

Can I still seek arbitration? The Bullet Point: Volume 2, Issue 6

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[Harker v. PNC Mortgage Co., 6th Cir. No. 17-8005 \(Feb. 6, 2018\).](#)

This appeal was a challenge by a mortgage lender to a Chapter 7 bankruptcy trustee's power to avoid a mortgage as a hypothetical lien creditor. In this case, the debtors filed for Chapter 7 protection. They included their interest in real property on their filings. Thereafter, the Chapter 7 trustee filed a complaint to avoid PNC Mortgage's first lien mortgage on the grounds that the acknowledgement clause was defective under Ohio law. Eventually, PNC moved to dismiss the complaint, but the bankruptcy court denied the order and PNC appealed.

On appeal, the Sixth Circuit Court of Appeals affirmed the district court's decision. In so ruling, the court found that the constructive notice provisions of section 1301.401 of the Ohio Revised Code do not limit a bankruptcy trustee's avoidance powers as a hypothetical judgment lien creditor under section 544(a)(1) of the federal Bankruptcy Code.

The Bullet Point: In this case, the Sixth Circuit made a distinction between constructive notice that results from a defective mortgage being recorded and the defective mortgage's priority over other interests. The court concluded that a defective mortgage that is recorded does provide constructive notice to all of its existence and contents. However, the court then found that such defective mortgage does not take priority over other liens and can be avoided as a result. This case highlights the importance of ensuring that a mortgage document is properly executed and acknowledged under Ohio law in order to avoid any argument or attempt to avoid its priority in a bankruptcy court.

[Yunker v. Hayes, 9th Dist. Summit No. 28521, 2018-Ohio-835.](#)

This was a breach-of-contract action between two parties who had entered into an agreement to purchase Cleveland Browns season tickets. Plaintiff agreed to buy seat licenses from the defendant for four season tickets. After the parties agreed, the defendant found out the licenses were substantially more valuable and backed out of the deal. Plaintiff then sued, arguing that defendant had breached the contract. The trial court eventually denied the plaintiff's request for relief, and he appealed.

On appeal, the Ninth Appellate District reversed finding that it improperly applied the affirmative defense of mutual mistake to preclude judgment.

The Bullet Point: A mutual mistake that is material to a contract occurs when both parties, at the time of entering the contract, make a “mistake * * * as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.” This is not a claim but, rather, a reason to make an otherwise valid contract voidable. To avoid mutual mistakes, a party should ensure that any contract is in writing and specifies, in detail, the basis and assumptions on which the contract is made.

[Boaeuf v. Memphis Station, LLC, 8th Dist. Cuyahoga No. 105799, 2018-Ohio-745.](#)

Plaintiff purchased a bar and liquor licenses from the defendant. Plaintiff made only one payment on the agreement, and defendant eventually obtained a cognovits judgment against him and then sold the assets to a third party. Plaintiff then filed suit, raising numerous claims including a claim for conversion. Judgment was eventually entered in plaintiff’s favor on the conversion claim, and defendant appealed.

On appeal, the Eighth Appellate District affirmed the trial court’s decision. In so ruling, the court found that defendant did not own the bar and assets when it sold them and that the plaintiff had not abandoned title to the assets.

The Bullet Point: “Conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.” Conversion occurs when someone lacks title to personal property but sells it or gives it to someone else. Abandonment can be a defense to a conversion claim. However, “mere non-use is not sufficient to establish the fact of abandonment, absent other evidence tending to prove the intent to abandon.”

[JDH Management Group, LLC v. Pierce, 12th Dist. Warren No. CA2017-07-100, 2018-Ohio-706.](#)

This was an appeal of a trial court’s decision finding that plaintiff waived its ability to arbitrate the claims. Defendants had contracted with plaintiff to build them a house. The contract included various specific items included in the purchase price. The contract also made clear the purchase price could change based on the defendants’ actual expenditures. Once the property was built, defendants could not afford the final payment and attempted to work out an arrangement with the plaintiff. The parties eventually worked out an arrangement where the plaintiff would obtain a mortgage that was to be paid in full by February 2015. The defendants failed to make all of the payments and plaintiff eventually commenced a breach action against defendants. Defendants in turn filed a number of counterclaims.

The plaintiff sought to compel arbitration of the counterclaims. The trial court, however, found that plaintiff waived its right to arbitrate when it filed suit in court. Plaintiff appealed, and on appeal, the Twelfth Appellate District reversed the trial court. In so ruling, the court found that the repayment agreement was a separate, enforceable contract from the construction contract on which the counterclaims were based, and thus plaintiff’s attempt to enforce the repayment agreement did not constitute waiver of its right to seek arbitration of defendant’s claims in the construction contract.

The Bullet Point: Typically, a party to a contract waives a right to arbitration when it files a lawsuit rather than requesting arbitration. However, waiver of a right to arbitrate is not to be lightly inferred and when a party has a separate, enforceable right to bring a lawsuit, doing so should not constitute a waiver of a right to arbitrate subsequent claims under a different contract or agreement.