

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

JOSEPH CORBETT,	:	
Plaintiff,		
v.	:	Case No. 3:11-cv-339
BENEFICIAL OHIO, INC. d/b/a BENEFICIAL MORTGAGE CO. OF OHIO, <i>et al.</i> ,	:	JUDGE WALTER H. RICE
Defendants.		

CERTIFICATION OF QUESTIONS OF STATE LAW TO OHIO SUPREME
COURT

Pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio, the Court certifies the following questions of state law to the Supreme Court of Ohio: (1) Does Ohio recognize a freestanding claim of “wrongful attempted foreclosure”; and (2) if so, what are the elements of such a claim, and what damages are available?

I. Factual Background and Procedural History

On April 21, 2001, Joseph Corbett borrowed \$80,500 from Key Bank, and executed a mortgage granting Key Bank a security interest in a six-unit apartment building located at 789 East Market Street in Xenia, Ohio. Key Bank assigned the security interest to Champion Mortgage Company, Inc., which later assigned it to

Beneficial Ohio, Inc., d/b/a Beneficial Mortgage Co. of Ohio ("Beneficial Ohio"), a subsidiary of HSBC Holdings PLC ("HSBC").

Thereafter, Corbett defaulted on the loan. On August 27, 2007, Beneficial Ohio filed a complaint in foreclosure in the Greene County Common Pleas Court, and asked the court to reform the April 21, 2001, mortgage on the grounds of "scrivener's error" and "mutual mistake of fact." It maintained that the security interest should be attached not to the six-unit apartment building located at 789 East Market Street, but rather to Corbett's home, which was located at 725 East Main Street in Xenia, Ohio. On September 24, 2007, HSBC executed a "Corrective Assignment of Mortgage," which was recorded in the Greene County Recorder's Office as a lien against Corbett's home at 725 East Main Street.

Beneficial Ohio then moved for summary judgment in the foreclosure action. In support of that motion, it attached an affidavit of Becky North, an attorney-in-fact for HSBC. She stated that Corbett's account had been delinquent since December of 2006, that the mortgage contained a scrivener's error, and that the security interest was intended to attach to the 725 East Main Street property rather than the 789 East Market Street property. The Greene County Common Pleas Court granted Beneficial Ohio's motion for summary judgment, entered a decree in foreclosure, and reformed the mortgage as requested. The Corrective Assignment of Mortgage was recorded in the Greene County Recorder's Office.

A sheriff's sale of Corbett's 725 East Main Street residence was scheduled for December 11, 2008, but was stayed after Corbett filed a Chapter 7 bankruptcy

petition on December 10, 2008. On December 23, 2008, Beneficial Ohio filed a motion for relief from the stay. In his response brief, Corbett acknowledged that he had granted a security interest in the 789 East Market Street property, but denied that Beneficial Ohio had a valid lien against the property located at 725 East Main Street. Beneficial Ohio subsequently withdrew its motion for relief from the stay.

Corbett obtained a bankruptcy discharge in May of 2009. In October of 2010, Beneficial Ohio reactivated proceedings and, in December of 2010, filed a Notice of Sheriff's Sale. That sale was canceled after Corbett filed a motion to vacate the judgment. In February of 2011, while that motion was still pending, Corbett asked Beneficial Ohio to produce documents proving its entitlement to a security interest in 725 East Main Street. He received no response.

On March 9, 2011, Beneficial Ohio, apparently finally acknowledging the error, filed a motion to set aside the judgment and dismiss the foreclosure complaint. The court issued an entry of dismissal on March 11, 2011, setting aside the judgment and decree of foreclosure and the order of sale.

Corbett filed suit on August 25, 2011, alleging wrongful foreclosure, numerous counts of fraud, theft and attempted theft, and violations of Ohio's Consumer Sales Practices Act and the federal Fair Debt Collection Practices Act. He sought compensatory damages, punitive damages, attorneys' fees and costs, along with an order canceling the Corrective Assignment of Mortgage.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants filed motions to dismiss for failure to state a claim upon which relief can be granted. On March 14, 2012, the Court issued a Decision and Entry dismissing all claims except Corbett's claim of wrongful foreclosure. The Court, relying on *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747, 805 N.E.2d 173, at ¶ 18, rejected Beneficial Ohio's argument that the wrongful foreclosure claim was a compulsory counterclaim that had to be asserted, if at all, in the state foreclosure action, given that, since the state court judgment in the foreclosure action was vacated, it had no preclusive effect.

Beneficial Financial I, Inc., successor by merger to Beneficial Ohio, Inc., then filed a motion for judgment on the pleadings, arguing that the wrongful foreclosure claim should be dismissed because, according to *Hammond v. Citibank, N.A.*, No. 2:10-cv-1071, 2011 WL 4484416 (S.D. Ohio Sept. 27, 2011), Ohio does not recognize any such claim as a freestanding cause of action. In the alternative, Beneficial argues that, even if Ohio did recognize such a cause of action, the claim would still fail because the judgment was vacated, the property at issue was never foreclosed, and Corbett never lost possession of his home. Beneficial contends that, under these circumstances, Corbett could not possibly recover for wrongful foreclosure. Beneficial further argues that the vast majority of states do not recognize a cause of action for wrongful *attempted* foreclosure.

In response, Corbett argues that *Hammond* is factually distinguishable because, in this case, Beneficial had no valid mortgage on the property and had no

authority to foreclose against his home. He maintains that he was wronged and should have *some* remedy available to him, whether that cause of action is construed as one of wrongful foreclosure, wrongful attempted foreclosure, malicious prosecution, abuse of process, or slander of title. He alleges that even though he did not lose possession of his home, he has suffered severe emotional distress, humiliation and embarrassment, and his home has lost value. The Corrective Assignment of Mortgage continues to cloud the title to Corbett's home. He further alleges that he has suffered other unspecified financial damages.

Corbett acknowledges that there appears to be no Ohio case law addressing the viability of claims of wrongful attempted foreclosure, but urges the Court to recognize such a claim and to find that the factual allegations in his Complaint are adequate to withstand the motion for judgment on the pleadings. In the alternative, he seeks leave to amend his complaint to assert claims of malicious prosecution, abuse of process and slander of title. Beneficial maintains that these proposed amendments would be futile because, for various reasons, the factual allegations are insufficient to support any of those new claims.

II. Reasons for Certification

Despite being labeled as a claim for "wrongful foreclosure," Corbett's one remaining count is clearly instead a claim for "wrongful attempted foreclosure." It is undisputed that the judgment of foreclosure was vacated before the sale of the

property took place. Corbett's case therefore hinges on the question of whether a claim of wrongful attempted foreclosure is cognizable under Ohio law.

As the district court noted in *Hammond*, wrongful foreclosure is typically raised as an affirmative defense in the context of a foreclosure action. 2011 WL 4484416, at *13. In some situations, a claim of wrongful foreclosure or wrongful attempted foreclosure may also be deemed a compulsory counterclaim.

Nevertheless, situations may also arise where it is appropriate to recognize a freestanding claim of wrongful foreclosure or wrongful attempted foreclosure. For example, the facts giving rise to the claim may not be known at the time the foreclosure action is pending. Or, in this case, even assuming that Corbett's claim of wrongful attempted foreclosure was a compulsory counterclaim, his failure to assert it in the earlier foreclosure action has no preclusive effect since the state court judgment was vacated. See *Baron*, 2004-Ohio-747, at ¶ 18. The question then becomes whether he can pursue a freestanding claim of wrongful attempted foreclosure in a separate action.

Several other states recognize freestanding claims of wrongful foreclosure and, despite the statement in *Hammond*, Ohio's stance on this issue appears to be somewhat unsettled. See 60 Ohio Jur.3d Mortgages § 297 ("In general, an action at law by the mortgagor against the mortgagee may be maintained to recover damages for a wrongful foreclosure – that is, a foreclosure without right, which would ordinarily be invalid irrespective of the manner in which it is executed."); *First Fed. Sav. & Loan Ass'n of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d

135 (Ohio Ct. App. 1983) (adjudicating counterclaim for wrongful foreclosure on the merits).

The Court has been unable to find any Ohio case law addressing the viability of a claim of wrongful *attempted* foreclosure. Having examined the motion for judgment on the pleadings and the parties' briefs, the Court finds that 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 of Ohio. See S.Ct.Prac.R. 9.01(A). Accordingly, the Court certifies the following issues to the Supreme Court of Ohio.

III. Questions Certified

- A. *Does Ohio recognize a freestanding cause of action for "wrongful attempted foreclosure?"***
- B. *If so, what are the elements of such a claim, and what damages are available?***

IV. Designation of Moving Party

The Court designates Defendant Beneficial Financial I, Inc., successor by merger to Beneficial Ohio, Inc., as the moving party.

V. Attorneys' Contact Information

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Date: February 1, 2013



WALTER H. RICE
UNITED STATES DISTRICT JUDGE