

My husband and I filed for a dissolution a few years ago. He got the house in the Settlement Agreement and was to refinance it. He never did. The house is in foreclosure and I have been sued. What defenses are available to me?

Unfortunately, this is not uncommon. The following are a few of the ways to challenge a foreclosure as to an innocent spouse.

### **Lack of Notice**

If only the ex-husband received notice of the foreclosure action, client may be able to argue that the mortgagee failed to provide proper notice since they assumedly no longer reside at the same address. A simple notice by publication regarding one's property interest is insufficient in Ohio. Thus, notice by mail is required where interest holder's address is known or ascertainable. *C. Trust Co., N.A. v. Jensen*, 616 N.E.2d 873 (Ohio 1993). Furthermore, if first class mail or actual delivery is required, then failure to follow these rules will not satisfy the notice requirements.

*Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556

### **Breach of Fiduciary Duty/ OCPA Violation**

Ohio Courts have held that while prospective borrowers are not owed a fiduciary duty by banks (*Groob v. KeyBank*, 843 N.E.2d 1170, 1175 (Ohio 2006)), actual borrowers are owed fiduciary duties by their mortgage brokers. *Gut*

*h v. Allied Home Mtg. Capital Corp.*, 2008-Ohio-3386

In instances where this occurs, it becomes an issue of fact to determine whether a fiduciary duty has been breached. The client's current situation may call for the broker to accept a divorce decree that places the burden of the payments on one spouse. However, courts have not ruled on this in Ohio.

Courts have held that filing suit against a debtor's spouse when one spouse does not have a legal obligation to pay the debt violates the Ohio Consumer Sales Practices Act. *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783 (S.D. Ohio 2006)

). If the divorce decree was enforced through a court order, the client may be able to argue that it did not have a legal obligation to pay the debt and therefore the responsibility rests with the spouse.

One may be able to fit the decree under Ohio's parol evidence rule in order to remove her personal obligation to pay for the mortgage. If the mortgage is silent or ambiguous (*Cranberry Fin., L.L.C. v. S & V Partn.*, 927 N.E.2d 623, 625 (Ohio App. 6th Dist. 2010)) on what occurs when the spouses assign responsibility, then it could be seen as an ambiguity that may be resolved by incorporating the divorce decree or settlement document.

It appears that most appellate districts in Ohio have not ruled on many cases involving foreclosure of residences of former spouses. However, one district has ruled against the mortgagors in this action. In *E. Capital Mortg. Services, Inc. v. Pohorence*, 2002-Ohio-979, the unpublished opinion upheld a mortgagee's motion for summary judgment in foreclosure a action brought following mortgagor-former wife's default on payments due after she assumed obligations under mortgage pursuant to parties' divorce decree, given former wife's payments making debt current and reinstatement of mortgage and timeliness of mortgagee's motion for relief.

### **Estoppel and Quieting Title**

Since the other spouse failed to refinance, then one may use equity as a way to remove her mortgage obligation. If there is no adequate remedy at law, the court may quiet title. *McClure v. Fischer Attached Homes*, 882 N.E.2d 61, 68 (Ohio Com. Pleas 2007)

. In order to remove the cloud of a spouse being foreclosed on a home she neither lives in nor has, under a divorce decree or settlement, an expectation of future responsibility for, the court may be inclined to quiet title. However, quieting title may not absolve her of the mortgage obligation.

If quieting title does not absolve the obligation, then using estoppel to assert that she has been innocently misled into some injurious change of position. *Great N. Sav. Co. v. Ingarra*, 423 N.E.2d 128, 131 (Ohio 1981). In this situation, she may argue that her husband's unwillingness to go through the financing led her to be placed in the predicament where she is brought in as a party to the foreclosure. Since she has previously disclaimed interest through the divorce settlement, she has done everything in her power in order to walk away from the situation.

## **Procedural Defenses**

Additionally, one may also assert that the holder of the note and mortgage (*Wells Fargo Bank, N.A. v. Sessley, Franklin App. No. 09AP-178, 2010-Ohio-2902*) followed the proper procedure in becoming the real party in interest. This includes the ensuring the proper party is recorded.

*Fifth Third Bank v. NCS Mtg. Lending Co., 168 Ohio App. 3d 41 3, 2006-Ohio-571, 860 M/E/2d 785 (1st Dist. Hamilton County 2006*

). This also requires that the right to enforce the note was not assigned, but rather negotiated in compliance to the Ohio Revised Code.

*R.C. 1301.01.*