How can my company be affected by a writ of quo warranto? The Bullet Point: Volume 3, Issue 1

January 08, 2019

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.

Writ of Quo Warranto

State ex rel. DeWine v. Omar Ibn el Khattab Mosque, Inc., Slip. Op. No. 2018-Ohio-5112.

This was an appeal from the grant of a writ of quo warranto. The dispute centered around a power struggle over a mosque. Over the years the corporation which owned the mosque failed to follow corporate formalities and lacked procedures to resolve internal disagreements. After years of litigation the Ohio Attorney General brought an action for a writ of quo warranto to dissolve the corporation. The Tenth Appellate District ultimately granted the writ and an appeal to the Ohio Supreme Court followed.

On appeal the Ohio Supreme Court affirmed, holding that the corporation's failure to adhere to corporate formalities caused internal dysfunction and loss of access to the corporation's charitable funds, supporting a dissolution.

The Bullet Point: R.C. 2733.02 permits the state to pursue an action in quo warranto against a corporation if that corporation has failed in certain respects to perform its essential functions. Dissolution of the corporation is required when the court determines that "by an act done or omitted, [the] corporation has surrendered or forfeited its corporate rights, privileges, and franchises." This can occur when a corporation fails to follow statutory requirements for corporations, including failing to hold annual meetings for the election of directors or failing to maintain membership records.

Failure to Identify a Signatory by Name in Agreement

The Bank of New York Mellon v. Rhiel, Slip Op. No. 2018-Ohio-5087.

This was an appeal of a certified question to the Ohio Supreme Court regarding whether the failure to identify a signatory by name in a mortgage agreement renders the agreement unenforceable against that individual.

In this case, two homeowners filed bankruptcy. In the bankruptcy the trustee sought to avoid the mortgage encumbering the homeowner's real property, arguing that the mortgage did not attach to one of the homeowner's interests because his name was not included in the definition of "borrower" in the mortgage. The bankruptcy court disagreed and the question was certified to the Ohio Supreme Court.

On appeal, the Ohio Supreme Court held "that the failure to identify a signatory by name in the body of a mortgage agreement does not render the agreement unenforceable as a matter of law against that signatory. It is possible for a person who is not identified in the body of a mortgage, but who has signed and initialed the mortgage, to be a mortgagor of his or her interest."

The Bullet Point: In reaching this conclusion, the Ohio Supreme Court determined that Ohio law does not have strict requirements for executing mortgages. Rather, they are generally governed by the standard rules of contract, which merely require for a contract to exist there must be a meeting of the minds of the parties regarding the contract's essential terms, and those terms must be reasonably certain and clear. Likewise, the Supreme Court noted that under standard rules of contract interpretation, a contracting party's signature manifests the party's intent to be bound to a contract's terms. Accordingly, "[a]s a matter of general contract interpretation, it is possible for a person who is not identified in the body of a mortgage but who has signed and initialed a mortgage to be a mortgagor of his or her interest."

FHA-HUD "Face-to-Face Interviews"

U.S. Bank Nat'l Assn v. Cavanaugh, 10th Dist. Franklin No. 18AP-358, 2018-Ohio-5365.

This was an appeal of a foreclosure judgment, considering whether the lender established compliance with all conditions precedent prior to foreclosure. The mortgage loan at issue was insured by FHA which requires, among other things, a lender to hold a face-to-face meeting with a homeowner before accelerating a loan. The law provides a number of exceptions to this requirement, including whether a lender made a "reasonable attempt" at a meeting, which requires sending a letter to the homeowner offering a meeting and at least one visit to the property.

Here, the lender put forth evidence that it mailed a letter to the borrowers offering a face-to-face meeting and visited the property. The borrowers claimed the evidence was insufficient to establish compliance with FHA-HUD regulations and the trial court disagreed, granting summary judgment to the lender.

The borrowers appealed and on appeal the Tenth Appellate District affirmed, finding that the lender presented sufficient evidence establishing compliance with FHA guidelines and the borrowers failed to present any evidence to the contrary to create an issue of fact for trial.

The Bullet Point: "Under FHA-HUD regulations, [t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." However, a face-to-face meeting is not required in certain circumstances. No meeting need occur if "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. 203.604(c)(5). A "reasonable effort" must include (1) "at a minimum one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and (2) "at least one trip to see the mortgagor at the mortgaged property," unless an exception is met. There is a split in authority in Ohio as to whether compliance with this regulation is a condition precedent or an affirmative defense to foreclosure. Likewise, courts are split as to whether the face-to-face meeting must be had before three payments are missed or whether that is a merely aspirational. The majority of courts adopting "a 'common-sense construction' of 24 C.F.R. 203.604 that requires lenders to conduct a face-to- face meeting, or make a reasonable effort to arrange such a meeting, at some point prior to filing for foreclosure."

Loan Servicer that Acquired the Loan via Assignment Subject to the CSPA

Murphy v. Ditech Financial LLC, 8th Dist. Cuyahoga No. 106896, 2018-Ohio-5041.

This appeal involved claims for abuse of process and violation of the Consumer Sales Practices Act (CSPA) brought by a mortgage borrower against her loan servicer for filing an allegedly meritless foreclosure action. The borrower claimed that the loan servicer and its counsel filed a foreclosure action without a legitimate basis to do so because she had discharged her debt in bankruptcy.

The loan servicer moved to dismiss, arguing that there was no allegation that the foreclosure was filed to accomplish some ulterior purpose as required to state an abuse of process claim and, moreover, that it was exempt from the CSPA. The trial court granted the motion and the borrower appealed.

On appeal the Eighth Appellate District affirmed in part and reversed in part, finding that while the borrower failed to please a plausible claim for abuse of process, the loan servicer, who was also the mortgagee of record, was in fact subject to the CSPA.

The Bullet Point: As the Ohio Supreme Court previously held, "[t]he servicing of a borrower's residential mortgage loan is not a 'consumer transaction' as defined in R.C. 1345.01(A)" and "[a]n entity that services a residential mortgage loan is not a 'supplier' as defined in R.C. 1345.01(C)." Anderson v. Barclay's Capital Real Estate, Inc., 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, paragraphs one and two of the syllabus. However, a loan servicer could still be subject to the CSPA if it is a loan officer, mortgage broker, or nonbank mortgage lender. A "nonbank mortgage lender" is defined as, among other things, "any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state,

another state, or the United States[.]" Courts, including the court in Murphy, have found that loan servicers that acquired the mortgage loan via assignment fit the definition of a nonbank mortgage lender subject to the CSPA.