IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM TODD DROWN,

Appellant,

Case No. 2:10-cv-00272
JUDGE GREGORY L. FROST

v.

WELLS FARGO BANK, NA,

Appellee.

WILLIAM TODD DROWN,

Appellant,

Case No. 2:10-cv-00307
JUDGE GREGORY L. FROST

v.

COLONY MORTGAGE CORP., et al.,

Appellees.

WILLIAM TODD DROWN,

Appellant,

Case No. 2:10-cv-00309
JUDGE GREGORY L. FROST

v.

AMERICA'S WHOLESALE LENDER, et al.,

Appellees.

WILLIAM TODD DROWN,

Appellant,

Case No. 2:10-cv-00310
JUDGE GREGORY L. FROST

v.

COUNTRYWIDE HOME LOANS, INC., et al.,

Appellees.

CLYDE HARDESTY,

Appellant,

Case No. 2:10-cv-00313
JUDGE GREGORY L. FROST

v.

OPTION ONE MORTGAGE CORPORATION, et al.,

Appellees.

CLYDE HARDESTY,

Appellant,

Case No. 2:10-cv-00315
JUDGE GREGORY L. FROST

v.

CHARTER ONE BANK, et al.,

Appellees.

WILLIAM TODD DROWN,

Appellant, **Case No. 2:10-cv-00316**
JUDGE GREGORY L. FROST

v.

AURORA LOAN SERVICES, LLC, et al.,

Appellees.

CLYDE HARDESTY,

Appellant, **Case No. 2:10-cv-00324**
JUDGE GREGORY L. FROST

v.

SMALL BUSINESS ADMINISTRATION,

Appellee.

WILLIAM TODD DROWN,

Appellant, **Case No. 2:10-cv-00325**
JUDGE GREGORY L. FROST

v.

WELLS FARGO BANK, NA, et al.,

Appellees.

OPINION AND ORDER

This matter is before the Court for consideration of the following filings:[1]

(1) a motion to certify questions (Doc. # 23) filed by Appellants, William Todd Drown and Clyde Hardesty;

[1] For ease of reference, the Court shall refer only to the docket numbers of the filings in Case No. 2:10-cv-00272. This Opinion and Order applies to the corresponding filings in each of the consolidated cases.

(2) a memorandum in opposition (Doc. # 28) filed by Appellees Aurora Loan Services, Inc., Mortgage Electronic Registration Systems, Inc., CitiMortgage, Inc., Option One Mortgage Corporation, Charter One Bank, and Wells Fargo Bank N.A.;

(3) a memorandum in opposition (Doc. # 29) filed by Appellees America's Wholesale Lender, Mortgage Electronic Registration Systems, Inc., Countrywide Home Loans, Inc., and United States of America, Small Business Administration;

(4) a memorandum in opposition (Doc. #30) filed by Appellees America's Wholesale Lender, Mortgage Electronic Registration Systems, Inc., and Wells Fargo Bank, N.A.; and

(5) a reply memorandum (Doc. # 31) filed by Appellants.

For the reasons that follow, the Court **DENIES** Appellants' motion to certify questions. (Doc. # 23.)

I. Background

Appellants, Chapter 7 trustees William Todd Drown and Clyde Hardesty, initiated adversary proceedings in the United States Bankruptcy Court for the Southern District of Ohio to avoid Appellees' mortgages pursuant to 11 U.S.C. § 554(a)(3). The Bankruptcy Court consolidated the nine above-captioned cases due to a shared question of law: "whether a trustee may avoid a mortgage on real property based solely on a defect in the execution of the deed by which the property was conveyed to a debtor." *Drown v. Wells Fargo Bank, N.A.* (*In re Scott*), 424 B.R. 315, 320 (Bankr. S.D. Ohio 2010). On March 2, 2010, the Bankruptcy Court granted summary judgment for Appellees, holding that "the Trustees had constructive notice of the Mortgagees' interests in the various parcels of real property. Accordingly, the Trustees' status as hypothetical purchasers from the Debtors does not provide a basis for avoidance of the

mortgages." *Id.* at 340. Appellants subsequently appealed.

On May 25, 2010, this Court issued an Order granting a motion to consolidate the above-captioned nine cases and to designate *Drown v. Wells Fargo Bank, N.A.*, Case No. 2:10-cv-00272, as the lead case. (Doc. # 14.) Appellants thereafter moved to certify two questions of state law to the Supreme Court of Ohio. The parties have completed briefing on Appellants' motion for certification, which is ripe for disposition. (Doc. # 23.)

II. Discussion

A. Standard Involved

Pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, a federal court may certify questions of law to the Supreme Court of Ohio when "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of [the] Supreme Court." R. Prac. S. Ct. Ohio XVIII § 1; *see Super Sulky Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 744 (6th Cir. 1999). It is well settled that "mere difficulty in ascertaining local law is no excuse" for a district court to certify a question. *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974). Moreover, when a question is genuinely unsettled under Ohio law and is properly certifiable under Rule XVIII, certification by the district court is not mandatory. *See id.* at 390-91 ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory."). Rather, the decision to certify rests within the sound discretion of the district court. *Id.* at 391.

Federal courts have certified questions of state law in cases where the interests of judicial and economic efficiency are best served through certification and in cases involving conflicting federal interpretations as to an important state law question that would otherwise

evade state court review. *See Arizonans for Official English v. Ariz.*, 520 U.S. 43, 76 (1997) (certification encouraged when leading to judicial and economic efficiency); *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994) (certification of question where conflicting interpretations existed between federal courts in interpreting a state law). Although certification to the Supreme Court of Ohio is more economically efficient for unsettled questions in some cases, it is clear that "certification . . . entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." *Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring) (citing *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 226-27 (1960)). Certification is therefore inappropriate when "a district court . . . believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so." *Id.* at 395.

B. Analysis

Appellants' motion sets forth the following two questions for potential certification:

> (1) Is the equitable interest that a grantee obtains from a grantor under a defectively executed deed, as identified in *Basil v.Vincello*, 50 Ohio St.3d 185, 189, 553 N.E.2d 602, 606 (1990), a mortgageable interest in real property?
>
> (2) If the equitable interest obtained by a grantee under a defectively executed deed is a mortgageable interest in real property, does a properly executed and recorded mortgage given by the grantee to a mortgagee subsequent to the defective deed fall within the chain of title so as to provide constructive notice to a bona fide purchaser?

(Doc. # 23, at 1-2.)

To determine whether certification of either or both questions is warranted, this Court must consider whether these questions involve "Ohio law that may be determinative of the proceeding." R. Prac. S. Ct. Ohio XVIII § 1. At issue in this case are the powers of the

bankruptcy trustee acting under 11 U.S.C. § 554(a). Section 544(a)(3), commonly referred to as the strong-arm clause,

> permits a bankruptcy trustee to avoid any unrecorded or undisclosed interests in property if a bona fide purchaser would have prevailed over that interest. In order to accomplish this goal, § 544(a)(3) confers upon a bankruptcy trustee the rights and powers of a bona fide purchaser of real property from the debtor if, at the time the bankruptcy is commenced, a hypothetical buyer could have obtained bona fide purchaser status.

Hunter v. Bank of N.Y. (*In re Anderson*), 266 B.R. 128, 132 (Bankr. N.D. Ohio 2001) (citing *Owen-Ames-Kimball Co. v. Mich. Lithographing Co.* (*In re Mich. Lithographing Co.*), 997 F.2d 1158, 1159 (6th Cir. 1993)). *See also Zaptocky v. Chase Manhattan Bank* (*In re Zaptocky*), 250 F.3d 1020, 1024 (6th Cir. 2001); *Craig v. Seymour* (*In re Crabtree*), 871 F.2d 36, 37 (6th Cir. 1989). Notably, "the extent to which a trustee's rights as a bona fide purchaser of real property will defeat a competing interest in the same property is measured by the substantive law of the state governing the property in question." *Hunter*, 266 B.R. at 132 (citing *Owen-Ames-Kimball Co.*, 997 F.2d at 1159). Because the appeals here involve property located in Ohio, the parties are correct that Ohio law applies. *Id.* (citing *Watson v. Kenlick Coal Co., Inc.*, 498 F.2d 1183, 1190 (6th Cir. 1974)).

Having concluded that Ohio law applies, the Court must next determine whether the proposed certified questions involving that state law "may be determinative of the proceeding." R. Prac. S. Ct. Ohio XVIII § 1. The issue of whether an equitable interest is mortgageable is determinative in these nine cases. The outcome of this question informs whether Appellees hold secured interests in the respective properties, or conversely, lesser unsecured interests that are subject to avoidance by Appellants exercising their strong-arm powers under § 554(a). Additionally, the second question posed by Appellants–"[i]f the equitable interest obtained by a

grantee under a defectively executed deed is a mortgageable interest in real property, does a properly executed and recorded mortgage given by the grantee to a mortgagee subsequent to the defective deed fall within the chain of title so as to provide constructive notice to a bona fide purchaser"–may also be determinative. (Doc. # 23, at 2.) This is because "Section 5301.25(A) [of the Ohio Revised Code] allows a bona fide purchaser to avoid a mortgage unless he has actual or constructive notice." *Degirolamo v. Suntrust Mortg., Inc.* (*In re Brode*), No. 09-64821, 2010 WL 3489059, at *3 (Bankr. N.D. Ohio Sept. 3, 2010) (citing *Zaptocky*, 250 F.3d at 1024). Section 544(a)(3), however, immunizes the trustee to actual notice. *Id.* (citing *Treinish v. Norwest Bank Minn.* (*In re Periandri*), 266 B.R. 651, 656 (B.A.P. 6th Cir. 2001)). Thus, the mortgages recorded by Appellees must be sufficient to provide Appellants with constructive notice to preclude Appellants from avoiding said mortgages.

Because the questions posed by Appellants involve Ohio law that may be determinative of these proceedings, the Court will now consider in turn whether these questions present issues "for which there is no controlling precedent in the decisions of [the Supreme Court of Ohio]." R. Prac. S. Ct. Ohio XVIII § 1; *see Super Sulky Inc.*, 174 F.3d at 744. Appellants concede that, pursuant to the Supreme Court of Ohio's holding in *Basil v. Vincello*, 50 Ohio St. 3d 185, 189, 553 N.E.2d 602, 606 (1990), a grantee obtains an equitable interest under a defective deed. (Doc. # 23, at 9.) Appellants contend, however, that such an equitable interest gives rise only to one of two rights–either a breach of contract action or a vendee's lien–and, as such, a grantee may not mortgage the equitable interest. After reviewing Ohio case law, this Court finds Appellants' conclusion unpersuasive. This Court does not read the non-restrictive *Basil* to confine the equitable interests as Appellants contend.

It is well settled that "[w]here a grantor has given consideration but legal title was not conveyed because of defects in execution, the grantee obtains an equitable interest in the real property." *Degirolamo*, 2010 WL 3489059, at *2; *see also Philly v. Sanders*, 11 Ohio St. 490, 492-93 (1860). Where legal title is not conveyed because of a defective deed, the Supreme Court of Ohio has held the type of equitable interest held by the grantee as equitable title. *Philly*, 11 Ohio at 492-93. Equitable title consists of "the legal possessory title, or right of possession *in presenti*; and the further equitable title, or right of the fee simple title, *in futuro*[.]" *Id.* at 493. To determine whether equitable title is sufficient to support a mortgage, the Court looks to the Supreme Court of Ohio's decision in *Philly v. Sanders*. *See also Buckingham's Lessee v. Hanna*, 2 Ohio St. 551 (1853).

In *Philly*, the Supreme Court of Ohio held that an equitable title is sufficient to support a mortgage "between the parties, convey[ing] to [the mortgagee] the legal possessory right of the grantor and his equitable interest in the lands." *Philly*, 11 Ohio St. 490, paragraph one of the syllabus. In accordance with *Philly*, courts have consistently held that equitable interests are mortgageable under Ohio law. *See In re Willingham*, 139 B.R. 670, 673 (Bankr. N.D. Ohio 1991) (holding that the owner of an equitable interest in property in the form of a land contract can grant a mortgage on that interest under Ohio law); *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N.E. 876, paragraph three of the syllabus (1898) ("[a] mortgage upon an estate, or any interest therein, legal or *equitable*, to be valid as against third persons, must be signed, acknowledged, witnessed, and recorded" (emphasis added)); *Albright v. Meredith*, 58 Ohio St. 194, 50 N.E. 719, paragraph one of the syllabus (1898) ("[i]n order to support a mortgage, it is not necessary that the mortgagor shall be the absolute owner of the property mortgaged . . . [i]t is not necessary that

the mortgagor shall have the entire title [because a] limited or special interest in property is sufficient to support a mortgage of it"). Accordingly, this Court **DENIES** certification of Appellants' first question as to whether an equitable interest can be mortgaged.

This leaves for consideration the second of Appellants' questions for certification:

> If the equitable interest obtained by a grantee under a defectively executed deed is a mortgageable interest in real property, does a properly executed and recorded mortgage given by the grantee to a mortgagee subsequent to the defective deed fall within the chain of title so as to provide constructive notice to a bona fide purchaser?

(Doc. # 23, at 2.) Explicit within Appellants' second question is that the mortgages involved in the question have been properly executed and recorded. Accordingly, the Court assumes without conclusively deciding that, for certification analysis, the mortgages have indeed been properly executed and recorded.

Portions of Appellants' arguments are arguably inconsistent with at least part of the premise underlying their proposed second question for certification. After classifying the mortgages as *properly executed*, Appellants argue that "[e]ven if a grantee under a *defectively executed mortgage* could mortgage the equitable interest he obtained, the mortgage does not provide constructive notice to a bona fide purchaser." (Doc. #23, at 12 (emphasis added).) Appellants also predicate their second question on the assumption that Appellees' mortgages were *properly recorded*, yet argue that

> [t]he defectively executed deeds to the debtors/grantees *were not entitled to be recorded* and since the mortgages executed by the debtors/grantees fell after the defective deed in the chain of title, the mortgages must be considered to be outside the chain of title and thus insufficient to provide constructive notice to Appellants, as hypothetical bona fide purchasers.

(Doc. # 23, at 15.) Such troubling inconsistencies suggest that perhaps the certified questions

may not even match some of the core issues that Appellants will raise in their merits briefing.

In any event, while acting under § 544(a)(3), Appellants are not permitted to " 'avoid . . . any interest of which a trustee would have had constructive notice under state law.' " *Argent Mortg. Co., LLC v. Drown* (*In re Bunn*), No. 2:07-cv-1206, 2008 WL 4449551, *3 (S.D. Ohio Sept. 30, 2008) (quoting *Covey v. Citizens Sav. Bank* (*In re Pak Builders*), 284 B.R. 663, 677 (Bankr. C.D. Ill. 2002)). Addressing constructive notice, the Sixth Circuit has explained that

> Ohio law deems any purchaser–including bankruptcy law's hypothetical [bona fide purchaser]–to have constructive notice of all instruments executed by the current owner of the land that are "proper[ly] record[ed]." The law assumes that any purchaser of . . . residential property has searched the relevant title indexes and examined the deeds in the chain of title.

Argent Mortgage Co., LLC v. Drown (*In re Bunn*), 578 F.3d 487, 489 (6th Cir. 2009) (citation omitted). It follows that "in order for a purchaser of real property to be charged with constructive notice of an encumbrance contained in a prior recorded instrument, the prior instrument must be recorded in the purchaser's chain of title." *Spring Lakes, Ltd. v. O.F.M. Co.*, 12 Ohio St. 3d 333, 336, 467 N.E.2d 537, 540 (1984). Additionally, the Sixth Circuit has held that in Ohio, "[o]nly properly executed mortgages take priority over a bona fide purchaser." *Kovacs v. First Union Home Equity Bank* (*In re Hoffman*), 408 F.3d 290, 293 (6th Cir. 2005); *cf. Zaptocky*, 250 F.3d at 1028 ("an improperly executed mortgage does not put a subsequent bona fide purchaser on constructive notice").

Constructive notice will not attach if: (1) the mortgages have not been recorded; (2) the mortgages have been recorded but were defectively executed; (3) the mortgages have been recorded, but were not entitled to be recorded; or (4) the mortgages were improperly recorded. *See Argent Mortg. Co.*, 578 F.3d at 489 (" 'a defectively executed mortgage is not entitled to

record, and even if it is recorded, the defective mortgage is treated as though it has not been recorded' " (quoting *Mortg. Elec. Registration Sys. v. Odita*, 159 Ohio App. 3d 1, 5, 822 N.E.2d 821, 825 (2004))); *Logan v. Universal 1 Credit Union, Inc.* (*In re Bozman*), No. 2:07-cv-414, 2007 WL 4246279, at *4 (S.D. Ohio Nov. 28, 2007) ("The fact that the defective mortgage was recorded does not provide [the trustee] with constructive knowledge"); *Kovacs*, 408 F.3d at 293; *Zaptocky*, 250 F.3d at 1028 ("an improperly executed mortgage does not put a subsequent bona fide purchaser on constructive notice").

A term sometimes used as a type of notice is inquiry notice, which is perhaps best understood for present purposes as a form of, or a secondary means of obtaining, constructive notice. *See Stern v. Cont'l Assurance Co.* (*In re Ryan*), 851 F.2d 502, 507 (1st Cir. 1988) (describing inquiry notice as a form of constructive notice (citing 4 *American Law of Property* § 17.11, at 565)). Inquiry notice arises when a purchaser has knowledge of facts that would lead a prudent person to suspect that another person might have an interest in a property and to conduct a further investigation into the facts. *See Argent Mortg. Co.*, 2008 WL 4449551, at * 3. As another judicial officer in this District has accurately stated, " '[u]nder Ohio law, a duty to inquire will arise after notice of facts which would put [a] person of ordinary prudence on inquiry. This "inquiry notice" can [a]ffect the Trustee's § 544(a)(3) avoidance powers.' " *Id.* (quoting *Costell v. Costell* (*In re Costell*), 75 B.R. 348, 353 (Bankr. N.D. Ohio 1987) (duty arises when there is an "irregularity" or "inconsistency" that would cause purchaser of ordinary prudence to make an inquiry)). *See also Covey*, 284 B.R. at 678 (duty of inquiry arises when "there is an error apparent on the face of the instrument and of such a character to lead a purchaser of ordinary prudence to make inquiry"). In situations where mortgages are properly

recorded but the chain of title has been broken, a bona fide purchaser is charged with inquiry notice where sufficient information is available to indicate the existence of an encumbrance on the property. *Argent Morg. Co.*, 578 F.3d at 488-89 (Sixth Circuit affirming district court decision made on the basis that a bona fide purchaser was placed on inquiry notice where "[a] person of ordinary prudence would find that the . . . mortgage encumbered a residential lot and would conclude that the mortgage likely encumbered the entire lot."). *See also Drown v. Davis* (*In re Farley*), 387 B.R. 751, 756 (Bankr. S.D. Ohio 2008) (finding mortgages properly recorded and containing sufficient information gave rise to inquiry notice). Operating under the premise that the mortgages in these cases were properly executed and recorded, Appellants would be charged with constructive notice. Given the foregoing, this Court also **DENIES** certification of Appellants' second question.

In summary, the Court concludes that, in light of the precedent discussed above, existing case law is sufficient to "resolve [the] issue of state law with [the] available . . . materials already on hand." *Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring). The Court notes that although the discussion set forth herein targets apparently determinative core issues involved in these appeals, this discussion is ultimately dispositive only of the certification issue. The parties remain free to present argument in their merit briefs contrary to today's analysis, in support of that analysis, or calling for modification of this analysis.

III. Conclusion

For the foregoing reasons, the Court **DENIES** Appellants' Motion to Certify Questions of State Law to the Supreme Court of Ohio. (Doc. # 23.) The Court also **ORDERS** that the parties participate in a telephone status conference on December 10, 2010, at 12:30 p.m., at

which time the Court shall set a merits briefing schedule. Appellant Drown shall coordinate and arrange the joint call to chambers.

IT IS SO ORDERED.

/s/Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE