What Do I Need to Prove in Order to Enforce a Promissory Note?

January 07, 2021

Statute of Repose

***Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827**

In this appeal, the Supreme Court of Ohio reversed the lower court's decision, determining that the plaintiffs' claims were time-barred because Ohio's saving statute does not create an exception to a true statute of repose.

- ***The Bullet Point:*** Statutes of limitations establish a time limit for bringing a lawsuit based on the date when the plaintiff's claim accrued. Statutes of repose bar an action that is brought after a specified period of time since the defendant acted, regardless of whether or not the plaintiff has yet to be injured by the defendant's actions. Simply stated, both statutes of limitations and statutes of repose limit the period of time in which a plaintiff may file an action. On the other hand, saving statutes extend that period of time. Under Ohio's saving statute, a plaintiff is afforded a limited period of time in which to refile a dismissed claim that would otherwise be time-barred. R.C. 2305.19(A). However, Ohio's saving statute does not toll the statute of limitations, and it does not operate as a statute of limitations itself. In this matter, the Court analyzed the interplay between the statute of limitations, statute of repose, and saving statute and determined the plaintiffs' medical malpractice claims against the defendant were time-barred. The Court noted that although the plaintiffs voluntarily dismissed their claims, they could not take advantage of the one-year filing period provided by the saving statute as their claims were dismissed after the statute of repose had already passed. The Court explained that the statute under which the plaintiffs brought their claims contains "a true statute of repose that, except as expressly stated [in the statute], clearly and unambiguously precludes the commencement" of a medical claim after the specified period of time. As the statute under which the plaintiffs brought their claims does not contain an express exception for application of the saving statute, the Court determined the Ohio General Assembly did not intend for the savings statute to apply. As such, the expiration of the statute of repose precluded the plaintiffs from using the saving statute to commence their actions against the defendant.

Chain of Title to Enforce a Promissory Note

***U.S. Bank Natl. Assn. v. George*, 10th Dist. Franklin No. 20AP-43, 2020-Ohio-6758**

In this appeal, the Tenth Appellate District affirmed the trial court's decision, agreeing that a lender does not need to prove a promissory note's chain of custody for all time in order to enforce the note and mortgage.

- ***The Bullet Point:*** A promissory note secured by a mortgage is a negotiable instrument. Under R.C. 1303.31(A), a person entitled to enforce such a promissory note includes the "holder" of the instrument. To qualify as a holder, a person must 1) have possession of the note, and 2) the note must be indorsed either in blank to the bearer or specifically to the one presenting it. R.C. 1301.201(B)(21)(a). In this matter, the borrowers argued the lender did not prove its possession of the original note as it did not demonstrate the note's chain of custody prior to the lawsuit. As the court explained, proving "possession" does not mean that the lender must track the physical location of the original note at all times. On the contrary, the lender must prove possession of the note at the time of trial. The court further explained that a "chain of custody is needed only when an item is by nature fungible and indistinguishable, having no unique characteristics, like a pill." The note had identifiable characteristics, namely, the borrowers' acknowledged signatures. Further, there was no evidence the note had been altered in any way since the borrowers signed it. Therefore, proof of the note's chain of custody was not necessary. The borrowers also argued the lender was not entitled to enforce the note as it failed to prove the note's chain of transfer. Pursuant to R.C. 1303.36(A), in actions with respect to an instrument, such as a foreclosure, "the authenticity of, and authority to make, each signature on an instrument is admitted" unless specifically denied in the pleadings. If the defendant makes this specific denial, the burden of establishing validity is on the plaintiff. That being said, there is a "rebuttable presumption that the signature is authentic and authorized." Here, the borrowers failed to specifically deny the authenticity of any signature or any person's authority to make any of the indorsements on the note. Moreover, they failed to present any evidence to overcome the rebuttable presumption of validity that attached to the signatures. As the lender proved possession by producing the original note at trial, and the indorsements were deemed valid, the court determined the lender was the holder entitled to enforce the note and mortgage against the borrowers.

Grounds to Vacate a Sheriff Sale

New Residential Mtge. LLC v. Barnes, 12th Dist. Warren No. CA2020-04-027, 2020-Ohio-6907

In this appeal, the Twelfth Appellate District affirmed in part and reversed in part the trial court's decision, holding that the sheriff's sale should be set aside under the doctrine of mistake.

- ***The Bullet Point:*** Although judicial sales have a certain degree of finality, such sales may be set aside depending upon the facts surrounding the sale. In determining whether or not to set aside a judicial sale, Ohio courts consider factors such as "(1) the difference between what the property sold for at a judicial sale and the amount of mortgage indebtedness; (2) the timeliness of the motion to set aside; and (3) the likelihood of a higher bid if the sale is set aside." In this matter, the creditor filed a motion to set aside a sheriff's sale on the ground of mistake. Specifically, the creditor's counsel was mistaken when it sent local counsel to make an in-person bid instead of an online bid on behalf of the creditor. Although the creditor's counsel tried to correct this mistake by making an online bid, the bid was rejected as there was insufficient time to register the creditor. The property was sold to the lowest bidder, and the creditor's counsel immediately moved to set aside the sheriff's sale. The appellate court agreed the sale should be set aside, explaining that "the primary objective of judicial sales is to raise the money due to the creditor, not to allow

the property to be sacrificed at a price significantly below its market value due to the mistake of a party or the party's counsel." In this instance, the property was sold the morning of the first day that the sheriff's sales took place online instead of in person. Although there were three higher bids, the property was sold to the lowest bidder as it was the only bidder who was able to register online to make a deposit. Further, if the sheriff's sale were to stand, the creditor would be faced with a deficiency judgment in excess of $38,000. Considering all of the factors, the appellate court determined "the equities of the situation dictate that the doctrine of mistake should be applied and the sale vacated."

Action for Money Had and Received

LRC Realty, Inc. v. B.E.B. Properties, 11th Dist. Geauga No. 2016-G-0076, 2020-Ohio-6999

In this appeal, the Eleventh Appellate District reversed in part the trial court's decision and remanded the matter, holding that the court's balancing of equities under Ohio's theory of money had and received is inappropriate on summary judgment as there existed genuine issues of material fact.

- ***The Bullet Point:*** Under longstanding Ohio law, an action for money had and received exists when one party to a contract fully performs its obligations and the other party is unjustly enriched thereby. As explained by the court, an action for money had and received is not based on contract. Rather, it is an equitable action based upon "a moral obligation to make restitution where retention of benefits bestowed would result in inequity and injustice." As such, a party may defeat an action on the contract but still be liable to the other party in equity. Judgment may also be entered against a non-contracting party under this theory when the non-contracting party withholds money that, in justice and equity, belongs to another. The court further explained that such an equitable claim exists when one party receives money from another without giving valuable consideration. When analyzing such equitable actions, Ohio courts must balance the competing equities. In this matter, the defendants argued it would be inequitable for them to pay damages to the co-defendant for rental payments they received under a lease. In support of their claim, the defendants presented evidence they were the only party to pay value for the right to receive said rental payments. In addition, the evidence demonstrated the co-defendant may have had prior knowledge it did not own the right to receive the rental payments. Analyzing the evidence presented, the court agreed with the defendants and determined they raised genuine issues of material fact regarding the co-defendant's entitlement to recover damages for the rental payments.

HUD Face-to-Face Requirements

***Wilmington Savs. Fund Soc., FSB v. Salahuddin*, 10th Dist. Franklin No. 19AP-190, 2020-Ohio-6934**

In this case, the Tenth Appellate District affirmed in part and reversed in part the trial court's decision, finding that the mortgagee failed to demonstrate it complied with the HUD requirements under 24 C.F.R. 203.602 prior to initiating foreclosure.

- ***The Bullet Point:*** Part 203, Title 24 of the Federal Code of Regulations contains the regulations applicable to federally insured mortgages for single-family mortgage insurance, and mortgagees must comply with these HUD regulations prior to initiating foreclosure proceedings. One of these conditions precedent is detailed in 24 C.F.R. 203.602, which states that the mortgagee must provide each mortgagor in default with a delinquency notice "on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary." As a condition precedent, a mortgagee moving for summary judgment on a note secured by a mortgage must present Civ.R. 56 evidence establishing that it complied with the default notice requirements in 24 C.F.R. 203.602 prior to bringing its foreclosure action. In this matter, the mortgagor opposed the mortgagee's motion for summary judgment, alleging the notice of default did not satisfy the HUD requirements. In support of her argument, the mortgagor submitted to the court documentation outlining what HUD requires in a default notice to satisfy 24 C.F.R. 203.602, as well as the information that must be included in the cover letter and accompanying brochure. In response, the mortgagee made a blanket assertion that the notice of default satisfied the HUD requirements. The court noted that the mortgagee failed to provide testimony in any affidavit averring that any of the default letters were on a form supplied by HUD or on a form approved by HUD. Moreover, the mortgagee failed to respond to or provide compliance evidence in response to the mortgagor's argument that HUD requires a specific brochure publication to accompany default letters. As a result, the court determined the mortgagee did not satisfy its burden under Civ.R. 56 with respect to the conditions precedent under 24 C.F.R. 203.602 as it did not respond to the mortgagor's arguments by demonstrating the default letter satisfied all the HUD requirements under 24 C.F.R. 203.602.

  On the other hand, the court determined the mortgagee did satisfy its burden under Civ.R. 56 by providing evidence it complied with the conditions precedent under 24 C.F.R. 203.604. In further opposition to the motion for summary judgment, the mortgagor argued the mortgagee failed to comply with the conditions precedent under 24 C.F.R. 203.604. Under 24 C.F.R. 203.604(b), a mortgagee is required to 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, this face-to-face meeting is not required if "[t]he mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either." 24 C.F.R. 203.604(c)(2). The mortgagee responded to the mortgagor's argument by providing the court with an affidavit containing an averment that neither the mortgagee nor the servicer has an office or branch within 200 miles of the mortgaged property. Consequently, the mortgagee satisfied its burden and was not required to comply with 24 C.F.R. 203.604(b)'s face-to-face meeting requirement.

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