

Has my contract been modified?

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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.

Ohio

Assignee of Contract

Auto Loan, Inc. v. Sisler, 11th Dist. Portage No. 2022-Ohio-3282.

In this appeal, the Eleventh Appellate District reversed the trial court's decision finding that the plaintiff was not an assignee under the terms of a retail installment contract.

The Bullet Point: Under R.C. 1925.02(A)(2)(ii), a small claims court lacks jurisdiction over "any claim brought by an assignee or agent..." Whether one is an assignee is a question of fact to be determined by the trier of fact. * As the appellate court noted, Black's Law Dictionary defines assignee as "[s]omeone to whom property rights or powers are transferred by another." ASSIGNEE, Black's Law Dictionary (11th ed. 2019). The drafters of R.C. 1925.02 could have limited the prohibition on assignments to, for example, assignments that occurred after the cause of action accrued. The statute includes no such limiting language but wholly excludes claims brought by assignees. The language of R.C. 1925.02(A)(2) unambiguously excludes assignees from the small claim court's jurisdiction. Courts must apply the plain meaning of statutes without inserting or deleting words. Here, the statute was plain and unambiguous and applied to the plaintiff, an assignee of the retail installment contract it sued under.

Equitable Subrogation

Kemba Fin. Credit Union v. Jackson on High Condo. Assn., 10th Dist. Franklin No. 2022-Ohio-3247.

In this appeal, the Tenth Appellate District affirmed in part and reversed in part the trial court's decision related to the plaintiff's claim for an equitable lien on real property.

The Bullet Point: R.C. 5301.23 establishes the general rule that the first mortgage recorded shall have priority over any subsequently recorded mortgage. R.C. 5301.28 addresses the release of a recorded mortgage, providing in part: "[w]hen the mortgagee of property * * * receives payment of any part of the money due the holder of the mortgage, and secured by the mortgage, and enters satisfaction or a receipt for the payment,

either on the mortgage or its record, that satisfaction or receipt, when entered on the record * * * by the county recorder, will release the mortgage to the extent of the receipt.” As the court noted, in cases where a first-priority lien was erroneously released by a recorder or third party, courts generally apply equitable principles to reinstate the priority of the first lien recorded. However, where there has been an intervening interest recorded, courts had ordered equitable reinstatement of the first lien and its priority only when the intervening lienholder had actual or constructive notice of the first lien and either did not detrimentally rely upon the erroneous release or were not prejudiced by the revival of the first lien.

Allonge affixed to a note

***Yemma v. Leber Real Estate, LTD.* 7th Dist. Mahoning, 2022-Ohio-3289.**

The Seventh Appellate District affirmed the trial court’s decision finding that the plaintiff was not the holder of a promissory note and thus lacked standing to enforce it because no evidence was presented that an allonge was affixed to the note.

The Bullet Point: “Under Ohio law, the right to enforce a note cannot be assigned; rather, the note must be negotiated in conformity with Ohio’s version of the Uniform Commercial Code.” However, negotiation may transfer a note under R.C. 1303.21(A). *Id.* “Negotiation” is the transfer of possession of the note “to a person who by the transfer becomes the holder of the instrument.” R.C. 1303.21(A). Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires the transfer of possession of the instrument and its indorsement by the holder. R.C. 1303.21(B). If an instrument is payable to the bearer, it may be negotiated by transfer of possession alone. The “transfer” of an instrument occurs when the note is physically delivered “for the purpose of giving the person receiving delivery the right to enforce the instrument.” R.C. 1303.22(A). An allonge is a “slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements.” The current version of the Uniform Commercial Code, codified as R.C. 1303.24(A)(2), allows allonges even where room exists on the note for further indorsements. However, the paper must be affixed to the instrument for the signature to be considered part of the instrument.

Modifying a Contract

***Dye v. JJ Detweiler Enterprises Inc.*, 5th Dist. Stark No. 2022-Ohio-3250.**

In this case, the Fifth Appellate District affirmed the trial court’s decision that the parties had orally modified the terms of a settlement agreement.

The Bullet Point: “A contract can be modified when there is clear and convincing evidence of the parties’ mutual intent to modify the contract through their course of dealing.” In fact, “even contracts that are required by the statute of frauds to be in writing can be modified orally ‘when the parties to the written agreement act upon the terms of the oral agreement.’” So how can one modify a contract orally? As the Fifth Appellate District noted,

“subsequent acts and agreements may modify the terms of a contract, and unless otherwise specified, neither consideration nor a writing is necessary. Oral agreements to modify a prior written agreement are binding if based upon new and separate legal consideration or, even if gratuitous, are so acted upon by the parties that a refusal to enforce the oral modifications would result in fraud to the promisee.”

Florida

Buyer in the Ordinary Course of Business

***Santana Equestrian Private Fin., LLC v. Richtmyer*, No. 4D21-3363 (Fla. Sept. 14, 2022)**

The Fourth District reversed a replevin judgment based upon a determination that the appellant was a good faith buyer in the ordinary course of business.

The Bullet Point: Under the Uniform Commercial Code (the UCC), if goods are entrusted to a merchant who deals in goods of that kind and the goods are ultimately sold to a good faith buyer in the ordinary course of business, the entruster’s intent, any intervening sales, and the merchant’s fraudulent actions are irrelevant. This appeal stems from the trial court’s order determining the right to immediate possession of a competitive jumping horse. It is undisputed that the appellee entrusted the horse to a known merchant, who, in turn, entrusted the horse to another merchant with directions to sell it. A year and a half after the initial entrustment, the second merchant sold the horse to the appellant.

The trial court granted replevin and awarded the horse to the appellee, concluding that the appellant was not a good-faith buyer in the ordinary course of business. On appeal, the Fourth District held that the record did not support the trial court’s conclusion. Rather, the evidence established that the sale comported “with the usual or customary practices” in the business of selling jumping horses and that the appellant was a good faith purchaser for value under the UCC. Accordingly, the replevin judgment awarding possession of the horse to the appellee was reversed.

In-Camera Review

***GCTC Holdings, LLC v. Tag QSR, LLC*, No. 2D21-3457 (Fla. 2d DCA Sept. 9, 2022)**

The Second District concluded that the trial court departed from the essential requirements of the law by requiring the production of asserted trade secret information without conducting an in-camera review.

The Bullet Point: When parties dispute whether documents are protected under the trade secret privilege, a trial court must first determine whether the requested information constitutes or contains trade secret information. This generally can be determined only after conducting an in-camera review of the documents. In this case, the trial court ordered the disclosure of asserted trade secret information without ever conducting an in-camera review or ruling on the assertion of the trade secret privilege. The Second District concluded this was

a departure from the essential requirements of the law resulting in material harm. Accordingly, the order was quashed.

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