ORIGINAL

IN THE SUPREME COURT OF OHIO

11-0170

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON, CSFB 2005-12	:	On Appeal From Cuyahoga County Court of Appeals, Eighth Appellate District
Plaintiff-Appellant,	:	
vs.	:	Court of Appeals Case No. CA-10-094757
WORLEY V. PERRY, *et al.*,	:	
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON, CSFB 2005-12

Scott A. King (#0037582) (COUNSEL OF RECORD)
Terry W. Posey, Jr. (#0078292)
THOMPSON HINE LLP
2000 Courthouse Plaza, NE
P.O. Box 8801
Dayton, Ohio 45401-8801
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
Scott.King@Thompsonhine.com
Terry.Posey@Thompsonhine.com

Counsel for Plaintiff-Appellant, U.S. Bank National Association, as Trustee for Credit Suisse First Boston, CSFB 2005-12

Lawrence J. Rich (#0006014)
ZASHIN & RICH CO., L.P.A.
55 Public Square
Fourth Floor
Cleveland, Ohio 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618
ljr@zrlaw.com

Counsel for Defendant-Appellee Worley V. Perry

FILED
JAN 28 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST

This case, along with *U.S. Bank v. Duvall*, Eighth Dist. App. No. 94714, 2010-Ohio-6478[1] present the Court with the most important mortgage foreclosure issue that it has been asked to review in more than a century. Unfortunately, that is not an overstatement.

This case involves an issue that has resulted in conflicting lines of precedent in the District Courts of Appeal and other state supreme courts. The issue has already generated class actions against lenders and lawyers, both in Ohio and nationwide, and are facing borrowers, lenders and the judiciary every day. This case presents an opportunity for the Court to decisively resolve the issue.

That issue, simply written, is what are the requirements for a lender to have standing to sue a borrower for foreclosure of a residential mortgage? That question involves: (a) is standing to sue measured by holding the promissory note or being the recorded mortgagee? and (b) in an Ohio court, can defects in standing be cured prior to judgment?

The First and Eighth Districts have held (a) standing to sue for foreclosure is measured not by holding the note but by being the mortgagee listed in the records of the county recorder and (b) under Ohio jurisprudence, standing must exist at the time of filing the complaint and is not a curable defect. The Eighth District's decision relies on its opinion in *Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092. *Jordan* has been cited by 13 appellate cases in Ohio courts since its release. *Jordan* relies on *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, which itself has been cited by 14 appellate cases in Ohio courts since its release.

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[1] The Notice of Appeal and Memorandum in Support of Jurisdiction for the *Duvall* case were filed contemporaneously with this case.

On identical facts—involving the same plaintiff in this case—the Seventh District has reached the exact *opposite* result on the first question, holding that standing is *not* measured by recording an assignment of mortgage, but rather by holding the promissory note. *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032

With respect to the second question, on identical facts—again involving the same plaintiff in this case—the Fifth District reached the conclusion opposite to that reached by the Eighth District, holding that standing does need to exist at the time the complaint is filed but only prior to judgment, and that in Ohio courts, standing is a curable defect. *U.S. Bank Nat'l Ass'n v. Bayless*, Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115. Other District Courts of Appeal are also holding standing *is* a curable defect.

As a result of the dismissal of foreclosure actions by the First and Eighth Districts, borrowers are bringing class actions against lawyers who filed foreclosure actions with a supposed lack of standing. *Turner v. Lerner Sampson and Rothfuss*, U.S. District Court, N.D. Ohio, Case Number 1:11-CV-00056. Borrowers are bringing similar class actions against national banks, *Kline v. Mortgage Electronic Security Systems,* U.S. District Court, S.D. Ohio, Case Number 3:08-CV-0408.

Just this month, the Massachusetts Supreme Court weighed in on this issue. Like the First and Eighth Districts, the Massachusetts Supreme Court held that standing is based on being a recorded mortgagee, and not on holding the note. *U.S. Bank Nat'l Ass'n v. Ibanez* (2011), No. SJC-10694, 458 Mass. 637, 652, 2011 Mass. LEXIS 5. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law . . . . This doctrine has not prevailed in Massachusetts.")

Foreclosures now comprise a large percentage (and in many counties the majority) of civil actions in this state. More than 89,000 foreclosure cases in Ohio were filed in 2009 – the 14th consecutive increase year over year.[2] There were more than 2.9 million foreclosures filed nationwide,[3] and that record is expected to be broken in 2011.[4] It is difficult to imagine an issue that has more far reaching consequences for borrowers, lenders, the judiciary and the bar than what standards that Ohio courts are to use for standing to foreclose a residential mortgage. This case presents a question of great general interest, and warrants this Court's jurisdiction.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

On July 10, 2008, Appellee U.S. Bank, N.A. as Trustee for Credit Suisse First Boston CSFB 2005-12 ("U.S. Bank") filed a Complaint for Foreclosure against Appellants Worley V. Perry and Dorothy Perry ("Perrys") seeking judgment on a Note and to foreclose on a Mortgage on a property located at 13211 Rexwood Avenue ("Property").

On July 31, 2008, the Perrys filed a Motion to Dismiss, asserting that U.S. Bank was not the recorded owner of the Mortgage. In response, U.S. Bank filed with the Trial Court a copy of the recorded Assignment of Mortgage, assigning the Mortgage to U.S. Bank on July 10, 2008, and which was recorded in the Cuyahoga County Recorder's office on July 15, 2008. On August 28, 2008, the Trial Court denied the Motion to Dismiss.

On October 15, 2008, U.S. Bank filed a Motion for Summary Judgment, asserting that the Note was in default and that it was entitled to judgment on the Note and to foreclose on the Mortgage. The Perrys responded by asserting that because the Mortgage was not assigned and recorded prior to the filing of the Complaint, U.S. Bank lacked standing.

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[2] http://www.supremecourt.ohio.gov/SCO/justices/oconnor/news/fraudSummit.asp.
[3] http://reversemortgagedaily.com/2011/01/19/record-2-9-million-foreclosure-filings-in-2010.
[4] http://www.housingwire.com/2011/01/12/foreclosures-reach-record-high-in-2010-realtytrac.

On December 22, 2008, the Magistrate issued an order recommending summary judgment. On January 5, 2009, the Perrys filed an objection, again stating that the Assignment was not recorded before the Complaint was filed. On February 23, 2010, the Trial Court overruled the objections and granted U.S. Bank judgment and issue a Decree of Foreclosure.

On December 16, 2010, the Eighth District Court of Appeals issued a Journal Entry and Opinion ("Opinion"), reversing and remanding, holding that U.S. Bank had to prove ownership of both the Note and the Mortgage, and must do so as of the date the Complaint was filed, and not merely as of the date that it moved for summary judgment. Opinion, ¶¶ 19-21, 25.

Statement of the Facts

On September 1, 2005, the Perrys executed the Note, borrowing $76,000 from American Brokers Conduit. On the same day, they executed the Mortgage, securing the performance of the Note with a lien on the Property.

American Brokers' Conduit endorsed the Note in "blank," endorsing the Note with the words "Pay to the Order of" but listing no payee.

The Perrys failed to make payment, constituting a default under the Note and Mortgage. U.S. Bank accelerated the entire balance due.

On July 10, 2008, U.S. Bank commenced this action. The Complaint alleged that U.S. Bank held the Note, and a copy of the Note (including the blank endorsement) was attached to the Complaint.

On July 10, 2008 (the same day the Complaint was filed), a notice of Assignment of Mortgage was executed. The signature on the Assignment did not reflect what time of day that the Assignment had been executed. The Assignment was recorded on July 15, 2008. The

Perry's moved to dismissed because the Assignment had not been recorded as of the filing of the Complaint. The Trial Court overruled that Motion.

On October 15, 2008, U.S. Bank filed a Motion for Summary Judgment with supporting affidavits. The affidavits described U.S. Bank's ownership of the Note and Mortgage, as well as the Perrys' default, and specifically averred that U.S. Bank was the owner and holder of the Note at that time.

The only argument which the Perrys asserted in opposition (and their only objections to the Magistrate's decision) was that, at the time the Complaint was filed, U.S. Bank was not the mortgagee shown in the records of the Recorder. Both the Magistrate and the Trial Court rejected that contention, concluding that U.S. Bank was entitled to summary judgment.

The Perrys appealed, again raising the same issue regarding the date of the recording of the Assignment of Mortgage. The Eighth District reversed, relying solely on its previous decision in *Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092:

> Because the complaint was filed the same day the assignment was dated, without evidence that the assignment was given prior to the filing of the complaint, the trial court should have denied the motion for summary judgment. See *Jordan supra*.
>
> *Wells Fargo v. Jordan* provides the following:
>
> "Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed. E.g., *In re Foreclosure Cases*, (N.D. Ohio 2007), Case Nos. 1:07CV2282, et seq., (Boyko, J.); *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F.Supp.2d 650, (Rose, J.). Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."
>
> "*In Wells Fargo Bank, N.A. v. Byrd, supra*, where Wells Fargo filed suit on its own behalf but acquired the mortgage from the original lender after filing, the court held that, 'in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.'"

> "Our facts are exactly the same here . . . WFB was not the real party in interest on the date it filed its complaint seeking foreclosure against Jordan."
>
> "Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan's first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint.

Opinion, ¶¶ 19-21, 25. The Eighth District then held U.S. Bank had not proven standing as the date the Complaint was filed, reversing the Trial Court's entry of summary judgment.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I

The holder of a promissory note has standing to enforce a mortgage which secures its payment.

The Eighth District measured standing to foreclose a mortgage by having a recorded assignment of mortgage. The Seventh District Court of Appeals has reached the opposite conclusion.

In the Seventh District, standing to foreclose is not measured by having a recorded assignment of mortgage, but rather by being a holder of the underlying note. In *Marcino,* a copy of the assignment of mortgage was *not* introduced into the record, but the Seventh District nonetheless held that U.S. Bank was entitled to enforce the note based *solely* because it was the holder of bearer paper:

> For nearly a century, Ohio courts have held that whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt, and the mortgage is a mere incident to the obligation. *Edgar v. Haines* (1923), 109 Ohio St. 159, 164, 141 N.E. 837. Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers* (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400.

Marcino, ¶ 52.

In *Marcino*, the court was only presented with authenticated copies of the original note and mortgage, but not the assignment. *Marcino*, ¶¶ 49-51. Nonetheless, based on earlier Ohio precedent and the Uniform Commercial Code,[5] the Seventh District concluded that being a holder of a promissory note had standing to foreclose a mortgage securing its payment, even if a notice of assignment of mortgage is not recorded. *Marcino*, ¶ 54.

The Seventh District's standard is consistent with earlier Ohio law that "security follows the debt" such that it is the owner of the note—and not the owner of the mortgage—which has priority. *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258. "Where a note secured by a mortgage is transferred, as by endorsement, so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered." *Kuck v. Sommers* (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400; *see also Noland v. Wells Fargo Bank N.A. (In re Williams)* (Bankr. S.D. Ohio 2008), 395 B.R. 33, 44 n.3, 47; *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)* (Bankr. S.D. Ohio 2006), 350 B.R. 74, 81-82, 84.

The Seventh District's position is consistent with the majority of other states. A recent white paper from the American Securitization Forum details the law in 30 states which also supports the principle that ownership of the mortgage follows the note, without the recording of an assigment of the mortgage.[6] That is the position of the American Law Institute:

> "The principle of this subsection, that the mortgage follows the note, . . . applies even if the transferee does not know that the obligation is secured by a mortgage . . . . **Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.**"

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[5] R.C. 1309.109(A)(3), R.C. 1309.102(A)(72)(d), R.C. 1309.203(G), and the official comment 9 to U.C.C. 9-203 are all discussed in *Marcino* at ¶ 53.

[6] See Transfer and Assigment of Residential Mortgage Loans in the Secondary Mortgage Market, American Securitization Forum, p. 16-21, available at http://www.americansecuritization.com/uploadedFiles/ASF_White_Paper_11_16_10.pdf.

Restatement (Third) of Property, Mortgages, §5.4(a), Comment b (emphasis added). Both the Fifth District and the Ninth District have adopted this Restatement position. *Bank of New York v. Dobbs*, Fifth Dist. App. No. 2009-CA-000002, 2009-Ohio-4742, ¶¶ 27-28; *Deutsche Bank Nat'l Trust Co. v. Traxler*, Ninth Dist. Ap. No. 09CA009739, 2010-Ohio-3940, ¶ 19 (following *Dobbs*).

In this case, the Eighth District acknowledged that the evidence before the trial court was that U.S. Bank held the Note at the time it filed for summary judgment. Opinion, ¶ 18. In the Seventh District, that alone would have been sufficient to give U.S. Bank standing to *both* sue on the Note *and* foreclose the Mortgage. The Eighth District reached the opposite conclusion, holding that the lender had to prove that the mortgage was assigned prior to the date the complaint was filed and that owning the Mortgage was measured by having a recorded Assignment of Mortgage. Opinion, ¶ 19. In *Marcino*, the Seventh District concluded that as the holder of the note, U.S. Bank was entitled to collect the balance due and to foreclose the mortgage, while in this case, the Eighth District concluded that without having a recorded Assignment of Mortgage prior to filing the complaint, U.S. Bank could do neither.

There is conflict among the Districts (and the states) as to what standard courts are to use to measure standing—holding the note or holding a recorded assigment of mortgage. This Court should accept jurisdiction to clearly establish what is Ohio law.

Proposition of Law No. II

Standing need only be proven prior to the entry of judgment.

There is another rift in the District Courts of Appeal. While Proposition of Law No. I addresses *what* is required to prove standing, the next question is *when* standing must be proven. The Eighth and First Districts have taken the position that real party in interest standing must

exist at the time the Complaint is filed, and that in Ohio courts, real party in interest standing is jurisdictional. Other districts have reached the opposite conclusion.

The Opinion quoted *Jordan* for the principle that "if [a] plaintiff has offered no evidence that it owned the note and mortgage *when the complaint was filed,* it would not be entitled to judgment." Opinion, ¶ 20, quoting *Jordan*, ¶¶ 22-23 (emphasis added). The First District follows a similar view of standing. *Byrd, supra; see, also Bank of New York v. Gindele*, First Dist. App. No. C-090251, 2010-Ohio-542, ¶ 6 ("In a foreclosure action, absent understandable mistake or circumstances where the identity of a party is difficult or impossible to ascertain, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.")

Jordan based its standing-is-an-incurable-defect conclusion on *Byrd*. *Byrd* based its reasoning on *United States use of Wulff v. CMA, Inc.* (9 Cir. 1989), 890 F.2d 1070, 1074-75. *Byrd* at ¶ 15.

While standing is not a curable defect under federal law because it is a requirement of Article III, real party in interest standing *is* a curable defect under Ohio law. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002; *Bayless* at ¶ 20-23; *Bank of New York v. Stuart*, Ninth Dist. App. No. 06CA008953, 2007-Ohio-1483, ¶¶ 11-13. Federal courts take a similar view of Ohio law. *Kline v. Mortgage Elec. Sec. Sys., Inc.* (S.D. Ohio March 22, 2010), Case No. 3:08cv408, 2010 U.S. Dist. LEXIS 26666, at *20; *Whittiker v. Deutsche Bank Nat'l Trust Co.* (N.D. Ohio 2009), 605 F. Supp. 2d 914, 929, n.18.

Other Districts Courts of Appeal have rejected the reasoning being used by the First and the Eighth Districts. Perhaps the most articulate has been the Fifth District:

> In *Wachovia Bank, N.A. v. Cipriano*, Guernsey App.No. 09CA007, 2009-Ohio-5470, ¶ 38, we emphasized: **"Pursuant to Civ.R. 17(A), the real party of**

> **interest shall 'prosecute' the claim. The rule does not state 'file' the claim."** We thus rejected Cipriano's argument in that case that the trial court had lacked jurisdiction because Wachovia was not the holder or owner of the note and mortgage at the time of the filing of the complaint. Id. at ¶ 40. We rejected a similar "real party in interest" argument in *LaSalle Bank Natl. Assn. v. Street*, Licking App.No. 08 CA 60, 2009-Ohio-1855, ¶ 28.
>
> In the case sub judice, it is undisputed that on May 30, 2008, appellee filed a notice of filing of assignment of the mortgage and note, more than six months before the trial court granted summary judgment. Appellant thereafter did not expressly contradict this evidence of ownership. Therefore, in light of our precedent in *Cipriano* and *Street*, we find no merit in appellant's arguments in this regard.

Bayless, ¶¶ 22-23 (emphasis added). The Ninth District agrees with the Fifth District. *Stuart,* ¶¶ 11-13. The Tenth District has in two cases also rejected the rigid view of *Jordan* and *Byrd. Countrywide Home Loan Servicing, L.P. v. Thomas*, Tenth Dist. App. No. 09AP-819, 2010-Ohio-3018 and *Deutsche Bank Nat'l Trust Co. v. Cassens*, Franklin App. No. 09-AP-865, 2010-Ohio-2851, ¶ 17. The Second District has noted the conflict among the Districts but ultimately determined that it did not need to reach the issue. *HSBC Bank USA, N.A. v. Thompson*, Second Dist. App. No. 23761, 2010-Ohio-4158, ¶¶ 82-86.

Here, there was no dispute that as of the time that it filed its motion for summary judgment, U.S. Bank was the holder of both the Note and, by that point, a recorded Assignment of Mortgage. The Eighth District nonetheless dismissed the Complaint because U.S. Bank did not have the Assigment of Mortgage at the time that it filed the Complaint.

In the Fifth, Ninth, and Tenth Districts, there is no requirement that the plaintiff be the recorded mortgagee at the time of filing. Those Districts hold that Rule 17 only requires standing to be shown to "prosecute"—not "file"—an action. The standards applied by the First and Eighth District are in open conflict with these decisions.

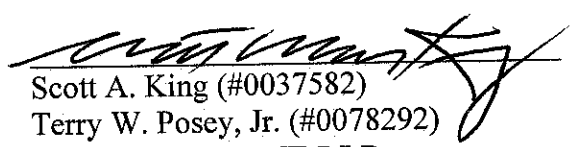
This proposition of law presents a clear conflict between the appellate districts and another question of great general interest, in a dispute that only this Court has the authority to resolve.

CONCLUSION

Foreclosures are the most common form of civil action in Ohio, and standing is routinely raised as a defense. The courts in the appellate districts are divided on the two most fundamental questions: when standing must be proven and what is required to establish standing. That issue is leading to class actions being filed against both lenders and lawyers, and impacting borrowers statewide.

It is difficult to imagine questions more deserving of this Court's review. This Court should accept jurisdiction to resolve these important issues.

Respectfully submitted,



Scott A. King (#0037582)
Terry W. Posey, Jr. (#0078292)
THOMPSON HINE LLP
2000 Courthouse Plaza, N.E./P.O. Box 8801
Dayton, OH 45401-8801
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
E-mail: Scott.King@Thompsonhine.com
Terry.Posey@Thompsonhine.com

Counsel for Plaintiff-Appellant, U.S. Bank National Bank Association, as Trustee for Credit Suisse First Boston, CSFB 2005-12

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following ordinary U.S. Mail, postage prepaid, on this 28th day of January, 2011:

Matthew A. Taulbee
LERNER, SAMPSON & ROTHFUSS
120 East Fourth Street, 8th Floor
P.O. Box 5480
Cincinnati, OH 45201

Lawrence J. Rich
ZASHIN & RICH CO., L.P.A.
55 Public Square
Fourth Floor
Cleveland, OH 44113

Scott A. King

642277.6

DEC 16 2010

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94757

U.S. BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

vs.

WORLEY V. PERRY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-664469

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

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VOL0719 PG0572

ATTORNEY FOR APPELLANTS

Lawrence J. Rich
Zashin & Rich Co., L.P.A.
55 Public Square
Fourth Floor
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Matthew A. Taulbee
Lerner, Sampson & Rothfuss
120 East Fourth Street, 8th Floor
P.O. Box 5480
Cincinnati, Ohio 45201

Scott A. King
Terry W. Posey, Jr.
Thompson Hine LLP
2000 Courthouse Plaza, N.E.
P.O. Box 8801
Dayton, Ohio 45401-8801

Dales S. Smith
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 16 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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VOL 0719 PG 0573

LARRY A. JONES, J.:

Defendants-appellants, Worley Perry and Dorothy Perry ("the Perrys"), appeal the February 23, 2010 decision of the trial court granting summary judgment in favor of U.S. Bank and issuing judgment in the amount of $74,062.58, plus interest at 7.5% from and after March 1, 2008, and issuing a decree of foreclosure. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm in part, reverse in part and remand to the trial court for further proceedings in accordance with this opinion.

STATEMENT OF THE CASE

On July 10, 2008, appellee, U.S. Bank National Association ("U.S. Bank") filed a complaint for foreclosure against the Perrys seeking judgment on a note in the amount of $74,062.58, plus interest and seeking to foreclose on the property at 13211 Rexwood Avenue in Garfield Heights, Ohio 44105.

On July 31, 2008, the Perrys filed a motion to dismiss, asserting that U.S. Bank was not the recorded owner of the mortgage on the property. In response, U.S. Bank filed a recorded assignment of mortgage executed by Mortgage Electronic Registration Systems, Inc., assigning the mortgage to U.S. Bank on July 10, 2008. The trial court denied the Perrys' motion to dismiss on August 28, 2008.

U.S. Bank filed its motion for summary judgment on October 15, 2008.

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U.S. Bank asserted that the note was in default and that it was entitled to judgment on the note and foreclosure on the mortgage. The Perrys responded by asserting that because the mortgage was not assigned and recorded prior to the filing of the complaint, U.S. Bank lacked standing.

On December 22, 2008, the magistrate issued an order recommending that the judge grant summary judgment in U.S. Bank's favor. The Perrys filed an objection on January 5, 2009. On February 23, 2010 the trial court overruled the objections and granted U.S. Bank judgment and a foreclosure decree. The Perrys filed their notice of appeal on March 2, 2010. The Perrys also filed a stay of the sheriff's sale pending appeal, which the trial court granted.

STATEMENT OF THE FACTS

On August 5, 2002, Worley Perry purchased the single family dwelling at issue. He later experienced financial difficulties due to the economy and his wife's illness and fell behind on the payments.

On September 1, 2005, the Perrys executed on a note, borrowing $76,000 from American Brokers Conduit. On the same day, they executed the mortgage, securing the performance of the note with a lien on the property. The Perrys failed to make payment after March 1, 2008. The failure constituted a default under the note and mortgage, and U.S. Bank accelerated the entire balance due.

ASSIGNMENTS OF ERROR

The Perrys assign two assignments of error on appeal:

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"[1.] The trial court erred and abused its discretion when it granted summary judgment to appellee because at the time appellee filed the complaint, appellee did not have the right to invoke the jurisdiction of the court, and thus was not entitled to judgment as a matter of law.

"[2.] The trial court erred and abused its discretion by relying on the supplemental affidavit in support of motion for summary judgment by Matthew A. Taulbee, an attorney for the plaintiff, which was improper."

LEGAL ANALYSIS

The Perrys argue in their first assignment of error that the trial court erred when it granted summary judgment because U.S. Bank did not have jurisdiction of the court.

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex*

Corp. v. Catrett (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, " * * * the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." Id. at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

This court reviews the trial court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153.

It is with the above standards in mind that we now address the Perrys' first assignment of error. The Perrys argue that the trial court erred when it granted summary judgment to U.S. Bank because at the time U.S. Bank filed the complaint, U.S. Bank did not have the right to invoke the jurisdiction of the court

and was therefore not entitled to judgment. We find the Perrys' argument to have merit.

Review of the docket and the markings on the complaint demonstrate that the complaint was filed on July 10, 2008. U.S. Bank filed its motion for summary judgment and attached an affidavit from China Brown, the Vice President of Loan Documentation for Wells Fargo. The affidavit provided the following:

> "2. Plaintiff is the holder of the note and mortgage which are the subject of the within foreclosure action. True and accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto as Exhibits 'A' and 'B'."[1]

The affidavit is dated September 22, 2008 and the affidavit states that the plaintiff is the holder of the note and mortgage. It does not state that plaintiff was the holder of the note and mortgage at the time the complaint was filed.

Because the complaint was filed the same day the assignment was dated, without evidence that the assignment was given prior to the filing of the complaint, the trial court should have denied the motion for summary judgment. See *Wells Fargo Bank, N.A., Trustee, Etc. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092.

Wells Fargo v. Jordan provides the following:

> "Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed. E.g., *In re Foreclosure Cases*, (N.D.

[1]See China Brown Affidavit, second paragraph.

Ohio 2007), Case Nos. 1:07CV2282, et seq., (Boyko, J.); *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F.Supp.2d 650, (Rose, J.). Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."

"*In Wells Fargo Bank, N.A. v. Byrd, supra,* where Wells Fargo filed suit on its own behalf but acquired the mortgage from the original lender after filing, the court held that, 'in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.'"

"Our facts are exactly the same here. Delta Funding Corporation owned the Mortgage for the Property on August 3, 2007, the date WFB filed its complaint against Jordan. On September 24, 2007, WFB filed a Notice of Filing of Final Judicial Report. Attached to the Notice were a Final Judicial Report and an Assignment of Mortgage, indicating the Mortgage had been assigned to WFB on August 22, 2007, nearly three weeks after it filed its complaint. In short, WFB was not the real party in interest on the date it filed its complaint seeking foreclosure against Jordan."

"Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan's first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint without prejudice."

Here, China Brown's affidavit does not state that U.S Bank was the holder of the note and the mortgage at the time the complaint was filed. Accordingly, the trial court did not have evidence to prove that U.S. Bank was indeed the holder of the note and the mortgage at the time the complaint was actually filed. Accordingly, we find that it appears from the evidence that reasonable minds can come to more than one conclusion.

The Perrys' first assignment of error is well taken.

The Perrys argue in their second assignment of error that the trial court erred by relying on Matthew A. Taulbee's supplemental affidavit in support of motion for summary judgment. Specifically, the Perrys argue that Taulbee was employed as trial counsel for Lerner, Sampson & Rothfuss, and as trial counsel for plaintiff, Taulbee is forbidden from acting as a witness.

However, a review of the record demonstrates that the Perrys failed to raise this issue in the court below. Generally, if a party has knowledge of an error with sufficient time to object before the judge takes any action, that party waives any objection to the claimed error by failing to raise that issue on the record before the action is taken. *Tissue v. Tissue*, Cuyahoga App. No. 83708, 2004-Ohio-5968; *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119, 617 N.E.2d 1075; *Mark v. Mellott Mfg. Co., Inc.* (1995), 106 Ohio App.3d 571, 589, 666 N.E.2d 631; *Sagen v. Thrower* (Apr. 8, 1999), Cuyahoga App. No. 73954. Therefore, a litigant who had the opportunity to raise a claim in the trial court, but failed to do so, waives the right to raise that claim on appeal. Id.

Accordingly appellants' second assignment of error is overruled.

Judgment is affirmed in part, reversed in part and remand to the trial court for further proceedings.

It is ordered that appellee and appellants split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR

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