STATUTE OF LIMITATIONS IN OHIO FOR MORTGAGE FORECLOSURES

A bankruptcy court in Ohio recently applied the incorrect statute of limitations in a mortgage foreclosure action.

- Ohio's statute of limitations jurisprudence has evolved from an accepted legal proposition derived from one opinion to supposedly well-settled law stating the complete opposite in another opinion.
- Federal courts interpreting Ohio law must apply the correct statute of limitations to mortgage foreclosure actions.

In the bankruptcy case of *In re Fisher*, 584 B.R. 185, 199–200 (N.D. Ohio Bankr. 2018), the United States Bankruptcy Court for the Northern District of Ohio disallowed a lender's proof of claim on a mortgage based on "the well-settled law in Ohio that the same statute of limitations governs enforcement of a note and a mortgage." At least one other district court in Ohio has since followed *Fisher*'s lead, relying on the same supposedly "well-settled law in Ohio" to cancel a lender's mortgage and hold the lender liable under the FDCPA for seeking to collect time-barred debt. *Baker v. Nationstar*, No. 2:15-cv-2917, 2018 U.S. Dist. LEXIS 121686 *31, *35–*39, 2018 WL 3496383 (S.D. Ohio July 20, 2018).

The bankruptcy court in *Fisher* and the district court following *Fisher* both openly rejected multiple opinions from Ohio's Eighth District Court of Appeals applying a longer statutory limitations period to foreclosure actions than actions seeking judgment on the note. See *id.*at *30–*35; *Fisher*, 584 B.R. at 199. They also contradict the Ohio Supreme Court's century-old ruling in *Fisher v. Mossman*, 11 Ohio St. 42, 45–46 (1860), which held that an expired statute of limitations barring judgment on a mortgage's underlying debt did not similarly bar an action to foreclose the mortgage.

This tale of two *Fisher*s tells the story of how Ohio's statute of limitations jurisprudence evolved from an accepted legal proposition derived from one *Fisher* opinion to "well-settled law" stating the complete opposite in another *Fisher* opinion. It is the best of legal analysis and the worst of legal analysis . . . .

The Holden Reset

In 2016, the Ohio Supreme Court reaffirmed several longstanding doctrines governing mortgage foreclosure in Ohio, reminding that lenders "may elect among separate and independent remedies to collect the debt secured by a mortgage." *Deutche Bank Nat'l Trust Co. v. Holden*, 2016-Ohio-4603, ¶ 21 (2016). As the *Holden* court explained, these remedies include: (1) a personal judgment against the borrower to recover the amount due on the note; (2) an action "in ejectment" to take possession of the property and apply income derived from the property to the loan, returning the property to the borrower once the loan is paid; and (3) an action to foreclose the mortgage, which cuts off the borrower's redemption rights and sells the property to satisfy the debt. *Id.* ¶¶ 21–24.

Thus, under Ohio law, actions for personal judgment on the note and actions to enforce the mortgage, whether by ejectment or foreclosure, "are separate and distinct remedies." *Id.* ¶ 25 (internal quotations omitted). The court confirmed that, "[b]ased on the distinction between these causes of action . . . the bar of the note or other instrument secured by mortgage does not necessarily bar an action on the mortgage." *Id.* (internal quotations omitted). *Holden* discussed these well-accepted principles in the context of loans discharged in bankruptcy, but nowhere did it limit them to only the bankruptcy context.

After the Ohio Supreme Court issued its *Holden* decision, Ohio's Eighth District Court of Appeals recognized that *Holden* "casts serious doubt" on Ohio cases that applied the six-year statute of limitations on notes to foreclosure actions. *Walker*, 2017-Ohio-535, ¶ 19. Accordingly, it held that a lender may still seek to enforce the obligations in a mortgage even when it is barred from seeking judgment on the note. *Id.* at ¶ 23. See also *U.S. Bank N.A. v. Robinson*, 2017 Ohio 5585, ¶ 11 (8th Dist.).

Nevertheless, despite the Eighth District's clear application of Ohio law as expressed by the Ohio Supreme Court in *Holden*, the United States Bankruptcy Court for the Northern District of Ohio and the United States District Court for the Southern District of Ohio both rejected the Eighth District's opinions. See *Baker*, 2018 U.S. Dist. LEXIS 121686, *30–*38; *Fisher* 584 B.R. 197–201.

In *Fisher*, the bankruptcy court focused on the Ohio Supreme Court's statement in *Kerr v. Ledecker*, 51 Ohio St. 240, 254 (1894), that "when a note is secured by mortgage, the statute of limitations as to both is the same." See *Fisher*, 584 B.R. at 200. Noting that *Holden* cited *Kerr* favorably, the bankruptcy court determined that the same statute of limitations governs actions for personal judgment on the note and actions to foreclose the mortgage. *Id.* In *Baker*, the district court picked up where *Fisher* left off, finding that *Holden* never intended to overrule *Kerr*. See *Baker*, 2018 U.S. Dist. LEXIS 121686, *33–*34. The district court therefore felt that because *Kerr* remained good law, the Eighth District's opinions in *Walker* and *Robinson* are not. *Id.*

The problem with the federal courts' analyses in *Fisher* and *Baker* is not that they are wrong about *Kerr* remaining good law, but that they are wrong about the law according to *Kerr*.

Reading Kerr in Context

The Ohio Supreme Court in *Kerr* did not rule as a matter of law that the statute of limitations for actions seeking judgment on the note always applied to actions seeking to foreclose the mortgage. Rather, it explained as a matter of fact that the statutes then in effect were the same. See *Kerr*, 51 Ohio St. at 254.

In *Kerr*, the lender brought a foreclosure action against a borrower. The borrower argued that Ohio's 15-year statute of limitations on specialties and written contracts barred the foreclosure. The trial court rejected the defense, finding that Ohio's 21-year statute of limitations governing actions to recover real property applied. The Ohio Supreme Court reversed. *Id.* at 247–55.

Noting that an action to foreclose a mortgage does not seek title or possession of the property but instead seeks to cut off the borrower's right of redemption and sell the property, the court held that an action to foreclose a mortgage is specialty governed by Ohio's statute of limitations on specialties. *Id.* at 251–53. The court distinguished this from an action in ejectment, which seeks to dispossess the borrower until the mortgage is paid and is governed by Ohio's statute of limitations on recovering possession of property. *Id.* at 250.

In ruling, the court in *Kerr* discussed its prior decision in *Fisher v. Mossman*, 11 Ohio St. 42 (1860), confirming that *Fisher* "correctly holds that the bar of the note, or other instrument secured by mortgage, does not necessarily bar an action on the mortgage." *Id*. at 253. In *Fisher*, the lender sought to foreclose against purchasers from a judicial sale held on judgment liens inferior to its mortgage. The purchasers argued that the lender could not foreclose his mortgage due to a statutory bar preventing him from enforcing the underlying debt, and the trial court agreed. The Ohio Supreme Court reversed. *Fisher*, 11 Ohio St. at 47.

Acknowledging that the lender could not enforce the underlying obligation due to the expired limitations period, the court in *Fisher* nevertheless held: "[D]oes it follow that because an action on the notes secured by the mortgage is barred by the statute [of limitations], that therefore the remedy in equity on the mortgage is also lost? We think not." *Id*. at 45. Rather, the court confirmed, "where a security for a debt is a lien on property, personal or real, that lien is not impaired in consequence of the debt being barred by the statute of limitations." *Id.* at 46 (internal quotations omitted).

Kerr relied on its earlier holding in *Fisher* to determine that different statutes of limitations apply to the different causes of action founded on notes and mortgages. *See Kerr*, 51 Ohio St. at 253–54. *Kerr* also clarified the impact its ruling would have in situations where the statute of limitations for the underlying debt differed from the mortgage securing the debt. *Id.* at 254. Using actions on an account as an example, the court found that "[a] mortgage may be made to secure an account, and an action on account may be barred in six years, while an action on the mortgage would not be barred short of fifteen years." *Id.*

Concerning the account scenario, the *Kerr* court explained further:

The payment of the account would extinguish the right of action on the mortgage, and in an action for the foreclosure of the mortgage after action on the account is barred, the presumption of payment of the account arising from the lapse of time, might be used as an item of evidence to prove payment, but such presumption would not be conclusive and might be overcome by satisfactory proof showing that in fact such account remains unpaid. In such case the lapse of six years is not the equivalent of payment. The condition of the mortgage is for *payment* of the account, and not for its bar by the statute of limitations.

Id. at 254 (emphasis in original).

Translating this from 19th century judge to 21st century lawyer, the court explained that if the borrower paid the account, then the lender could not foreclose the mortgage securing the account. *Id*. If the lender sought to foreclose the mortgage after the account's six-year statute of limitations expired, then the lender's failure to sue on the account could establish a presumption that the borrower paid the account—a presumption the lender could overcome with evidence showing the account remained unpaid. *Id*. Nevertheless, the expired limitations period barring an action on the account is not the same as payment, and the lender could still foreclose the mortgage if it demonstrated the account remained unpaid. *Id*.

In the context of this discussion, the *Kerr* court then stated:

But when a *note* [as opposed to an account] is secured by mortgage, the statute of limitations as to both is the same; and therefore the mortgage will be available as a security to the note in an action for foreclosure and sale until the note shall be either paid or barred by statute; but in such case an action for foreclosure and sale cannot be maintained on the mortgage after an action on the note shall be barred by the statute of limitations.

Id. at 254–55 (emphasis in original).

Read in this context, *Kerr* plainly did not issue a new rule that the statute of limitations for actions to enforce a note is always the same as the statute of limitations for actions to foreclose a mortgage. *Id*. It instead contrasted the situation where the mortgage secured a note as opposed to where the mortgage secured an account, and it recognized the factual reality that—as Ohio law existed at the time—the same 15-year statute of limitations governed actions to enforce notes and actions to foreclose mortgages, as opposed to the different statute of limitations that governed actions on accounts. *Id*.

Indeed, a rule that the limitations period to enforce the note is always the same as the limitations period to foreclose the mortgage would have directly conflicted with *Kerr*'s opposite conclusion in the two immediately preceding paragraphs on accounts. *Id*. It would also have conflicted with the court's previous holding in *Fisher*—which *Kerr* cited with approval and confirmed was correct—where the court expressly held that "[it does not] follow that because an action on the notes secured by the mortgage is barred by the statute [of limitations], that therefore the remedy in equity on the mortgage is also lost." *Fisher*, 11 Ohio St. at 45.

The Ohio Supreme Court later confirmed this analysis and harmonized *Kerr* with prior rulings that recognized the oft-stated proposition that the mortgage "is a mere incident to the debt." *Bradfield v. Hale*, 67 Ohio St. 316, 321–25 (1902). In *Bradfield*, the lender brought an ejectment action more than 15 years after the underlying debt secured by the mortgage became due. The trial court refused to allow the mortgage into evidence on statute of limitations grounds, and the appellate court reversed. The Ohio Supreme Court affirmed the reversal. *Id.* at 323–25.

Determining that the 15-year statute of limitations barring the mortgage foreclosure action did not also bar the ejectment action, the court indicated that it fully covered the same question in *Williams v. Englebrecht*, 37 Ohio St. 383, 386–88 (1881), where the court held that the illegality of promissory notes secured by a mortgage did not constitute a defense to an ejectment action on the mortgage even though it could be used as a defense against the notes. See *Bradfield*, 67 Ohio St. at 323–24.

In other words, *Bradfield* confirmed that a defense against foreclosing the mortgage does not necessarily constitute a defense against ejectment based on the mortgage, just as a defense against enforcing the note does not necessarily constitute a defense against enforcing the mortgage. See *id*. at 324. This makes sense because all three are separate and distinct actions with separate and distinct remedies. See, e.g., *Holden*, 2016-Ohio-4603, ¶¶ 21–25.

Applying the Old Rules Today

These early Ohio Supreme Court rulings perfectly align with *Holden* and the Eighth District's decisions in *Walker* and *Robinson*, as well as with commonly recognized legal principles in Ohio.

Under Ohio law, a statute of limitations—like a bankruptcy discharge—creates an affirmative defense to a complaint. See Ohio Civ. R. 8(C). In the context of promissory notes, the statute's lapse acts as a procedural bar to obtaining a personal judgment against the borrower on the note, but the underlying debt continues to exist. See, e.g., *Summers v. Connolly*, 159 Ohio St. 396, 402 (1953). However, these defenses against an action on the note do not transfer to an action on the mortgage. See, e.g., *Bradfield*, 67 Ohio St. at 321–25; *Williams*, 37 Ohio St. at 386–88.

Relatedly, a statutory bar to obtaining judgment on the note does not destroy the underlying obligation. See, e.g., *Summers*, 159 Ohio St. at 402. The debt continues to exist, and the mortgage continues to secure the debt. This is why lenders can still foreclose even after borrowers discharge their debt in bankruptcy. See, e.g., *Blue View Corp. v. Gordon*, 2007-Ohio-5433, ¶¶ 19–23 (8th Dist. 2007).

If the lender can prove it is entitled to enforce the note, then it can prove that the borrower owes the lender money. See, e.g., *Fannie Mae v. Hicks*, 2015-Ohio-1955, ¶¶ 31–32 (8th Dist. 2015). If the borrower proves some valid defense to the lender's action on the note, then the defense prevents judgment on the note. However, the borrower's obligation to repay the money still exists, and the mortgage—an incident to that obligation—also still exists.

Once the lender proves that the borrower owes it a debt, the lender can enforce the mortgage securing that debt. See, e.g., *Hicks*, 2015-Ohio-1955, ¶¶ 31–32; *Blue View Corp.*, 2007-Ohio-5433, ¶¶ 19–23. As the Ohio Supreme Court expressly recognized in *Holden*: "There is a significant difference between being a party that cannot obtain judgment on the note and being a party that is not entitled to enforce the note." *Holden*, 2016-Ohio-4603, (internal quotations omitted). Expiration of the note's statute of limitations prevents the lender from obtaining judgment on the note; it does not prevent the lender from proving it is entitled to enforce the note.

Explaining Ejectment

The different treatment of statutes of limitations for ejectment and foreclosure also makes sense under current Ohio law.

Under Ohio law, ejectment and foreclosure arise from property rights given in the mortgage. See, e.g., *id.* ¶¶ 23–24. A mortgage is effectively a conditional deed conveying a property interest that the borrower can redeem by paying back the loan. *Id.* ¶ 23. When the borrower defaults on the mortgage, title to the property as between the borrower and the lender automatically transfers to the lender, and only the borrower's equitable right to redeem remains with the borrower. *Id.*

In a foreclosure action, the lender seeks to cut off the borrower's redemption rights and sell the property to satisfy the debt. See *id.* ¶ 24. In an ejectment action, the lender seeks to take possession of the property until the profits pay off the loan, or until the borrower redeems. *Id.* ¶ 23. In the statute of limitations context, the lender has eight years (previously 15 years before 2012 statutory amendments) to cut off the borrower's redemption rights and have the property sold in foreclosure, but the lender has 21 years to take possession through ejectment. *See* O.R.C. §§ 2305.04, 2305.06.

In other words, even if the lender fails to timely foreclose, it can still take possession of the property. See, e.g., *Bradfield*, 67 Ohio St. at 324–25. It just cannot cut off the borrower's redemption rights or sell the property, meaning the property will eventually return to the borrower once the loan is paid. The inability to obtain a personal judgment on the note does not impact either of these rights under the mortgage. See *id*. at 323–25; *Kerr*, 51 Ohio St. at 253–55; *Fisher*, 11 Ohio St. at 45–46.

A "Well-Settled Law" is Born

So how did Ohio get from *Fisher*'s 1860 Ohio Supreme Court ruling that the statute of limitations barring the underlying debt does not impair mortgage rights to *Fisher*'s 2018 bankruptcy court ruling that it does? Like most things, the devil is in the details.

In *Fisher* 1860, the lender could not collect the underlying debt due to a four-year statutory bar involving probate administration. *Fisher*, 11 Ohio St. 45–46. The Ohio Supreme Court determined that the four-year limitations period did not also bar an action to foreclose the mortgage, and it specifically said it saw no reason the analysis would change for nonprobate statutes. *Id.* at 45. Later, in *Bradfield*, the court similarly held that expiration of the limitations period governing foreclosure did not also bar an action in ejectment. *Bradfield*, 67 Ohio St. at 323–25.

In between these two rulings came *Kerr*, which confirmed that the six-year statute of limitations on actions to collect an account would not bar an action foreclosing a mortgage securing the account. *Kerr*, 51 Ohio St. at 254. This analysis perfectly aligned with the court's earlier analysis from *Fisher* 1860 and its later analysis in *Bradfield*. Nevertheless, the line from *Kerr* destined to ring through the ages was its recognition that "when a *note* is secured by mortgage, the statute of limitations as to both is the same." *Id.* (emphasis in original).

Importantly, *Kerr*'s description of the statutes of limitations governing notes and foreclosure actions was true when made in 1894, and it stayed true for over 100 years afterward. Then, in 1994, Ohio amended its Uniform Commercial Code to create a six-year statute of limitations for promissory notes. *See* O.R.C. § 1303.16(A) (eff. Aug. 19, 1994). This changed the applicable statute of limitations on the note from the then-15-year period governing written contracts to the newly enacted six-year period governing negotiable instruments. *See* O.R.C. §§ 1303.16(A), 2305.06. The statute governing specialties like mortgage foreclosures remained the same. *See* O.R.C. § 2305.06.

About 10 years after the amendments to Ohio's U.C.C., the Twelfth District Court of Appeals declared that, "it has long been settled in this state that when a debt that is secured by a mortgage is barred by the statute of limitations, the mortgage securing the debt is also barred." *Barnets, Inc. v. Johnson*, 2005-Ohio-682, ¶ 16 (12th Dist.). In *Barnets*, the lender sought to foreclose a mortgage securing an account despite expiration of the six-year statute of limitations governing actions on the account. The Twelfth District reversed the trial court's order of foreclosure, holding that the expired limitations period on the account also barred the mortgage foreclosure action. *Id.* ¶ 18.

Confusingly, *Barnets* specifically discussed *Kerr* while simultaneously contradicting *Kerr*'s detailed explanation for how an expired statute of limitations on an account would impact an action to foreclose the mortgage. The Ohio Supreme Court in *Kerr* clearly explained that expiration of the statute of limitations on an account would not prevent the foreclosure of a mortgage securing the account. *Kerr*, 51 Ohio St. at 254. The appellate court in *Barnets* held the opposite. *Barnets*, 2005-Ohio-682, ¶ 18.

Further clouding its analysis, the *Barnets* court went on to "parenthetically" note that "in most instances, the debt secured by the mortgage will often be a promissory note, which, as a written contract, has a 15-year statute of limitation." *Id.* ¶ 18. Oddly, this clarification was as incorrect as it was unnecessary because the Ohio legislature had already amended the applicable U.C.C. provision governing notes a decade earlier. *See* R.C. § 1303.16(A).

In short, the court in *Barnets* made a mistake. It misread *Kerr*, and its misreading birthed a previously nonexistent legal rule that eventually grew into "well-settled law in Ohio" that was neither well settled nor the law in Ohio.

The End of the Tale

A careful examination of the underlying cases shows that the Ohio Supreme Court never intended to create a hard and fast rule that the same statute of limitations governing actions on the note also governs actions to foreclose the mortgage. In fact, it appears the court intended the opposite.

As one Ohio trial court explained: "[T]he previously 'well settled proposition' [that when a debt . . . secured by a mortgage is barred by the statute of limitations, the mortgage securing the debt is also barred] was derived from the fact that prior to 1994, the same statute of limitations applied to notes and mortgages." *Deutsche Bank Nat'l Trust Co. v. Kalista*, Case No. CV-2016-03-1477, 2017 Ohio Misc. LEXIS 6506 *12 (Summit C'ty Common Pleas Sept. 27, 2017) (internal quotation omitted). "Therefore, while there has been some confusion on this issue, *Holden* and *Walker* are consistent with long-standing Ohio law." *Id.*at *13.

Yet according to at least two federal courts in Ohio, a statutory bar preventing judgment on the note will also bar foreclosure of the mortgage. *See Baker*, 2018 U.S. Dist. LEXIS 121686, *30–*38; *Fisher* 584 B.R. 197–201. In fact, according to one of these courts, seeking to foreclose the mortgage under the statute of limitations applicable in state court could even subject a lender to liability under the FDCPA in federal court. *See Baker*, 2018 U.S. Dist. LEXIS 121686, *35–*39.

Hopefully, as the tale of two *Fisher*s draws to a close, federal courts interpreting Ohio law will correct course and begin to apply the proper statute of limitations to mortgage foreclosure actions. The current confusion on this issue deserves a far, far better rest than it has ever known.