Can I recover excess proceeds from a foreclosure sale?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation. We're pleased to expand our Commercial Law Bulletin from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

Ohio

Claim to excess funds in foreclosure

***Treasurer of Cuyahoga County v. Unknown Heirs of Nancy Weisner*, 8th Dist. Cuyahoga, 2022-Ohio-2668**

In this appeal, the Eighth Appellate District considered who is entitled to excess sale proceeds; another mortgagee (who never appeared or answered in the case) or the borrower? Here, the Eighth Appellate District affirmed the trial court's decision which distributed excess proceeds from the foreclosure of real property to the borrower's estate.

The Bullet Point: The word "mortgage" encompasses a promissory note and a security instrument; the security instrument typically collateralizes real property as security for payment of the note. A creditor seeking to enforce a mortgage agreement has several remedies available. "Upon breach of condition of the mortgage agreement, a mortgagee has concurrent remedies. It may, at its option, sue in equity to foreclose, or sue at law directly on the note; or, bring an action in ejectment." '"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.'" A junior lienholder is entitled to sale proceeds when it has appeared in an action and asserted its interest.

Conversely, a junior lienholder who has defaulted is not entitled to share in any proceeds realized from the foreclosure sale because its default can be construed as a disclaimer of interest in the property. Even then, however, the junior lienholder may be able to enforce the debt through a separate lawsuit against the borrower. The moral of the story? If you are named as a party in a foreclosure action and wish to collect sale proceeds, promptly respond to the complaint and assert your interest.

Standing to sue on Contract

***Breen v. Group Management Servs., Inc*., 8th Dist. Cuyahoga, 2022-Ohio-2689.**

In this appeal, the Eighth Appellate District affirmed the trial court's decision to dismiss a breach of contract claim on the basis that the plaintiff failed to establish its standing to sue under the contract.

The Bullet Point:

"It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." "An action brought by a party that lacks standing will be dismissed." To establish standing, a party must show they suffered "(1) an injury that is (2) fairly traceable to the appellees' allegedly unlawful conduct, and (3) likely to be redressed by the requested relief."

Where there are no allegations that a plaintiff is a party to a contract or a third party intended beneficiary to a contract, a court does not err in dismissing the complaint for lack of standing.

Excessive Interest under Mortgage Loan Act

***Forsythe Finance, LLC v. Seibert, et al.*, 1st Dist. Hamilton, 2022-Ohio-2798.**

The First Appellate District reversed the trial court's decision to dismiss various counterclaims and third-party claims for failure to state a claim, finding that the borrowers had adequately plead claims under Ohio's Ohio Mortgage Loan Act (OMLA) and Credit Services Organization Act (CSOA).

The Bullet Point: This opinion thoroughly explores the relationship between the OMLA and CSOA. Under the OMLA, registrants are authorized to offer unsecured loans (not to exceed $5,000) with "unlimited" interest rates. Despite this, the OMLA did subject registrants to another law that capped interest rates at 21 % of the unpaid principal balance on a loan, not to exceed 25%. According to the First Appellate District, registrants began to circumvent this interest rate cap by utilizing credit services organizations (CSOs) under the CSOA, which places no cap on the fees charged by CSOs. The court explained the intersection between these two laws: "[t]he CSOA specifically excludes organizations that make or collect loans and licensed mortgage brokers. By law, MLA registrants cannot be CSOs, and CSOs cannot be MLA registrants. Under what certain lenders dubbed the "CSO model," the setup goes like this: the lender (NCP) registers under the MLA so that it can advertise and collect on the loan. But because that opens it up to interest limitations they prefer to avoid, the MLA registrant partners with a CSO to "assist" the consumer in obtaining the loan. The MLA registrant can only charge 25 percent interest on its loan portion. The CSO, however, can and does charge fees far exceeding 25 percent interest."

According to the court, this exact arrangement occurred in this case. When the borrowers defaulted on the loan and were sued by the assignee of the contract, they filed third-party complaints against the MLA registrant and the CSO for violations of the OMLA and CSOA, among other claims. While the trial court dismissed the claims, the First District reversed. In so ruling, the court noted that the fee charged by the CSO was "murky" and could be considered principal or interest under the OMLA and, depending on how classified, could be a prohibited charge under the statute. The court found that the OMLA was applicable, noting that the loans themselves indicated as much. The court also found that the borrowers had to plead plausible claims for violation of the Ohio Consumer Sales Practices Act, noting that the record was "devoid" of any evidence that the CSO provided an actual service to the borrowers and that the borrowers could repay the loan.

Implied-in-fact contract

***Jones v. BPO/RICO Manufacturing, Inc.,* 9th Dist. Medina No. 2022-Ohio-2715.**

In this case, the Ninth Appellate District affirmed the trial court's summary judgment decision finding no implied-in-fact contract existed between the parties.

The Bullet Point:

"An implied-in-fact contract hinges upon proof of all of the elements of a contract." The elements are "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." "An implied-in-fact contract diverges from an express contract in the form of proof that is required to establish each contractual element." "In express contracts, assent to the terms of the contract is actually expressed in the form of an offer and an acceptance." "On the other hand, in implied-in-fact contracts the parties' meeting of the minds is shown by the surrounding circumstances, including the conduct and declarations of the parties, that make it inferable that the contract exists as a matter of tacit understanding."

Florida

Orders Issuing Temporary Injunctions

***SPC Fortebello, LLC v. Catuogno*, No. 5D21-2513 (Fla. 5th DCA August 5, 2022)**

The Fifth District concluded that a trial court's order granting a motion for a temporary injunction failed to comply with the requirements of Florida Rule of Civil Procedure 1.610(c).

The Bullet Point: Under Florida Rule of Civil Procedure 1.640(c), a trial court's order granting a temporary injunction must include specific findings on each of the elements necessary for issuance of an injunction: (1) a likelihood of irreparable harm; (2) the unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; and (4) considerations of the public interest support the entry of the injunction. Conclusory statements that the required elements have been established are insufficient to satisfy this requirement. In this case, the trial court made numerous factual findings but failed to relate those findings to the four elements in the order. Accordingly, the order was reversed.

Venue Transfer Based on *Forum Non Conveniens*

***At Home Auto Glass, LLC v. Mendota Insurance Company*, No. 5D21-2052 (Fla. 5th DCA August 12, 2022)**

The Fifth District concluded that the trial court abused its discretion in transferring venue based on *forum non conveniens*.

The Bullet Point: When a *forum non conveniens* challenge is raised, the parties must submit affidavits or other evidence that will shed light on the issues of the convenience of the parties and witnesses and the interest of justice. If the venue is proper in more than one place, the plaintiff's selection will not be disturbed absent evidence that the chosen venue is either not proper or substantially inconvenient.

In this case, the appellee sought a venue transfer based on *forum non conveniens*, arguing the current venue was inconvenient for its key witness and that the venue should be transferred in the interest of justice to avoid imposing jury duty on an uninvolved community. The appellee's motion to transfer was unsworn; it presented no evidence by way of affidavits, deposition, or live testimony at the hearing; and it did not file any pre-hearing affidavits or sworn evidence in support of its motion. In contrast, the appellant filed an affidavit opposing the motion to transfer and explaining its witnesses would not be inconvenienced by the litigation remaining in its current venue.

At issue in this appeal was whether the trial court abused its discretion by granting the appellee's motion to transfer venue. The Fifth District concluded that it did. The Fifth Districted reasoned that absent evidence showing that a witness would be inconvenienced by the venue remaining in its current location or how the interest of justice would otherwise be served by a venue transfer, it is an abuse of discretion to transfer venue based on *forum non conveniens*. In summary, the Fifth District reversed the other transferring venue because the appellant failed to meet its burden to establish the basis to transfer venue based on *forum non convenient*.

Trees as Part of Realty

***Kim v. Galasso*, No. 2D20-3313 (Fla. 2nd DCA August 3, 2022)**

The Fourth District concluded that the trial court properly entered summary judgment based on a ruling that trees planted on land were part of the real estate.

The Bullet Point: As a general rule, trees planted in the land are considered part of the realty. Any contract taking the trees out of that general rule must clearly show the parties intended the trees to be personal property and must satisfy the statute of frauds.

In this case, the parties disputed ownership of over $1 million worth of palm trees that were planted on land. The trees at issue were planted on the property in late 2004 or early 2005 by the appellant, and the trees continued growing there in 2011 when the property was sold to the appellees. The appellees claimed the trees were part of the real estate and that they took ownership of the trees as a result of the land purchase. The appellant claimed he was the owner of the trees, and the trees were intended to be excluded from the realty as personal property. However, the only written document memorializing that intention was created in 2011, after the trees were planted, and it did not contain two witness signatures.

At issue in this appeal was whether the trial court erred in granting summary judgment in favor of the appellees. The Fourth District concluded it did not. The Fourth District reasoned that the trees were part of the realty, and the only contract memorializing the agreement that the trees were intended as personal property did not satisfy

the statute of frauds because it did not contain two witness signatures. Therefore, it was not legally sufficient to grant ownership of the trees. Accordingly, the Fourth District affirmed the entry of summary judgment.

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