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 5:15-cv-01577—Benita Y. Pearson, District Judge.

Argued: December 6, 2017

Decided and Filed: April 16, 2018

Before: SILER, KETHLEDGE, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Todd A. Mazzola, RODERICK LINTON BELFANCE, LLP, Akron, Ohio, for Appellants. Mary E. McDonald, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee. **ON BRIEF:** Todd A. Mazzola, William G. Chris, Lawrence R. Bach, RODERICK LINTON BELFANCE, LLP, Akron, Ohio, for Appellants. Mary E. McDonald, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee.

SILER, J., delivered the opinion of the court in which KETHLEDGE and THAPAR, JJ., joined. KETHLEDGE, J. (pp. 11–13), delivered a separate concurring opinion.

OPINION

SILER, Circuit Judge. The Grace Cathedral church operates a restaurant on its Cuyahoga Falls, Ohio, campus called Cathedral Buffet. For many years, Cathedral Buffet was open to the public and was partially staffed by unpaid church members. Following a Department of Labor (DOL) suit and a bench trial, the district court found that the restaurant's use of unpaid labor violated the minimum wage requirement of the Fair Labor Standards Act (FLSA).

However, to be considered an employee within the meaning of the FLSA, a worker must first expect to receive compensation. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). It is undisputed that the volunteers who worked at Cathedral Buffet had no such expectation. We therefore REVERSE and REMAND.

I.

Cathedral Buffet is organized as an Ohio for-profit corporation. The restaurant's sole shareholder is Grace Cathedral, Inc., a 501(c)(3) non-profit religious organization. Despite its for-profit status, Cathedral Buffet does not generate a profit, and Grace Cathedral subsidizes the restaurant.[1] Grace Cathedral's pastor, Reverend Ernest Angley, also serves as the president of Cathedral Buffet.

The DOL's Wage and Hour Division began investigating Cathedral Buffet in 2014, reviewing the restaurant's employment practices for a period stretching back two years.[2] During

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[1]Prior to Cathedral Buffet's incorporation in 2013, Winston Broadcasting Network, Inc. owned Cathedral Buffet. Grace Cathedral is also the sole shareholder of Winston Broadcasting Network. The district court found that, despite this change in ownership, "[m]any aspects of the Buffet have remained constant for the past nineteen years," and imposed liability upon Cathedral Buffet, Inc. as Winston Broadcasting's successor-in-interest. Cathedral Buffet does not raise successor liability as an issue on appeal.

[2]The 2014 investigation was not Cathedral Buffet's first encounter with the DOL. In 1999, the agency alleged the restaurant had committed many of the same FLSA violations. The parties settled the 1999 case, and Cathedral Buffet agreed to pay $37,037.28 in back wages and not to violate the FLSA in the future. For a time following the 1999 investigation, volunteers were issued checks for their work at the restaurant. However, several volunteers testified that they were required to endorse and return the checks to Grace Cathedral's secretary. DOL

that period, the restaurant separated its workers into two classes, "employees" and "volunteers." Volunteers performed many of the same restaurant-related tasks as employees: cleaning, washing dishes, serving cake, chopping vegetables, and manning the cash register. However, there was one meaningful distinction between employees and volunteers. Employees received an hourly wage; volunteers did not.

Reverend Angley recruited volunteers from the church pulpit on Sundays. Sonya Neale, the restaurant's manager, would tell Angley when the restaurant was shorthanded, and before his sermon, Angley would announce to the congregation that more volunteers were needed. Angley said the restaurant was "the Lord's buffet," and "[e]very time you say no, you are closing the door on God." He suggested that church members who repeatedly refused to volunteer at the restaurant were at risk of "blaspheming against the Holy Ghost," which was an unforgivable sin in the church's doctrine. Ushers would pass around slips of paper, and parishioners interested in volunteering would write down their phone number and hand it in.

Church members would then receive calls from Cathedral Buffet managers, and sometimes Angley himself, asking them to volunteer. The managers would work around the volunteers' schedules, ensuring they were free during their assigned shifts. Managers were instructed to tell prospective volunteers that Angley would find out if they refused to work. According to church member Alishea Gay, on one occasion when she did not return a phone call, Angley called her directly and asked her to work. Gay agreed to work because she "feared failing God."

The DOL filed suit after concluding Cathedral Buffet violated the FLSA by using unpaid volunteers and by failing to keep records of the hours they worked. After a three-day bench trial, the district court issued its Findings of Fact and Conclusions of Law. *Hugler v. Cathedral Buffet*, No. 5:15-CV-1577, 2017 WL 1287422 (N.D. Ohio Mar. 29, 2017). It held that Cathedral Buffet's religious affiliation did not exempt it from FLSA coverage because the restaurant was a for-profit corporation engaged in commercial activity. *Id.* at *7-8 (citing *Alamo*, 471 U.S. at 296-99, 302). Applying the economic realities test, the district court concluded that the church

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investigators returned to Cathedral Buffet in 2003 as part of the agency's recidivism initiative and found no violations.

member volunteers were employees under the FLSA. *Id.* at *8-11. In the court's view, "The Buffet's constant solicitation of volunteer labor, Reverend Angley's admissions that the use of volunteer labor was intended to save money, and the volunteers' feelings of pressure and coercion to provide the labor all demonstrate that the volunteers were actually employees." *Id.* at *11. The court also noted that the volunteers were "clearly integral to the Buffet's operations," and that the restaurant's management exerted a "high level of supervision and control . . . over the volunteers." *Id.* The court rejected Cathedral Buffet's argument that workers need not be paid minimum wage if they have no expectation of compensation, saying that "[s]uch a reading of the FLSA . . . clearly violates the intent and purpose of the Act" and would run afoul of the Supreme Court's holding in *Alamo*. *Id.*

Because Cathedral Buffet failed to keep accurate records, the district court adopted the DOL's estimate of the volunteers' back wages, $194,253.95. *Id.* at *15. The district court also awarded the DOL an equal amount of liquidated damages, for a total of $388,507.90, because Cathedral Buffet failed to demonstrate a good faith effort to comply with the FLSA. *Id.* at *15-16. Finally, the court enjoined Cathedral Buffet and Angley from further violations of the FLSA and ordered that they "shall not solicit or coerce . . . any employee – including those workers classified as 'volunteers' – to return or to offer to return to the Defendants or to someone else on behalf of the Defendants any money" awarded to the employee by the judgment. This appeal followed.

II.

Following a bench trial, "we review a district court's factual findings for clear error and its legal conclusions de novo." *Muniz-Muniz v. United States Border Patrol*, 869 F.3d 442, 444 (6th Cir. 2017) (quoting *Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015)). "A district court's factual findings are clearly erroneous if, based on the entire record," the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Shelby Cty. Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 364-65 (6th Cir. 2009) (citations and internal quotation marks omitted).

III.

A.

The FLSA mandates that "[e]very employer shall pay to each of his employees who . . . is employed in an enterprise engaged in commerce or in the production of goods for commerce" a minimum wage set by Congress. 29 U.S.C. § 206(a). An "[e]nterprise engaged in commerce" is one that, among other things, "has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce" or "whose annual gross volume of sales made or business done is not less than $500,000." *Id.* § 203(s)(1)(A)(i), (ii). The restaurant concedes that it is a covered enterprise under the FLSA. Thus, the only remaining question is whether the church member volunteers are employees within the meaning of the Act.

The FLSA defines an "employee" as "any individual employed by an employer," *id.* § 203(e)(1), and "employ" as "to suffer or permit to work," *id.* § 203(g). These are wide-ranging definitions; indeed, the Supreme Court has stated that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The statutory language "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Mendel v. City of Gibraltar*, 727 F.3d 565, 569 (6th Cir. 2013) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)).

To determine whether a worker is an FLSA employee, we typically look to the economic realities of the business relationship in light of all the relevant factors. *See, e.g.*, *Ellington v. City of East Cleveland*, 689 F.3d 549, 555-56 (6th Cir. 2012). However, Cathedral Buffet urges us to eschew this approach based upon the Supreme Court's holding in *Alamo*, 471 U.S. at 302, a case with similar facts.

There, the Tony and Susan Alamo Foundation, a non-profit religious organization, operated a number of commercial businesses to support its ministry. *Id.* at 292. The Foundation staffed those businesses with persons it called "associates," who were mostly rehabilitated "drug addicts, derelicts, or criminals." *Id.* Associates received no wages, but the Foundation provided them with food, clothing, and shelter. *Id.*

The Supreme Court held that the associates were entitled to minimum wage under the FLSA. First, the Court found that the Foundation was a covered enterprise under the Act because its "businesses serve[d] the general public in competition with ordinary commercial enterprises." *Id.* at 299. When the FLSA was expanded to cover "enterprises" in 1961, the Court said, "[t]here was . . . broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations." *Id.* at 297-98.

The *Alamo* Court also concluded that the Foundation's associates were employees within the meaning of the FLSA. *Id.* at 301-02. In an earlier case, *Portland Terminal*, 330 U.S. at 153, the Court held that enrollees in a week-long railyard training course were not FLSA employees because they participated for their own benefit, had no expectation of compensation, and provided the railroads with no "immediate advantage." In contrast, the *Alamo* Court found that, although the Foundation's associates did not expect to receive wages, they had an implied agreement for compensation with the Foundation in the form of in-kind benefits and were sometimes wholly dependent upon the Foundation for several years. *Alamo*, 471 U.S. at 301.

Important for our purposes, the *Alamo* Court rejected the Foundation's argument that requiring it to pay the associates would chill other volunteer activities normally associated with religious organizations. The Court wrote that "[t]he Act reaches only the 'ordinary commercial activities' of religious organizations, and only those who engage in those activities in expectation of compensation." *Id.* at 302 (quoting 29 C.F.R. § 779.214 (1984)).

In this case, although Cathedral Buffet stresses its religious nature, it does not contest the district court's determination that the restaurant is an FLSA "enterprise" because it engages in competitive commercial activity. Instead, Cathedral Buffet argues that its volunteers are distinguishable from the associates in *Alamo* because they did not expect to receive any type of compensation. Under Cathedral Buffet's reading of *Alamo*, to find that its volunteers are FLSA employees, we must first find that they worked "in expectation of compensation." *Id.* Because that requirement is not met, the restaurant says, the volunteers are not employees, and the court need not proceed to the economic realities test.

We agree that a volunteer's expectation of compensation is a threshold inquiry that must be satisfied before we assess the economic realities of the working relationship. The Supreme Court held as much in *Portland Terminal* when it defined a volunteer as a "person who, *without promise or expectation of compensation*, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." *Portland Terminal*, 330 U.S. at 152 (emphasis added). The *Alamo* Court reiterated this test, making clear that when a religious organization undertakes a commercial endeavor, its workers are only covered under the FLSA if they "engage in those activities in expectation of compensation." *Alamo*, 471 U.S. at 302. We are, of course, bound by the Supreme Court's interpretation of the FLSA. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.").

In the past, we have stressed that "[t]he issue of the employment relationship does not lend itself to a precise test, but is to be determined on a case-by-case basis upon the circumstances of the whole business activity." *Mendel*, 727 F.3d at 569 (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)). But our earlier cases dealt with the distinction between employees and independent contractors. *See, e.g.*, *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 804-05 (6th Cir. 2015); *see also Marie v. Am. Red Cross*, 771 F.3d 344, 352 (6th Cir. 2014) (recognizing in a Title VII case that, "because volunteers do not usually receive compensation in the traditional sense, they are quite differently situated than either employees or independent contractors"). In that context, it is a foregone conclusion that the workers, whether employees or independent contractors, expect to receive compensation. Thus, the threshold question of remuneration becomes irrelevant, and we proceed to determine whether the workers, "as a matter of economic reality[,] are dependent upon the business to which they render service." *Keller*, 781 F.3d at 807 (citations omitted). Here, however, *Portland Terminal* and *Alamo* plainly require us to first ask whether Cathedral Buffet's volunteers worked in "expectation of compensation." *Alamo*, 471 U.S. at 302; *Portland Terminal*, 330 U.S. at 152.

They did not. It is undisputed that the volunteers were not economically dependent upon Cathedral Buffet in any way; the parties stipulated as much before trial. The volunteers neither

expected nor received any wages or in-kind benefits in exchange for their service. They were not even allowed to accept tips from customers. Put simply, there was no economic relationship between the restaurant and the church member volunteers. Because the volunteers did not work in expectation of compensation, the threshold remuneration requirement fails.

B.

Cathedral Buffet says this should be the end of the story—because the volunteers did not expect to be compensated, they cannot be FLSA employees. The DOL contends, however, that a showing of coercion can satisfy the expectation-of-remuneration requirement. And because the district court found that the volunteers were coerced, it argues, the volunteers are employees, despite their lack of actual or expected compensation.

The DOL's argument finds some support in the *Alamo* decision. The Court expressed concern that allowing workers to opt out of FLSA protection would open the door to coercion: "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,'" the Court said, "employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." *Alamo*, 471 U.S. at 302.

We agree that in some circumstances, a showing of coercion might be sufficient to overcome a volunteer's lack of expected compensation and bring her within the protections of the FLSA. But those circumstances are not present in this case. The type of coercion with which the FLSA is concerned is economic in nature, not societal or spiritual.

Congress's primary goal in enacting the FLSA "was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950); *see Keller*, 781 F.3d at 806 ("The FLSA aimed to correct labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ." (citations and internal quotation marks omitted)). To "protect all covered workers from substandard wages and oppressive working hours," *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), the Act requires that employers pay their employees a minimum wage set by Congress, *Ellington*, 689

F.3d at 552 (citing 29 U.S.C. § 206(a)). But although the FLSA might aim to curb the societal ills caused by low wages, it does so through a comprehensive system of economic regulations. The Act does not go so far as to regulate when, where, and how a person may volunteer her time to her church. After all, the giving of one's time and money through religious obligation is a common tenet of many faiths. For instance, the Bible calls upon Christians to "use whatever gift you have received to serve others, as faithful stewards of God's grace in its various forms." 1 Peter 4:10 (NIV). In the Islamic faith, believers are instructed to "show kindness unto parents, and unto near kindred, and orphans, and the needy." The Qur'an, *An-Nisa* 4:36.

The Tenth Circuit's recent decision in *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225 (10th Cir. 2018), is readily distinguishable. There, a Utah pecan ranch had an agreement with the Fundamentalist Church of Jesus Christ of Latter-Day Saints, whereby the Church would send community members—mostly children—to gather fallen pecans that had been missed in the harvest. *Id.* at 1230. The Tenth Circuit rejected the ranch's argument that the children were not employees under *Alamo* and *Portland Terminal*, agreeing instead with the district court that the children worked at the ranch because they were coerced to do so by their parents, community, and the Church. *Id.* at 1231-32. But *Paragon*, unlike the case at bar, involved the use of child labor, and the children were not providing labor to a church-affiliated enterprise. Further, the court devoted only a small portion of its opinion to the issue of coercion, and did not squarely address the issue of spiritual coercion, as we are called to do today.

Because we hold that spiritual coercion cannot stand in for the economic coercion that the FLSA and the *Alamo* decision require, we need not decide whether the district court erred by finding that the Cathedral Buffet volunteers were actually coerced.

C.

The DOL suggests that allowing Cathedral Buffet to rely on unpaid labor gives it an unfair advantage over other restaurants in the Cuyahoga Falls area. That may very well be the case. But the *Alamo* decision also counsels us to accommodate the "ordinary volunteerism" in which many organizations like Grace Cathedral engage. *Alamo*, 471 U.S. at 303. The Court listed several examples of volunteer work that would not fall within the purview of the FLSA:

"driv[ing] the elderly to church, serv[ing] church suppers, or help[ing] remodel a church home for the needy." *Id.* at 302. These activities could all be seen as competing with other businesses, yet they are still exempted from FLSA coverage because the workers do not expect to receive an economic benefit in return for their service. A church van competes with a taxi service. A Catholic fish fry competes with a fast food restaurant. A volunteer homebuilding project competes with a construction company. Granted, Cathedral Buffet was organized to turn a profit (although there is little evidence that the restaurant ever generated revenue for the church). But, as the Court made clear in *Portland Terminal*, what matters is not the object of the enterprise, but instead the purpose of the worker. *Portland Terminal*, 330 U.S. at 152-53.

IV.

Because the district court erred by finding that the church member volunteers were FLSA employees, its judgment must be reversed on that basis. We need not reach Cathedral Buffet's arguments regarding the Free Exercise Clause, *see Bond v. United States*, 134 S. Ct. 2077, 2087 (2014), nor must we address the propriety and scope of the district court's injunction.

REVERSED and REMANDED.

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring. One hopes that the Department of Labor simply failed to think through its position in this case. Since initiating this litigation in 2015, the Department has argued, and the district court held, that volunteers at the Cathedral Buffet were in fact employees under the Fair Labor Standards Act—because, the Department says, their pastor spiritually "coerced" them to work there. That argument's premise—namely, that the Labor Act authorizes the Department to regulate the spiritual dialogue between pastor and congregation—assumes a power whose use would violate the Free Exercise Clause of the First Amendment.

By way of background, the Grace Cathedral Church operated the Cathedral Buffet, a nominally for-profit corporation that in fact never turned a profit, and that the church heavily subsidized (by more than $1 million between 2012-16). Instead, the record makes clear, the Buffet's purpose was to allow the church's members to proselytize among local residents who dined there. Although the Buffet had 35 full-time paid employees—all of whom, incidentally, have lost their jobs as a result of this lawsuit, *see* Gov't Br. at 36 & n.13—much of its work was performed by volunteers from the congregation.

In the district court, the Department obtained injunctive relief and about $388,000 in damages on the theory that these congregants were employees (rather than volunteers) under the Act. Normally that determination is governed by economic criteria: whether the workers are economically dependent upon the defendant, whether the defendant can hire or fire them, whether the defendant substantially controls the terms and conditions of the work. *See Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012). Here, per those criteria, the congregants are not employees, as our opinion today makes clear. But here the Department has divined spiritual criteria as well: "during Church services[,]" the Department contends, Rev. Angley "exerted undue pressure and influence upon the volunteers" by telling the congregation that a failure to volunteer would be "the same as failing God," and that "God is not pleased" with

congregants who did fail. Gov't Br. at 40. Thus, the Department says, putative spiritual coercion can be a stand-alone basis for fines and injunctive relief under the Act.

One can agree that the Reverend's comments were in poor taste, and yet see that the Department has no business regulating them. For the power that the Department purports to exercise here is out of bounds even under *Employment Div. v. Smith*, 494 U.S. 872 (1990). There, of course, the Court held that a neutral law of general applicability does not violate the Free Exercise Clause when the law burdens religious exercise only incidentally. *Id.* at 879. But here the Department's actions meet none of those criteria. The Department seeks to regulate spiritual conduct *qua* spiritual conduct, and to impose significant liability as a result. The very criterion by which the Department would impose liability is expressly spiritual. Hence this is not a case, like *Smith*, where illegal conduct (there, smoking peyote) remained illegal even though it was religiously motivated. Instead, the Department's position here is that otherwise *legal* conduct—such as volunteering at a church restaurant—becomes illegal if the worker's pastor spiritually pressures her to engage in it. (Under this regime, one supposes, whether a pastor can invoke the Book of James—"a person is justified by works and not by faith alone[,]" James 2:24—might be determined on a case-by-case basis.) The Department's actions therefore "target[] religious conduct for distinctive treatment[,]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); and their burdens upon religious exercise would come by design.

Nor is the Department even competent to make the spiritual judgment it purported to make here. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989). That same idea of centrality perforce lies beneath any judgment about spiritual coercion. And bureaucrats are no better than judges at making that judgment. Hence it is beyond the ken of federal agencies, or the courts, to determine that congregants were spiritually coerced even though the congregants themselves say they were not—which is what 134 members of Grace Cathedral said under oath here.

Thus, the coercion that matters is not anything that Rev. Angley said to his congregation on a Sunday morning. What matters, rather, is the Department's own attempt to coerce religious leaders—of any faith—not to exhort their followers on spiritual grounds to engage in conduct that is otherwise legal. For "the Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (internal quotation marks omitted). The coercion here would take the form of a check in the amount of $388,507.90, "payable to 'United States Department of Labor—Wage and Hour Division[.]'" Judgment and Order Regarding Injunction at 2. That coercion affects not only Rev. Angley—who along with the Buffet was ordered to pay that amount—but also the congregants themselves; since, even if they return any moneys to Angley or the Buffet, "Defendants shall immediately remit such amount to the U.S. Department of Labor[.]" *Id*. at 3.

What is perhaps most troubling about the Department's position in this case, however, is the conceit of unlimited agency power that lies behind it. The power of a federal agency is no more than worldly. The Department should tend to what is Caesar's, and leave the rest alone.

[Cite as *Arbor Grove Properties v. Clear Sky Realty, Inc.*, 2018-Ohio-1467.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ARBOR GROVE PROPERTIES, et al.

Plaintiffs-Appellees

-vs-

CLEAR SKY REALTY, INC., et al.

Defendants-Appellants

JUDGES:
Hon. John W. Wise, P. J.
Hon. Craig R. Baldwin, J.
Hon. Earle E. Wise, Jr., J.

Case No. 2017 CA 00124

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2015 CV 02504
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 16, 2018

APPEARANCES:

For Plaintiffs-Appellees

JOHN P. MAXWELL
MATTHEW W. ONEST
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., LPA
4775 Munson Street
Canton, Ohio 44718

For Appellants Clear Sky Realty & Wohlwends

BRIAN D. SULLIVAN
REMINGER CO., LPA
101 West Prospect Avenue, Suite 11400
Cleveland, Ohio 44115-1093

ROBERT S. YALLECH
REMINGER CO., LPA
11 Federal Plaza Central, Suite 1200
Youngstown, Ohio 44503

For Appellants Clear Sky Properties

JOHN V. BOGGINS
1428 Market Avenue North
Canton, Ohio 44714-2616

Wise, John, P. J.

{¶1} Defendants-Appellants Clear Sky Realty, Inc., et al., appeal the decision of the Stark County Court of Common Pleas, which denied certain motions to compel arbitration in a lawsuit filed by Appellees Arbor Grove Properties, LLC, et al. for breach of contract and other claims. The relevant facts leading to this appeal are as follows.

{¶2} On December 1, 2015, Appellees Arbor Grove Properties, LLC, One Rowland, LLC, Pioneer Trail Properties, LLC, Pollyanna Properties, LLC, and Julian Real Estate, LLC (hereinafter “appellees") filed a civil action in the Stark County Court of Common Pleas against Appellants Clear Sky Realty, Inc., Eric M. Wohlwend, and Lila Wohlwend.

{¶3} In their complaint, appellees, owners of certain residential properties, alleged that between October 2012 and August 2015 they had entered into several agreements with appellants concerning management services for some of appellees’ residential tenant units. Appellees further alleged that appellants overcharged them for various maintenance and repair work performed at the residential buildings and that appellants failed to properly manage the properties. The complaint included several breach of contract claims against Appellant Clear Sky Realty, and breach of fiduciary duties, fraud, and accounting against Appellants Clear Sky Realty, Eric M. Wohlwend, and Lila Wohlwend.

{¶4} The management agreements in question include a total of eleven arbitration provisions. Nine of these eleven provisions are in pertinent part as follows: "Owner and agent agree to submit any dispute *over District Court maximum limits* to

arbitration before the American Arbitration Association. Except as prohibited by Ohio law ***." (Emphasis added).

{¶5} The remaining two of the eleven provisions provide in pertinent part: "Owner and agent agree to submit any dispute *over court maximum limits* to arbitration before the American Arbitration Association. Except as prohibited by Ohio law ***." (Emphasis added).

{¶6} On January 25, 2016, Appellants Clear Sky Realty, Eric M. Wohlwend, and Lila Wohlwend (the original three defendants) answered appellees' aforesaid complaint and asserted various counterclaims alleging failure of compensation for services performed under the management agreements. Appellants also therein advanced two third-party complaints, the details of which need not be recited in the present appeal.

{¶7} Over a year later, on March 1, 2017, appellees moved to amend their complaint. At that time, appellees further alleged that discovery of new factual issues required the naming of an additional party, Clear Sky *Properties*, Inc. (emphasis added) and the assertion of breach of contract against all defendants. Appellees also asserted that they had "inadvertently failed to attach several written contracts between the parties, which would likely cover plaintiffs' claims during the terms of those agreements." Motion for Leave to Amend *Instanter* at 4.

{¶8} On March 29, 2017, the trial court granted appellees' motion for leave to file their amended complaint.

{¶9} On April 7, 2017, appellants filed their answers to the amended complaint and, for the first time, separate motions to stay proceedings and to compel arbitration. Appellants argued that the additional management agreements made subject to the

litigation by virtue of the amended complaint, as well as the management agreements identified in the original complaint, mandated that the dispute be arbitrated. On April 21, 2017, appellees and the two third-party defendants filed a memorandum in opposition to arbitrating the dispute. On April 28, 2017, appellants filed a reply in support of their motion to compel arbitration.

{¶10} After conducting a hearing, the trial court denied appellants' motions to compel arbitration and stay the proceedings. *See* Judgment Entry, June 30, 2017.

{¶11} On July 11, 2017, Appellants Clear Sky Realty, Inc., Eric M. Wohlwend, Lila Wohlwend, and Clear Sky Properties, Inc. jointly filed a notice of appeal. They herein raise the following sole Assignment of Error:

{¶12} "I. THE TRIAL COURT INCORRECTLY DENIED DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS."

I.

{¶13} In their sole Assignment of Error, appellants contend the trial court erred in denying their motions to compel arbitration and stay proceedings. We disagree.

Jurisdiction

{¶14} As an initial matter, we find we have appellate jurisdiction to proceed in this matter, even though a final judgment is not before us. As a general rule, a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. *See Moscarello v. Moscarello,* 5th Dist. Stark No. 2014CA00181, 2015–Ohio–654, ¶ 11, quoting *Rice v. Lewis,* 4th Dist. Scioto No. 11CA3451, 2012–Ohio–2588, ¶ 14 (additional citations omitted). However, an order under R.C. 2711.02(B) that grants or denies a stay of a trial of an action pending arbitration is a final appealable order.

See R.C. 2711.02(C). Such a decision under R.C. 2711.02 remains a final appealable order even without the language of Civ.R. 54(B). *See*, *e.g.*, *Welsh v. Indiana Insurance Co.,* 5th Dist. Stark No. 2005-CA-00327, 2006-Ohio-6803, ¶ 15 (citations omitted). We will therefore proceed to the merits of the present appeal.

Standard of Review

{¶15} R.C. 2711.02(B) states as follows: "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."

{¶16} Ohio public policy favors enforcement of arbitration provisions. *See Harrison v. Toyota Motor Sales, U.S.A., Inc.,* 9th Dist. Summit No. 20815, 2002–Ohio–1642, ¶ 9. "Arbitration is favored because it provides the parties thereto a relatively expeditious and economical means of resolving a dispute." *Sunrush Construction Co. v. Landmark Properties, L.L.C.*, 4th Dist. Ross No. 17CA3596, 2017-Ohio-8598, ¶ 17, quoting *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992).

{¶17} Generally, an appellate court reviews a trial court's stay of proceedings pending arbitration under R.C. 2711.02 under an abuse of discretion standard. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 159 Ohio App.3d 27, 30, 822 N.E.2d 841, 2004–Ohio–5953, citing *Pinette v. Wynn's Extended Care, Inc.,* Summit App. No. 21478, 2003–Ohio–4636, ¶ 5. However, the issue of whether a controversy is

arbitrable under an arbitration provision of a contract is a question of law for the court to decide; therefore, the standard of review on those issues is *de novo*. *Simmons v. Extendicare Health Servs., Inc.*, 5th Dist. Delaware No. 15 CAE 12 0095, 2016-Ohio-4831, ¶ 13, citing *Church v. Fleishour Homes, Inc.,* 172 Ohio App.3d 205, 874 N.E.2d 795, 172 Ohio App.3d 205, ¶ 19 (5th Dist.2007).

Severability Issue

{¶18} Appellants first propose that the trial court erroneously failed to sever the "maximum limits" language in the arbitration provision in order to facilitate arbitration in this matter.

{¶19} There is no duty to arbitrate particular disputes where there has been no agreement between parties requiring such disputes to be submitted to arbitration. *See Kegg v. Mansfield*, 5th Dist. Stark No. 1999CA00167, 2000 WL 222118. In the case *sub judice*, the eleven agreements at issue evince a meeting of the minds to submit disagreements to arbitration only where the amounts involved are "*over court maximum limits" or "over District Court maximum limits."* However, appellants do not dispute the trial court's observation that the Stark County Court of Common Pleas has no such upper limit, nor do federal district courts, the only "District Courts" extant in Ohio.[1] Therefore, strictly speaking, no dispute in an Ohio common pleas court under the agreements in question could ever go to arbitration, no matter how large.

[1] Although the underlying action was not brought in a municipal court, we nonetheless recognize that under R.C. 1901.17, "[a] municipal court shall have original jurisdiction only in those cases in which the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed fifteen thousand dollars, except that this limit does not apply to the housing division or environmental division of a municipal court. ***." We also take note *inter alia* of Ohio's statutory damage caps under R.C. 2315.18.

{¶20} The doctrine of severability generally provides that where a contract consists of several agreements, one of which is illegal, the illegal portion can be severed if it does not destroy the symmetry of the contract. *Black v. Pheils*, 6th Dist. Wood No. WD-03-045, 2004-Ohio-4270, ¶ 55, citing *Vincent v. Santa Cruz* (1982), 98 Nev. 338, 341, 647 P.2d 379, 381. Under the doctrine of severability, an arbitration agreement is treated as an independent contract that does not necessarily fail if the remainder of the contract is found invalid. *See Champaign Landmark, Inc. v. Prince,* 2nd Champaign Nos. 97 CA 28, 97 CA 29, 97 CA 30, 1998 WL 735914. Whether a part of a contract may be severed from the remainder "depends generally upon the intention of the parties, and this must be ascertained by the ordinary rules of construction." *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶ 11, citing *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co*. (1924), 109 Ohio St. 488, 2 Ohio Law Abs. 197, 143 N.E. 132, syllabus. A court must determine whether the part of the contract sought to be excised is fundamental to the overall meaning of the agreement, or whether it may be severed so that the remainder of the agreement may be given effect. *Hehman v. Maxim Crane Works*, 12th Dist. Butler No. CA2010-01-009, 2010-Ohio-3562, ¶ 32, citing *Ignazio*, *supra* (internal quotations omitted).

{¶21} Our research indicates that in a number of cases, the issue on appeal focused on the severability of the entire arbitration provision, rather than removal of portions of a single sentence within the provision, as presently urged by appellants. However, in *Rude v. NUCO Edn. Corp.*, 9th Dist. Summit No. 25549, 2011-Ohio-6789, the Ninth District Court of Appeals cogently noted several examples of cases where a

court had "severed a discrete term of the arbitration provision and enforced the remainder of it." *Id.* at ¶ 29.

{¶22} Nonetheless, upon review, we find no basis to invoke the doctrine of severability under the unusual circumstances presented. Arbitration is a matter of contract and, in spite of the strong policy in its favor, a party cannot be compelled to arbitrate any dispute which he or she has not agreed to submit. *Teramar Corp. v. Rodier Corp.*, 40 Ohio App.3d 39, 40, 531 N.E.2d 721, (8th Dist. 1987) (additional citations omitted). In this instance, the agreements set forth that only disputes of a sufficient magnitude to exceed nebulous "court maximum limits" would go to arbitration. While such an arrangement may have reflected a misunderstanding of the law or court rules, it is nonetheless fundamental to the overall functioning of the agreement (*Hehman*, *supra*), and it is by no means illegal or unconscionable. We therefore hold that severing the limiting language of the arbitration clause would improperly compel the parties into a means of remedy upon which they did not clearly agree.

Waiver Issue

{¶23} The briefs before us also present arguments on the issue of whether appellants waived their claim to arbitration in the trial court. We have recognized that active participation in a lawsuit, and failure to request arbitration in a timely manner, may evince an acquiescence to proceeding in a judicial forum. *Smith Design & Constr., Inc. v. N.L. Constr. Corp.*, 5th Dist. Stark No. 2014 CA 00002, 2014-Ohio-4904, ¶ 55, citing *Griffith v. Linton,* 130 Ohio App.3d 746, 752, 721 N.E.2d 146 (10th Dist. 1998). Appellants herein contend that although they did not immediately raise the issue of arbitration during the first stages of litigation, appellees' amendment of the complaint in 2017 meant that

"the legal landscape of the loss dramatically changed," causing appellants to invoke arbitration at that time. Appellants' Brief at 9.

{¶24} However, we have generally recognized that an appellate court is not required to render an advisory opinion or to rule on a question of law that cannot affect matters at issue in a case. *See Ambrose v. Galena,* 5th Dist. Delaware No. 15 CAH 01 0011, 2015-Ohio-3157, ¶ 29, citing *State v. Bistricky* (1990), 66 Ohio App.3d 395, 584 N.E.2d 75. In light of our previous determinations, we will not further analyze the issue of waiver of arbitration in the within appeal.

Conclusion

{¶25} The trial court did not err in denying appellants' motions to compel arbitration and stay proceedings. Appellants' sole Assignment of Error is therefore overruled.

{¶26} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, John, P. J.

Baldwin, J., and

Wise, Earle, J., concur.

.

JWW/d 0327

[Cite as *Wells Fargo Bank, N.A. v. Mayo*, 2018-Ohio-1432.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Wells Fargo Bank, N.A.	Court of Appeals No. E-16-007
Appellee	Trial Court No. 2012-CV-375
v.	
Hollies P. Mayo	**DECISION AND JUDGMENT**
Appellant	Decided: April 13, 2018

* * * * *

Daniel C. Gibson, Nelson M. Reid and Kara H. Herrnstein, for appellee.

Geoffrey L. Oglesby and Danielle C. Kulik, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Hollies P. Mayo, appeals from the December 31, 2015 judgment of the Erie County Court of Common Pleas granting appellee, Wells Fargo Bank, N.A., Trustee for the Certificate Holders of Carrington Mortgage Loan Trust, Series 2007-FRE1 Asset-Backed Pass-Through Certificates (hereinafter "Wells Fargo"), judgment on

a promissory note in the amount of $92,306.82 and granting foreclosure of the mortgage securing the note. The notice of appeal was premature, but a final judgment of foreclosure was entered on January 21, 2016. For the reasons which follow, we affirm.

{¶ 2} On appeal appellant asserts the following assignments of error:

> ASSIGNMENT OF ERROR NO. I
>
> The Trial Court Erred by Finding that the Plaintiff Note Holder complied with the terms of the agreement of giving Thirty Days' Notice of Default to the Defendant when the Note Holder never sent notice that the Defendant was in Default of the Note that Plaintiff recently possessed.
>
> ASSIGNMENT OF ERROR NO. II
>
> The Trial Court erred by finding that Plaintiff's Predecessor gave notice to the Defendant of Default when there was no evidence that the notice of default was sent to the address Defendant had given to the Plaintiff's Predecessor.

{¶ 3} On May 21, 2012, Wells Fargo filed a complaint in foreclosure against Mayo. Summary judgment was denied to Wells Fargo because the trial court found there was a genuine issue of material fact as to whether Wells Fargo had complied with all contractual preconditions to filing a foreclosure action. The case proceeded to a bench trial on February 17, 2015.

{¶ 4} We note that while appellant ordered a transcript of the trial, she did not pay for the transcript and, therefore, neither the transcript nor the exhibits admitted into

evidence were filed in the appeal. The transcript of the lower court proceedings must be filed by appellant, if necessary for disposition of the appeal, because appellant bears the burden of showing error by reference to the record. App.R. 9(B), 10(A), and 12(A)(2); *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 19, 520 N.E.2d 564 (1988), citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Therefore, our review is limited on appeal to the questions of law determined by the trial court based on the facts found by the trial court.

{¶ 5} The trial court made the following factual findings in its December 31, 2015 judgment entry. On November 30, 2006, Mayo executed a promissory note in the amount of $94,500. The lender was Fremont Investment & Loan. The note was secured by a first mortgage to Mortgage Electronic Registration Systems, Inc., as nominee for Fremont Investment & Loan, which encumbered the property at 1102 Columbus Avenue, Sandusky, Ohio. The mortgage was recorded December 11, 2006. EMC Mortgage LLC (hereinafter "EMC") was the servicer for the original lender in 2007. Mayo's last payment on her account was made December 1, 2009. At the time of the breach, EMC physically held the note, which was endorsed in blank and made payable to the bearer.

{¶ 6} Under the promissory note paragraphs 7(C) and 8, notice of default was necessary for acceleration of the debt and that notice was required to be delivered or mailed by first class mail to the property address. Under the mortgage, paragraph 22, a notice of default was required to be sent prior to acceleration of the debt and exercise of the right of foreclosure by judicial proceeding and sale of the property. The stated

purpose of the notice of default was to give the borrower 30 days to cure the default. Pursuant to the mortgage, paragraph 15, the notice of default had to be delivered or mailed by first class mail to the property address unless another address was provided.

{¶ 7} The court found EMC mailed a notice of default on August 3, 2010, to Mayo at the property address. Mayo had not notified the note holder of a different address for receiving notice of default. The notice of default informed Mayo that a default occurred on January 1, 2010; what action Mayo needed to take to cure the default and by what date; that failure to cure the default would result in commencement of the foreclosure action; and of her rights to reinstate after default and to defend in foreclosure. The notice of default further directed that Mayo remit payment to the mortgage loan servicer at that time, EMC. When EMC sent the default letter to Mayo in 2010, it had already (in May, 2008) been acquired by JPMorgan Chase, N.A. (hereinafter "Chase") and continued to do business under the control of Chase until it was fully absorbed by Chase in April 2011. Chase is a loan servicer for Wells Fargo and maintains all of its mortgage loan records.

{¶ 8} Wells Fargo acquired the note and the mortgage on May 1, 2012 (and the assignment of the mortgage was recorded May 10, 2012). Therefore, the court concluded Wells Fargo was the holder of the note and mortgage when it filed the foreclosure action on May 21, 2012. The trial court also found Wells Fargo had complied with the conditions for notice of default and acceleration of the note. The trial court concluded Mayo had been properly notified of the default, she did not act to cure the arrearage, and the entire note became due with interest. The court found the current principal balance

due Wells Fargo was $92,306.82, with interest at 8.6 percent per annum from December 1, 2009. In its January 25, 2016, judgment entry, the trial court ordered foreclosure of the mortgage lien. Mayo appeals from the final judgment of foreclosure.

{¶ 9} On appeal, Mayo argues in her first assignment of error the trial court erred in finding that Wells Fargo sent a notice of default to Mayo as required by the promissory note and mortgage as a contractual condition precedent to a claim for foreclosure. Mayo argues the notice of default sent by EMC became moot once EMC ceased to be the holder of the note because EMC was made whole by the sale of the note to Wells Fargo. She further argues Wells Fargo had a separate duty to send her notice of the default as the subsequent holder of the note. Because Wells Fargo had acquired the note less than one month prior to filing the foreclosure action, Mayo argues Wells Fargo cannot establish it had complied with the condition precedent of sending Mayo notice of her default.

{¶ 10} We note that Mayo generally denied in her answer the allegation made by Wells Fargo in its complaint that it had complied with all conditions precedent prior to foreclosing the mortgage. Civ.R. 9(C) allows the plaintiff to aver conditions precedent generally, but requires the defendant to deny performance or occurrence of the conditions precedent "specifically and with particularity" or the allegation that the conditions precedent were satisfied is deemed admitted. Civ.R. 8(D); *Huntington Bank v. Popovec*, 7th Dist. Mahoning No. 12 MA 119, 2013-Ohio-4363, ¶ 15. In this case, Mayo's general denial does not satisfy the requirements of Civ.R. 9(C) and the trial court should have

found that she had already admitted this fact and dismissed her arguments regarding the fulfillment of the conditions precedent.

{¶ 11} Even if we consider the question of law she raises, as the trial court did, we conclude the notice sent by a prior holder inures to the benefit of a subsequent holder. Therefore, we reject Mayo's argument to the contrary.

{¶ 12} A holder is defined as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." R.C. 1301.201(B)(21)(a). The holder is the "person entitled to enforce" the instrument. R.C. 1303.31(A)(1). R.C. 1303.22(B) provides that "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." Furthermore, we agree with Wells Fargo that basic contract principles apply to mortgage agreements, *First Fed. S. & L. Assoc. v. Perry's Landing, Inc*., 11 Ohio App.3d 135, 143, 463 N.E.2d 636 (6th Dist.1983), including the concept of privity as a result of the assignment of the mortgage, *Bank of New York Mellon v. Huth*, 6th Dist. Lucas Nos. L-12-1241, L-12-1283, 2014-Ohio-4860, ¶ 36, quoting *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799, 841 N.E.2d 855, ¶ 20 (10th Dist.) (citation omitted).

{¶ 13} EMC sent default notice in 2010 as a holder of the note. Wells Fargo became the holder of the note in 2012, when it purchased the note. Since there is nothing in the trial court's factual findings to dispute that Wells Fargo purchased the note in good faith as part of its ordinary course of business, Wells Fargo obtained all the rights of

EMC under the note, including the right to file a foreclosure action. Mayo acknowledges that the purpose of the notice of default is to ensure fair dealing and give the maker opportunity to cure the default. Certainly after two years of being in default, the maker cannot claim the failure of a subsequent holder to send a second notice of default resulted in unfairness. The trial court found Mayo had not taken any action since 2010 to cure the default.

{¶ 14} Therefore, we conclude that upon the sale of the note and assignment of the mortgage to Wells Fargo, it also acquired the right to accelerate the debt and file a foreclosure action because the conditions precedent had been satisfied. Mayo's first assignment of error is found not well-taken.

{¶ 15} In her second assignment of error, Mayo argues that her personal address was the address to which the notice of default should have been sent. She contends that the fact that the foreclosure complaint listed her personal address was evidence that she had supplied the holder with a new address for sending the notice of default.

{¶ 16} The trial court specifically found that Mayo had not given the holder her personal address for purposes of sending the notices as required by paragraph 15 of mortgage. Because Mayo did not file a transcript of the trial, we cannot review this factual finding. *Rose Chevrolet*, 36 Ohio St.3d at 19, 520 N.E.2d 564. Nonetheless, we note that the use of Mayo's residential address for purposes of filing the foreclosure action is not evidence the holder was notified of Mayo's personal address for purposes of

sending notices as required by the note and mortgage. Mayo's second assignment of error is found not well-taken.

{¶ 17} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
JUDGE

Christine E. Mayle, P.J. _____
CONCUR.
JUDGE

[Cite as *Wells Fargo Fin. Ohio 1, Inc. v. Doe(s)*, 2018-Ohio-1472.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wells Fargo Financial Ohio 1, Inc.,	:	
Plaintiff-Appellant,	:	
		No. 17AP-727
v.	:	(C.P.C. No. 17CV-4841)
John Doe(s), names unknown et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 17, 2018

On brief: *Manley Deas Kochalski LLC*, and *Kyle E. Timken*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo"), appeals from a judgment of the Franklin County Court of Common Pleas granting in part and denying in part its motion for default judgment. For the following reasons, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶ 2} Wells Fargo filed a complaint in the court of common pleas on May 26, 2017, naming Nancy J. Whittington, the Franklin County Treasurer, and various unknown parties as defendants. The complaint asserted that Whittington executed a promissory note ("the Note") and mortgage ("the Mortgage"), copies of which were attached to the complaint. Under the Note, which was entered on June 25, 2007, Whittington promised to pay $82,266.22, plus interest, to Wells Fargo. Under the Mortgage, which was entered

on June 25, 2007, Whittington granted a mortgage to Wells Fargo on property located at 376 Woodlawn Avenue, Columbus, Ohio, to secure payment of the Note. The Mortgage was recorded on July 2, 2007. The complaint asserted the Note and Mortgage were in default. The complaint further asserted Whittington was deceased and the identity of any executor, administrator, or personal representative of her estate, and any spouse or heirs, devisees, legatees, or beneficiaries and their spouses were unknown and could not be discovered by reasonable diligence. The complaint requested a finding of default on the Note and foreclosure of the Mortgage, and an order directing sale of the property secured by the Mortgage. Wells Fargo subsequently moved to add Kellie Mann and her unknown spouse, if any, as defendants, asserting that Mann was a possible heir to Whittington.

{¶ 3} On August 23, 2017, Wells Fargo moved for default judgment on the complaint, asserting that neither Mann, who was served by process server, nor any of the unknown defendants, who were served by publication, had filed an answer or otherwise defended in the action. No response to the motion for default judgment was filed. On September 11, 2017, the trial court issued a decision and entry granting in part and denying in part the motion for default judgment. The trial court granted Wells Fargo's claim for a finding of default on the Note, but denied its claim for a finding that the Mortgage was a valid and subsisting first lien on the property and for foreclosure of the Mortgage.

II. Assignment of Error

{¶ 4} Wells Fargo appeals and assigns the following sole assignment of error for our review:

> The Trial Court erred as a matter of law by denying judgment and holding that plaintiff-appellant Wells Fargo Financial Ohio 1, Inc.'s Mortgage was unenforceable.

III. Discussion

{¶ 5} Under Civ.R. 55(A), when a party against whom a judgment is sought fails to plead or otherwise defend as provided in the rules, the opposing party may apply to the court for a default judgment in its favor. We review a trial court's grant or denial of a motion for default judgment for abuse of discretion. *Bank of Am., N.A. v. Malone*, 10th Dist. No. 11AP-860, 2012-Ohio-3585, ¶ 18. An abuse of discretion occurs when a trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 6} The trial court granted Wells Fargo's motion for default judgment on the first claim of the complaint, alleging default on the Note, based on its finding that defendants failed to answer or otherwise appear to defend against the complaint. With respect to the second claim, which sought foreclosure of the Mortgage, the trial court noted the acknowledgment clause of the Mortgage failed to set forth Whittington's name. The acknowledgment clause, which was signed by a notary public, stated "On this 25th day of June 2007, _____, Mortgagor(s) in the foregoing mortgage personally appeared before me, a Notary Public in and for said County and acknowledged the execution of the foregoing instrument to be their voluntary act and deed for the uses and purposes therein expressed." (Emphasis sic.) (Mortgage at 11.) Whittington's name was not written or typed on the blank line contained in the acknowledgment clause. Further, the trial court noted that "Mortgagor" was not a defined term in the Mortgage. Instead, the Mortgage referred to Whittington as "Borrower." Based on this flaw in the acknowledgment clause, the trial court concluded that the Mortgage was defectively executed and was not a valid lien against the property, and denied Wells Fargo's motion for default judgment as to the claim for foreclosure of the Mortgage.

{¶ 7} Wells Fargo argues on appeal the defect in the acknowledgment clause of the Mortgage was cured by operation of law, pursuant to R.C. 5301.07(C) and, therefore, it is entitled to foreclosure of the Mortgage. R.C. 5301.07(C) provides:

> When a real property instrument is of record for more than four years from the date of recording of the instrument, and the record shows that there is a defect in the making, execution, or acknowledgement of the instrument, the instrument and the record thereof shall be cured of the defect and be effective in all respects as if the instrument had been legally made, executed, acknowledged, and recorded. The defects may include but are not limited to the following:
>
> * * *
>
> (3) The certificate of acknowledgment is defective in any respect.

The current version of R.C. 5301.07(C) is the result of a recent amendment, which became effective April 6, 2017, *see* 2016 Am.Sub.S.B. No. 257. Prior to this amendment, an instrument conveying an interest in real estate that had a defective acknowledgment clause

would be cured by operation of law after it had been of record for more than 21 years. Former R.C. 5301.07(C).

{¶ 8} The Mortgage was recorded on July 2, 2007. Wells Fargo's complaint in the present case was filed nearly ten years later, on May 26, 2017. The trial court's decision on the motion for default judgment was rendered September 11, 2017. Thus, based on the record before us, it appears the amended version of R.C. 5301.07(C) may apply to the analysis of whether the defect in the acknowledgment clause of the Mortgage was cured by operation of law.[1]

{¶ 9} Due to the procedural posture of this appeal, however, it is unclear whether the trial court considered the effect of the recently amended statute. Wells Fargo moved for default judgment based on defendants' failure to answer or otherwise defend, but did not make any substantive legal arguments regarding the merits of its claims. The trial court sua sponte determined that the Mortgage did not constitute a valid and subsisting first lien on the property because the acknowledgment clause was defective, and denied Wells Fargo's motion for default judgment on its claim for foreclosure of the Mortgage on that basis. Wells Fargo asserted the defect would have been cured by operation of R.C. 5301.07(C) in a motion to reconsider the denial of default judgment, but the trial court did not act on that motion and Wells Fargo filed the present appeal. As it is unclear whether the trial court considered the effect of the recent amendment to R.C. 5301.07(C) on its conclusion that the Mortgage was not a valid first lien on the property due to the defective acknowledgment clause, we decline to do so in the first instance here. Rather, we find it appropriate to remand to the trial court for consideration of that issue.

{¶ 10} Accordingly, we sustain Wells Fargo's sole assignment of error.

IV. Conclusion

{¶ 11} For the foregoing reasons, we sustain Wells Fargo's sole assignment of error. We affirm in part the judgment of the Franklin County Court of Common Pleas to the extent

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[1] We note the amended version of R.C. 5301.07 provides it "shall be given retroactive effect to the fullest extent permitted under Section 28 of Article II, Ohio Constitution" but "shall not be given retroactive effect if to do so would affect any accrued substantive right or vested rights in any person or in any real property instrument." R.C. 5301.07(G). In the proceedings before the trial court, Wells Fargo presented a death certificate indicating Whittington died on November 28, 2016. We reach no conclusion in the first instance as to whether the retroactivity provisions in R.C. 5301.07(G) bar application of the amended version of R.C. 5301.07(C) to the Mortgage as a result of any rights that may have vested in Whittington's heirs, devisees, or other beneficiaries at the time of or following her death.

it grants default judgment on Wells Fargo's first claim, and we reverse in part the judgment to the extent it denies default judgment on Wells Fargo's second claim. We remand this matter to that court for further proceedings consistent with law and this decision.

Judgment affirmed in part
and reversed in part;
cause remanded.

LUPER SCHUSTER and HORTON, JJ., concur.

[Cite as *Mid Am. Mtge., Inc. v. Scott*, 2018-Ohio-1403.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106099

MID AMERICA MORTGAGE, INC.

PLAINTIFF-APPELLEE

vs.

JOHN SCOTT IV, ET AL.

DEFENDANTS

[Appeal by Nichelle Scott, Defendant-Appellant]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-864226

BEFORE: S. Gallagher, J., E.A. Gallagher, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: April 12, 2018

ATTORNEY FOR APPELLANT

Robert C. Brooks II
1893 East 82nd Street
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

For Mid America Mortgage, Inc.

Christian E. Niklas
Kim M. Hammond
Suzana Kukovec-Krasnicki
Keith D. Weiner & Associates Co., L.P.A.
75 Public Square, 4th Floor
Cleveland, Ohio 44113

John Scott, pro se
66 Grand Street
Bedford, Ohio 44146

Janice M. Matteo, pro se
6500 Gaines Ferry Road, Apt. K6
Flowery Branch, Georgia 30542

Jane Doe, unkown spouse, if any, of
Janice M. Matteo, pro se
6500 Gaines Ferry Road, Apt. K6
Flowery Branch, Georgia 30542

SEAN C. GALLAGHER, J.:

{¶1} Nichelle Scott, the ex-wife of the borrower John Scott IV, appeals the decree of foreclosure entered in part upon the default judgment against John on all claims (based on both the note and mortgage) and in part upon summary judgment against Nichelle on the foreclosure claims. We affirm.

{¶2} In 2014, John agreed to pay the principal sum of $109,971 plus interest at 4.25 percent per year to Mid America Mortgage, Inc., d.b.a. Schmidt Mortgage Company ("Mid America"). As part of the transaction, Nichelle signed the mortgage instrument that granted Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for Mid America, a prioritized lien on the divorced couple's residential property. Her signature was required under R.C. 5301.04, which provides that a "deed, mortgage, or lease of any interest of a married person in real property shall be signed, acknowledged, and certified as provided in" R.C. 5301.01 (in turn providing that any mortgage interest shall be signed by the mortgagor). Mid America, at all times, held the note. The mortgage was assigned from MERS to Mid America two months before the foreclosure action was commenced and after John defaulted under the terms of the note.

{¶3} John defaulted in the foreclosure action, and judgment was entered against him upon Mid America's claims. Nichelle, however, attempted to challenge the foreclosure, claiming that Mid America lacked standing to proceed, amongst other defenses John failed to advance on his own behalf. The trial court, upon summary judgment under Civ.R. 56, entered a decree of foreclosure and ordered the sale of the

property. Nichelle sought a stay of that final judgment. This court granted the stay, but conditioned it on Nichelle posting a bond. No bond was posted, and the sale proceeded. Despite the failure to post the bond as ordered by this court, the trial court held the motion to confirm the sale in abeyance pending this appeal. In effect, Nichelle has obtained a stay over the confirmation of the sale.

{¶4} On this point, Nichelle claimed that the trial court lacked jurisdiction to confirm the sale in light of the appeal perfected on the final judgment of foreclosure. Her claim is not supported by any relevant legal analysis and, in fact, contradicts the weight of authority on this topic. The decree of foreclosure is a final appealable order, and the confirmation of sale is separate and distinct, in the nature of proceedings to aid in execution. *Countrywide Home Loans Servicing, L.P. v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565, ¶ 6, quoting *Triple F Invests. v. Pacific Fin. Servs., Inc*., 11th Dist. Portage No. 2000-P-0090, 2001 Ohio App. LEXIS 2484, 3 (June 2, 2001). The two judgments are separately appealable. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 35. Unless the decree of foreclosure is stayed, the trial court has jurisdiction to proceed on the confirmation of sale. "The filing of a notice of appeal does not completely divest a trial court of jurisdiction over a case; rather, 'a trial court retains all jurisdiction which does not conflict with the jurisdiction of the appellate court.'" *Chase Manhattan Mtge. Corp. v. Urquhart*, 12th Dist. Butler Nos. CA2004-04-098 and CA2004-10-271, 2005-Ohio-4627, ¶ 28, quoting *Hagood v. Gail*, 105 Ohio App.3d 780, 784, 664 N.E.2d 1373 (1995), citing

Yee v. Erie Cty. Sheriff's Dept., 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990). Despite a pending appeal, a trial court retains jurisdiction to enforce the final judgment and initiate proceedings in support of that judgment. *Id.* Nichelle's opposition to the sale confirmation was not based on the law nor any colorable extension of the law.

{¶5} Nevertheless, most of Nichelle's appellate arguments focus on Mid America's right to enforce the note to which Nichelle is not a party and are contrary to the final judgment entered against John, in which Mid America was deemed the party entitled to enforce the note and mortgage.

{¶6} "An action at law on a promissory note to collect a mortgage debt is separate and distinct from an action in equity to enforce the mortgage lien on the property." *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 35. "The person entitled to enforce the note pursuant to R.C. 1303.31 has standing to seek a personal judgment against the promisor on that obligation, while the mortgagee or its successor and assign has standing to foreclose on the mortgage." *Id.* "A mortgage[, however,] is nothing more than a lien on the premises, the purpose of which is to put other lien holders on notice that there is a prior claim on the premises." *Bank of New York Mellon Trust Co., N.A. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶ 37, citing R.C. 5301.233; *GMAC Mtge. Corp. v. McElroy*, 5th Dist. Stark No. 2004-CA-00380, 2005-Ohio-2837, ¶ 16; R.C. 5301.01(B)(1)(b); *Wells Fargo Bank v. Schwartz*, 8th Dist. Cuyahoga No. 96641, 2012-Ohio-917. In this case, Mid

America was both the holder of the note and the mortgage at the time the foreclosure action was filed.

{¶7} The only instrument that Nichelle was privy to was the mortgage instrument. According to the unambiguous terms within the security instrument, however, Nichelle executed the document "only to mortgage, grant and convey" her interest in the property. She further agreed that Mid America and John could forbear or make any accommodations with regard to the terms contained within the document without her consent. "Common words appearing in a written instrument will_be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 245, 374 N.E.2d 146 (1978). Thus, according to the terms of the mortgage instrument, Nichelle's only interest in this transaction is the surplus after foreclosure. *Jackson v. Moissis*, 2017-Ohio-1000, 87 N.E.3d 591, ¶ 16 (11th Dist.) (nonborrowing spouse's interest only extends to the surplus after the purchase money has been repaid).

{¶8} Ohio recognizes the "general prohibition on a litigant's raising another person's legal rights." *Unger* at ¶ 31, citing *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Nichelle's agreement to allow John to encumber her interest in the residential property does not entitle her to advance any defenses to the enforcement of the note that John as the debtor could have raised. She is not standing in John's shoes. Nichelle has a separate and distinct interest in the transaction.

{¶9} Nichelle is challenging Mid America's standing to prosecute the foreclosure action, the chain of assignments of the mortgage, the lack of additional discovery to determine whether Mid America had standing to proceed with the foreclosure, and whether Mid America met the conditions precedent to commencing the foreclosure action against John. Nichelle, therefore, is presenting arguments that John could have advanced, but did not. Thus far, Nichelle's interest in the foreclosure action was limited to preserving her half interest in the mortgaged property, which was inferior to the security interest pledged to the mortgagee. In light of her acknowledgment and acceptance of Mid America's prioritized lien, she could only advance claims with respect to the surplus following the foreclosure.

{¶10} John was obligated to pay the loan, and he defaulted. He did not contest the foreclosure action — an act well within his rights legally and contractually with Mid America. The judgment on the note stands. A "determination of liability under the note is a prerequisite to enforcement of the mortgage itself because a mortgage is but an incident to the debt it secures." *Fannie Mae v. Hicks*, 2015-Ohio-1955, 35 N.E.3d 37, ¶ 32 (8th Dist.), citing *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (1895). Nichelle cannot contest this determination; she is not a party to the note, nor is she obligated under the same. Further, the judgment against John is final and unassailable given his indifference to the outcome — he has not appealed or otherwise challenged the judgment. Nichelle's signature on the mortgage instrument merely demonstrated her

acceptance of Mid America's lien on the property, which was co-titled in her name after the lien was acknowledged.

{¶11} However, committing her interest in the property to satisfaction of the mortgage did not transform her position into that of the debtor with the ability to assert the contractual and statutory rights arising from the note and mortgage. The terms of the mortgage instrument provided otherwise. Nichelle signed the document to pledge her interest in the mortgaged property as satisfaction of the debt and permitted John to forebear any term under the note and mortgage without Nichelle's consent.

{¶12} To recognize otherwise would open the door to two inequitable situations. It would encourage creditors to reassess the common proposition that a nonborrowing, co-mortgagor is not liable for the debt under the note — if the nonborrowing co-mortgagor is entitled to raise the abandoned defenses of the debtor that only arise under the terms of the note and mortgage, then a creditor in turn should be permitted to enforce the debt obligation on the nonborrowing spouse under those same terms. It would also permit the nonborrowing spouse to prevent the sale of the property meant to indemnify the debtor, leaving the borrowing spouse in the position of being financially responsible for the property without the benefit of using the property to mitigate the damages.

{¶13} The nonborrowing spouse in Nichelle's position is limited in a foreclosure action to seeking a partition of the property to secure the nonborrowing spouse's interest in the property, had she not pledged her interest in satisfaction of the debt. *See, e.g.*,

Mtge. Electronic Registration Sys. v. Kaehne, 11th Dist. Portage No. 2007-P-0033, 2008-Ohio-4051, ¶ 23. In exchange for not being bound to the debt under the note, the nonborrowing spouse cedes the right to raise defenses to the foreclosure action the debtor could have raised. Otherwise the nonborrowing spouse could obtain all the benefits granted under the note and mortgage without incurring the liability. One cannot avail oneself of the favorable provisions of a contract at the same time as disavowing any negative obligations arising thereunder.

{¶14} This is not to suggest that the nonborrowing spouse wishing to retain possession of the home is without remedies. Nichelle could have exercised an equitable right to pay the balance on the note if she wished to retain the property — thus relieving John of the burden to satisfy the judgment entered against him. *Id.* at ¶ 25; *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190 (mortgagor's right to redeem is absolute and exercisable at any time before the confirmation of sale).

{¶15} Absent the co-mortgagor invoking the equitable right to redeem, John is entitled to use the property as satisfaction of the debt. The right of action of a legal holder of a note (money judgment) is independent of the remedy (foreclosure) because a foreclosure proceeding "'is in the nature of a proceeding *in rem* to enforce certain security specially set apart for the *indemnity of the holder of the note*.'" (Emphasis added.) *U.S. Bank Natl. Assn. v. George*, 2015-Ohio-4957, 50 N.E.3d 1049, ¶ 12 (10th Dist.), quoting *BAC Home Loans Servicing, LP v. Mowery Properties, Ltd.*, 10th Dist. Franklin No. 10AP-396, 2011-Ohio-1596. The debtor, upon default, is entitled to use the encumbered

property as indemnification up to the full value of the debt owed. Nichelle agreed to as much by signing the mortgage instrument pledging her interest in the property as satisfaction of John's debt. Nichelle cannot intervene and prevent the foreclosure from proceeding — John is entitled under the terms of the note and mortgage to permit the mortgagee to sell the property in partial or complete satisfaction of the debt.

{¶16} Nichelle, as the nonborrowing spouse, cannot prevent that occurrence by raising defenses John specifically abandoned in favor of permitting Mid America to enforce the note and the mortgage. If we concluded otherwise, we would be permitting the nonborrowing spouse to potentially retain possession of the property, thereby forcing the borrowing spouse to be responsible for the entire debt without the benefit of selling the property, which is meant to mitigate the damages from the debtor's breach.

{¶17} "A mortgage may be enforced only by a person who is entitled to enforce the obligation the mortgage secures." *Hicks*, 2015-Ohio-1955, 35 N.E.3d 37, at ¶ 33, citing Restatement of the Law 3d, Property: Mortgages, Section 5.4(C) (1997), and *In Re Dorsey*, 6th Cir. No. 13-8036, 2014 Bankr. LEXIS 875 (Mar. 7, 2014). On the other side of that coin, a debtor is not obligated to challenge a foreclosure action and may use the property as satisfaction of the outstanding debt. In this case, Mid America, through the judgment entered against the debtor upon the note, is the party entitled to enforce the obligation the mortgage secures. John was entitled to permit Mid America to foreclose on the property as satisfaction of the debt, in order to avoid the full impact of the

monetary judgment entered against his interest. Nichelle cannot intercede because of the unambiguous language contained in the mortgage instrument.

{¶18} On this point, the law on dower is instructive. Although Nichelle is the titled co-owner of the property, that interest is subservient to Mid America's security interest based on the mortgage instrument Nichelle executed. Had the property not been co-titled in her name, her interest would be the same: she would have a half interest in the property during the life of the borrowing spouse. *See, e.g., SFJV 2005, L.L.C. v. Ream*, 187 Ohio App.3d 715, 2010-Ohio-1615, 933 N.E.2d 819, ¶ 34 (12th Dist.). "The law is well-settled that, when a married person conveys a mortgage or interest in property that is held in the name of that spouse only, the mortgage will not be effective against the non-title holding spouse's dower interest unless that spouse has also signed the mortgage or document conveying the interest." *GE Credit Union v. Medow*, 2016-Ohio-3266, 54 N.E.3d 1281, ¶ 10_ (1st Dist.), citing *Std. Fed. Bank v. Staff*, 168 Ohio App.3d 14, 2006-Ohio-3601, 857 N.E.2d 1245, ¶ 21 (1st Dist.). Dower is simply "'an interest in real estate intended to protect a non-title holding spouse.'" *Id.* at ¶ 7, quoting *Staff* at ¶ 16.

{¶19} In foreclosure proceedings, the nonborrowing spouse is entitled to receive the present value of her dower interest following the foreclosure of the property if the spouse is not a signatory to the mortgage instrument. *Id.* at ¶ 8. This is generally achieved through partitioning the property, for the nonborrowing spouse can only challenge or preserve claims with respect to her interest. It is for this reason that nonborrowing spouses are required to sign the mortgage instrument pledging their interest

as satisfaction of the debt incurred for the purpose of purchasing the property. R.C. 5301.04. Having pledged her interest as satisfaction of the debt, Nichelle's interest in this foreclosure action is limited to the valuation of the property that exceeds the outstanding debt. *Moissis*, 2017-Ohio-1000, 87 N.E.3d 591, at ¶ 16.

{¶20} Nichelle as the nonborrowing co-mortgagor cannot challenge Mid America's right to enforce the note or proceed to a foreclosure sale because John as the debtor defaulted on both those claims. John has the legal and contractual right to permit Mid America to enforce the note and cause the sale of the property in satisfaction of his debt. Nichelle pledged her interest in the property for this purpose and has not challenged any aspect of her contractual agreement or her priority over her ownership interest in the property. As a matter of law, Mid America was entitled to the decree of foreclosure. We affirm.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, A.J., and
TIM McCORMACK, J., CONCUR