

DEFECTIVELY EXECUTED MORTGAGE STILL PROVIDES CONSTRUCTIVE NOTICE

The Supreme Court of Ohio recently held that a mortgage defectively executed but properly recorded still provides constructive notice of its contents.

A copy of the opinion is available at: [Link to Opinion](#).

The borrowers executed a promissory note and a mortgage. The notary acknowledgment on the mortgage was left blank. The mortgage was recorded with the notary section incomplete. The mortgage was later assigned.

The borrowers later initiated a Chapter 13 bankruptcy asking to avoid the mortgage as defectively executed under Ohio Rev. Code § 5301.01. The U.S. Bankruptcy Court for the Southern District of Ohio certified the issue to the Supreme Court of Ohio. The Court agreed to answer.

The Supreme Court of Ohio began its analysis by examining the relevant parts of the statutes at issue. Ohio Rev. Code § 5301.01(A) sets forth Ohio mortgage requirements:

A . . . mortgage . . . shall be signed by the . . . mortgagor . . . The signing shall be acknowledged by the . . . mortgagor . . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgment.

In addition, Ohio Rev. Code § 1301.401(B) provides that recording of certain documents constitutes constructive notice:

The recording with any county recorder of any document described in division (A)(1) of this section . . . shall be constructive notice to the whole world of the existence and contents of [the] document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

§ 1301.401(A)(1) names “[a]ny document described or referred to” in Ohio Rev. Code § 317.08. The documents listed in Ohio Rev. Code §

317.08(A)(19) include “[m]ortgages, including amendments, supplements, modifications, and extensions of mortgages . . .”

The Court rejected the borrower’s argument that Ohio Rev. Code § 1304.401 only applied to transactions governed by Ohio’s Uniform Commercial Code (UCC) because it is located in the portion of the Ohio Revised Code that contains the UCC.

Instead, the Supreme Court of Ohio found that R.C. 1301.401 states that it applies to “any document described in division (A)(1)” of the section. R.C. 1304.401(A)(1) states that documents described in § 317.08 are included in its purview. In turn, R.C. § 317.08(A)(19) explicitly includes mortgages. Therefore, the Court held that R.C. 1304.401 applies to all recorded mortgages in Ohio based on the unambiguous statutory language.

The Court also disagreed with the borrower’s argument that a mortgage does not provide constructive notice if it is not properly executed under Ohio Rev. Code § 5301.25(A). The Supreme Court of Ohio explained that R.C. 1301.401 does not require that a mortgage be “properly executed” to provide constructive notice, but rather provides that if the document recorded is a “mortgage” then notice of its contents is provided.

Last, the Court also rejected the borrowers’ argument that under Ohio Rev. Code §§ 5301.01(B) and 5301.23(B) constructive notice is not provided for defectively executed mortgages. The Supreme Court of Ohio noted that those statutes set forth two instances where defectively executed mortgages provide constructive notice. However, the Court reasoned that this did not preclude the legislature from “recognizing other instances in which the recording of a defectively executed mortgage can provide constructive notice” and thus R.C. 1301.401 was compatible with the provisions of R.C. 5301.01(B) and 5301.23(B).

Accordingly, the Supreme Court of Ohio held that R.C. 1301.401 applies to all recorded mortgages in Ohio, and thus that statute requires that a mortgage defectively recorded under R.C. 5301.01 provides constructive notice of its contents.