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IN COMMON PLEAS COURT
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DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

**IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO**

STATE OF OHIO, ex rel. : CASE NO. 11M001087
JAMES FLAIZ, et al., :
Plaintiff(s) : JUDGE FORREST W. BURT
-vs- : **DECISION**
MERSCORP, INC., et al., :
Defendant(s) :

This matter came on for consideration upon Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint.

Plaintiffs have filed a Class Action Complaint on behalf of themselves and all other Ohio counties. Plaintiffs contend that this action arises out of the Defendants' failure to prepare and record all mortgages and mortgage assignments at the County Recorders offices in which the real property subject of the mortgages and assignments is situated and that Defendants have failed to pay the attendant recording fees as required by Ohio law.

Count One

Pursuant to R.C. 309.12, County Prosecutors have statutory authority to initiate civil actions on behalf of their counties to recover money that is withheld or should have been paid to the county. Plaintiffs allege that Defendants have failed to record mortgage assignments as required by law and that failure has resulted in a loss of fees to the counties in which such mortgage assignments should have been recorded.

Count Two

Plaintiffs ask this Court to enter a declaratory judgment that R.C. 5301.25 and R.C. 5301.32 mandate that all mortgages and mortgage assignments shall be recorded with the County Recorder of the county in which the subject real property is located. Plaintiffs further ask this Court to enjoin Defendants from assigning mortgages without recording them and ordering Defendants to record all mortgage assignments with the appropriate County Recorder and to pay the requisite fee to that County Recorder.

Count Three

Because Defendants have recorded initial mortgages on real property and then failed to record assignments of those mortgages, it is Plaintiffs' position that Defendants have taken advantage of the benefit of lien priority conferred by R.C. 5301.23 while refusing to comply with the statutory mandates of R.C. 5301.25 and R.C. 5301.32. Plaintiffs argue that Defendants have been unjustly enriched by their conduct; consequently, Defendants must be ordered to disgorge themselves of all profits, benefits, and other compensation Defendants have obtained by their wrongful conduct.

Count Four

The failure or refusal of the Defendants to record mortgage assignments with county recorders was the result of a scheme among the Defendants to avoid Ohio's laws requiring recording of mortgage assignments and paying fees for that recordation. These actions constitute a civil conspiracy to deny Ohio's counties the recording fees.

Count Five

The Defendants' actions interfere with rights common to the public, including the right to have true, accurate, and complete real property records. Such interference constitutes a public nuisance.

Defendants ask this Court to dismiss Plaintiffs' Complaint on the following grounds:

1. Ohio's General Assembly has not created a private right of action to enforce statutory provisions concerning mortgage assignments
2. Plaintiffs have not suffered any compensable injuries.
3. There is no obligation to record mortgages or mortgage assignments under Ohio law.
4. The Plaintiffs' Complaint fails to allege facts that state cognizable claims for relief.

Statement of Facts

Plaintiffs' Second Amended Complaint provides an excellent recitation of the facts upon which Plaintiff base their claims. Very generally stated, the relevant facts are:

1. Defendant Mortgage Electronic Registration System, Inc., (MERS) is a private corporation used by the other named Defendants as a mechanism and entity to create public, recorded priority interests in secured land transactions and to transfer or assign mortgages.
2. MERS registers and tracks mortgage ownership among its member financial institutions.
3. MERS is often, but not always, named as the mortgagee on a mortgage deed or security instrument filed with a County Recorder.
4. While many of the mortgage assignments among Defendants are registered with MERS, some mortgage assignments are neither registered with MERS nor recorded with any County Recorder.
5. MERS does not originate, assign, service or invest in mortgages.
6. The financial institutions that are members of MERS certify their employees as MERS assistant secretaries or vice presidents. These assigned employees sign mortgage assignments on behalf of MERS.
7. Defendants utilize MERS to assign and re-assign mortgages among one another for the purpose of "bundling" mortgages into securities to be sold on the securities market. The assignments of those mortgages are not recorded with a County Recorder.

Decision

In ruling upon Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, this Court must consider only factual allegations within the complaint, attached materials, and reasonable inferences drawn from the factual allegations, all of which are accepted as true. *Howell v. Rintala*, (11th Dist.) 2012 Ohio 1464; Civ. R. 12(B)(6), 10(C).

R.C. 2301.25(A) states: All deeds, land contracts referred to in division (A) (21) 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).

R.C. 2301.32 states: A mortgage may be assigned or partially released by a separate instrument of assignment or partial release, acknowledged as provided by section 5301.01 of the Revised Code. The separate instrument of assignment or partial release **shall be recorded in the county recorder's official records**. The county recorder shall be entitled to charge the fee for that recording as provided by section 317.32 of the Revised Code for recording deeds. The signature of a person on the assignment or partial release may be a facsimile of that person's signature. A facsimile of a signature on an assignment or partial release is equivalent to and constitutes the written signature of the person for all requirements regarding mortgage assignments or partial releases. (Emphasis added).

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all assignments and partial releases of mortgages be by separate instruments. The original instrument bearing the proper endorsement may be used as the separate instrument.

An assignment of a mortgage shall contain the then current mailing address of the assignee.

Despite the use of the word "shall" in the above-referenced statutes, it is this Court's determination that the Ohio General Assembly has not mandated that all mortgages and assignments of mortgages must be recorded with the County Recorder of the county in which the subject real property is situated. This Court agrees with the Defendants' contention that the recording statutes provide a mechanism or method by which property owners, mortgagors and mortgagees, and assignors and assignees may record deeds, mortgages, and assignments to establish public record of title and protect priority of lien interests, but that the recording of deeds, mortgages, and mortgage assignments is not mandatory.

If the General Assembly intended to impose a mandatory duty upon persons or entities to record mortgages and mortgage assignments, the General Assembly would also have to state: 1) who is required to record the mortgage or mortgage assignment; and 2) when was the mortgage or mortgage assignment to be recorded. R.C. 5301.25 and R.C. 5301.32 provide neither. Neither of the statutes imposes a duty to record on the mortgagor or the mortgagee or upon the assignor the assignee. Neither of the statutes state a time period in which mortgages or mortgage assignments are to be recorded.

Mortgagees and assignees have very strong reasons to record mortgages and mortgage assignments; the recording of those instruments provides notice and establishes at least the presumption of priority. It would seem that only a foolhardy mortgage assignee would choose to not record a mortgage assignment with a County Recorder and run the risk of another entity filing a subsequent mortgage assignment and claiming priority. And yet, that is exactly what the Defendants

have chosen to do with the MERS system. Without giving too much credit to financial institutions that have been substantially responsible for the recent recession, those financial institutions have chosen the benefits of the MERS system over the protections of the public recording statutes. The laws of the State of Ohio as presently constituted permit those financial institutions to make that choice.

If the General Assembly intended to impose a mandatory duty upon persons or entities to record mortgages and mortgage assignments, it would have stated a penalty for failing to do so. R.C. 5301.25 provides, in part: Until so recorded or filed for record, they [deeds, encumbrances, etc.] 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. Beyond that, there is no statutory ramification for failing or refusing to file a mortgage or mortgage assignment. There is no fine, no penalty, no punishment imposed upon persons or entities who have not recorded a mortgage or mortgage assignment.

Certainly, the General Assembly has demonstrated that if it intends to impose a duty upon a person or entity to perform a task and that person or entity fails to perform, the General Assembly will impose a penalty for that failure. R.C. 5301.36 provides an example. Not only does that statute mandate that the mortgagee file a release of the mortgage evidencing the fact of its satisfaction in the appropriate county recorder's office and pay any fees required for the recording, the statute requires that the recording be done within ninety days from the date of the satisfaction of the mortgage.

Additionally, R.C. 5301.36 (C) through (E) establishes financial penalties upon those mortgagees who fail to comply with the statute's mandates.

Courts must pay due deference to the words within the statutes enacted by the General Assembly. Courts may not insert words or language into those statutes. In its enactment of R.C. 5301.25 and R.C. 5301.32, the General Assembly has not included any fine, penalty, or punishment to be imposed upon persons or entities who have not recorded a mortgage or mortgage assignment; nor has the General Assembly identified who is responsible for recording mortgages or mortgage assignments with the County Recorder in which the real property is situated or when those instruments must be recorded. Because the General Assembly has chosen not to identify who is responsible for recording mortgages or mortgage assignments, has not stated a time in which those instruments must be recorded, and has failed to provide for any fine, penalty, or punishment to be imposed upon persons or entities who have not recorded a mortgage or mortgage assignment, it is this Court's determination that Plaintiffs claims for unpaid recording fees are without merit. *Sidle v. Maxwell* (1854), 4 Ohio St. 236; *Pinney v. Merchants' Nat. Bank* (1904), 71 Ohio St. 173.

Plaintiffs' standing to prosecute the within matter is dependent upon the existence of a viable claim that Defendants have illegally used county funds or have deprived Plaintiffs of monies. R.C. 309.12; *Ohio ex rel. Kolkowski v. Bd. of Comm'rs* (11th Dist.) 2009 Ohio 2532. In that this Court has determined that Plaintiffs' claims for unpaid recording fees are without merit, Plaintiffs lack standing to pursue the remainder of the claims in Plaintiffs' Second Amended Complaint.

The absence of statutory directives as to who must record mortgages and mortgage assignments results in this Court being without authority to enter a declaratory judgment that R.C. 5301.25 and R.C. 5301.32 mandate that all mortgages and mortgage assignments shall be recorded with the County Recorder of the county in which the subject real property is located. Nor may the Court enjoin Defendants from assigning mortgages without recording them and ordering Defendants to record all mortgage assignments with the appropriate County Recorder and to pay the requisite fee to that County Recorder.

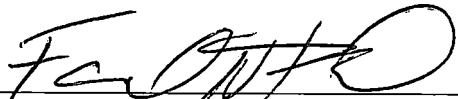
An unjust enrichment claim must allege facts showing a) a benefit conferred by Plaintiffs upon Defendants; b) knowledge by the Defendants of the benefit; and c) retention of the benefit(s) by Defendants under circumstances where it would be unjust to do so without payment. *Ohio Cat v. A. Bonamase Leasing, Inc.*, (11th Dist.), 2009 Ohio 1140. The benefit conferred upon Defendants in this matter is the same benefit conferred by statute upon the general public and all mortgagors and mortgagees. Defendants cannot be unjustly enriched by Plaintiffs' performance of their statutorily mandated duties.

The Court has determined that Defendants' failure or refusal to record all mortgage assignments is not in violation of Ohio's laws; consequently, Defendants cannot be found to have engaged in a civil conspiracy to commit a wrongful act. *Pickle v. Swinehart* (1960), 170 Ohio St. 441. Defendants acted to advance their legitimate business interests, not to maliciously injure Plaintiffs.

A public nuisance may be absolute (involving inherently injurious conduct), or qualified (carelessly done lawful actions). A common law public nuisance claim must allege an unreasonable interference with a public right, significant and widespread harm, and proximate cause. *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416; 2002 Ohio 2480. Plaintiffs have not alleged facts showing that Defendants' claimed violations of the recording statutes cause significant and widespread harm and present either an inherent injury or an unreasonable interference with public safety, health, or convenience. Plaintiffs have not shown that Defendants' conduct has been statutorily identified or classified as being a nuisance.

After consideration of only the factual allegations within Plaintiffs' Second Amended Complaint, attached materials, and reasonable inferences drawn from Plaintiffs' factual allegations, all of which are accepted as true, it is this Court's determination that Plaintiffs have failed to state a claim upon which relief may be granted.

Defendants' Joint Motion to Dismiss shall be sustained.


FORREST W. BURT, JUDGE

- cc:
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|----------------------------|------------------------------|
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