did not occur. Several months later, the court approved the sale of the hotel to another buyer for about $5 million less.

The buyers sued the receivers for the return of their earnest money deposit. Both sides moved for summary judgment, with each claiming that the other had breached the contract. The buyers and sellers agreed that the purchase contract created sequential duties leading to closing. However, they each claimed that the contract required a different sequence of events. The buyers said that delivery of a clean title commitment was a condition precedent to the buyers' delivery of the purchase money, and that the buyers were thus excused from performing. The sellers argued that they were not required to deliver clean title until the buyers delivered the money, and that the buyers suggested the appeal exception to Fidelity to disguise their own inability to come up with the purchase money.

Applying Florida law, the court held that the contract required both parties to perform simultaneously and that neither side had met its closing obligations. Thus, both breached the contract and had lost the right to enforce it. The court reviewed several decisions from Florida and other states that have adopted the principle that both parties must perform concurrently under real estate purchase contracts that contain time-of-the-essence provisions and where the buyer refused to deliver money because of a title issue that the seller could have solved with the purchase money. The court noted the California decision of *Pittman v. Canham,* 3 Cal.Rptr. 2d 340 (Cal. App. 1992), in which the court explained that, while the buyer may have been reluctant to make the deposit into escrow, "in a contract with concurrent conditions, the buyer and seller cannot keep saying to one another, 'No, you first.'" The *Pittman* court held that the "failure of both parties to perform concurrent conditions during the time for performance results in a discharge of both parties' duty to perform."

This decision provides a very scholarly analysis of this thorny issue, which can also be a malpractice trap for the unwary lawyer.

Conveyance News

# Borrower Cannot Worm Out of Mortgage Based on Acknowledgment Omission

*Central Mortgage Co. v. Seye,* ___ N.E.3d ___, 2017 -Ohio- 8713, 2017 WL 5713411 (Ohio App. 10 Dist. 2017) (permanent citation not yet available).

An Ohio court has wisely ruled that a borrower may not have his own mortgage declared void due to an inadvertent blank space in the acknowledgment, since the sole purpose of the acknowledgment is to provide a safeguard against forgery and a mortgage is enforceable against the borrower even without notarization.

Mamadou Seye and Mohamad Kebe got a loan secured by their house in Ohio. They defaulted. The holder of the loan, Central Mortgage, filed a foreclosure action. Seye and Kebe filed counterclaims and third party claims against the lender, closing company and title insurer. Their one claim relevant to this article was that their names had not been typed into the acknowledgment block on the mortgage.

After dismissing the borrowers' claims, the court entered a judgment reforming the mortgage to include the borrowers' names in the acknowledgment based on mutual mistake. Seye and Kebe appealed, and the court affirmed.

The court began by noting the applicable statutes. Ohio's R.C. 5301.01(A) says that a deed, mortgage, land contract or lease shall be acknowledged before a notary public, who shall certify and sign the certificate of acknowledgement. R.C. 2719.01 says that a written instrument containing an omission or error is still to be construed to give effect to the parties' intent.

Then the court the addressed the reason why the statutes require an acknowledgment, which is to protect against forgery:

> *The Supreme Court of Ohio has noted that the acknowledgement required by R.C. 5301.01 "is for the purpose of affording proof of the due execution of the deed by the grantor, sufficient to authorize the register of deeds to record it." Basil v. Vincello, 50 Ohio St.3d 185, 188 (1990). Further, "a defectively executed conveyance of an interest in land is valid as between the parties thereto, in the absence of fraud." Id. at 188-89, quoting Citizens Natl. Bank v. Denison, 165 Ohio St. 89, 95 (1956). It has been noted that "[t]he reasoning behind such a rule is to bind the parties to that which they intended." Seabrooke at 169. Thus, while "[t]he purpose of the acknowledgement statute (R.C. 5301.01) is to provide evidence of execution and authority for recordation," it is not intended "to provide a way of escape for a party who later wishes to renege on his agreement." Id.*
>
> *Accordingly, in the absence of fraud, a defect resulting from the failure to include a notarized acknowledgment of a signature "does not render the terms of the mortgage unenforceable as between the parties." Everbank v. Fleming, 2d Dist. No. 2012-CA-10, 2013-Ohio-3030, ¶ 5. Ohio courts have therefore upheld the validity of a mortgage despite a defect in the acknowledgement clause.*

This is a refreshing and excellent decision, particularly because it elevates substance over form using the correct legal analysis. The lender was ably represented by Adam J. Turer of Lerner, Sampson & Rothfuss and Michael J. Sikora, III, Richard T. Craven and C. Richley Raley, Jr. of Sikora Law LLC.

This decision contrasts with many others, which are appalling in their perversity. Many courts, particularly bankruptcy judges, regularly declare mortgages to be void or unenforceable solely because

Continued on Page 10

Continued From Page 9

of some small inadequacy in the acknowledgment. Those courts forget, or do not care, that legislatures required acknowledgments to be affixed to recorded instruments only as a protection against forgery. Further, although the office of notary has existed since Roman times, the recent advent of electronic signatures and the idea of virtual closings has so compromised the notarial act that state legislators should be considering whether to repeal these recording laws. Your editor finds amusing the notion that a digital signature can truly be acknowledged, given that no physical signature is affixed and there is no paper document being signed.

Conveyance News

# Lender Does Not Get First Lien Without First Proving That Its Mortgage Is on Correct Lot

*West RADC Venture 2010-2, LLC v. Indymac Venture, LLC,* 2017 WL 6273838 (Cal.App. 4 Dist.) (unpublished).

A lender that apparently took a deed of trust on the wrong lot, by mistake, cannot establish its "priority" over another deed of trust on the same lot without first proving that its security instrument was recorded against the correct parcel.

In 2004, Frank Eder owned two adjacent vacant lots in Rancho Mirage, California that are legally described as Lots 16 and 17 in a certain tract. Their street addresses are 68 and 70 Royal Saint Georges street.

Eder got two loans on the same day, each secured by one of the lots. One deed of trust referred to the property as Lot 16, having a street address of 70 Royal Saint Georges. The other deed of trust described the property as Lot 15, with a street address of 68 Royal Saint Georges. Title people know the punch line: the descriptions and addresses were flipped. The question is which identifier is correct for each loan.

Eder later said that the street addresses were correct when he signed the deeds of trust. A "loan processor" later attached the legal description pages, and stapled them to the wrong instruments. Both loans were sold to what became AmTrust Bank.

In 2007, Eder borrowed about $3 million from Indymac Venture and built a house at 68 Royal Saint Georges. That deed of trust used that street address and its correct corresponding parcel number, Lot 16. Indymac demanded a first lien. AmTrust issued a payoff letter that identified the loan only by loan number and the street address of 68 Royal Saint Georges. After making the payoff, Stewart Title recorded a release of the deed of trust that had referred to Lot 16.

In 2008, Eder and AmTrust signed a loan modification for its remaining loan, which should have been secured by Lot 15. They recorded two documents evidencing the loan mod. Both described the property as Lot 16. Eder noticed the problem and told AmTrust, but the lender did not straighten the issue out. AmTrust failed, and the FDIC sold the loan to West RADC Venture 2010-2.

Eder also borrowed more money from another lender, secured by a deed of trust against Lot 15 (likely because that lot appeared to be free and clear). Then Eder defaulted on all three loans. The other lender foreclosed on Lot 15 in 2010, preventing West RADC from imposing its security interest on what appears to be the intended lot.

Therefore, West RADC brought an action seeking a judgment declaring that it had the first lien on Lot 16, and thus had priority over the $3 million deed of trust held by Indymac Venture. The trial court granted summary judgment to West RADC, viewing the issue as a simple question of lien priority. The court granted West RADC a priority interest on Lot 16, including the valuable house built with Indymac's money.

Indymac appealed. In a lengthy and astute opinion, the appeals court held that this was not simply a question of priority:

> *Indymac is correct—priority and property rights are distinct issues. The recording laws generally do not govern the creation of interests in real property. Rather, they affect the priority of interests by defining when a person is deemed to have constructive notice of another interest in the property. (4 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 10.1, pp. 10–11 to 10–12... .*
>
> *"Recording itself does not grant an interest in property...." ... Accordingly, before determining the priority of competing trust deeds, the court must first determine whether the party claiming lien priority has a security interest in the subject property. ...*
>
> *West RADC may be correct that recording and indexing its trust deed in the lot 16 chain of title provides constructive notice of the content of that trust deed. ... However, in this case, where the trust deed contains inconsistent descriptions of the encumbered property, the question remains—on what property does West RADC have a security interest? Recording and indexing West RADC's trust deed in the lot 16 chain of title does not answer that question. The threshold issue in this case is a contract interpretation question, not a priority question. And the contract interpretation issue is determined, not by the act of recording or indexing the trust deed, but by its terms and properly admissible extrinsic evidence of the parties' intent. ...*
>
> *Thus, while it may be true, as West RADC asserts, that Indymac took its interest " 'subject to' the interest of the West RADC [d]eed of [t]rust," the starting point is: Exactly what is the property interest created in the West RADC deed of trust? Is it an encumbrance on lot 15? Or is it on lot 16? Unless and until that question is answered, a discussion of priority is premature.*

The court held further that the West RADC deed of trust was ambiguous because it contained inconsistent descriptions of the property it