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A Cautionary Tale: Original Mortgagee's Modified Loan Prevails Over Second Secured Lender

An Ohio residential loan and mortgage were made and recorded in 2008. After default, a foreclosure case was started, but not completed – it was dismissed without prejudice.

A second foreclosure case was filed in March 2012. Thirteen months later, in July 2013, summary judgment was awarded to the lender/mortgagee.^[1] Nineteen months later, in December 2014, the summary judgment was vacated on a joint motion. The second foreclosure case was then also dismissed without prejudice. During that 19-month period, the borrower/mortgagor executed a Loan Modification Agreement that referenced the 2008 mortgage. That modification agreement was recorded, after the July 2013 summary judgment was entered.

While the second foreclosure case was pending, in 2012, the borrower/mortgagor borrowed money from, and granted a mortgage to, a second lender (the "Second Lender"). The Second Lender's mortgage was recorded in 2012. The published decision does not address either the application of Ohio's *lis pendens* rule nor the effectiveness of the Second Lender's mortgage whose recording occurred during the pendency of the second foreclosure case. See, ORC Section 2703.26 ("... While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title.")^[2]

In 2016, a third foreclosure case was filed, again by the First Lender. This foreclosure case forced the trial and appellate courts to decide the priority dispute between the 2008 "modified" mortgage (modification recorded in 2013) and the Second Lender's 2012 mortgage. Each mortgagee had a case that seemed to support its position. Favoring the 2008 mortgage, both courts relied on these facts with respect to the modified loan and mortgage: the "modification of a note where there were no additional funds, the interest rate was not increased, the repayment period was

extended and the monthly payments were reduced” did not “affect the priority of the original mortgage.” The courts decided to follow the 2008 mortgagee’s authority ([Community Action Commt. of Pike Cty., Inc. v. Maynard](#), 4th Dist. Pike No. 02CA695, 2003–Ohio–4312, 2003 WL 21949715); instead of the Second Lender’s authority ([Panzica Constr. Co. v. Bridgeview Crossing, L.L.C.](#), 2015–Ohio–3478, 39 N.E.3d 529).

The above-discussed case is *Bayview Loan Servicing v. Vasko, et al.*, Wood County, Ohio App. Case No. WD-17-029 (Jan. 5, 2018).

[1] Generally speaking, obtaining a judgment that forecloses a mortgage to collect the secured promissory note extinguishes that promissory note. See, *In re Ballard*, N.D. Ohio Bankr., Case No. 07-6148 (Mar. 25, 2008) (“There is no question that, by operation of law, the doctrine of merger works to merge the contract, in this case the promissory note secured by the mortgage, into the foreclosure judgment. Upon merger, a majority of courts find that the contract terms are extinguished.”)

The court’s decision seems to assume (but does not discuss) if and how vacation of the 2013 summary judgment revived the 2008 mortgage and the promissory note secured by it, so that said note could be “modified.” This question could have been important since the court’s rationale includes discussion of a 1928 Ohio Supreme Court case apparently holding that an unpaid debt was secured by its mortgage despite modification of the debt’s payment terms.

[2] In the end, the 2008 lender did not need to assert that the *lis pendens* statute prohibited the Second Lender’s mortgage from gaining propriety over the 2008 mortgage that was then subject of the pending foreclosure case when the Second Lender’s mortgage was recorded.

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