

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK NATIONAL ASSOCIATION)	CASE NO. 11-0170
)	
)	
Plaintiff-Appellant)	
)	
v.)	
)	
WORLEY V. PERRY, et al.)	
)	
Defendant-Appellees)	

ON DISCRETIONARY APPEAL FROM CUYAHOGA COUNTY COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

APPELLEES WORLEY V. PERRY AND DOROTHY PERRY'S MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF GREAT GENERAL INTEREST

The Plaintiff-Appellant makes it appear to this Court that this is a case of great general interest. It is of great general interest to them, because they lost, but not to the general public.

Moreover, the case involves particularized facts, and because of those facts, the legal issues involved are of interest only to the parties. Thus, because the questions are of interest primarily to the parties, the Court should not accept jurisdiction over the case.

Williamson v. Rubich (1960) 171 Ohio St. 253, 254 (Ohio 1960).

The Court of Appeals for Cuyahoga County correctly ruled on the issues before it. The Plaintiff-Appellant is disappointed in the ruling of the Court of Appeals and thus has tried to convince this Court that this is a case of great general interest. The fact of the matter is that the Court of Appeals for Cuyahoga County followed precedent, including other cases that it had previously ruled on and cases from the United States District Court for the Northern District of Ohio.

In the case at bar the Court of Appeals held that the Plaintiff-Appellants did not put on evidence that the assignment was given prior to the filing of the Complaint. So the problem is not with the law, but the problem is with the actions of the Plaintiff-Appellant. The Plaintiff-Appellant failed to prove its case, but it is now asking this Court to overrule the Court of Appeals, notwithstanding that Plaintiff-Appellant failed to put their proper case on in the trial court. That is the issue here. It is not whether the Court of Appeals decision was contrary to the decision of other courts.

The Plaintiff-Appellant makes a point that attorneys are being sued and class actions are being filed. The fact of the matter is, that if parties to lawsuits would follow the law, and properly prepare their cases, they would not be open to damages.

According to the Massachusetts Supreme Court in the case of *US Bank National v. Ibanez* 458 Mass. 637, 2011 Mass. LEXIS 5, decided January 7, 2011, the court stated at Page 655, "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the Plaintiff-Appellant's failure to abide by those principles and requirements in a rush to sell mortgage-backed securities."

The Plaintiff-Appellant on Page 6 of its brief states that the Eighth District measures standing to foreclose a mortgage by having a recorded assignment of mortgage. That is not what the Court of Appeals in the case at bar held. The Court of Appeals stated at the bottom of page 6:

Accordingly, the trial court did not have evidence to prove that U.S. bank was indeed the holder of note and the mortgage at the time the complaint was actually filed.

The Court of Appeals also stated on Page 5:

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 the plaintiff was the holder of the note and mortgage at the time the complaint was filed.

The issue discussed by the Court of Appeals was the assignment of a note and mortgage and the Plaintiff-Appellants never proved the Note and Mortgage were assigned prior to the filing of the action. It did not deal with the question of whether the ownership of the mortgage followed that of the note. The Plaintiff-Appellant never proved it owned the note and the mortgage. The Eighth District Court of Appeals only held that Plaintiff-Appellant must prove that they are the holders of the note and mortgage at the time the

Complaint is filed, not that the assignment be recorded by the mortgagee at the time the Complaint is filed.

The issue here is attorneys proving their case. In the case at bar, and in the Massachusetts case, the attorneys did not prove their case. That surely does not warrant the Ohio Supreme Court taking jurisdiction.

The Court should recall that it refused jurisdiction over the case of *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-5031 (09/30/2009 Case Announcements, Case No. 2009-1030). *Jordan* was very similar to this case - the facts, the appellate court's holding, and the propositions of law presented by the appealing bank. There is no reason for the Court to conclude that this case is of public or great general interest, when it declined to find such in *Jordan*.

This case has far more to do with burden of proof than it does with legal analysis. Also, it must be noted that the Court of Appeals decision does not result in any forfeiture of U.S. Bank National Association's rights, whatever they might be. The case was remanded to the trial court for further proceedings. The Court of Appeals held that the granting of summary judgment was in error. The Plaintiff-Appellant will still be able to try its case in the trial court.

Such a fact sensitive case does not present broad issues of law or policy which make it a candidate for Supreme Court review.

STATEMENT OF THE FACTS AND THE CASE

This matter is a foreclosure filed in the trial court on July 10, 2008. The Defendant-Appellants Worley V. Perry and Dorothy Perry ("Perrys") filed a Motion to Dismiss which was denied on August 28, 2008. The Perrys then filed an Answer on or about September 4, 2008. The Plaintiff-Appellant U.S. Bank National Association

("Bank") filed a Motion for Summary Judgment on October 15, 2008. The Perrys filed a Brief in Opposition to the Motion for Summary Judgment on October 21, 2008. The Bank, in connection with its Motion for Summary Judgment, presented a copy of an assignment of mortgage which was dated July 10, 2008, assigning the mortgage from Mortgage Electronic Registration Systems as Nominee for American Brokers Conduit and assigning it to the Bank. Said Assignment is dated the same day as the filing of the Complaint and was recorded five days thereafter on July 15, 2008. On December 18, 2008, the Motion for Summary Judgment was granted by a Magistrate. The Perrys filed objections thereto, which were overruled, and an Order of Sale was granted on February 23, 2010. On March 2, 2010, the Perrys filed an appeal with the Eighth District Court of Appeals. The Perrys filed a motion for stay with the Trial Court, which motion was partially granted in that the Trial Court allowed the sale to go forward but stayed the confirmation of sale. The Eighth District Court of Appeals granted a stay and the sale was withdrawn.

The Defendant-Appellee Worley Perry purchased the within single family dwelling on or about the 5th day of August, 2002. The Perrys sustained financial difficulty due to the economy and due to his Mrs. Perry's illness and fell behind on the note. The mortgage and note were originally executed with American Brokers Conduit as per the note and mortgage attached to Bank's Motion for Summary Judgment. Also attached to the Motion for Summary Judgment was an Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. as Nominee for American Brokers Conduit to the Plaintiff-Appellant, U.S. Bank National Association as Trustee for Credit Suisse, First Boston CSFD, 2005-12. The Assignment of Mortgage is dated July 10, 2008 and shows a recording in the Cuyahoga County Recorder's office of July 15, 2008.

ARGUMENT AGAINST PLAINTIFF-APPELLANT'S PROPOSITIONS OF LAW

Proposition of Law No. 1: The holder of a promissory note has standing to enforce a mortgage which secures its payment.

This Court has held that “the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' [citation omitted] * * * as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' [citation omitted].” *State ex rel. Dallman v. Court of Common Pleas, Franklin County*, (1973) 35 Ohio St.2d 176, 178-79 (quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 31 L.Ed.2d 636, 641. “Standing requires a demonstration of a concrete injury in fact, rather than an abstract or suspected injury.” *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, syll. ¶3. There must be some present interest in the subject matter of the case.

Perry's argument is simple: (1) a plaintiff's standing is required to vest a common pleas court with subject matter jurisdiction; (2) U.S. Bank lacked standing to bring suit; and (3) without jurisdiction, the trial court's actions are void.

Standing is a prerequisite to a trial court's adjudication of a case. On December 16, 2010, this Ohio Supreme Court considered the requirement of standing and stated:

Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio.St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio.St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22. It is an issue of law, so we review the issue de novo. *Id.* at ¶ 23. To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. *Ohio Pyro*, ¶ 27. This

holding is based upon the principle that "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. See also Section 4(B), Article IV, of the Ohio Constitution.

An actual controversy is a genuine dispute between adverse parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas* (1996), 74 Ohio.St.3d 536, 542, 660 N.E.2d 458; *Corron v. Corron* (1988), 40 Ohio.St.3d 75, 79, 531 N.E.2d 708. It is more than a disagreement; the parties must have adverse legal interests. *Id.*; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio.St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

Kincaid v. Erie Ins. Co. 2010 Ohio 6036 at ¶¶9-10.

The law is clear as demonstrated by the Eighth District Court of Appeals that the Plaintiff must have the right to invoke the jurisdiction of the Court at the time the Complaint is filed. It is clear from the examination of the docket in this case and the markings on the Complaint that it was filed on July 10, 2008.

The Bank filed a Motion for Summary Judgment and attached an Affidavit of China Brown, Vice President of Loan Documentation for Wells Fargo. The Affiant stated in her second paragraph of the Affidavit as follows:

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".

It should be noted that this 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 the Plaintiff was the holder of the note and mortgage at the time the Complaint was filed. Since the

Complaint was filed the same day as 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. We refer the Court to the case of *Wells Fargo Bank, N.A., Trustee, etc. v. Jordan*, (March 12, 2009), Cuyahoga App. No. 91675, 2009 Ohio 1092; 2009 Ohio App. LEXIS 881 (Appendix Page 1), which the Eighth District Court of Appeals in its well reasoned decision held as follows:

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., 2007 U.S. Dist. LEXIS 84011, (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."

.....

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.

In the case at bar, the Affidavit of China Brown does not state that the Bank was the holder of the note and mortgage at the time the Complaint was filed; thus the trial court lacked evidence of that fact. Without that fact being proven, the Bank's Motion for Summary Judgment must fail.

See also *Flagstar Bank FSB v. Moore* (2010) 195 Ohio App. 3d 659, 2010 Ohio 375, where the Court stated as follows:

Moore and Braxton contend that genuine issues of material fact challenging Flagstar Bank as the real party in interest existed. We agree.

Civ.R. 17 requires that a civil action be prosecuted by the real party in interest. A real party in interest is one who is directly benefitted or injured by the outcome of the case rather than one merely having an interest in the action. Mickey v. Denk, Cuyahoga App. No. 90484, 2008 Ohio 3983, citing State ex. rel. Village of Botkins v. Laws, 69 Ohio St.3d 383, 387, 1994 Ohio 518, 632 N.E.2d 897. The purpose behind the real party in interest rule 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 at interest in the same matter." Morelli v. Walker, Cuyahoga App. No. 88706, 2007 Ohio 4832, citing Shealy v. Campbell (1985), 20 Ohio St.3d 23, 24, 20 Ohio B. 210, 485 N.E.2d 701.

This action was filed by Sovereign Bank on December 27, 2006, one day after a letter was issued from Flagstar Bank to Moore stating that Flagstar Bank had assigned the loan to Countrywide Mortgage. Another document in the record indicates that on May 23, 2007, "MERS, Mortgage Electronic Registration Systems, Inc., as nominee for Lenders Choice Mortgage LLC (Assignor)" transferred and assigned the note and mortgage to Flagstar Bank, FSB. On this record, genuine issues of material fact exist as to who is the real party in interest and the trial court erred in granting judgment in favor of Flagstar Bank.

Thus the Bank did not have standing to bring its action against the Perrys.

Proposition of Law No. 2: Standing need only be proven prior to the entry of judgment.

Standing to prosecute a claim is a threshold question, one which "embodies general concerns about how courts should function in a democratic system of government." State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 469, "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." Ohio Contractors Assn. v. Bicking, 71 Ohio St.3d 318, 320, 1994-Ohio-183, *see also*, Ohio Pyro, Inc. v. Ohio Dept. of

Commerce, 2007-Ohio-5024, 115 Ohio St.3d 375, ¶27. Without standing, a plaintiff is may not invoke the jurisdiction of an Ohio court. *State ex rel. Dallman, supra*, at p. 179.

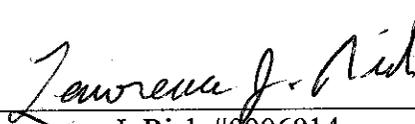
It is this distinction between standing and real party in interest which is made in *Byrd* and *Jordan*. See also, *Bank of New York v. Gindele*, (Hamilton Co. 2010) 2010-Ohio-542, ¶¶2-6. Those cases held that a real party in interest analysis can not occur until the plaintiff has standing to invoke the court's jurisdiction in the first place. Without standing, the Bank could not invoke the subject matter jurisdiction of the trial court. Without jurisdiction, the trial court could not enter any judgment in the matter.

CONCLUSION

The real issue here is whether the trial court erred in granting summary judgment to the Bank. The Court of Appeals stated that the trial court did err and remanded the case back to the trial court. At the trial court level the Bank will have the opportunity to place in evidence testimony and documents to attempt to prove its case. This case therefore does not present any issue of public or great general interest.

For the foregoing reasons the Appellee Perrys request that this Court decline jurisdiction.

Respectfully submitted,



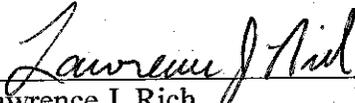
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellees Worley V. Perry and Dorothy Perry's Memorandum in Response to Memorandum in Support of Jurisdiction was sent by regular United States mail this // day of February, 2011 to the following:

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