Ohio Land Title Association

Spring Seminar

Foreclosure Issues for Title Examiners, Loan Closers, and Escrow Officers

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1. Identification of the property secured by the mortgage

Any conveyance of property, including mortgages, must employ sufficient terms in the description to enable a court to identify the location and boundaries of the land. *Eggleson's Lessee v. Bradford*, (1840), 10 Ohio 312, 316. A legal description is acceptable if it identifies the locations and the boundaries of the land with precision. Kuehnle & Levey, *Ohio Real Estate Law* (3rd.Ed. 2003) Section 20:49; *See also* Ohio State Bar Association's Standards of Title Examination, Section 3.2 Comment B.

Ohio courts have held that a correct street address and parcel number are sufficient to describe property for conveyance purposes. *Fifth Third Mortgage Co. v. Brown*, (May 17, 2012), Cuyahoga App. No. 97450, 2012-Ohio-2205; *ABN Amro Mortgage Group, Inc. v. Jackson*, (2005), 159 Ohio App.3d 551, 558-559; *In re Bunn*, (6th Cir. 2009), 578 F.3d 487, 490 (applying Ohio law). *Huntington Natl. Bank v. Coffman, 2014-Ohio-3743.*

2. Defective mortgages

R.C. 5301.25 provides, in relevant part: all deeds, land contracts referred to in division (A) (2) (b) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. *Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument. (Emphasis added)*

a. Unrecorded mortgages

The purpose of recording mortgages and other encumbrances on property is to give notice to bona fide purchasers of the mortgage holder's lien. In this way, the lienholder may claim that all subsequent purchasers of the property have been constructively notified of the lien. R.C. 5301.25 provides that if a lienholder fails to record an encumbrance on real property, the lienholder will not have the benefit of being able to claim constructive notice of the lien against a subsequent purchaser. The recorded mortgage also protects the lienholder by giving the lienholder priority of interest in the secured property. R.C. 5301.25 has no effect on a mortgagor's obligation to pay the mortgagee, whether or not the mortgage was recorded. *Daniely v. Accredited Home Lenders, 2013-Ohio-4373.*

An unrecorded mortgage is effective and enforceable against the grantor but has no priority as a lien against third parties. *Coshocton National Bank v. Hagans* (1931), 40 O App 190, *Amick v. Woodworth* (1898), 58 Ohio St. 86. \

b. Defectively executed mortgages

A defectively executed mortgage, which is not entitled to be recorded, but is nevertheless filed for record, is a nullity as to third parties, even if they have actual notice. *Mtge. Electronic Registration Sys. v. Odita*, 159 Ohio App. 3d 1, 2004 Ohio-5546.

c. Defectively acknowledged mortgages

A mortgage lacking a notarized acknowledgment required by R.C. 5301.01 is defective. However, in the absence of fraud, that defect does not render the terms of the mortgage unenforceable as between the parties thereto. The purpose of an acknowledgment is to provide third parties with evidence of execution and to provide authority for recording the instrument. It is not to provide a way of escape for a party who later wishes to renege on his agreement. *Citizens Nat. Bank v. Denison*, 165 Ohio St. 89, 133 N.E.2d 329 (1956);; *CitiMortgage, Inc. v. Kermeen*, 2d Dist. Darke No. 2011 CA 2, 2012-Ohio-1655; *Seabrooke v. Garcia*, 7 Ohio App.3d 167, 169, 454 N.E.2d 961 (9th Dist. 1982).

d. Defective assignments of mortgages

In *HSBC Bank, USA v. Maust*, 2014-Ohio-3170 (5th Dist.) a R.C. 5301.252 affidavit was held to be sufficient to correct two assignments of a mortgage that had incorrect names of the assignees. The concurring opinion would have held that the R.C. 5301.252 affidavit should only have been deemed sufficient because the incorrectly named assignees had been named as parties to the action.

e. The rights of a Chapter 7 bankruptcy trustee

If the property owner files a Chapter 7 bankruptcy, an unrecorded, defectively executed, or defectively acknowledged mortgage leaves the creditor vulnerable to the interest of the trustee in bankruptcy, who can avoid the mortgage and sell the property free of the lien, and treat the creditor as a general unsecured creditor.

3. Mistakenly released mortgages

When a mortgage is inadvertently released or released without consideration, the creditor holding that mortgage is entitled to reinstatement. *Transamerica Financial Services v. Stiver*, (1989), 1 Ohio App 3d 49, 53; *Farmers Savings & Loan Co. v. Kline*, (1951), 92 Ohio App. 406, 409-410; *In Re Kildow*, (Bkr. S.D. Ohio 1999), 232 B.R. 686, 694.

An inadvertently satisfied mortgage cannot, however, be reinstated merely by filing an affidavit of facts pursuant to R.C. 5301.252. As detailed by the Ottawa County Court of Appeals:

> An affidavit filed under R.C. 5301.252 is not an instrument which casts doubt on the record owner's title or stands in the way of his full and free exercise of his ownership; the filing, in and of itself, creates no interest in the subject real property or encumbrance on the title, but rather is a statutory device for recording facts which may affect title to real estate in Ohio; thus, the filing of such affidavits does not support a cause of action on the part of the owner of properties described in the affidavits to quiet title or remove a cloud on title.
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> *Catawaba West Inc., v. Domo* (1991), 75 Ohio App.3d 80, 83. *See also The Croghan Colonial Bank v. Olena Food Farm, Inc.*, (October 11, 2013), Huron App. No. H-13-006, 2013-Ohio-4520 (A mortgagee seeking to reinstate an inadvertently released mortgage must seek "an equitable reinstatement of its lien.")

As discussed in *Bank One, N.A. v. Russo*, (August 19, 2005), Cuyahoga C.P. No. 534861, unreported:

> If an 'Affidavit of Erroneous Satisfaction' can restore a mortgage, a lender would not incur the legal expense and delay by filing an action to reinstate. Also, if the law allows reinstatement by affidavit, a homeowner could never be certain that a mortgage remains satisfied. A judicial proceeding provides the homeowner with actual notice that the lender intends to vacate the satisfaction. More importantly, it provides the opportunity for the homeowner to dispute the reinstatement. It is clear that the Courts in Ohio hold that reinstatement of a mortgage is the subject of separate action or, at the very least, as a claim for relief that is separate and apart from a claim for foreclosure.
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> . . .
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> Nowhere does [R.C. 5301.252] allow a lender to reinstate an inadvertently satisfied mortgage. . . . There is no statutory basis for the plaintiff to use an Affidavit of Erroneous Satisfaction to reinstate its encumbrance on the subject parcel.

If there are no intervening liens filed between the inadvertent release and the reinstatement of the mortgage, the reinstated mortgage retains its original priority. *The Croghan Colonial Bank v. Olena Food Farm, Inc.*, (October 11, 2013), Huron App. No. H-13-006, 2013-Ohio-4520. If, however, a lien is filed during the period the mortgage was released of record, the mortgage is reinstated to its original priority only when the intervening lienholder had actual or constructive notice of the mortgage and either did not detrimentally rely upon the erroneous release or was not prejudiced by the revival of the mortgage. *Id.*

4. Line of credit payoffs

Escrow officers should ensure that the line of credit lender will be obligated to release the mortgage upon payoff. See *Bank of New York v. Fifth Third Bank of Central Ohio*, WL 121925, Delaware Cty, 2002).

5. Mortgages on fractional interests

If a property is owned by multiple owners and less than all owners execute a mortgage to convey their interest in the property, the mortgage encumbers only a fractional interest in the property. This most commonly occurs when spouses jointly own property, spouse A generally executes the mortgage, and spouse B executes the mortgage "solely to release dower". In such circumstances, the mortgage encumbers only the half-interest of Spouse A and the dower of Spouse B in Spouse A's half. *See Wells Fargo Bank, N.A. v. Nelson, Trustee*, (June 10, 2009), Fed. Dist. Ct. S.D. Ohio No. 1:09-CV-00090, 2009 U.S. Dist. LEXIS 49550 (applying Ohio law). A "release of dower" does not convey an interest in the releasing party's fee interest. *Id.*

When a lien encumbers a fractional interest, only that fractional interest may be sold at a judicial sale. *National City Bank Northwest*, (September 22, 1995), Lucas App. No. L-94-352, 1995 Ohio App. LEXIS 4062.

6. Mortgages subject to various interests

Marshaling of liens claim is asserted by a lien claimant in a foreclosure case whereby all other lien claimants must assert their interests in the property or be barred from asserting them in the future. *Zukerman, Daiker & Lear Co. L.P.A. v. Signer*, (2009), 186 Ohio App.3d 686, 691; *Lexington Ridge Homeowners Ass'n v. Schlueter*, (April 22, 2013), Medina App. No. 09CIV0561, 2013-Ohio-1601. The Court then has the duty to ascertain the nature and extent of all liens and pay them out of the proceeds of sheriff's sale according to their priority. *See Carr v. Home Owners Loan Corp.*, (1947), 148 Ohio St. 533, 539. A marshaling of liens claim is dependent upon a foreclosure claim and cannot be raised independently. *Morgan Stanley Credit Corp. v. Fillinger*, (September 12, 2012), Cuyahoga App. No. 98197, 2012-Ohio-4295.

When a party asserts an interest in a foreclosure, at times issues arise concerning the priority of the interest. Ohio has long adhered to the common law rule of priority for liens of "first in time, first in right." *Elstner v. Fife*, (1877), 32 Ohio St. 358, 373; *Wells Fargo v. Schwartz*, (March 8, 2012), Cuyahoga App. No. 96641, 2012-Ohio-917. This rule is now codified in R.C. 5301.23. Thus, generally, interests in property perfected after a mortgage are subject to the mortgage and are paid or protected after the mortgage.

Interests perfected before the mortgage are superior to it and must be paid before the mortgage.

- Types of interests and common issues related to their priority:

a. Life estates

A recorded life estate that is in existence prior to the mortgage is superior to a mortgage and remains undisturbed by a foreclosure. *See* Curry & Durham, *Ohio Real Property Law & Practice* (6th Ed. 2016) Section 10.10, Estates and Future Interests, Valuation of the Life Estate.

A life estate acquired after a mortgage is subject to the mortgage and is extinguished upon foreclosure of the mortgage. *See* Curry & Durham, *Ohio Real Property Law & Practice* (6th Ed. 2016) Section 17.03[1], Mortgages, Determining Priority of Mortgages, Recording.

b. Dower

If the mortgagor is married at the time a mortgage is granted and the mortgagor's spouse does not join in the execution of this mortgage, the mortgage is subject to the dower interest of the spouse. R.C. 2103.02; *In re Freeman*, (1945), 31 Ohio Ops. 232, 235. An exception to this rule exists in the case of purchase money mortgages. *See* Jackson *v. Moissis*, (March 20, 2017), Geauga App.No. 2016-G-0080, 2017-Ohio-1000. In such cases, the dower spouse is "dowable" only in the surplus arising after the purchase money has been paid.

This dower interest must be paid in the judicial sale even if the spouse has not asserted the spouse's dower interest in the foreclosure proceedings. *See Jewett v. Feldheiser*, (1903), 68 Ohio St. 523, syllabus paragraphs 2 & 3 (dower of wife is not foreclosed when creditors of husband bring suit to marshal liens even where wife is made a party to the case and is in default of the creditor's complaint).

The methods used to calculate dower differ depending upon the date of the marriage and whether the dower is vested – that is, the owner is deceased – or contingent – the owner is alive. *Stand Energy Corp. v. Epler*, 163 Ohio App.3d at 359-360; *First Bank National Ass'n v. Parker*, (July 13, 2006), Cuyahoga Common Pleas Case Number 498066, unreported; *Merrick-Rippner, Ohio Probate Law*, (4th Ed. 1988), Appendix 3.

A dower interest acquired after a mortgage is subject to the mortgage and is extinguished upon foreclosure of the mortgage. *Jackson v. Moissis*, (March 20, 2017), Geauga App.No. 2016-G-0080, 2017-Ohio-1000.

c. Leasehold interests

A lease that is superior to the mortgage, either because it was recorded before the mortgage or because the mortgage was subordinated to it, remains undisturbed by a foreclosure. *Prudential Ins. Co. v. Bull Market, Inc.*, (C.P. 1979), 66 Ohio Misc. 9, 13.

A lease that is inferior to a mortgage is extinguished upon foreclosure of the mortgage. *See New York Life Ins. Co. v. Simplex Products Corp.*(1939), 135 Ohio St. 501, 504. This is so *even if the lessee is not joined in the foreclosure*. *Hembree v. Mid-America Federal Savings & Loan Ass'n*, (1989), 64 Ohio App.3d 144, 154; *Victoria mortgage Corp. v. Williams*, (April 25, 1996), Cuyahoga App. No. 68012, 1996 Ohio App. LEXIS 1683, 1996 WL 200160. These courts reason that the right of possession conveyed through a lease is a personal right deriving its existence through the lessor's title. *Hembree v. Mid-America Federal Savings & Loan Ass'n*, 64 Ohio App.3d at 154. Thus, when the lessor's interest is extinguished by the foreclosure sale, the lessee's interest is extinguished as well. *Id. But see First Federal Savings & Loan Ass'n v. Rig Oil Co., Inc.*, (August 2, 1983), Muskingum App.No. CA 83-11, 1983 Ohio App. LEXIS 13050, 1983 WL 7013 (Junior Lessee's interest is not terminated by foreclosure sale where the lessee was not joined in the foreclosure case).

d. Land installment contracts

A land contract that is recorded before the mortgage is superior to the mortgage. Nevertheless, unless the vendee joins in the mortgage, the mortgage only encumbers the vendor's interest in the property, not the vendee's. *See Fannie Mae v. Winding*, (April 21, 2014), Butler App.No. CA2013-09-179, 2014-Ohio-1698 (A mortgagor can only convey the property the mortgagor has and a mortgagee can take no greater title that that held by the mortgagor). In residential land contracts, the vendor is entitled to be first paid the proceeds of sale up to and including the unpaid balance due on the land contract. R.C. 5313.07. The mortgagee would step into the same priority position as the vendor. *See* Curry & Durham, *Ohio Real Property Law & Practice* (6th Ed. 2016) Section 3.06[4], Priorities in Land Contract Foreclosures. The remainder of the proceeds are payable to the vendee. *Id.*

Where the land contract is unrecorded, the land contract vendee is not joined in the foreclosure, and the sheriff's sale purchaser is on notice that the land contract exists, the vendee's *right of possession* may be foreclosed. *See Hembree v. Mid-America Federal Savings & Loan Ass'n*, (1989), 64 Ohio App.3d 144, 156. Nevertheless, under those circumstances, the vendee's right of redemption survives the sheriff's sale. *See Hembree v. Mid-America Federal Savings & Loan Ass'n*, (1989), 64 Ohio App.3d 144, 156; *See* Curry & Durham, *Ohio Real Property Law & Practice* (6th Ed. 2016) Section 19.05[9], Foreclosure and Judicial Sales, Determining Parties, Considering Tenants. The mere possession of the property by the land contract vendee may place the purchaser on notice of the existence of the land contract. *See Id.*

A land contract that is recorded after a mortgage is inferior to the mortgage and is extinguished upon foreclosure of the mortgage. *See* Curry & Durham, *Ohio Real Property Law & Practice* (6th Ed. 2016) Section 17.03[1], Mortgages, Determining Priority of Mortgages, Recording.

e. Condominium Liens

Condominium associations often argue that condominium liens have a "super priority" based upon R.C. Sec. 5311.18(B)(1), which provides:

> The [condominium lien] is prior to any lien or encumbrance subsequently arising or created except liens for real estate taxes and assessments of political subdivisions and liens of first mortgages that have been filed for record . . .

This section states that the condominium lien is prior to any lien *subsequently arising* - i.e. first in time, first in right – except for real estate tax liens and first mortgages. This statute creates an exception to the first in time rule *in favor of the holders of real estate tax liens and first mortgages*. It places a condominium lien behind real estate tax liens and first mortgages, even if the tax lien or mortgage "arose" subsequent to the condominium lien. It says nothing about liens *arising prior to the condominium lien.*

Thus, a lien filed before a condominium lien has priority over condominium liens. *See Esquire House Condominium Owners Ass'n v. Williams*, (January 24, 2017), Cuyahoga C.P. No. 850015, unreported.

7. Service of summons issues

A claim for foreclosure is a civil case governed by the Rules of Civil Procedure. *See Frysinger v. Leech*, (1983) 10 Ohio App.3d 150, 152. The summons must be served as provided in Civ.R 4 - 4.6. Pleadings and motions filed after the initial complaint must be served in accordance with Civ.R. 5.

Cross-claims seeking foreclosure must be served on parties who have not entered an appearance in the manner provided in Civ.R. 4-4.6. Civ.R. 5(A); *Kral Builders Supply, Inc. v. Gerl*, (1986), 27 Ohio App.3d 353, 355.

A decree of foreclosure is void if entered without valid service of summons on all parties. *See The Lincoln Tavern, Inc. v. Snader*, (1956) 165 Ohio St. 61, syllabus 3.

The most common service of summons issue is premature publication. The court is looking for *unequivocal evidence*, in the form of service returns and their contents, that the attempted address is not valid. Generally, in the absence of other factors, the following *do not* justify service of summons by publication:

- Non-returned certified mail. A non-return means the post office misplaced the return. It does not necessarily mean that the address is invalid. Try certified mail again.

- Unclaimed commercial carrier mail. This means the defendant did not answer the door when the courier knocked at the door and did not respond to the notices left at the address, not necessarily that the address is invalid. Try certified mail at this address.

- Special process server service or sheriff's service return marked: "avoiding service"; "not there"; "vacant"; etc. The fact that the defendant did not answer the door when a special process server knocked does not necessarily mean that the address is invalid. Try certified mail at this address.

It has been said that certified mail is the preferred method of service. *Broadvx, LLC v. Oreste*, (July 16, 2009), Cuyahoga App. No. 92064, 2009-Ohio-3466. There are good reasons for this:

- The post office has a system in place to accept forwarding addresses and to forward mail sent to an old address to a new one. This cannot be said of commercial carriers, special process servers, or the sheriff.

- The certified mail/ordinary mail procedure accounts for the fact that people may not always accept mail from someone who knocks on their door and allows for a passive form of delivery when the active form fails. No such passive delivery system exists after failed commercial carrier, special process server, or sheriff's service.

- People accept mail at addresses where they do not live. The post office can leave mail in a receptacle at such addresses. Commercial carriers, special process servers, and the sheriff cannot.

Some unequivocal notations on service returns that justify publication:

- No such address.

- Not deliverable as addressed/no forwarding address.

- Moved/left no address.

Sometimes the post office will include forwarding addresses on returned service attempts. *Examine the returns for these addresses and attempt service of summons there.*

Forwarded mail affects ordinary mail service as well. If the certified mail was forwarded from address A to address B, the ordinary mail service must be sent to address B to be effective. Ordinal mail sent to address A will not be valid service.

The court docket is a great resource for people's addresses. If you are having trouble serving a party, search for the party's name on the court's docket.

8. Lis pendens

For *lis pendens* to apply, the property must be "sufficiently described in the pleadings" (See Part 1 for a discussion of legal descriptions). *Cook v. Mozer*, (1923) 108 Ohio St. 30, 36-37; *Allen-Baker v. Shiffler*, (C.P. 1998) 99 Ohio Misc.2d 49, 54.

One not a party to a suit is generally not affected by the judgment. *Beneficial Ohio, Inc. v. Rudloff*, (2009), 121 Ohio St.3d 89, 91. One who acquires an interest in property which is at that time involved in litigation in a court having jurisdiction, however, takes subject to the judgment or decree and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset. *Id.* This is so irrespective of whether he has been made a party to the proceeding, or had actual notice of the pendency of the proceeding, and even where there was no possibility of his having had notice of the pendency of the litigation. *Id.* It is immaterial that a purchaser was a *bona fide* purchaser and for a valuable consideration. *Id.* The doctrine of *lis pendens* is not based upon notice but upon reasons of public policy founded upon necessity. *Id.*

The following three elements must be present for *lis pendens* to apply: 1) the property must be of a character to be subject to the rule; 2) the court must have jurisdiction both of the person and the *res*; and 3) the property or *res* involved must be sufficiently described in the pleadings. *Id.*

Lis pendens has been codified at R.C. 2703.26, which provides:

> When a complaint is filed, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title.

In a mortgage foreclosure action, all persons acquiring an interest in the property after the case is filed are bound by the decree and the sale made thereunder. *Avco Financial Services Loan, Inc. v. Hale,* (1987), 36 Ohio App.3d 65, 67; *Recob* v. *McClendon* (Oct. 13, 1981), Franklin App. No. 81AP-468, 1981 Ohio App. LEXIS 14324, 1981 WL 3529. Therefore, while a foreclosure action is pending, no other action may be commenced concerning the property. *Avco Financial Services Loan, Inc. v. Hale,* 36 Ohio App.3d at 67.

9. Guardian ad litem

A default judgment may not be rendered against a minor or incompetent party, unless "represented by a guardian or other such representative who has appeared therein." Civ.R. 55(A). If a party is known to be a minor or incompetent and has failed to enter an appearance, a guardian *ad litem* must be appointed for the minor or incompetent who files an answer on behalf of the minor or incompetent and otherwise defends the foreclosure action. Civ.R. 17(B); *See Quill v. Elrich*, (June 21, 1996), Montgomery App.

No. 15608, 1996 Ohio App. LEXIS 2565, 1996 WL 339945; *Leonhart v. Delaney*, (September 12, 1978), Franklin App. No. 78AP-257, 1978 Ohio App. LEXIS 8408, 1978 WL 217084.

The guardian *ad litem* appointed in foreclosure proceedings need not be an approved guardian *ad litem* for domestic relations or juvenile proceedings, but must be a licensed attorney to represent the minor or incompetent in legal proceedings.

Even were a minor or incompetent party is not in default of answer, Civ.R. 17(B) requires that a minor or incompetent be appointed a guardian ad litem if the minor or incompetent is not otherwise represented in the action. *Quill v. Elrich*, (June 21, 1996), Montgomery App. No. 15608, 1996 Ohio App. LEXIS 2565, 1996 WL 339945. A judgment rendered against an incompetent party without representation may be invalid. *Id.*

10. Effect of bankruptcy

In most cases a bankruptcy filing stays all attempts by creditor to collect debt: 1) from the debtor personally; and 2) out of any property of the bankruptcy estate. 11 U.S.C. 362(a). The filing of a bankruptcy *does not result in a stay* if the debtor has two bankruptcies dismissed in the previous 365 day period, unless the bankruptcy court orders otherwise. 11 U.S.C. 362(c)(4). Filing of the case, attempts at service, sheriff's sales and other steps necessary for plaintiff to collect its debt, if done while the stay is in effect, are void and violate the stay. *C.f. Huntington National Bank v. Muraco*, (1990), 70 Ohio App.3d 96, 97.

A bankruptcy stay terminates in Chapter 13 Bankruptcy when:

1) Relief from stay is expressly granted to a creditor;

2) Case is dismissed by the bankruptcy court;

3) The case is closed; or

4) The debtor is discharged.

11 U.S.C. 362(c).

If the debtor is discharged in a Chapter 13 before relief from stay is expressly granted to the creditor seeking foreclosure, the loan is likely current and the foreclosure likely should be dismissed. *See In re Schlageter*, (3d Cir. 1963), 319 F.2d 821; *National City Mortgage Co. v. Gibbs*, (February 15, 2005) Cuyahoga County Common Pleas Case No. 381060.

A bankruptcy stay terminates in Chapter 7 Bankruptcy when:

1) Relief from stay is expressly granted to a creditor; OR

2) The debtor is discharged; AND

3) The Bankruptcy Trustee Abandons the property subject to the foreclosure; OR

4). Case is dismissed by the bankruptcy court; OR

5). The case is closed.

11 U.S.C. 362(c).

A report of no assets by the trustee is not abandonment. *See In re Schoenewerk*, (E.D.N.Y.2003), 304 B.R. 59, 63; *In re Gagliardi*, (D.Col. 2003), 290 B.R. 808, 818; *Vonderahe v. Polaniecki*, (S.D. Ohio 2001), 276 B.R. 856, 859-860; *In re Ardisson*, (N.D. Ill. 2001), 272 B.R. 346, 351; *In re Henderson*, (S.D. N.Y. 2000), 245 B.R. 449, 454; *In re Beaton*, (N.D. Ala. 1997), 211 B.R. 755, 758; *In re Weisberger*, (M.D. Pa. 1997), 205 B.R. 727, 731; *But see In re Amoakohene*, (N.D. Ill. 2003), 299 B.R. 196, 209; *In re Green*, (N.D. Ill. 1999), 241 B.R. 550, 558. Termination and closure of the case act as abandonment of any property not previously abandoned by the trustee. 11 U.S.C. 554(c).

Bankruptcy court orders are effective when order itself is entered on the docket, not when the court makes notation following hearing.

11. Junior lienholder statute – R.C. 2329.20

A defendant who is the senior lienholder may demand in its answer that the property be sold subject to its lien. The minimum bid at the sheriff's sale must be not less than two-thirds of the difference between the value of the property as appraised by the sheriff and the amount due on the obligation owed to the senior lienholder. Upon confirmation of the sale, the senior lien is not released. The purchaser will acquire title to the property subject to the lien.

12. Sheriffs' sales and private selling officers' sales

a. Execution with the Sheriff

Execution after judgment is governed by R.C. 2329.01 *et seq.* Following a preacipe for order of sale issued by the party awarded the decree of foreclosure, the Clerk of Court issues a writ of execution to the Sheriff commanding the Sheriff to advertise and sell the subject property. R.C. 2329.09. After the clerk issues a writ of execution, the Sheriff must execute upon the writ within sixty days of its issuance. R.C. 2329.53. Three appraisers appointed by the sheriff appraise the property subject to execution. R.C. 2329.17.

R.C.. 2329.26 & 2329.27 set forth notice requirements regarding sheriff's sale. The party seeking foreclosure must send notice of the sale to all parties to the case, unless those parties are in default of answer, and file a notice of doing so with the Clerk of Court at least seven days prior to sale. R.C. 2329.26(A)(1). The Sheriff must publish in a newspaper of general circulation notice of the sale at least three consecutive weeks prior to the sale date. R.C. 2329.26(A)(2) and R.C. 2329.27(A).

After appraisal and notice, the Sheriff sells the property. The sheriff's sale is an auction with the minimum bid set at 2/3 of the appraised value. R.C. 2329.20. The sheriff's sale can be either at a physical location or, once the official public sheriff sale website is available, online. R.C. 2329.152(B); R.C. 2329.153; R.C. 2329.154. In residential mortgage foreclosures, if no bids are received for at least 2/3 of the appraised value, the property is set for sale a second time with no minimum bid. R.C. 2329.52. If not sold at the second sale, the property may be offered for sale in subsequent sales with no minimum bid. *Id.*

In residential foreclosures, deposit requirements are set by R.C. 2329.211(A)(1)-(3) and vary depending on the appraised value of the property. If the judgment creditor is the purchaser as the sheriff's sale, the purchaser will not be required to make a deposit. R.C. 2329.211(A). For commercial foreclosures, the terms of the sale are set by local rule or the rules of the selling officer. R.C. 2329.211(B). The balance of the sheriff's sale purchase price is due thirty days from the date of confirmation. R.C. 2329.31(B).

The court confirms the sale if the court is "satisfied of the legality of the sale." R.C. 2329.31. Unless the sale is vacated, the sale must be confirmed no later than thirty days after the sale or thirty days after the expiration of a stay of confirmation. R.C. 2329.31(A). Prior to confirmation of the sale, the property owner may redeem by depositing the judgment amount plus costs, poundage and interest. R.C. 2329.33.

After confirmation the Sheriff must issue a deed for the property executed upon to the sheriff's sale purchaser and record the deed. R.C. 2329.36. Title vests in purchaser after sale and issuance of deed. R.C. 2329.37. Title vests as of the date of sale even if the sale is confirmed and the deed is issued on some later date. *Jashenosky v. Volrath*, (1899), 59 Ohio St. 540, 545; *Hemmer v. Leigh*, (March 17, 1995), Erie App. No. E-94-052; 1995 Ohio App. LEXIS 922, 1995 WL 112861; *Mid-American National Bank v. Heiges*, (November 18, 1994), Ottawa App. No. 94OT025, 1994 Ohio App. LEXIS 5145, 1994 WL 645780.

b. Execution with a private selling officer

The judgment creditor may file a motion with the court for an order authorizing a private selling officer to sell the property at private auction. R.C. 2329.152(A). The Private Selling Officer must be a resident of Ohio and both a licensed real estate broker or salesperson and a licensed auctioneer. R.C. 2329.01(B)(2).

Once the private selling officer is appointed, the judgment creditor may file a praecipe for sale with the Clerk of Court. R.C. 2329.152(C). The clerk then issues an order of appraisal to the sheriff, who appraises the property in the usual manner, and order of sale to the private selling officer. R.C. 2329.152(C)(1)-(2). The private selling officer then must advertise and sell the property in conformity with the provisions of R.C. 2329.01 to 2329.61. R.C. 2329.152(C)(2). The private selling officer sale can be either at a physical location or online. R.C. 2329.152(B). A private selling officer must hire an escrow agent to perform title and escrow services. R.C. 2329.152(E)(3). The successful purchaser pays the purchase price to this escrow agent.

The private selling officer must return the order of sale to the Clerk of Courts with a report of sale and a report of the private selling officer's costs. R.C. 2329.152(A)(2); R.C. 2329.28; R.C. 2329.152(D)(2) Thereafter, the court will confirm the sale.

The private selling officer will issue a deed to the purchaser and record the deed. R.C. 2329.152(E)(1)(c) and (d). By placing a bid, the purchaser appoints the private selling officer agent of the purchaser for the purpose of accepting delivery of the deed. R.C. 2329.152(E)(2). The escrow agent will distribute the proceeds of sale in accordance with the court's order of distribution – likely in the order of confirmation.

13. Right of redemption

a. Owner's right of redemption

R.C. §2329.33.

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of 8% per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court of common pleas thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase money paid by him, and the interest from the clerk.

Posting bond in lieu of cash is not an acceptable substitute and does not satisfy statute. *Women's Federal Savings Bank v. Pappadakas* (1988), 38 Ohio St. 3d 143.

Only the mortgagor can be the "debtor" within the meaning of the statute, and no other party can exercise the debtor's right of redemption. *Wayne Savings and Loan Co. v.Young* (1976), 49 Ohio App. 2d 35. See also *In re Foreclosure of Liens for Delinquent Taxes v. Parcels of Land Encumbered with Delinquent tax Liens*, 5th Dist., 2013-Ohio-1400.

The bankruptcy law provisions relating to the debtor's power to cure default and modify the rights of secured creditors is not applicable after a foreclosure sale has been confirmed *Johnson v. First National Bank of Montevideo*, 719 F.2d 270.

b. **Foreclosure judgment creditor's right of redemption**

R.C. §2329.311

If there are no bidders at a sale of residential property with no minimum bid, the judgment creditor and the first lienholder each may redeem the property within 14 days after the sale by paying the costs and taxes to the clerk of courts. If both the judgment creditor and the first lienholder (assuming they are different parties) each seek to redeem the property, the first lienholder prevails. Upon timely payment, the redeeming party is considered the successful purchaser.

c. USA's right of redemption

28 USC 2410(c).

120 days from date of sale for IRS lien. One year from date of sale for other liens. The USA seeking to exercise its right of redemption is only required pay the amount of the foreclosure sale price, not entire amount of debt owed on the mortgage. *Delta Savings and Loan Association v. IRS*, (1988), 847 F.2d 248.

14. Title insurance claims

a. Prior mortgage paid but not satisfied of record

b. Liens against similar names

c. Property not owned by debtor at time mortgage was recorded

d. Breaks in chain of title of deed or breaks in chain of assignments of mortgage

15. Parties with interests in the property, who were not named as parties in the foreclosure

The rights of lienholders who are not made parties to the foreclosure remain unaffected by the sale, the same as if no judicial sale had been made. *Hollinger v. Bates*, (1885), 43 Ohio St. 437, 446; *Society Bank & Trust Co. v. Zigterman,* (1992), 82 Ohio App.3d 124, 126-127. (See the discussion of *lis pendens* in Part 8 and the discussion of mortgages subject to various interests, and leasehold interests in Part 6 for exceptions to this rule).

If a party has a valid interest in the property and was not joined in the foreclosure, the only way to extinguish the interest without agreement or payment is to vacate the confirmation, sale, and decree of foreclosure and file an amended complaint to join the party.

If the interest is *invalid*, one in title may file a quiet title case to extinguish the interest. *Novogroder v. DiPaola*, (1919), 11 Ohio App. 374, 377-378 (Title may be quieted in one who brings an action pursuant to R.C. 5303.01 where a claim of a party to that action is shown to be invalid).

16. Cases that have been resolved between the parties, but the decree of foreclosure was never vacated or the case was never dismissed.

While judgments become dormant after five years (R.C. 2329.07), decrees in equity never become dormant. A decree of foreclosure is a decree in equity. Therefore, a "decree for the sale of specific real property" does not become dormant *Beaumont v. Herrick*, (1873), 24 Ohio St. 445, 456-457; *see also Rankin v. Hannan*, (1881), 37 Ohio St. 113, 117; *Odell v. Firestone*, (App. 1923), 1 Ohio Law Abs. 632; *Smith v. Phillips*, (C.P. 1907), 18 Ohio Dec. 429, 432.

Thus, in order to remove a satisfied but not vacated decree of foreclosure as a cloud on title, one would have to move the court that entered the decree to vacate it – likely based on Civ.R. 60(B)(4) (judgment satisfied, released, or discharged).

In cases where one may suspect that the decree has been satisfied but has no proof, one may move the court to vacate an old decree of foreclosure based on laches. *See Fox v. Reeder*, (1875), 28 Ohio St. 181, 188. To do so, one would have to show that the failure of the party awarded the decree of foreclosure to timely execute upon it prejudiced innocent parties who acquired interest in the property. *See Id.* This method is employed on a routine basis by the Cuyahoga County Treasurer regarding properties with languishing decrees of foreclosure and delinquent taxes.