

## Invalidation of a Mortgage Requires Mortgagor to Assert and Establish Fraud

*Lasalle Bank N.A. v. Zapata*, 184 Ohio App.3d 571, 2009-Ohio-3200



By: **Todd M. Jackett**

On June 30, 2009, the Sixth District Court of Appeals decided the case of *Lasalle Bank N.A. v. Zapata*, 184 Ohio App.3d 571, 2009-Ohio-3200. In *Zapata*, the successor mortgagee filed an action against the mortgagor as a result of the mortgagor's default on a promissory note and sought to foreclose on the secured property.

The mortgagor filed a motion for summary judgment arguing that the mortgage was not enforceable because it failed to meet the requirements of R.C. 5301.01(A). R.C. 5301.01(A) requires a mortgage to be signed by the mortgagor with the execution properly notarized. The trial court granted the mortgagor's motion for summary judgment on the foreclosure based upon the mortgagor's affidavit attesting to the fact that she did not execute the mortgage in the presence of the individual who notarized the mortgage. The trial court, therefore, concluded that the mortgage was unenforceable as it did not comply with the requirements of R.C. 5301.01(A).

The mortgagee subsequently filed a motion for reconsideration asserting that the mortgagor's self-serving affidavit claiming she did not execute the mortgage in the presence of the notary was insufficient to sustain the mortgagor's motion for summary judgment. The mortgagee also submitted an affidavit from the notary disputing the mortgagor's contention and, thus, argued an issue of fact existed precluded the granting of summary judgment. Finally, the mortgagee argued that the mortgagor could not claim fraud as she never denied executing the mortgage. The trial court denied the mortgagee's motion for reconsideration.

On appeal, the appellate court overturned the trial court's decision granting summary judgment in favor of the mortgagor. The court acknowledged that a defectively executed mortgage is valid between the parties to the mortgage as long as the execution was not the result of fraud. Thus, the court held that "a debtor's allegation that he [or she] never signed a mortgage and that the certificate of acknowledgement is fraudulent is a sufficient defense to an action to enforce [a] mortgage."

The court, however, further held that fraud is an affirmative defense that "must be asserted in the defendant's answer with particularity." In reviewing the record, the court found that the mortgagor in *Zapata* had not asserted the defense of fraud in her answer. The court emphasized that the mortgagor had not even claimed in any briefing filed in the trial court that she had been defrauded. In fact, the court noted that the mortgagor does not claim that she did not intend to sign the mortgage but only that her signature was not properly notarized.

Based upon these facts, the court concluded that the mortgagor "should not be permitted to renege on her agreement." The court, therefore, held that "the mortgagee assignee, [who] is the equivalent of an original party to the mortgage \*\*\* may seek to enforce the mortgage even though it was defectively executed." The court further held that in order for a mortgagor to avoid enforcement of a mortgage, the mortgagor must establish fraud with respect to the execution of the document.

The decision in *Zapata* creates a bright line rule for courts in reviewing whether the enforcement of a mortgage should be avoided. Under this rule, a mortgagor cannot avoid the enforcement of a mortgage against the mortgagee or any subsequent mortgagee assignee simply by claiming that the mortgage was not properly executed as required by R.C. 5301.01(A). Rather, to avoid enforcement, the mortgagor must assert fraud as a defense and must establish the existence of fraud in the execution of the mortgage.

In other words, a mere technical violation of the execution requirements of R.C. 5301.01(A) is insufficient to avoid enforcement of the mortgage. Instead, a mortgagor bears the greater burden of demonstrating actual fraud in the execution of the mortgage.

If you would like a copy of the full opinion or if you have any other questions regarding secured transactions or issues pertaining to Financial Institution and Creditor Rights and Liabilities, feel free to contact one of our Financial Institution and Creditor Rights and Liabilities Practice Group Attorneys.

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