

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK, NATIONAL
ASSOCIATION, AS TRUSTEE FOR
CMLTI 2007-WFHE2
C/O WELLS FARGO BANK, N.A.,

Plaintiff-Appellant,

v.

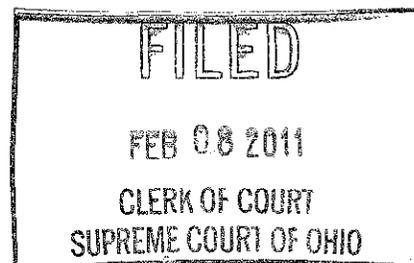
ANTOINE DUVALL, *et al.*,

Defendants-Appellees.

11-0218

On Appeal From Cuyahoga County Court
of Appeals, Eighth Appellate District

Court of Appeals
Case No. CA-10-094714



NOTICE OF CERTIFIED CONFLICT OF APPELLANT,
U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE
FOR CMLTI 2007-WFHE2

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Notice of Certified Conflict of Appellant, U.S. Bank, National
Association, as Trustee for CMLTI 2007-WFHE2

Appellant U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 (“U.S. Bank”) gives notice that on January 31, 2011, the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Case No. CA-10-094714 a Journal Entry (attached as “Exhibit A”) certifying the following question pursuant to App.R. 25:

To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note and the mortgage when the Complaint was filed?

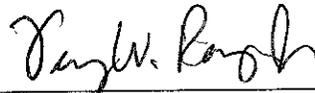
The Eighth District certified the conflict based on its decision in *U.S. Bank, N.A. v. Duvall* (Dec. 30, 2010), Cuyahoga App. No. 94714, Journal Entry and Opinion filed December 30, 2010 (“Exhibit B”). The conflict cases are:

1. *U.S. Bank, N.A. v. Bayless*, Delaware App. No. 09 CAE 01 004, 2009-Ohio-6115 (Fifth District) (“Exhibit C”);
2. *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032 (Seventh District) (“Exhibit D”).
3. *Bank of New York v. Stuart*, Lorain App. No. 06CA008953, 2007-Ohio-1483 (Ninth District) (“Exhibit E”); and
4. *Countrywide Home Loan Servicing, L.P. v. Thomas*, Franklin App. No. 09AP-819, 2010-Ohio-3018 (Tenth District) (“Exhibit F”).

Pursuant to S. Ct. Prac. R. 4.1, a copy of the Entry certifying the conflict, the underlying decision, and the conflict cases are all attached.

A discretionary appeal from the underlying judgment in this action is also pending as Case No. 2011-0171.

Respectfully submitted,



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WFHE2

CERTIFICATE OF SERVICE

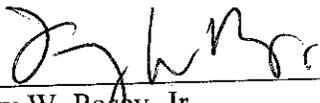
I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 7th day of February, 2011.

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Terry W. Posey, Jr.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

US BANK NATIONAL ASSOC.

Appellant

COA NO.
94714

LOWER COURT NO.
CP CV-638676

COMMON PLEAS COURT

-VS-

ANTOINE DUVALL, ET AL.

Appellee

MOTION NO. 440883

Date 01/31/11

Journal Entry

PLAINTIFF-APPELLANT U.S. BANK, N.A., AS TRUSTEE FOR CMLTI 2007-WFHE2 C/O WELLS FARGO BANK, N.A.'S MOTION TO CERTIFY CONFLICT IS GRANTED. THIS COURT'S JUDGMENT IN U.S. BANK, N.A. V. DUVALL (DEC. 30, 2010), CUYAHOGA APP. NO. 94714 IS IN CONFLICT WITH THE FOLLOWING DECISIONS FROM OTHER DISTRICT COURTS OF APPEALS OF OHIO: U.S. BANK, N.A. V. BAYLESS, DELAWARE APP. NO. 09 CAE 01 004, 2009-OHIO-6115 (FIFTH DISTRICT); BANK OF NEW YORK V. STUART, LORAIN APP. NO. 06CA008953, 2007-OHIO-1483 (NINTH DISTRICT); COUNTRYWIDE HOME LOAN SERVICING, L.P. V. THOMAS, FRANKLIN APP. NO. 09AP-819, 2010-OHIO-3018 (TENTH DISTRICT); AND U.S. BANK, N.A. V. MARCINO, 181 OHIO APP.3D 328, 2009-OHIO-1178, 908 N.E.2D 1032 (SEVENTH DISTRICT).

THIS COURT CERTIFIES THE FOLLOWING QUESTION TO THE OHIO SUPREME COURT PURSUANT TO APP.R.25(A) AND ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION FOR RESOLUTION OF THE FOLLOWING ISSUE:

TO HAVE STANDING AS A PLAINTIFF IN A MORTGAGE FORECLOSURE ACTION, MUST A PARTY SHOW THAT IT OWNED THE NOTE AND THE MORTGAGE WHEN THE COMPLAINT WAS FILED?

RECEIVED FOR FILING

JAN 3 12 011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *A. Musch* DEP.

Presiding Judge SEAN C. GALLAGHER,
Concurs

Judge MARY DEGENARO, Concurs

James J. Sweeney
Judge JAMES J. SWEENEY

EXHIBIT

A

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ALL PARTIES - COSTS TAEND

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94714

U.S. BANK NATIONAL ASSOC.

PLAINTIFF-APPELLANT

vs.

ANTOINE DUVALL, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-638676

BEFORE: Sweeney, J., Gallagher, A.J. and DeGenaro, J.*

RELEASED AND JOURNALIZED: December 30, 2010

VOL 0720 PG 0158

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EXHIBIT

B

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ALL PARTIES.-COSTS TAXED



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

DEC 30 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY G. E. Fuerst DEP.

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ALL PARTIES. COSTS TAXED

VOL 0720 PG 0159

JAMES J. SWEENEY, J.:

Plaintiff-appellant U.S. National Bank Association, as Trustee for CMLTI 2007-WFHE2 c/o Wells Fargo Bank, N.A., ("plaintiff"), appeals the dismissal of its complaint in foreclosure against defendants-appellees Antoine Duvall and Madinah Samad ("defendants"). After reviewing the facts of the case and pertinent law, we affirm.

On December 26, 2006, defendants executed a promissory note for \$90,000 ("the note") secured by a mortgage on property located at 13813 Diana Avenue, in Cleveland ("the mortgage"), with Wells Fargo Bank ("Wells Fargo"). On March 1, 2007, Wells Fargo transferred the note, among other assets, to a trust, of which plaintiff was trustee. Subsequently, defendants defaulted on the note. On October 15, 2007, plaintiff filed a complaint in foreclosure.

On February 5, 2008, Wells Fargo assigned the mortgage to plaintiff as trustee of the previously mentioned trust.

On October 24, 2008, plaintiff filed a summary judgment motion, supported by an affidavit from a Wells Fargo representative. This affidavit stated that plaintiff acquired the note on April 10, 2007.¹ The affidavit also stated that Wells Fargo "assigned and transferred" the mortgage to plaintiff.

¹ There is a discrepancy in the record as to whether the note was transferred on March 1, 2007 or April 10, 2007; however, this inconsistency is not material to the disposition of the instant case.

Crucial to the outcome of this case, the affidavit did not state when plaintiff acquired the mortgage, although it stated that the "assignment of mortgage instrument" was filed in the Cuyahoga County Recorder's Office on February 14, 2008.

Defendants did not dispute the delinquent payments in court; rather, on November 10, 2009, in their brief in opposition to plaintiff's summary judgment motion, defendants requested that this case be dismissed for lack of standing. Defendants relied on this court's decision in *Wells Fargo Bank v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092, ¶23, which held that a foreclosure "complaint must be dismissed if the plaintiff cannot prove that it owned the note and the mortgage on the date the complaint was filed." (Emphasis added.)

On December 8, 2009, the court ordered plaintiff to supplement the record "with some definitive proof of the acquisition date of the subject note and mortgage within 20 days of this court's entry. Failure to do so shall result in dismissal."

On December 28, 2009, plaintiff supplemented the record with a second affidavit and a "Schedule of Mortgage Loans" from Wells Fargo. However, these documents, along with a previously filed document entitled "Pooling and Service Agreement," merely reiterated that Wells Fargo transferred the note to the trust of which plaintiff was trustee.

On January 21, 2010, the court dismissed the instant case, stating in its journal entry, in pertinent part, as follows: "The court has reviewed the documents submitted by plaintiff to address the issue of standing. * * * The documents remain devoid of what the court is requesting. * * * The mortgage assignment was * * * dated and subsequently filed with the recorder after the filing of the complaint. * * * As plaintiff has failed to show standing pursuant to *Wells Fargo Bank v. Jordan*, * * * this case is dismissed in its entirety."

Plaintiff appeals and raises one assignment of error for our review.

I. "The Trial Court erred in dismissing this mortgage foreclosure action for a supposed lack of standing."

Lack of standing is properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.* (1994), 97 Ohio App.3d 623, 647 N.E.2d 222. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293. Thus, the movant may not rely on allegations or evidence outside the complaint; otherwise, the motion must be treated, with reasonable notice, as a Civ.R. 56 motion for summary judgment. Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights*

Comm. (1990), 55 Ohio St.3d 98, 99, 562 N.E.2d 1383.” *State v. ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 506 N.E.2d 378.

Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

In the instant case, defendants did not file a motion to dismiss or a motion for summary judgment. Plaintiff argues that we should review this case under a de novo standard, citing to authority on the standard of review for summary judgment. Defendants, on the other hand, argue that the court involuntarily dismissed the instant case under Civ.R. 41(B)(1), which requires an abuse of discretion standard of review. Under either standard, we conclude that the court did not err.

Ohio law holds that “[a]n action on a note and an action to foreclose a mortgage are two different beasts.” *Gevedon v. Hotopp*, Montgomery App. No. 20673, 2005-Ohio-4597, ¶28. See, also, *Third Fed. Savs. Bank v. Cox*, Cuyahoga App. No. 93950, 2010-Ohio-4133; *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65.

In *Jordan*, supra, this court held that "[t]he owner of rights or interest in property is a necessary party to a foreclosure action. * * * 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." Id., ¶¶22-23.

Accordingly, we conclude that plaintiff had no standing to file a foreclosure action against defendants on October 15, 2007, because, at that time, Wells Fargo owned the mortgage. Plaintiff failed in its burden of demonstrating that it was the real party in interest at the time the complaint was filed. Plaintiff's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.


JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
*MARY DEGENARO, J., CONCUR

*(Sitting by Assignment: Judge Mary DeGenaro of the Seventh District Court of Appeals.)

NOV 07 20 00 15 4

[Cite as *U.S. Bank Natl. Assn. v. Bayless*, 2009-Ohio-6115.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION

Plaintiff-Appellee

-vs-

BRIAN S. BAYLESS, et al.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CAE 01 004

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 08 CVE 02 0280

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 13, 1009

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EXHIBIT

C

Wise, J.

{¶1} Appellant Brian S. Bayless appeals the decision of the Court of Common Pleas, Delaware County, which granted foreclosure of his residential property in favor of Appellee U.S. Bank, National Association. The relevant facts leading to this appeal are as follows.

{¶2} On November 10, 1998, appellant executed a promissory note with Norwest Bank in the amount of \$131,595.00. On the same date, appellant and Karen Bayless, his spouse, executed a mortgage to secure the note, the subject property being 231 Overtrick Drive in Delaware, Ohio.

{¶3} On October 6, 2006, appellant executed a loan modification agreement with the successor to Norwest, which was Wells Fargo Bank. Under said agreement, while the note and mortgage remained in full effect, the amount owed by appellant was modified to \$122,485.53.

{¶4} In October 2007, appellant began defaulting on the note and mortgage.

{¶5} On February 28, 2008, Appellee U.S. Bank filed an action in the Delaware County Court of Common Pleas against appellant and Karen Bayless, seeking the balance of the aforesaid note and foreclosure of the mortgage. Appellee also named as defendants the Delaware County Treasurer and Bank One, N.A., which later merged with JP Morgan Chase Bank, N.A.¹ Appellee therein alleged that it was the "holder" of the note. However, Wells Fargo, the prior holder of the note and mortgage (via a merger with Norwest Bank), did not formally assign and transfer said note and mortgage to

¹ Chase has participated in this appeal as a defendant-appellee. Chase maintains, and we agree, that appellant, by not raising the issue herein, has forfeited any claimed error regarding the trial court's decision to grant Chase's motion to strike appellant's "counterclaim" against it.

appellee until April 1, 2008, and the assignment was not recorded in Delaware County until April 14, 2008.

{¶16} On May 19, 2008, appellant filed a “response” to appellee’s complaint, as well as a motion to dismiss. The motion to dismiss stated that appellee’s complaint should be dismissed for want of plaintiff’s standing, on the basis that appellee was not the holder of the note at the time of the filing of the complaint. Appellant also essentially alleged that Wells Fargo, the prior holder of the note and mortgage, failed to work out a loan modification in good faith.

{¶17} On May 30, 2008, appellee filed a response to the motion to dismiss, concurrently submitting a notice of filing of assignment of the mortgage and note from Wells Fargo to appellee.

{¶18} On August 1, 2008, appellant filed a motion for stay and a counterclaim. On August 25, 2008, appellee filed a motion for summary judgment and a motion to dismiss appellant’s counterclaim. On September 12, 2008, appellant filed a motion to extend time for responding to appellee’s motion for summary judgment. However, appellant did not further file a response.

{¶19} On October 7, 2008, following a status conference, the trial court issued a judgment entry stating that “mediation may be appropriate” and ordering that the case be held in abeyance for sixty days. The entry also provided as follows:

{¶10} “The parties shall advise the Court on or before December 3, 2008 in writing as to the status of this matter. If this matter is not resolved, then the parties shall be scheduled, at that time, for mediation with William Kepko. Said mediation shall be completed on or before December 31, 2008.” Judgment Entry, October 7, 2008.

{¶11} On December 11, 2008, the trial court granted summary judgment in favor of Appellee U.S. Bank. On January 5, 2009, a final judgment entry was issued, granting a decree of foreclosure and establishing the priority of damages for appellee, the county treasurer, and Chase Bank.

{¶12} On January 12, 2009, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶13} "I. US BANK WAS NOT THE HOLDER OF THE MORTGAGE IN QUESTION AT THE TIME OF THE ORIGINAL FILING AND THUS, NOT ENTITLED TO ASSERT THE JURISDICTION OF THE COURT.

{¶14} "II. DEFENDANT WAS ENTITLED TO, AND WAS INFORMED BOTH VERBALLY AND IN THE OFFICIAL COURT DOCUMENTS THAT CASE [SIC] WOULD BE REFERRED FOR MEDIATION IF PARTIES WERE UNABLE TO RESOLVE THEIR DIFFERENCES BY DECEMBER 3, 2008.

{¶15} "III. DEFENDANT WAS ENTITLED TO EQUAL PROTECTION UNDER THE PROVISIONS OF THE 14TH AMENDMENT OF THE US CONSTITUTION."

I.

{¶16} In his First Assignment of Error, appellant contends summary judgment was improper for the reason that appellee was not the holder of the note and mortgage at the time of the filing of its complaint. We disagree.

{¶17} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-

5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶18} Civ.R. 56(C) provides, in pertinent part:

{¶19} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *"

{¶20} The legal concept of "real party in interest" is addressed in Civ.R. 17(A), which reads in pertinent part as follows:

{¶21} "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. *** No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification,

joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

{¶22} 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.

{¶23} 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.

{¶24} Appellant’s First Assignment of Error is overruled.

II.

{¶25} In his Second Assignment of Error, appellant contends the trial court committed reversible error in granting summary judgment where the court had previously ordered the case referred to mediation if the parties could not reach a resolution. We disagree.

{¶26} Appellant challenges the trial court’s decision to grant summary judgment on December 11, 2008, despite its prior order that the case would be referred to a mediator if no resolution was reached by the parties by December 3, 2008. However, it

is well-established that an appellant, in order to secure reversal of a judgment, must generally show that a recited error was prejudicial to him. See *Tate v. Tate*, Richland App.No. 02-CA-86, 2004-Ohio-22, ¶ 15, citing *Ames v. All American Truck & Trailer Service* (Feb. 8, 1991), *Lucas App. No. L-89-295*, quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137. The trial court's decision to order possible mediation under these circumstances was wholly discretionary, and any effective rescission of that order cannot be deemed prejudicial based on our above de novo conclusion that summary judgment in favor of appellee was ultimately proper.

{¶27} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶28} In his Third Assignment of Error, appellant challenges the grant of summary judgment to appellee as a violation of his rights under the Fourteenth Amendment to the United States Constitution.

{¶29} Appellant essentially challenges, on equal protection grounds, the trial court's application of Ohio's Civ.R. 17, supra, to recognize appellee as the real party in interest, vis-à-vis the United States District Court's interpretation of Fed.R.Civ.P. 17 in *In re Foreclosure Cases* (N.D. Ohio 2007), Case Nos. 1:07CV2282, et seq., 2007 WL 3232430.

{¶30} By analogy, we have maintained that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal."

State v. Ivery, Stark App.No. 2005CA00270, 2006-Ohio-5548, ¶ 44, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus.

{¶31} As noted in our recitation of facts, appellant failed to file any response to appellee's motion for summary judgment of August 25, 2008. Furthermore, although appellant's response to the complaint makes brief reference to the aforementioned federal case, our review of the trial court file reveals no attempt by appellant to raise the constitutional challenge now presented on appeal. We therefore find appellant's equal protection argument to be waived.

{¶32} Appellant's Third Assignment of Error is therefore overruled.

{¶33} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

/S/ WILLIAM B. HOFFMAN

JUDGES

[Cite as *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

| | |
|----------------------------------|------------------|
| U.S. BANK NATIONAL ASSOCIATION) | CASE NO. 08 JE 2 |
| AS TRUSTEE FOR THE BNC) | |
| MORTGAGE LOAN TRUST 2006-2,) | |
|) | |
| APPELLEE,) | |
|) | |
| V.) | OPINION |
|) | |
| MARCINO et al.,) | |
|) | |
| APPELLANTS.) | |

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Jefferson County, Ohio
Case No. 07CV00476

JUDGMENT: Affirmed.

APPEARANCES:

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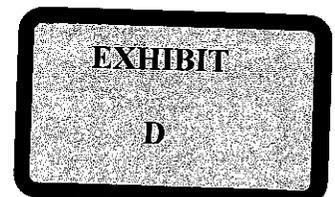
Anthony T. Marcino and Melissa C. Marcino, pro se.

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: March 10, 2009

Waite, Judge.



{¶11} Appellant, Anthony T. Marcino, appearing pro se, appeals the summary judgment entered in the Jefferson County Court of Common Pleas in favor of appellee, U.S. Bank National Association, as trustee for the BNC Mortgage Loan Trust 2006-2 in this foreclosure action. Appellant contends that summary judgment was granted in error because appellee has never demonstrated that it is the real party in interest.

{¶12} Although appellee incorrectly argues that the trial court took judicial notice of the recorded assignment of the note and mortgage at issue in this case, appellee, in the alternative, successfully relies on several sections of the Ohio Revised Code, adopted from the Uniform Commercial Code, to establish that it is the current note and mortgage holder in this case.

Facts

{¶13} On August 18, 2006, appellant obtained a mortgage loan from BNC Mortgage Inc. ("BNC"). In consideration of the loan, appellant executed an adjustable rate note in the face amount of \$75,200. Appellant and his wife, Melissa C. Marcino, granted a mortgage in favor of BNC on the real estate located at 1927 Majestic Circle, Steubenville, Ohio to secure the indebtedness.

{¶14} Attached to the note is a separate document, captioned "Allonge to Note," which reads, in its entirety, "PAY TO THE ORDER OF: _____
WITHOUT RECOURSE **BNC MORTGAGE, INC.**" The allonge is signed on behalf of BNC by "Dolores Martinez, Asst. Vice President."

{¶15} According to the affidavit of appellee's vice president of loan documentation, Steven M. Patrick, dated November 13, 2007, appellee is the holder of

the note and mortgage. Appellant defaulted under the terms of the note and mortgage, and the account is due for the June 1, 2007 payment and all subsequent payments. As of November 13, 2007, a principal balance of \$74,816.76 was due on the account, with interest thereon from May 1, 2007, at 8.375 percent per annum. There is an acceleration provision in both the note and mortgage, allowing appellee to call the entire unpaid principal balance with interest immediately due and payable.

{¶6} On September 7, 2007, appellee filed its complaint in forfeiture against the Marcinos. On September 11, 2007, the Marcinos, appearing pro se, filed a number of affidavits in response to the complaint, including those captioned "Affidavit: Withdrawal of Participation in Social Security," "Affidavit: Live Birth," "Affidavit: Declaration of Domicile," "Affidavit: Certificate of Citizenship," "Affidavit: Revocation of Signature," and "Affidavit: Revocation of Power of Attorney." The affidavits were apparently filed in an effort to call into question the trial court's jurisdiction over the Marcinos. Each of the affidavits was signed by the Marcinos as "Sovereign state Citizen[s]/Principal[s], by special appearance, proceeding Sui Juris."

{¶7} On October 16, 2007, appellees filed a motion for default judgment. The Marcinos filed two pleadings on October 19, 2007, captioned "Amended Answers, Defenses, and Counterclaims" and "Motion and Order of Dismissal, And Or Demurrer." On October 23, 2007, the trial court set the motion for default judgment for hearing on October 29, 2007.

{¶8} On October 26, 2007, appellee filed a motion to strike the Marcinos' answer or for leave to file a reply to the counterclaims. On the same day, appellee filed

a reply to the Marcinos' motion to dismiss. On October 29, 2007, the Marcinos filed a pleading captioned "Amended Defenses (Continued)."

{¶9} On October 31, 2007, the trial court denied the motion for default judgment, gave the Marcinos an extension of time until November 2, 2007, to file an amended answer to the complaint, and gave appellee an additional 30 days to respond to the Marcinos' counterclaims.

{¶10} On November 27, 2007, appellee filed its motion for summary judgment. The Marcinos filed a so-called motion for dismissal of summary judgment on November 26, 2007, which the trial court treated as a response in opposition to appellee's motion for summary judgment.

{¶11} The trial court conducted a hearing on the motion for summary judgment on December 17, 2007. At the hearing, appellant estimated that he had made his last payment on the note in "June, May, early last year."

{¶12} Appellant also conceded that he had not filed any affidavits or exhibits in support of his brief. The trial court attempted to explain to appellant his evidentiary burden on summary judgment, twice describing the difference between argument and evidence. The trial court told appellant that he must produce evidence in the form of an affidavit or exhibits in order to survive a properly supported motion for summary judgment.

{¶13} However, appellant insisted that appellee had failed to meet its burden on summary judgment because appellee had not produced the original loan document and

had failed to establish that the note had been assigned to appellee by BNC. Appellant stated:

{¶14} “[S]ince the inception of this loan I have -- I have asked for discovery for this -- this whole loan and it's taken me much distress, not only my credit but my whole financial situation to -- for me to -- I'm still trying to get them to prove that this is -- that they are the -- the original note holder. They have yet to prove that.”

{¶15} The trial court twice explained that appellee was not the original holder but that the note and the mortgage had been assigned to appellee. The trial court stated, “[Appellee] attached the assignment in their things showing that the note and mortgage were then assigned to them.”

{¶16} Contrary to the trial court's statement, the record reflects that a copy of the assignment was not filed in support of appellee's motion for summary judgment. In appellee's brief, it claims:

{¶17} “U.S. Bank also submitted a Memorandum in Support of its Motion for Summary Judgment. The Memorandum recited an additional fact of which the trial court was permitted to take judicial notice, *i.e.*, that an assignment of the Mortgage had been recorded in the Jefferson County real estate records on September 24, 2007, approximately three weeks after the filing of the Complaint. * * * The trial court took judicial notice of the recorded assignment during the hearing on December 17, 2007.”

{¶18} At the hearing, appellant continued to assert that appellee had not met its burden on summary judgment. Appellant summarized his legal argument as follows:

{¶19} “[T]he debtor has to prove that they own this debt. They have not done it yet. They have not done it yet. They filed a copy, a glorified certified copy. It doesn’t validate the debt. They have to prove it prima facie and that means the original. I’ve been asking for that for, you know, 12 to 18 months but officially only three or four because it’s been filed and they have to prove that.

{¶20} “The general accounting practices ledger will prove that, one, they have not lent me money. They’ve lent me credit. They do not have the original note. They do not have the original mortgage and it’s illegal for banks -- national banks to lend credit and I’ve stated that.”

{¶21} When asked by the trial court whether appellant’s signature appeared on the note he responded, “No.” However, when asked again, appellant responded, “No. Those are -- those are copies of what appears to be my signature but yet they have not -- they have not proven that.”

{¶22} Due to a typographical error in the judgment entry, the trial court granted default judgment instead of summary judgment in favor of appellee, and the decree of foreclosure was entered on December 17, 2007. Appellant filed his notice of appeal on January 16, 2008. On May 1, 2008, the real property subject to this action was withdrawn from sheriff’s sale on application of appellee. Appellee indicated that it was reviewing the matter and disposition of its collateral, and therefore did not wish to execute judgment at that time. On July 28, 2008, while the case was on limited remand, the trial court issued a nunc pro tunc judgment and decree in foreclosure in order to correct the typographical error in the original judgment.

Standard of Review

{¶23} An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court as set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that (1) no genuine issue as to any material fact remains 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 to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. When a court considers a motion for summary judgment, the facts must be taken in the light most favorable to the nonmoving party. *Id.*

{¶24} "[T]he 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 on a material element of the nonmoving party's claim.*" (Emphasis sic.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party carries its burden, the nonmoving party has the reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, in the face of a properly supported motion for summary judgment, the nonmoving party must produce some evidence that

suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023.

Assignment of Error

{¶25} "The trial court erred as a matter of law in granting summary judgment in favor of Plaintiff-Appellee and against Defendant-Appellant in the Final Judgment Entry in Foreclosure filed December 17, 2007."

{¶26} Appellant argues that appellee has failed to demonstrate that it is the real party in interest in this case. More specifically, appellant claims:

{¶27} "By his only assignment of error, Defendant argues that the trial court erred in granting summary judgment because there is a genuine issue of fact about whether **US BANK NATIONAL, ASSOCIATION** is the holder of the note and mortgage. Appellant admits that he executed the note and mortgage in favor of BNC — not **US BANK NATIONAL, ASSOCIATION**. Appellant argues that because **US BANK NATIONAL, ASSOCIATION** did not present evidence how it became the holder of the note and mortgage, it has not shown that it is a real party in interest." (Boldface sic.)

{¶28} Appellee counters that it has adequately proved the derivation of its status as holder:

{¶29} "It did so through the materials it presented in support of its Motion for Summary Judgment. These materials included the [Patrick] Affidavit, with its sworn attestation of U.S. Bank's status as holder and its authentication of the allonge endorsed in blank, and the Memorandum, with its reference to the recorded Assignment, which the trial court was permitted to recognize by judicial notice."

{¶30} Despite the trial court's warning to appellant that he could not survive summary judgment without providing an affidavit or exhibit, appellant did not attach anything to his opposition brief or put forth any evidence at the hearing. Because appellant did not file a supporting affidavit or adduce any evidence at the trial court level, the propriety of summary judgment turns exclusively on whether appellee met its initial burden of demonstrating that no genuine issue of material fact exists with respect to this foreclosure action.

{¶31} "Every action shall be prosecuted in the name of the real party in interest." Civ.R. 17(A). A real party in interest is one who is directly benefited or injured by the outcome of the case. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24, 485 N.E.2d 701. The real-party-in-interest requirement, "enable[s] the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." *Id.* at 24-25, quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240, 273 N.E.2d 903.

{¶32} The current holder of the note and mortgage is the real party in interest in foreclosure actions. *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C061069, 2007-Ohio-5874, at ¶18; *Kramer v. Millott* (Sept. 23, 1994), 6th Dist. No. E-94-5 (plaintiff did not prove that she was the holder of the note and mortgage, as she did not establish herself as a real party in interest). Where a party fails to establish itself as the current holder of the note and mortgage, summary judgment is inappropriate. *First Union Natl. Bank v. Hufford* (2001), 146 Ohio App.3d 673, 677, 679-680.

{¶33} In *First Union*, the Third District Court of Appeals reversed a summary judgment in favor of a bank that failed to produce sufficient evidence that it was the current note holder. The Third District concluded that the affidavit filed in support of summary judgment contained “inferences and bald assertions” rather than a “clear statement or documentation” proving that the original holder of the note and mortgage transferred its interest to First Union. *Id.* at 678.

{¶34} Appellant contends that the facts of this case are analogous to *Washington Mut. Bank, F. A. v. Green*, 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604. In that case, Green gave a note and mortgage to Check ‘n Go Mortgage Services. *Id.* at ¶2. Washington Mutual filed a complaint in foreclosure against Green when she allegedly defaulted on the note. *Id.* In an affidavit in support of summary judgment, Washington Mutual’s vice president stated that she had personal knowledge of the account, and that the account was in default. *Id.* at ¶6.

{¶35} However, Green submitted documents from the county recorders’ office showing assignments to two other mortgage companies, but not to Washington Mutual. *Id.* at ¶7. Moreover, during the proceedings, Green received correspondence from another lending institution, Fairbanks Capital Corporation, that asserted a right to the proceeds of the note and mortgage. *Id.* Although Green filed a motion for leave to file a third-party complaint against Fairbanks, the trial court denied the motion and entered summary judgment in favor of Washington Mutual. *Id.* at ¶9.

{¶36} On appeal, we concluded that the affidavit of Washington Mutual’s vice president did not establish that the note and mortgage had been assigned to it.

Specifically, “[t]he affidavit did not mention how, when, or whether Washington Mutual was assigned the mortgage and note.” *Washington Mut.*, 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604, at ¶32; see also *Everhome Mtge. Co. v. Rowland*, 10th Dist. No. 07AP-615, 2008-Ohio-1282, ¶15 (“Without evidence demonstrating the circumstances under which it received an interest in the note and mortgage, [the plaintiff] cannot establish itself as the holder”).

{¶37} Furthermore, we declined Washington Mutual’s invitation to infer from the affidavit the fact that it owned the note and mortgage. We adopted the rationale first articulated by the Sixth District Court of Appeals in *First Union*, supra, that, “ [t]hough inferences could have been drawn from this material, inferences are inappropriate, insufficient support for summary judgment and are contradictory to the fundamental mandate that evidence be construed most strongly in favor of the nonmoving party.’ ” *Washington Mut.* at ¶29, quoting *First Union*, 146 Ohio App.3d 673 at 679.

{¶38} We were influenced by the real possibility that the entry of summary judgment could leave Green subject to multiple judgments on the same debt because the lower court had not permitted Green to join Fairbanks. *Washington Mut.*, 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604, at ¶32. As a consequence, we reversed the trial court’s decision and remanded the matter for further proceedings. *Id.* at ¶33.

{¶39} In the case at bar, the Patrick affidavit unequivocally states that appellee is the holder of the note and mortgage. In addition, appellee contends that the trial court took judicial notice of the recorded assignment.

{¶40} Evid.R. 201 states:

{¶41} "(A) **Scope of rule.** This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

{¶42} "(B) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

{¶43} The trial court referred to the assignment twice at the hearing. First, in an effort to explain the elements of the foreclosure action to appellant, the trial court recounted the evidence in the record. The trial court acknowledged that copies of the note and mortgage were in the court's file, "[a]nd there's an assignment of that in here as well."

{¶44} Later in the hearing, the trial court explained the assignment process in response to appellant's allegation that appellee is not the original note holder:

{¶45} "[Appellee] could not be the original bank that lent the money to you. That's why they have an assignment. The bank lent the money to you. They then bought it, then it was assigned. They have attached the assignment in their things showing that the note and mortgage were then assigned to them."

{¶46} The transcript of the hearing reveals that apparently the trial court mistakenly believed that a copy of the assignment had been filed in support of appellee's motion for summary judgment. It appears from our review of the record that a copy of the assignment was never made a part of the record. Contrary to the

appellee's argument, even the most liberal reading of the hearing transcript does not support the conclusion that the trial court took judicial notice of the assignment.

{¶47} Because the assignment was not made a part of the record, we must examine the remaining evidence to determine whether appellee met its burden on summary judgment. Although the Patrick affidavit contains an unequivocal statement that appellee is the holder of the note and the mortgage (unlike the affidavit in *Washington Mut.*), the affidavit "did not mention how, when, or whether" appellee had been assigned the note and the mortgage. *Washington Mut.*, 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604, at ¶32.

{¶48} Consequently, the trier of fact is forced to infer from the Patrick affidavit that appellee was an assignee of BNC. However, we have consistently refused to infer appellee's alleged status of current note holder when appellee has not made the actual assignment a part of the record. *Id.*, see also *DLJ Mtge. Capital, Inc. v. Parsons*, 7th Dist. No. 07-MA-17, 2008-Ohio-1177. Therefore, there is no evidence on the record that appellee is the current assignee of the note and mortgage.

{¶49} Despite appellee's failure to make the assignment a part of the record, appellee can establish itself as the current owner of the note and mortgage. Appellee argues, in the alternative, that the allonge, indorsed in blank, converted the note to bearer paper. As a consequence, appellee's possession of the original note is sufficient evidence to establish that appellee is the real party in interest.

{¶50} R.C. 1303.25(B) states: " 'Blank indorsement' means an indorsement that is made by the holder of the instrument and that is not a special indorsement. When an

instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.”

{¶51} The Patrick affidavit states: “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’.” In Ohio, a “holder” is defined as a person who is in possession of an instrument made payable to bearer. R.C. 1301.01(T)(1).

{¶52} 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.

{¶53} Various sections of the Uniform Commercial Code, as adopted in Ohio, support the conclusion that that the owner of a promissory note should be recognized as the owner of the related mortgage. See R.C. 1309.109(A)(3) (“this chapter applies to the following: * * * [a] sale of * * * promissory notes”), 1309.102(A)(72)(d) (“‘Secured party’ means: * * * [a] person to whom * * * promissory notes have been sold”), and 1309.203(G) (“The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien”). Further, “[s]ubsection (g) [of U.C.C.9-203] codifies the common-law rule that a transfer

of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” Official Comment 9 to U.C.C. 9-203, the source of R.C. 1309.203.

{¶54} Thus, although the recorded assignment is not before us, there is sufficient evidence on the record to establish that appellee is the current owner of the note and mortgage at issue in this case, and, therefore, the real party in interest. Accordingly, appellant’s sole assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

DONOFRIO and VUKOVICH, JJ., concur.

[Cite as *Bank of New York v. Stuart*, 2007-Ohio-1483.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BANK OF NEW YORK etc., et al.

C. A. No. 06CA008953

Appellees

v.

CARL STUART, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 05 CV 142128

DECISION AND JOURNAL ENTRY

Dated: March 30, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellants, Carl and Eleanor Stuart, appeal the decision of the Lorain County Court of Common Pleas, which granted summary judgment in favor of appellee, Bank of New York. This Court affirms.

I.

{¶2} On July 7, 1999, appellants signed a promissory note in favor of Countrywide Home Loans, Inc. ("Countrywide"), d/b/a America's Wholesale Lender. That note was secured by a mortgage on the real property subject to this action. On August 7, 2003, a loan modification agreement was entered into

EXHIBIT

E

between appellants and Countrywide which amended and supplemented the original promissory note and mortgage signed by appellants on July 7, 1999.

{¶3} On May 16, 2005, Bank of New York, as Trustee for the Certificateholders of CWABS Series 99-3 and Mortgage Electronic Registration Systems, Inc., solely as nominee, Successor in Interest to Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender filed a complaint for money, foreclosure, and other equitable relief in the Lorain County Court of Common Pleas against appellants and other parties.¹ The complaint sought to foreclose on a mortgage from appellants and Vicki Stuart to America's Wholesale Lender securing a note in the original amount of \$88,000 dated July 7, 1999. Appellants filed an answer to the complaint in which they denied that appellee was the lawful holder of the July 7, 1999 note of the loan modification, or that appellee was the assignee of the mortgage securing those notes. Therefore, appellants contended that appellee had no legal right to file suit to foreclose on the real property.

{¶4} Appellee filed a motion for summary judgment which was supported by an assignment dated October 19, 2005, in which Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender assigned all of its interest in the mortgage to appellee, as Trustee for the Certificateholders of CWABS Series 99-3.

¹ This Court notes that the other parties named in the complaint have been dismissed from the action, so that appellants are the only original defendants remaining parties to the action on appeal.

Appellants filed a memorandum in opposition to appellee's motion, and on June 6, 2006, the trial court granted summary judgment in favor of appellee.

{¶5} Appellants timely appealed the trial court's decision, setting forth three assignments of error for review.

II.

FIRST ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN IT CONSIDERED EVIDENTIARY MATERIAL RELATING TO TRANSACTIONS AND EVENTS WHICH OCCURRED AFTER THE COMPLAINT WAS FILED.”

SECOND ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING WHETHER THE BANK OF NEW YORK IS THE LAWFUL ASSIGNEE OF THE UNDERLYING NOTE AND MORTGAGE DATED JULY 7, 1999, AND THE LOAN MODIFICATION AGREEMENT DATED AUGUST 7, 2003.”

{¶6} In their first and second assignments of error, appellants argue that the trial court erred in awarding summary judgment to appellee because appellee was not a party in interest at the time the complaint was filed. In addition, appellants argue that the assignment from America's Wholesale Lender to appellee which was reduced to writing and filed in the trial court after appellee filed its complaint for foreclosure was an insufficient means of advising the court and the parties that appellee was a party in interest. This Court disagrees.

{¶7} Appellate courts review decisions on summary judgment de novo, viewing the facts as most favorable to the non-moving party and resolving any doubt in favor of that party. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105; *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2. Summary judgment is proper if there is no genuine dispute of a material fact so that the issue is a matter of law and reasonable minds could come to but one conclusion, that being in favor of the moving party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶8} The issue to be determined is whether appellee was the real party in interest or not. Actions must be prosecuted in the name of the real party in interest. The real party in interest has been defined as the party who will directly be helped or harmed by the outcome of the action. The real party in interest must have a real interest in the subject matter of the litigation and not merely an interest in the outcome of the case. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24. He or she must have some interest in the subject matter of the litigation or be the person who can discharge the claim on which the suit is brought. *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240.

{¶9} If a party is not the real party in interest, the party lacks standing to prosecute the action. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. However, an action will not be dismissed on this ground until a reasonable time has been allowed for the real party in interest to ratify the commencement of

the action or to be either joined or substituted as a party. Civ.R. 17(A). The purpose behind Civ.R. 17 is “to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter.” *Shealy*, 20 Ohio St.3d at 24-25.

{¶10} In its motion for summary judgment, appellee argued that appellants were in default in the payment of the promissory note they issued to America’s Wholesale Lender and the terms of the mortgage deed given to secure the promissory note. Appellee further asserted that it was the lawful holder of the promissory note and, therefore, had the right to foreclose on the mortgage. In support of its motion, appellee attached the promissory note dated July 7, 1999, from appellants to America’s Wholesale Lender; the assignment of the mortgage from America’s Wholesale Lender to appellee; and an affidavit from an officer of Countrywide Home Loans, Inc., d/b/a/ America’s Wholesale Lender, stating the total amount due and owing from appellants as of March 14, 2005.

{¶11} In their memorandum opposing appellee’s motion for summary judgment, appellants argued that appellee did not have a valid assignment of their mortgage when appellee filed its complaint. Appellants also pointed out the fact that the assignment from America’s Wholesale Lender to appellee had an effective date of more than five months after appellee filed its complaint for foreclosure.

Appellants further argued that appellee could not legally foreclose on the mortgage in question without seeking and being granted leave of the court to file a supplemental complaint.

{¶12} Although appellants argue that appellee was required to file a supplemental complaint in order to proceed with the foreclosure action, they have failed to cite any case law to support their argument. While it not this Court's job to create appellants' argument for them, this Court has been unable to find any case law to support appellants' position. However, this Court has found case law to support appellee's claim that filing the assignment with the trial court before judgment was entered was sufficient to alert the court and appellants that appellee was the real party in interest. See *Campus Sweater and Sportswear Co. v. M. B. Kahn Constr. Co.*, (D.C.S.C. 1979), 515 F.Supp. 64, 84-85 (The court held that because the assignment of the cause of action took place a year before trial, that the defendant was not prejudiced by the assignment and that the assignor was effectively precluded from bringing any suit on the cause, assignee was the real party in interest to bring the suit.). See, also, *Dubuque Stone Prods. Co. v. Fred L. Gray Co.* (C.A.8, 1966), 356 F.2d 718, 723-724 (The court held that insurance agent which was not a party to the contract nevertheless was a real party in interest and could sue for premiums owing on insurance contract in view of an all inclusive assignment from insurer to agent. Assignment was not rendered invalid

by having been made after the filing of the complaint because it was made before trial and defendant showed no prejudice.).

{¶13} In the present matter, appellants have failed to show that they were prejudiced by the assignment. In addition, the assignment did preclude America's Wholesale Lender from bringing an action against appellants. Therefore, this Court finds that appellee was a real party in interest for purposes of filing the foreclosure action. Consequently, the trial court correctly awarded summary judgment in favor of appellee. Appellant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT WHEN BANK OF NEW YORK FAILED TO JOIN AN INDISPENSABLE PARTY.”

{¶14} In their third assignment of error, appellants aver that the trial court erred in entering summary judgment in favor of appellee because appellee failed to join an indispensable party. Specifically, appellants argue that appellee should have named Countrywide Home Loans, Inc., and/or Full Spectrum-Lending, Inc., as a party. For the reasons set forth below, this Court finds that appellants have waived this issue on appeal.

{¶15} Civ.R. 8(C) requires a party to set forth an affirmative defense in a pleading. An affirmative defense also may be raised in a Civ.R. 12(B) motion if no responsive pleading has been filed. A party also may seek to amend its

responsive pleading under Civ.R. 15 to raise an affirmative defense. If the party fails to raise its affirmative defense by use of any of these methods, he or she will waive that defense. *Spence v. Liberty Twp. Trustees* (1996), 109 Ohio App.3d 357, 362; Civ.R. 12(B) and 12(H).

{¶16} In the present matter, appellants did not assert appellee's failure to join Countrywide Home Loans, Inc., and/or Full Spectrum-Lending, Inc., as a party as an affirmative defense in their answer, nor did they seek to amend their answer to raise such a defense. Therefore, because appellants failed to raise the issue as an affirmative defense, they may not raise it for the first time on appeal. Appellants' third assignment of error is overruled.

III.

{¶17} Appellants' assignments of error are overruled. The decision of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
MOORE, J.
CONCUR

APPEARANCES:

BARRY ECKSTEIN, Attorney at Law, for appellants.

NICOLE VANDERDOES, Attorney at Law, for appellee.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Countrywide Home Loan Servicing, L.P., :

Plaintiff-Appellee, :

v. :

James D. Thomas, Jr. et al., :

Defendants-Appellants. :

No. 09AP-819
(C.P.C. No. 08CVE-12-17523)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 30, 2010

Lerner, Sampson & Rothfuss, LPA, and Adam R. Fogelman,
for appellee.

James D. Thomas, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, James D. Thomas, Jr. ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Ocwen Loan Servicing, LLS ("Ocwen")¹ in the foreclosure action against him.

{¶2} On or about October 31, 2005, appellant executed and delivered a note and mortgage with America's Wholesale Lender. The note and mortgage were filed on November 5, 2005. Countrywide Home Loan Servicing, L.P. ("Countrywide"), filed its

¹ Ocwen was substituted as a party-plaintiff in this case pursuant to the trial court's May 4, 2009 entry.

EXHIBIT

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complaint in foreclosure on December 10, 2008, stating that it held the note executed by appellant. The complaint indicated that a copy of the note was not attached to the complaint because it was "not available." The mortgage was attached to the complaint and named America's Wholesaler Lender as the lender and contained a blank endorsement to Countrywide Home Loans, Inc., a New York Corporation, d.b.a. America's Wholesale Lender. The complaint also alleged default under a promissory note and demanded enforcement of the mortgage. On May 4, 2009, the trial court granted Countrywide's motion to substitute Ocwen as a party-plaintiff based on the assignment of the note and mortgage from Countrywide to Ocwen that occurred on March 24, 2009.

{¶3} On May 21, 2009, Ocwen filed a motion for summary judgment with supporting affidavits arguing there was no genuine issue of material fact that appellant was in default under the terms and conditions of the note and mortgage held by Ocwen. Responses were filed, and on July 31, 2009, the trial court granted summary judgment in favor of Ocwen. This appeal followed, and appellant brings the following assignment of error² for our review:

Whether the trial court erred in granting summary judgment to the substitute plaintiff as the original plaintiff lacked standing to file the complaint?

{¶4} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the

² Although appellant titles this as an "Issue," we deem this to be his assignment of error.

motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶5} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant in the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher, supra*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} In his single assignment of error, appellant contends Countrywide was not the real party in interest at the time it filed its complaint in foreclosure, and, therefore, the trial court lacked subject-matter jurisdiction over this cause of action. For the reasons that follow, we do not find appellant's arguments persuasive.

{¶7} The complaint filed by Countrywide stated that it currently owned the note that was the subject of the action. Though the note was not attached, the mortgage naming America's Wholesale Lender as the lender and containing a blank endorsement to Countrywide, dba America's Wholesale Lender, was attached to the complaint. After

the complaint was filed, Ocwen was substituted for Countrywide as a party-plaintiff based on an assignment of the note and mortgage from Countrywide to Ocwen dated March 24, 2009. The affidavit filed in support of Ocwen's motion for summary judgment stated that Ocwen was the holder of the subject note and mortgage. A supplemental "Affidavit As To Real Party In Interest" of Kevin M. Jackson, custodian of the books and records maintained by Ocwen, was filed on July 23, 2009. This affidavit stated that Countrywide obtained the authority to hold the note, and the mortgage securing the same, on or about November 4, 2005. The affidavit further indicated that while Mortgage Electronic Registration Systems, Inc. ("MERS"), the nominee for America's Wholesale Lender, executed an assignment of mortgage from it to Countrywide on December 11, 2008, this assignment was "merely an administrative function to update the public records, as all legal and equitable interest in the loan & mortgage was passed to [Countrywide] prior to December 10, 2008." (July 23, 2009 affidavit, 2.)

{¶8} Appellant does not dispute that Ocwen was the holder and owner of the note and mortgage at the time Ocwen filed for summary judgment. Rather, appellant contends that when Countrywide filed its complaint on December 10, 2008, it was not the real party in interest and lacked capacity to sue on the note and mortgage because MERS had not yet assigned the same to Countrywide.

{¶9} Indeed, Civ.R. 17(A) states:

Every action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect

as if the action had been commenced in the name of the real party in interest

{¶10} Appellant relies on *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, wherein the Eighth District Court of Appeals held that Wells Fargo Bank lacked standing to bring a foreclosure action because it owned neither the note nor the mortgage at the time it filed its foreclosure action. Here, however, Ocwen established that Countrywide did hold the note at the time it filed the instant complaint. Further, the Fifth District Court of Appeals has considered and upheld judgments against debtors in scenarios analogous to ours. In *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115, discretionary appeal not allowed by 124 Ohio St.3d 1509, 2010-Ohio-799, the debtor executed a promissory note and a mortgage to secure the note on November 10, 1998, with Northwest Bank. After default, on February 28, 2008, U.S. Bank filed a complaint in foreclosure alleging that it was the holder of the note; however, Wells Fargo, the prior holder of both the note and mortgage (via a merger with Northwest Bank), did not formally assign and transfer the note and mortgage to U.S. Bank until April 14, 2008. The debtor filed a motion to dismiss based on standing, and U.S. Bank filed a motion for summary judgment. The trial court granted summary judgment in favor of U.S. Bank, and the court of appeals affirmed. The *Bayless* court stated:

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.

Id. at ¶122. Therefore, in *Bayless*, because U.S. Bank filed notice of the assignment of the note and mortgage prior to the trial court's granting of summary judgment, the court found there was no evidence contradicting U.S. Bank's ownership, and summary judgment was appropriate.

{¶11} Likewise, in *Deutsche Bank Natl. Trust Co. v. Pagani*, 5th Dist. No. 09CA000013, 2009-Ohio-5665, the debtor argued Deutsche Bank was not the real party in interest because Deutsche Bank filed its foreclosure complaint on July 15, 2008, despite the fact the assignment of the note and mortgage from Ameriquest Mortgage Co. did not occur until July 23, 2008, eight days later. Relying on *Taylor and Street*, supra, the *Pagani* court found that when Deutsche Bank filed its motion for summary judgment, it provided sufficient evidence via affidavit that it was the current holder of the note and mortgage, and, because the debtors failed to meet their reciprocal burden under Civ.R. 56, the debtors failed to establish a genuine issue of material fact existed, the court held that summary judgment in favor of Deutsche Bank was appropriate. See also *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178 (holding the negotiation of a note operates as an equitable assignment of the mortgage even though the mortgage is not assigned or delivered). Here, it is undisputed that Countrywide was the holder of the note at the time it filed the instant action. It is further undisputed that Ocwen was the holder of the note and mortgage at the time it filed for summary judgment. Thus, under *Bayless*, even if Countrywide did not formally hold the note, which it did, and mortgage at the time it filed its complaint, because Ocwen undisputedly established it was the holder of the note and mortgage at the time it filed for summary judgment and appellant

produced no evidence to create a genuine issue of material fact as to this issue, summary judgment in favor of Ocwen was appropriate. Accordingly, we overrule appellant's assignment of error.

{¶12} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
