

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0634

Countrywide Home Loans, Inc.,

*

Appellee,

*

On Appeal from the Lucas County Court
of Appeals, Sixth Appellate District

vs.

*

Court of Appeals Case No: L-09-1169

*

Robert E. Montgomery, et al.,

*

Appellant.

*

*

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ROBERT E. MONTGOMERY

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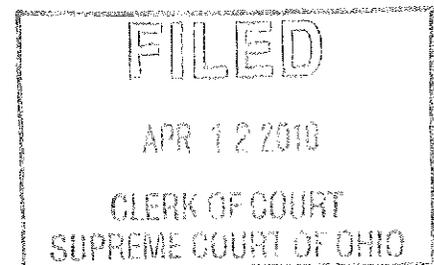


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case concerns a foreclosure action brought by Countrywide Home Loans, Inc. against Robert E. Montgomery on March 19, 2008. The action was based on a mortgage and note executed by Montgomery on February 11, 2004, to Keybank, N.A., the original lender. Summary judgment was granted to Countrywide on or about March 2, 2009, and a Motion to Vacate Summary Judgment for Lack of Subject Matter Jurisdiction was filed on March 27, 2009. The motion was denied on May 19, 2009, and an appeal was taken on June 18, 2009. The Sixth District Court of Appeals affirmed the trial court decision on February 26, 2010. See Attached Exhibit A.

This cause presents two critical issues for debtor property owners when an alleged creditor is seeking to foreclose on home loans in Ohio: (1) When the Plaintiff is not the real party in interest, because they are not the holder of the Note and the Mortgage, the trial court is under a duty to dismiss the case on the basis that the Plaintiff lacks standing at the time the suit is filed; (2) a trial court errs when it grants summary judgment to a Plaintiff in a foreclosure action when the Plaintiff lacks standing to prosecute the suit on the legal basis that they are not the real party in interest; hence any resulting judgment is void ab initio due to the court's lack of subject matter jurisdiction. A plaintiff who is not the real party in interest is unable to invoke the court's jurisdiction due to their lack of standing.

In this case, the Court of Appeals failed to find that the real party in interest was not Countrywide Home Loans, Inc., but some other entity, since Countrywide failed to prove that it owned not only the mortgage, but also the promissory note, a matter overlooked by the Court of

Appeals. Its decision was in contradiction to the authorities cited in the Appellate Brief, and was contrary to holdings in the 1st Appellate District, Wells Fargo et al., v. Gloria Byrd, et al. (2008), 178 Ohio App. 3d 285, 2008 Ohio 4603; and 8th Appellate District, Wells Fargo Bank N.A. v. Oties Jordan, et al., (2009), 2009 Ohio 1092; 2009 Ohio App. Lexis 881; and Flagstar Bank, FSB v. Moore, 2010-Ohio-375; as well as several Federal Court decisions, Deutsche Bank National Trust Co. v. Steele (S.D. Ohio, Jan.8, 2008, 2008 U.S. Dist. Lexis 4937; In re Foreclosure Cases (N.D. Ohio 2007), 2007 U.S. Dist. Lexis 84011, and In re Foreclosure Cases, (S.D. Ohio 2007), 521 F. Supp.2d 650, wherein foreclosure cases brought when the plaintiff lacks standing have been dismissed without prejudice.

In order for a creditor to foreclose, they must demonstrate that at the time of filing the complaint, they owned not only the mortgage, but the note also, and failing which, they lack standing to invoke the court's jurisdiction. The decision of the Court of Appeals herein stands to threaten the security of the property rights of citizens of Ohio by permitting alleged creditor(s) to foreclose on properties wherein they have no legal right to do so. Such a decision has repercussions and implications that continue to encourage alleged creditors without valid ownership of the notes or status as holders of the notes and mortgages, to obtain foreclosure judgments. These alleged creditors gain an advantage through the Ohio judicial system, and even though their documentation does not show proper standing under the Constitution to enforce the notes, their maneuvers violate the debtors rights to fairness, notice, and due process.

Importantly, a promissory note is a negotiable instrument, which provides the person entitled to enforce the note the right to payment of the obligation it represents. Furthermore, a person entitled to enforce a note is a person who according to *Ohio Revised Code §1303.31(A)*:

U.C. C. §3-301 (2002), falls into one of three categories. One such category is when the person is a holder of the note, and under *Ohio Revised Code §1301.01*, a person includes an individual or organization. A note may be endorsed by an allonge, which is a paper affixed to the instrument, which then becomes a part of the instrument. Once a note is endorsed, its negotiation is complete upon transfer of possession. However, possession alone in the State of Ohio does not establish that the party in possession of a note is entitled to receive payments under it. As stated, under Ohio law, the right to enforce a note cannot be assigned; instead, the note must be negotiated in accordance with Ohio's version of the Uniform Commercial Code. An attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note. *Ohio Revised Code §1301.01 et seq.* and *U.C.C. Article 3. All American Finance Co., et al., v. Pugh Shows, Inc., et al.*, (1987), 30 Ohio St. 3d 130.

As the mortgage (attached as Exhibit B) documentation herein reveals, Mortgage Electronic Registration System (herein after referred to as "MERS") was named as nominee, for KeyBank National Association, and was designated as the mortgagee on February 11, 2004. The promissory note, (attached as Exhibit C) was also executed on February 11, 2004, but was endorsed to Countrywide Document Custody Services, a division of Treasury Bank, N.A. on February 23, 2004. No assignment to MERS of the note is ever evidenced in the case below. Therefore MERS did not have ownership of the note to assign any interest or ownership to the plaintiff, Countrywide Home Loans, Inc..

Countrywide Home Loans, Inc. never filed a recorded assignment below evidencing legal ownership in the mortgage and note when it filed suit on March 19, 2008. A purported assignment of the mortgage which was allegedly signed on March 14, 2008 (a stamped date

which could have been put on weeks after March 14, 2008) was not filed in the action below until on or about April 13, 2009. See Exhibit D attached. The purported assignment was not recorded in Lucas County until April 16, 2008. As the mortgage follows the note, the assignment from MERS is invalid to transfer the Note, as MERS was never assigned the Note from Keybank N.A., or Countrywide Document Custody Services.

As the law currently stands, an attempt to assign a note, may create a claim to ownership, but does not transfer the right to enforce the note, where such an individual or organization is not the legal holder of the note. The evil created in this case, has been commented upon by Federal and State courts in Ohio, that in a foreclosure action, the party bringing the suit must show that they are the holder and owner of both the note and mortgage at the time of filing the complaint.

In its opinion, the Sixth District Court of Appeals did not address the argument that the Note was held by Countrywide Document Custody Services, not Countrywide Home Loans, Inc.. These two entities are different, and are not one and the same company. Countrywide Home Loans, Inc. eventually filed an assignment wherein MERS attempted to assign the mortgage and note to them, but MERS did not have any legal interest in the note to assign. Therefore, it was error to affirm the judgment of the Lucas County Common Pleas Court. The Appeals Court decision does not determine the valid, legal holder and owner of the Note, and hence, fails to consider the lack of standing of the Plaintiff. Countrywide Home Loans, Inc. is not entitled to judgment and has no enforcement rights of the underlying Note. Therefore, this Court should grant jurisdiction to hear this case and review the erroneous decision of the Sixth District Court of Appeals in order to protect the rights of citizens of this state pursuant to the 14th amendment.

STATEMENT OF THE CASE AND FACTS

On March 19, 2008, Countrywide Home Loans, Inc., located in the State of Texas, filed a foreclosure complaint in the Common Pleas Court of Lucas County, against Appellant, Robert E. Montgomery. On or about March 2, 2009, summary judgment was granted in favor of the Plaintiff.

It is the contention of the Defendant/Appellant that the Plaintiff/Appellee is not the correct party legally entitled to bring suit in the action against him, as the Plaintiff/Appellee lacked standing to maintain the suit. The 'Note' attached to the Complaint as 'Exhibit A' does not reference anywhere in the document or any attachments to the document, the Plaintiff's name, or MERS' name, the assignor in this matter. The only names appearing in the Note or any attachments to the Note are Keybank, N.A. and Countrywide Document Custody Services, a division of Treasury Bank, N.A.. It appears that MERS, the alleged assignor to Countrywide Home Loans, Inc., never had any interest, legal or equitable, and was never a holder or owner, to the Note. No transfer or assignment of the Note to the Plaintiff is evidenced in the Complaint or in the attached Exhibits in accordance with law as required in Ohio Revised Code § 5301.231, and the Statute of Frauds, Ohio Revised Code § 1335.04, therefore divesting Countrywide of the right to bring the foreclosure action.

Furthermore, what is important is that in order for MERS to legally assign and transfer the interest in the Mortgage and the Note, they must be holder of the Note pursuant to Ohio Uniform Commercial Code §1301.01 (U.C.C. 1-201). The *Ohio Uniform Commercial Code §1301.01 (T)(1)* defines holder as with respect to a negotiable instrument to mean: (a) *If the instrument is payable to bearer, a person who is in possession of the instrument.* A holder is

further defined as “a person who is in possession of a document of title or a certificated instrument...indorsed to him or to his order or to bearer or in blank.” All American Finance Co., et al., v. Pugh Shows, Inc. et al., (1987), 30 Ohio St. 3d 130. In this case, as stated on the Note, the holder was either KeyBank National Association or Countrywide Document Custody Services, a division of Treasury Bank, N.A.. The entity that is holder of the Note is entitled to enforce the instrument as defined by *Ohio Uniform Commercial Code §1301.31 (U.C.C. 3-301)*, which states, (A) “Person entitled to enforce” an instrument means any of the following persons: (1) The holder of the instrument. This person whether it be a person or organization must have the Note, which is a negotiable instrument *§1303.03 (U.C.C.3-104)*, and have it properly indorsed pursuant to *Ohio Uniform Commercial Code §1301.24 (U.C.C. 3-204)* and transfer of such an instrument must be properly done in accordance with *Ohio Uniform Commercial Code §1303.22 (U.C.C. 3-203)*.

The Plaintiff/Appellee ultimately makes the error of conflating the transfer of a security instrument with the transfer of the debt it secures. A security instrument e.g. mortgage or deed of trust follows the debt e.g. promissory note, not the other way round. The mortgage is a mere incident to the debt and its transfer or assignment does not transfer or assign the debt or the note, thus the mortgage goes with the note. If the latter is transferred or assigned, the mortgage automatically goes along with the assignment or transfer, one cannot transfer the beneficial interest in underlying debt merely by assigning the security instrument. It is axiomatic that any attempt to assign the mortgage without proper transfer of the debt, will not pass the mortgagee’s interest to the assignee. To properly exercise its right to assign the note, it must demonstrate that it is the holder of the note that has been complied substantially with the various provisions of

the Ohio Uniform Commercial Code (U.C.C.), as stated above.

Therefore, the trial court should have dismissed the action based on the lack of subject matter jurisdiction, pursuant to Civ. R. 12(H)(3), which states that “**Whenever** it appears by suggestion of the parties, or otherwise, that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.” Furthermore, due to Plaintiff/Appellee’s apparent lack of standing to bring the suit, the Court of Appeals should have reversed the decision of the Trial Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. The Plaintiff/Appellee failed to prove that it was the holder of the note at the time that the Complaint was filed

In its decision the Court of Appeals failed to address the fact that the Plaintiff/Appellee was not the holder of the Note at the time that the Complaint was filed or prove that it was the legal owner of the Note at the time that the Complaint was filed. For MERS to legally assign and transfer the interest in the Mortgage and the Note, they must be holder of the Note pursuant to *Ohio Uniform Commercial Code §1301.01 (U.C.C. 1-201) and §1301.24 (U.C.C. 3-204)*. The transfer of such an instrument (Note) must be properly done in accordance with *Ohio Uniform Commercial Code §1303.22 (U.C.C. 3-203)*, All American Finance Co., et al., v. Pugh Shows, Inc., et al., (1986) (5th Dist.) 1986 Ohio.App. LEXIS 7439. An assignment of a note must be negotiated, as it is a negotiable instrument. This was also confirmed in Pheils v. Garber-Lawrence Publishing Group, Inc., (1993) (6th Dist.) 1993 Ohio.App. Lexis 5914 at [*25-26].

No evidence was presented to establish that the Plaintiff/Appellee is the legal holder of the note. The Plaintiff/Appellee seems content to let their argument rest dispostively on their

position that MERS, by the mere language in the mortgage assignment has authority to transfer the beneficial interest in the underlying debt. The mere ownership or possession of a note is insufficient to qualify an individual as a 'holder.' It must be obtained through a process termed as negotiation, which is defined as 'the transfer of an instrument in such form that the transferee becomes a holder' U.C.C. §3-202(1). John M. Adams, Jr., et al v. Madison Reality & Development, Inc., et al, (1988), 853 F.2d 163, 1988 U.S. App. Lexis 9951. In the instant matter, failure to comply with the requirements of the Ohio Uniform Commercial Code and the U.C.C., deprived the Plaintiff/Appellee of legal entitlement as holder of the Note, enforcement of the Note and standing to file the suit.

II. The Plaintiff/Appellee failed to prove that it was the real party in interest at the time that the Complaint was filed

Where a court lacks subject matter jurisdiction, the matter is to be dismissed. The United States Supreme Court held in Louisville and Nashville RR. Co. v. Mottley (1908), 211 U.S. 149, 29 S.Ct., 42, 53, L.Ed 126, that if there is a defect in subject matter jurisdiction, it can be raised at any time, even on appeal and that if the parties fail to point it out, the court is under a duty to raise the matter. Also, subject matter jurisdiction cannot be conferred on a court by consent of the parties, nor can it be waived. Kraus v. Hanna, (2004) Ohio 3928, quoting In re Estate of Vitelli (1996), citing State v. Wilson (1995), 73 Ohio St.3d 40, 46. To bring an action against a Defendant, the Complaint must establish the legal party entitled to bring the suit. The Ohio Rules of Civil Procedure 17 (A) states: "*Every action shall be prosecuted in the name of the real party in interest.*" A party who is not the real party in interest in law lacks standing to bring a foreclosure action and to invoke the court's jurisdiction against a Defendant, as in this case,

Countrywide Home Loans, Inc.. The evidence before the Courts below consisted of merely bold assertions of an entitlement to foreclose. No evidence was presented to clearly and legally establish Countrywide Home Loans, Inc., as the real party in interest.

In its decision the Sixth District Court of Appeals stated that Plaintiff/Appellee must prove that it owned the note and mortgage on the date that its complaint for foreclosure was filed at ¶ 12 and then proceeds to solely discuss the ownership of the mortgage alone. ¶ 13-14. The Appellate Court did not center any of its analysis on the ownership of the note or rather MERS lack of ownership of the note. In the instant matter, the Plaintiff/Appellee had no valid assignment, neither legal or equitable to confer standing and the right to enforce the note. Under Ohio law, the right to enforce a note cannot be assigned—instead, the note must be negotiated in accord with Ohio’s version of the Uniform Commercial Code.

In accordance with this, the United States District Court for the Southern District of Ohio, Eastern Division was paramount in conveying the principle that where there is a failure to demonstrate in a foreclosure action that the Plaintiff is a real party in interest in accordance with Ohio law, such a party lacks standing as the real party in interest. The District Court opined that *“Plaintiffs have not presented any evidence of any assignment, legal or [equitable].”* In Re Foreclosure Cases (2007), U.S. Dist. Lexis 90812 at [*9]. Attention was focused on the note as well as the mortgage and the cases were dismissed.

The District Court for the Southern District of Ohio, Western Division agreed with the Eastern Division’s position by reiterating the law that *“To show standing, then, in a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage and at the time the complaint was filed.”* MidFirst Bank v. Isiah N. Davenport, et al., 2007 U.S. Dist. Lexis

87741, [*7]. This was also the position of the United States District Court for the Northern District of Ohio in Deutsche Bank National Trust Company v. Duawn E. Kay, 2007 U.S. Dist. Lexis 94975 when it stated that:

“The record, therefore, does not show that the Plaintiff was the owner and holder of the interest, title, and rights under the Mortgage and Note at the time of the filing of the foreclosure complaint on August 2, 2007. Plaintiff Deutsche Bank does not appear to have any ownership interest at the time that this lawsuit was commenced. The Plaintiff, therefore, has not carried its burden of proving standing because it has not shown that it personally suffered an actual injury prior to the filing of the Complaint.”

Id. at [*4].

The underlying evidence submitted below does not demonstrate that the Plaintiff was the holder and owner of the note and mortgage at the time the complaint was filed, and therefore Plaintiff lacked standing to file suit, and enforce the note and was not the real party in interest in the foreclosure case. The Defendant/Appellant in its Appellate Brief cited several cases dealing with issues relating to owner and holder of the interest, title, and rights under the mortgage and note at the time the foreclosure complaint was filed, but none of these were addressed appropriately.

CONCLUSION

The law in Ohio is clear, that in order to maintain a cause of action in a foreclosure case, the Plaintiff must be the real party in interest at the time that it filed the complaint. The real party in interest must be entitled to enforce not only the mortgage, but the note. A promissory note is a negotiable instrument, which provides the person entitled to enforce the right to payment of the obligation it represents. Generally, a person is a holder of the note by having

physical possession of the note, which has been endorsed over to them. A note may be endorsed by an allonge affixed to the instrument, which becomes a part of the instrument. Once a note is endorsed, its negotiation is complete upon transfer of possession. Under Ohio law, the right to enforce a note cannot be assigned—instead, the note must be negotiated in accord with Ohio’s version of the Uniform Commercial Code. An attempt to assign a note can create a claim to ownership, but does not transfer the right to enforce the note, unless it has complied substantially with the requirements of the Ohio Uniform Commercial Code.

The person or organization, who is the holder and owner of the note, is entitled to enforce it through a court of law. Only an owner and holder of the note can establish the right to enforce the note and one who is not the owner and holder cannot simply allude that they have ownership and holder status as a means to obtain an advantage in a foreclosure action to which they are not entitled.

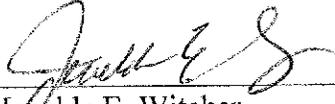
The Plaintiff/Appellee was unable to satisfy the requirements of the Ohio Uniform Commercial Code with respect to the note, hence they lacked standing. The law is clear and has been explained with precision that where a party in a foreclosure action is not the real party in interest they lack standing to either bring a suit or prosecute the case. The Complaint filed in this matter and the attached Exhibits evidence that the real party in interest may be one of two separate entities that do not appear in the proceedings below as parties. The Note clearly references Countrywide Document Custody Services, a division of Treasury Bank, N.A., and the lender was Keybank, N.A..

The real party in interest was not named as a party in the underlying action, and thence, Countrywide Home Loans, Inc., lacked standing to prosecute this foreclosure action and

enforce the note against Defendant/Appellant, Robert E. Montgomery. Since Countrywide is not the real party in interest, they are unable to show any injury or resultant harm in this action.

Wherefore, Appellant respectfully requests that this honorable Court exercise its jurisdiction in this matter, and review the decision of the Appellate Court rendered below. Review is requested in the interests of fairness and justice for all Ohio citizens who may find themselves as a party defendants in foreclosure actions, which are ever increasing in these difficult, economic times. When a plaintiff is not the real party in interest, it is requested that this Court clearly and plainly delineate the UCC title issues at odds herein and reverse the judgment rendered below.

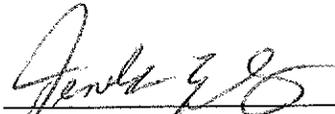
Respectfully submitted,



Jenelda E. Witcher
Attorney for Defendant-Appellant
Robert E. Montgomery

PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum In Support of Jurisdiction was served via regular U.S. Mail to Eric T. Deighton of Carlisle, McNellie, Rini, Kramer & Ulrich Co., L.P.A., 24755 Chagrin Blvd., Suite 200, Cleveland, Ohio 44122 attorney for Plaintiff, on this the 12th day of April 2010.



Jenelda E. Witcher

APPENDIX

1. Exhibit A - Opinion and Judgment Entry of the Sixth District Court of Appeals
2. Exhibit B - Mortgage
3. Exhibit C - Note
4. Exhibit D - Assignment

FILED
COURT OF APPEALS
2010 FEB 26 A 8:00

COMMON PLEAS COURT
BERNE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Countrywide Home Loans, Inc.

Court of Appeals No. L-09-1169

Appellee

Trial Court No. CI08-2809

v.

Robert E. Montgomery, et al.

DECISION AND JUDGMENT

Appellant

Decided:

FEB 26 2010

* * * * *

Eric T. Deighton, for appellee.

Jenelda E. Witcher, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, we are asked to address the following assignments of error:

{¶ 2} "1. The Plaintiff was not the real party in interest in the lawsuit filed in the trial court and therefore lacked standing to bring suit at the time the suit was filed against

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FEB 26 2010

Exhibit A

the defendant. In failing to establish that the Plaintiff was the real party in interest, the Plaintiff therefore was not legally entitled to bring the suit against appellant."

{¶ 3} "2. The Lucas County Common Pleas Court erred when it granted summary judgment to Countrywide Home Loans, Inc., since at the time of filing the Complaint Countrywide lacked standing given that they were not legally the real party in interest entitled to bring the suit against the Defendant. The court therefore lacked jurisdiction over the case brought by a party who was not the real party in interest at the time of filing suit."

{¶ 4} In 2004, appellant, Robert E. Montgomery, purchased property located in Toledo, Lucas County, Ohio. He borrowed \$175,000 from Keybank National Association ("Keybank") in order to buy that property and, on February 11, 2004, signed a mortgage agreeing to repay this debt to Keybank.

{¶ 5} On March 14, 2008, appellee, Countrywide Home Loans, Inc. ("Countrywide") filed a foreclosure action in the trial court in which it asserted that:

- (1) appellant was in default on the mortgage that was held by Keybank; and
- (2) Countrywide was "the creditor to whom the debt was owed." Among others, Keybank was also named as a defendant. Attached to the complaint was the original mortgage and a second document captioned "Note." This second document also contained the terms of the mortgage and was signed by appellant. The ensuing language was added at the end of this note: "Pay to the order of Countrywide Document Custody

Services, a division of Treasury Bank, N.A. without recourse this 23rd day of February, 2004. Keybank National Association."

{¶ 6} Appellant filed an answer and a counterclaim. As part of the proceedings below, First American Title Insurance compiled a preliminary and a final Judicial Report. The final report contains the following statement:

{¶ 7} "1. Said Mortgage was assigned to COUNTRYWIDE HOME LOANS, INC., 7105 CORPORATE DRIVE, PTX-B-209, PLANO, TX 75024 BY SEPARATE INSTRUMENT dated March 14, 2008, filed for record April 16, 2008 at 9:10 a.m. and recorded in INSTRUMENT NO. 20080416-0018897 of Lucas County records."

{¶ 8} On February 6, 2009, Countrywide filed a motion for summary judgment. Appellee's requests for admissions are attached to the motion for summary judgment. In those requests, appellant admitted that Countrywide is the holder of the mortgage on his property and that Countrywide is the assignee of Keybank. In addition, the affidavit of Ely Harless, the vice president of Countrywide is also attached to the motion for summary judgment. In the affidavit, Harless avers that Countrywide is the holder of appellant's mortgage and note.

{¶ 9} Montgomery never filed a memorandum in opposition to this motion. Consequently, on March 2, 2009, the common pleas court granted Countrywide's motion for summary judgment¹. Nonetheless, on March 27, 2009, appellant filed a motion to

¹Because the claims of other parties, e.g., Keybank, were not yet resolved by the trial court, the judge added the requisite Civ.R. 54(B) language, to wit, "no just cause for

vacate the trial court's judgment for lack of subject matter jurisdiction. Appellant maintained that as of the date that Countrywide initiated its foreclosure action, it failed to establish that it was the real party in interest as required by Civ.R. 17(A). Montgomery therefore claimed that Countrywide lacked standing to bring the instant action. Appellee filed a memorandum in opposition. On May 19, 2009, the trial court denied appellant's motion, and appellant timely filed the instant appeal.

{¶ 10} Because appellant's assignments of error are intertwined, we shall consider them together. In order to grant a motion for summary judgment, a trial court must determine that: (1) there is no genuine issue as to a material fact; (2) the moving party is entitled to summary judgment; and (3) it appears from the evidence, which is construed in the favor of the nonmoving party, that reasonable minds can come to but one conclusion and that conclusion is adverse to that party. Civ.R. 56(C). Our review of a lower court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶ 11} Civ.R. 17(A) requires that "a civil action must be prosecuted by the real party in interest, that is, by a party who can discharge the claim upon which the action is instituted or is the party who has a real interest in the subject matter of that action." *Discover Bank v. Brockmeier*, 12th Dist. No. 2006-057-078, 2007-Ohio-1552, ¶ 7 (Citation omitted.). If an individual or one in a representative capacity does not have a

delay," in order to render the grant of summary judgment to Countrywide a final, appealable order.

real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court. *State ex rel Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, syllabus.

{¶ 12} In a foreclosure action, the entity that is "[t]he current holder of the note and mortgage is the real party in interest," see *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15, and, thus, has the standing to raise the court's jurisdiction. See, also, *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, ¶ 24 (A bank that was not the mortgagee when its foreclosure action was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.); *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092 (holding that the plaintiff must prove that it owned the note and the mortgage on the date that its complaint in foreclosure was filed).

{¶ 13} Appellant interprets both *Byrd* and *Jordan* as standing for the proposition that a mortgagee must prove that it is the holder of a mortgage on the exact date that the complaint in foreclosure is filed. For the following reason, we disagree. In *Byrd*, Wells Fargo Bank admitted that it was not the holder of the mortgage at the time that it commenced its foreclosure action. *Id.* at ¶ 13. The same is true in *Jordan* wherein Wells Fargo Bank was assigned the mortgage three weeks after it commenced its foreclosure action. *Id.* at ¶ 25. Nothing in either of these decisions indicates proof that a mortgage was assigned to the mortgagee prior to or at the time of the filing of the foreclosure action cannot be offered after the filing of said action. Accord; *Wells Fargo Bank, N.A. v.*

Stovall, supra at ¶ 16 (An assignment of the mortgage to Wells Fargo Bank, N.A. was attached to the bank's motion for summary judgment. The date of the assignment showed that it was made prior to the commencement of the foreclosure action thereby demonstrating that the bank was the real party in interest.).

{¶ 14} As applied to the case before us, uncontradicted evidence, as set forth *infra*, was offered to establish that appellee was the holder of appellant's mortgage on March 14, 2008, the date that this foreclosure action was commenced. Accordingly, no genuine issue of material fact exists on the question of whether Countrywide is the real party in interest and possessed standing to institute this action. Therefore, the trial court did not err in granting summary judgment to Countrywide. Appellant's first and second assignments of error are found not well-taken.

{¶ 15} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

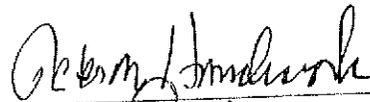
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Countrywide Home Loans, Inc.
v. Montgomery
C.A. No. L-09-1169

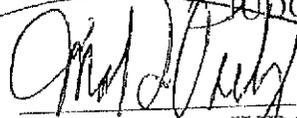
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

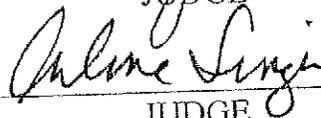
Arlene Singer, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

MBS 285417

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Page: 17 Fee: \$148.00
02/18/2004 05:17:10 AM
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Lucas County Recorder MORT

After Recording Return To:
KeyBank National Association
800 Superior Avenue, 7th Floor
Cleveland, Ohio 44114
Attn: Collateral Document Dept OH-01-02-0726

(Space Above This Line For Recording Date)
This instrument was prepared by KeyBank National Association
MORTGAGE

Loan Number: 44857340A
MIM-100065700063672452

CHL-6367249

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **FEBRUARY 11, 2004**, together with all Riders to this document.

(B) "Borrower" is **ROBERT E MONTGOMERY, AN UNMARRIED MAN**

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is **KeyBank National Association** Lender is a corporation organized and existing under the laws of The United States of America Lender's address is **127 Public Square, Cleveland, Ohio 44114**

(E) "Note" means the promissory note signed by Borrower and dated **February 11, 2004**. The Note states that Borrower owes Lender **One Hundred Seventy-Five Thousand and No/100** Dollars (U.S. \$ **175,000.00**) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **March 1, 2018**

Louisville Box

DEPOSIT **B**

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

Robert E. Montgomery (Seal)
ROBERT E MONTGOMERY -Borrower

(Seal)
-Borrower

(Seal)
-Borrower

NOTE

CHL-6367249

Loan Number: 44857340A
MIN-100065700063672492

FEBRUARY 11, 2004

[Date]

TOLEDO, Ohio

[City]

[State]

3420 SCARSBOROUGH ROAD, TOLEDO, OH 43615

[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 175,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is KeyBank National Association, 127 Public Square, Cleveland, Ohio 44114

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder".

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5.6000%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on April 1, 2004. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on March 1, 2019, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at KeyBank National Association, 127 Public Square, Cleveland, Ohio 44114 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$ 1,429.90

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

EXHIBIT

C

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform Instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

Robert E. Montgomery (Seal)
ROBERT E. MONTGOMERY -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower
[Sign Original Only]

Pay to the order of Countrywide Document Custody Services, a division of
Treasury Bank, N.A. without recourse this 23rd day of February,
2007 KeyBank National Association.

By Lauren R. Murphy
LAUREN R. MURPHY
AUTHORIZED SIGNOR

By Eileen C. Perry
EILEEN C. PERRY
AUTHORIZED SIGNOR

Title _____

Title _____

