

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.

: Case No. 2011-0218
:
:
: On Appeal From Cuyahoga County Court
: of Appeals, Eighth Appellate District
:
: Court of Appeals
: Case No. CA-10-094714
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**BRIEF OF APPELLANT U.S. BANK, NATIONAL ASSOCIATION,
AS TRUSTEE FOR CMLTI 2007-WFHE2**

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 CMLTI
2007-WFHE2

Gary Cook (#0021240) (COUNSEL OF RECORD)

3655 Prospect Avenue East
3rd Floor

Cleveland, Ohio 44115

Telephone: (216) 965-4410

Facsimile: (216) 431-6149

gcookesq@yahoo.com

Michael Aten (#0083386)

3214 Prospect Avenue East
Cleveland, Ohio 44115

Telephone: (216) 431-7400 x 117

Facsimile: (216) 431-6149

michaelaten@hotmail.com

Counsel for Defendants-Appellees
Antoine Duvall and Madinah Samad

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT..... 4

Certified Conflict Question

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? 4

A. The contours of the analysis. 4

B. Standing to sue on the promissory note is governed by the U.C.C. 4

 1. Holders of promissory notes. 5

 2. Nonholders in possession of the instrument who have the rights of a holder. 6

 3. Lost or stolen instruments. 9

 4. The importance of possession. 9

C. In a foreclosure action, persons who are entitled to enforce the promissory note have standing to foreclose a mortgage securing its payment..... 10

D. The recording of a mortgage or an assignment of a mortgage is not necessary to have standing to sue on the note or to foreclose. 21

E. Standing only needs to be proven prior to judgment..... 25

F. An analysis of the conflict cases..... 33

 1. *Marcino*..... 33

 2. *Bayless*..... 34

 3. *Thomas*..... 34

4.	<i>Duvall</i>	35
G.	Answering the question.	36
IV.	CONCLUSION	37
	CERTIFICATE OF SERVICE	38
 APPENDIX		
	Notice of Certified Conflict of Appellant, U.S. Bank, National Association, As Trustee for CMLTI 2007-WFHE2 (February 8, 2011).....	A-1
	Journal Entry and Opinion of the Cuyahoga County Court of Appeals (December 30, 2010).....	A-53
	Journal Entry of the Cuyahoga County Common Pleas Court (January 21, 2010).....	A-60

TABLE OF AUTHORITIES

CASES

<i>Armour Fertilizer Works v. Zills</i> (1937), 235 Ala. 41, 177 So. 136, 138	13
<i>Aurora Loan Servs., LLC v. Cart</i> , Eleventh Dist. App. No. 2009-A-0026, 2010-Ohio-1157.....	30, 31
<i>Ballou v. Young</i> (1894), 42 S.C. 170, 20 S.E. 84	19
<i>Bank of N.Y. v. Dobbs</i> , Fifth Dist. App. No. 2009-CA-000002, 2009-Ohio-4742.....	8
<i>Bank of N.Y. v. Stuart</i> , Ninth Dist. App. No. 06CA008953, 2007-Ohio-1483.....	28, 29, 30
<i>Bank W. v. Henderson</i> (1994), 255 Kan. 343, 874 P.2d 632.....	16, 32
<i>Batesville Institute v. Kauffman</i> (1873), 85 U.S. (18 Wall.) 151, 21 L.Ed. 775, 776.....	13
<i>Bill Gates Custom Towing, Inc. v. Branch Motor Express Co.</i> (1981), 1 Ohio App.3d 149, 440 N.E.2d 61	28, 32
<i>Bremer County Bank v. Eastman</i> (1872), 34 Iowa 392	16
<i>Bridge v. Amames Capital Corp.</i> (N.D. Ohio Sept. 28, 2010), No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154.....	24
<i>Capital Investors Co. v. Ex'rs of Estate of Morrison</i> (4th Cir. 1973), 484 F.2d 1157	15
<i>Carpenter v. Longan</i> (1873), 83 U.S. 271	14
<i>Chase Home Fin., LLC v. Fequiere</i> (2010), 119 Conn. App. 570, 989 A.2d 606.....	23
<i>Chase Manhattan Mortg. Corp. v. Smith</i> , First Dist. App. No. C061069, 2007-Ohio-5874.....	6, 19, 27
<i>Citizens Nat'l Bank v. Denison</i> (1956), 165 Ohio St. 89, 133 N.E.2d 329	22, 23
<i>Countrywide Home Loan Servicing, L.P. v. Thomas</i> , Tenth Dist. App. No. 09AP-819, 2010- Ohio-3018.....	3, 34
<i>Daniels v. Katz</i> (Fla. App. 1970), 237 So.2d 58.....	15
<i>Deutsche Bank Nat'l Trust Co. v. Gardner</i> , Eighth Dist. App. No. 92916, 2010-Ohio-663	7
<i>Dixie Grocery Co. v. Hoyle</i> (1933), 204 N.C. 109, 167 S.E. 469	18

<i>Edgar v. Haines</i> (1923), 109 Ohio St. 159, 141 N.E. 837.....	11, 33
<i>Fannie Mae v. Kuipers</i> (2000), 314 Ill. App.3d 631, 732 N.E.2d 723	15, 22
<i>Fed. Home Loan Mtge. Corp. v. Schwartzwald</i> , Second Dist. App. No. 2010 CA 41, 2011-Ohio-2681	5, 8, 27, 28
<i>Feinberg v. Bank of N.Y. (In re Feinberg)</i> (Bankr. S.D.N.Y. 2010), 442 B.R. 215.....	23
<i>First Nat'l Bank v. Vagg</i> (1922), 65 Mont. 34, 212 P. 509	17
<i>Franzese v. Fidelity N.Y. FSB</i> (N.Y. App. Div. 2d Dep't 1995), 214 A.D.2d 646, 625 N.Y.S.2d 275	18
<i>Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)</i> (Bankr. S.D. Ohio 2006), 350 B.R. 74	11, 24
<i>George v. Surkamp</i> (Mo. 1934), 76 S.W.2d 368.....	17
<i>Ginsberg v. Capitol City Wrecking Co.</i> (1942), 300 Mich. 712, 2 N.W.2d 892	16
<i>Hahn v. Smith</i> (1930), 157 S.C. 157, 154 S.E. 112	19
<i>Hill v. Hawes</i> (D.C. Cir. 1944), 144 F.2d 511	15
<i>Holmes v. McGinty</i> (1870), 44 Miss. 94, 1870 Miss. LEXIS 88.....	17
<i>In re AMSCO, Inc.</i> (Bankr. D. Conn. 1982), 26 B.R. 358.....	15
<i>In re Bird</i> (Bankr. D. Md. Sept. 7, 2007), No. 03-52010-JS, 2007 WL 2684265	16
<i>In re Ivy Properties, Inc.</i> (Bankr. D. Mass. 1989), 109 B.R. 10.....	20
<i>In re Kennedy Mortg. Co.</i> (Bankr. D.N.J. 1982), 17 B.R. 957.....	18
<i>In re Miller</i> (Bankr. W.D. Pa. Jan. 9, 2007), No. 99-25616 JAD, 2007 WL 81052	18
<i>In re Nowak</i> , 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335	23
<i>In re Staff Mortg. & Inv. Corp.</i> (9th Cir. 1980), 625 F.2d 281	14
<i>In re Union Packing Co.</i> (Bankr. D. Neb. 1986), 62 B.R. 96	17
<i>Jackson v. Mortg. Elec. Registration Sys.</i> (Minn. 2009), 770 N.W.2d 487	16

<i>Johnson v. Cincinnati Gen. Hosp.</i> (Oct. 28, 1980), Tenth Dist. App. No. 80AP-480, 1980 Ohio App. LEXIS 13411	28, 32
<i>JPMorgan Chase Bank Tr. v. Murphy</i> , Second Dist. App. No. 23927, 2010-Ohio-5285	31
<i>Kernohan v. Manss</i> (1895), 53 Ohio St. 118, 41 N.E. 258.....	11, 12, 21, 36, 37
<i>Kincaid v. Erie Ins. Co.</i> , 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207	26
<i>Kinder v. Zuzak</i> , Eleventh Dist. App. No. 2008-L-167, 2009-Ohio-3793	27, 32
<i>Kirby Lumber Corp. v. Williams</i> (5th Cir. Tex. 1956), 230 F.2d 330	19
<i>Kline v. Mortgage Elec. Sec. Sys.</i> (S.D. Ohio March 22, 2010), Case No. 3:08cv408, 2010 U.S. Dist. LEXIS 26666	27, 30, 32
<i>Kuck v. Sommers</i> (1950), 100 N.E.2d 68, 59 Ohio Abs. 400	11, 33
<i>Lagow v. Badollet</i> (Ind. 1826), 1 Blackf. 416, 419, 1826 Ind. LEXIS 1	15
<i>Lasalle Bank N.A. v. Zapata</i> , 184 Ohio App.3d 571, 2009-Ohio-3200, 921 N.E.2d 1072	23
<i>LaSalle Bank Nat'l Ass'n v. Street</i> , Fifth Dist. App. No. 08 CA 60, 2009-Ohio-1855	30
<i>Leach v. First Cmty. Bank</i> (Ark. Ct. App. Oct. 3, 2007), No. CA 07-05, 2007 Ark. App. LEXIS 671	14
<i>Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC</i> (6th Cir. 2010), 399 Fed.Appx. 97, 2010 WL 4275305	23
<i>Matter of Falls</i> (1900), 31 Misc. 658, 66 N.Y.S. 47, 1 Mills 558, <i>aff'd</i> 66 App. Div. 616, 73 N.Y.S. 1134 (1901).....	18
<i>McLynas v. Karr</i> , Tenth Dist. App. No. 03AP-1075, 2004-Ohio-3597	28, 32
<i>Midfirst Bank v. C.W. Haynes & Co.</i> (D.S.C. 1994), 893 F.Supp. 1304.....	19
<i>Midland Title Sec., Inc. v. Carlson</i> , 171 Ohio App.3d 678, 2007-Ohio-1980, 872 N.E.2d 968	8
<i>Mortg. Elec. Registration Sys. v. Odita</i> , 159 Ohio App.3d 1, 2004-Ohio-5546, 822 N.E.2d 821	22
<i>Mortgage Elec. Registration Sys., Inc. v. Coakley</i> (N.Y. App. Div. 2d Dep't 2007), 41 A.D.3d 674, 838 N.Y.S.2d 622	18
<i>Nance v. Woods</i> (1914), 79 Wash. 188, 140 P. 323	19

<i>Noland v. Wells Fargo Bank, N.A. (In re Williams)</i> (Bankr. S.D. Ohio 2008), 395 B.R. 33 ..11, 24	
<i>Ohio Pyro, Inc. v. Ohio Dep't of Commerce</i> , 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, cert. denied, 552 U.S. 1275 (2008).....	25, 26
<i>Payne v. Wilson</i> (1878), 74 N.Y. 348	18
<i>Prime Fin. Servs. LLC v. Vinton</i> (2008), 279 Mich. App. 245, 761 N.W.2d 694	16
<i>Provident Bank v. Community Home Mortg. Corp.</i> (E.D.N.Y. 2007), 498 F. Supp. 2d 558	18
<i>Robbins v. Warren</i> (May 6, 1996), Twelfth Dist. No. CA95-11-200, 1996 Ohio App. LEXIS 1815	27, 32
<i>Shealy v. Campbell</i> (1985), 20 Ohio St.3d 23, 485 N.E.2d 701	28
<i>Sierra Club v. Morton</i> (1972) , 405 U.S. 727	25
<i>Smith v. Jarman</i> (1922), 61 Utah 125, 211 P. 962	19
<i>Southerin v. Mendum</i> (1831), 5 N.H. 420, 1831 WL 1104	17
<i>State ex rel. Consumers League of Ohio v. Ratchford</i> (1982), 8 Ohio App.3d 420, 457 N.E.2d 878	25
<i>State ex rel. Jones v. Suster</i> (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002	26, 27, 30, 32, 36
<i>U.S. Bank, N.A. v. Bayless</i> , Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115.....	3, 29, 30, 32, 34
<i>U.S. Bank, N.A. v. Marcino</i> , 181 Ohio App. 3d 328, 2009-Ohio-1178, 908 N.E.2d 1032	3, 6, 11, 12, 33, 36
<i>UMLIC VP LLC v. Matthias</i> (D.V.I. 2002), 234 F.Supp. 2d 520	19
<i>United States Bank Nat'l Ass'n v. Ibanez</i> (2011), 458 Mass. 637, 941 N.E.2d 40.....	19, 20
<i>United States use of Wulff v. CMA, Inc.</i> (9th Cir. 1989), 890 F.2d 1070	31
<i>Wachovia Bank v. Cipriano</i> , Fifth Dist. App. No. 09CA007, 2009-Ohio-5470	30, 34
<i>Wash. Mut. Bank, F.A. v. Green</i> , 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604	29
<i>Wead v. Kutz</i> , 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482	21, 23

<i>Weaver Hardware Co. v. Solomovitz</i> (1923), 235 N.Y. 321, 139 N.E. 353.....	18
<i>Wells Fargo Bank, N.A. v. Byrd</i> , 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.....	31, 32, 33
<i>Wells Fargo Bank, N.A. v. Jordan</i> , Eighth Dist. App. No. 91675, 2009-Ohio-1092	3, 31, 32, 33
<i>Wells Fargo Bank, N.A. v. Stovall</i> , Eighth Dist. App. No. 91802, 2010-Ohio-236	6
<i>Whittiker v. Deutsche Bank Nat'l Trust Co.</i> (N.D. Ohio 2009), 605 F. Supp. 2d 914	30, 32
<i>Wood v. Smith</i> (Hamilton App. 1943), 38 Ohio Law Abs. 556, 50 N.E.2d 793	22
<i>Yerby v. Lynch</i> (1847), 3 Gratt. 460, 44 Va. 460, 1847 WL 2384.....	19
<i>Yuille v. Am. Home Mortg. Servicing, Inc.</i> (E.D. Mich. Sept. 22, 2010), No. 09-11203, 2010 U.S. Dist. LEXIS 113300	23
<i>Zorn v. Van Buskirk</i> (1925), 111 Okla. 211, 239 P. 151	18

STATUTES/CODES

Ariz.Rev.Stat. Ann. 33-817	14
Cal.Civ.Code 2936	14
Conn.Gen.Stat. Ann., Title 49-17	14
Kan.Stat. Ann. § 58-2323	16
R.C. 1301.01(T)(1).....	5
R.C. 1303.03 (U.C.C. § 3-104).....	4
R.C. 1303.10(A) (U.C.C. § 3-109).....	5
R.C. 1303.10(D)	5
R.C. 1303.21(B) (U.C.C. § 3-201)	6
R.C. 1303.22 (U.C.C. § 3-203).....	4, 7
R.C. 1303.31 (U.C.C. § 3-301).....	5, 10, 36
R.C. 1303.31(A)(1).....	5

R.C. 1303.31(A)(2).....	6
R.C. 1303.38 (U.C.C. § 3-309).....	9, 10
R.C. 1303.61(B) (U.C.C. § 3-501)	9
R.C. 1303.67 (U.C.C. § 3-602).....	10
R.C. 1309.102.....	33
R.C. 1309.109.....	33
R.C. 1309.203.....	12, 21, 33, 36
R.C. 5301.01(A)	22
R.C. 5301.25.....	22
U.C.C. 9-203(g).....	20

RULES

Civ.R. 1(B)	28
Civ.R. 17.....	28, 29, 32, 34
Civ.R. 21.....	28
Fed.R.Civ.P. 17.....	31, 32

OTHER AUTHORITIES

55 American Jurisprudence 2d (2011), Mortgages, § 927	13
69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 103.....	22
69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 129.....	22
Restatement of the Law 3d, Mortgages (1997), Section 5.4	23
Restatement of the Law 3d, Property (1997), Mortgages, § 5.4.....	13
White & Summers, 2 Uniform Commercial Code (5th Ed. 2008) 145,.....	5

6A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (2d Ed. 2007 update), Section 1545	33
American Securitization Forum, <i>Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market</i> , in ASF White Paper Series (dated November 16, 2010), available at http://www.americansecuritization.com/uploadedFiles/ASF_White_Paper_11_16_10.pdf	13
UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them, Draft Report (March 29, 2011), 4-5, available at http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage _Notes-Circulation_Draft.pdf	7, 9, 12, 20

I. INTRODUCTION.

This case is before the Court pursuant to Article 4, Section 3(B)(4) and Article 4, Section 2(B)(2)(f) of the Ohio Constitution to resolve the conflicts among the Fifth, Seventh, Ninth and Tenth District Courts of Appeal on the requirements to commence a foreclosure action. This Court has accepted certification from the Eighth District to answer the question: “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?”

This Court is in the unique position of clarifying this important area of Ohio law. The answers to the certified question are: (a) To have standing to sue for the balance on a promissory note, the plaintiff need not be the “owner” but only a “person entitled to enforce the note” under R.C. 1303.31; (b) to have standing to enforce a mortgage, the plaintiff must be a person entitled to enforce the note; (c) prior to filing a foreclosure action, there is no requirement to file an assignment of mortgage; and (d) under Civ.R. 17(A), defects in real party in interest standing must only be cured prior to the entry of judgment.

II. STATEMENT OF FACTS.

On December 26, 2006, Defendant-Appellee Antoine Duvall executed a promissory note (“Note”) in favor of Wells Fargo Bank, N.A. (“Wells Fargo”) in connection with his purchase of 13813 Diana Avenue, Cleveland, Ohio (the “Property”), and both Mr. Duvall and Defendant-Appellee Madinah Samad executed a mortgage (“Mortgage”) on the Property to secure its payment. Renewed Motion Ex. A, Response of Duvall and Samad to Request for Admission 1 (“Admission 1”); Renewed Motion Ex. B, Affidavit in Support of Plaintiff’s Motion for Summary Judgment (“Rivera Aff.”) at Ex. A, Note; Rivera Aff. at Ex. B, Mortgage. The

Mortgage was recorded the next day, listing Wells Fargo as the mortgagee. Wells Fargo indorsed the Note in blank. Note, p. 5.

On March 1, 2007—more than 6 months prior to the filing of the Complaint—U.S. Bank, N.A. (“U.S. Bank”), as Trustee for CMLTI 2007-WFHE2 (the “Trust”) and Wells Fargo entered into a Pooling and Servicing Agreement (“PSA”) under which the Note was transferred to the Trust. Rivera Aff. ¶ 4; PSA § 2.01(i), (ii) (attached as an exhibit to the Renewed Motion); Kline Aff. ¶ 3, Mortgage Loan Schedule; Supplemental Brief. Wells Fargo remained the servicer for the Trust, and has physical possession of the Note, which is indorsed in blank. Rivera Aff. ¶ 4.

On October 15, 2007, U.S. Bank commenced this action. The Complaint expressly alleged that U.S. Bank was the “holder and owner” of the Note and Mortgage, and sought the balance due on the Note and to foreclose the Mortgage. Complaint ¶¶ 1, 2.

On October 30, 2007, Duvall and Samad filed an Answer, which asserted as an affirmative defense that U.S. Bank was not a real party in interest. Counterclaim ¶ 8.

On February 5, 2008—three months after the filing of the Complaint—Wells Fargo executed an Assignment of Mortgage (“Assignment”), which provided notice that the Mortgage had been assigned; on February 14, 2008, the Assignment was recorded with the Cuyahoga County Recorder. Rivera Aff. ¶ 5 and Ex. C, Assignment.

On October 24, 2008, U.S. Bank filed a motion for summary judgment. Docket #19. Duvall and Samad opposed by arguing the “Complaint must be dismissed irrespective of whether [U.S. Bank] subsequently acquired the interest upon which it brought suit” and “request[ed] that the instant action be dismissed pursuant to Rule 17.” Docket #21. The Trial Court deferred consideration of the motion to allow mediation; Duvall and Samad failed to appear and the case was returned to the active docket.

On October 13, 2009, U.S. Bank renewed its motion for summary judgment. Docket #31. On November 10, 2009, Duvall and Samad opposed and filed a cross motion requesting dismissal for lack of standing. Opposition p. 1 and §§ 2, 3. On December 8, 2009, the Trial Court ordered U.S. Bank “to supplement the [summary judgment] affidavit of real party in interest with some definitive proof of the acquisition date of the subject note and mortgage . . . Failure to do so shall result in dismissal.” Docket #36.

On December 28, 2009, U.S. Bank filed another affidavit. Kline Aff. ¶¶ 1, 2. On January 21, 2010, the Trial Court entered an order (“Dismissal Order”), holding “As plaintiff has failed to show standing pursuant to [*Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092] this case is dismissed in its entirety. Court costs assessed to the plaintiff(s).” Docket #40. The Dismissal Order says “87 DIS W/O PREJ-FINAL.” *Id.*

U.S. Bank appealed and the Eighth District affirmed. The Eighth District found that U.S. Bank was the holder of the Note prior to filing the Complaint, but concluded that this did not matter because U.S. Bank was required to prove “that it owned the note *and the mortgage* on the date the complaint was filed.” Opinion, n.1 and ¶ 5; citing *Jordan, supra* (emphasis in original). The Eighth District affirmed dismissal of both the claim to recover the balance due on the Note *and* the claim to foreclose the Mortgage.

On January 10, 2011, U.S. Bank filed a Motion to Certify a Conflict with the decisions of the Fifth District in *U.S. Bank, N.A. v. Bayless*, Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115; the Seventh District in *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032; and the Tenth District in *Countrywide Home Loan Servicing, L.P. v. Thomas*, Tenth Dist. App. No. 09AP-819, 2010-Ohio-3018. On January 31, 2011, the Eighth District certified the Conflict.

III. ARGUMENT.

Certified Conflict Question

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?

A. The contours of the analysis.

The question posed by the Eighth District is comprised of four separate issues which lower courts are utilizing to determine standing for a foreclosure action. The first is “must a party show that it *owned* the note?” The second is “must a party show that it *owned* the mortgage?” The third is must these criteria exist “when the Complaint is filed?” And a final issue posed by a number of the conflicts cases is “must there be a recorded assignment of mortgage?” Each will be addressed.

B. Standing to sue on the promissory note is governed by the U.C.C.

As is typical in most mortgage foreclosure cases, the Note in this case is an unconditional promise to pay money by a date certain, *i.e.*, it is a negotiable “instrument” governed by the Uniform Commercial Code (“U.C.C.”), R.C. Chapters 1301 and 1303, *et seq.* R.C. 1303.03 (U.C.C. § 3-104). Analysis of the first part of the certified question—who has standing to enforce a promissory note—thus begins with the U.C.C.

The U.C.C. does not define standing in terms of “ownership,” but rather by looking at whether one is entitled to “enforce” the instrument: “The right to enforce an instrument and ownership of the instrument are two different concepts.” R.C. 1303.22 (U.C.C. § 3-203), Official Comment 1. “[A] person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.” *Id.* In some circumstances, even a “thief” can be person entitled to enforce a note. R.C. 1303.22 (U.C.C. § 3-203), Official Comment 2. As White and Summers explain:

This fine tuning by the drafters of the 1990 revisions makes clear that the party “entitled to enforce the instrument”—the one who should be paid and whose payment will discharge the instrument—may not be a holder. This would be true, for example, in the case of a payee from whom the instrument is stolen.

White & Summers, 2 Uniform Commercial Code (5th Ed. 2008) 145, Sections 16-12.

The U.C.C. defines three categories of persons who may to enforce an instrument:

- (1) A “holder” of the instrument;
- (2) A “nonholder” in possession of the instrument who has the rights of a holder;
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38.

R.C. 1303.31 (U.C.C. § 3-301); *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Second Dist.

App. No. 2010 CA 41, 2011-Ohio-2681, ¶ 35. Each category is described below.

1. Holders of promissory notes.

A “holder” of a negotiable instrument is a term of art, and means:

- (a) If the instrument is payable to bearer, a person who is in possession of the instrument;
- (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.

R.C. 1301.01(T)(1). “Holders” are thus either persons in possession of “bearer paper,”¹ or persons who are in possession of the note and who are its specified payee. Either can enforce.

R.C. 1303.31(A)(1).

Both types of “holders” can either acquire or transfer the instrument by “negotiation.”

“‘Negotiation’ means a voluntary or involuntary transfer of possession of an instrument by a

¹ “Bearer paper” is an instrument “payable to the bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment,” “does not state a payee,” or is “payable to ‘cash.’” R.C. 1303.10(A) (U.C.C. § 3-109). “An instrument payable to an identified person may become payable to the bearer if it is indorsed in blank.” R.C. 1303.10(D).

person other than the issuer to a person who by the transfer becomes the holder of the instrument.” R.C. 1303.21(B) (U.C.C. § 3-201). For instruments which are payable to a specific person, negotiation “requires transfer of possession of the instrument *and its indorsement* by the holder.” *Id.* (emphasis added). On the other hand, bearer paper “may be negotiated by transfer of possession alone.” *Id.*

Ohio courts have applied these principles. As a general rule, “[t]he current holder of the note and mortgage is the real party in interest in a foreclosure action.” *Wells Fargo Bank, N.A. v. Stovall*, Eighth Dist. App. No. 91802, 2010-Ohio-236, ¶ 15; citing *Chase Manhattan Mortg. Corp. v. Smith*, First Dist. App. No. C061069, 2007-Ohio-5874; *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶¶ 47-54. The U.C.C., however, provides additional categories of persons who may enforce a note.

2. Nonholders in possession of the instrument who have the rights of a holder.

The second category of persons entitled to enforce a note is “nonholders” in possession of the instrument who have “the rights of a holder.” R.C. 1303.31(A)(2). These are persons who did not acquire the note through “negotiation” but nonetheless rightfully have it. In its simplest terms, a “nonholder” is someone who possesses an instrument that is payable to someone else. The U.C.C. also gives “nonholders” the right to enforce. R.C. 1303.31(A)(2).

There is, however, an important difference between holders and nonholders. While “holders” are entitled to enforce *merely* by having possession, a nonholder must show that, in addition to possessing the note, the person who transferred the note was itself a “holder”:

If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection [R.C. 1303.22(B)] the transferee

obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved.

R.C. 1303.22 (U.C.C. § 3-203), Official Comment 2.

Succinctly, like holders, nonholders must have possession. However, unlike holders (who need to *only* have possession), nonholders must also have independent evidence of transfer and that the person transferring the instrument had the right to do so. For ease of reference, nonholders must have evidence of "possession plus." The Permanent Editorial Board of the Uniform Commercial Code ("PEB") explains:

How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of subrogation or estate administration, by which one person is the successor to or acquires another person's rights. It can also occur if the delivery of the note to that person constitutes a "transfer" (as that term is defined in UCC Article 3, see below) because transfer of a note "vests in the transferee any right of the transferor to enforce the instrument." Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder (as in the example below). Similarly, a subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them, Draft Report (March 29, 2011), 4-5, available at http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_Notes-Circulation_Draft.pdf ("PEB Report") (footnotes omitted).

Cases from the lower courts offer examples of nonholders entitled to enforce. In *Deutsche Bank Nat'l Trust Co. v. Gardner*, Eighth Dist. App. No. 92916, 2010-Ohio-663, the note was payable to someone other than the plaintiff. *Gardner* held that the right to enforce the note and mortgage could be transferred via assignment pursuant to R.C. 1303.22 (U.C.C. § 3-203), but that additional extrinsic evidence was needed to establish the standing to sue. In

Gardner, the evidence of servicing the mortgage loan, combined with the uncontroverted testimony that the plaintiff was in possession of the note and mortgage, was sufficient to demonstrate that the plaintiff possessed standing to bring the suit.

In *Midland Title Sec., Inc. v. Carlson*, 171 Ohio App.3d 678, 2007-Ohio-1980, 872 N.E.2d 968, a title company closing the sale of a home mistakenly paid the homeowner instead of paying off the mortgage. Honoring its title policy, the title company paid the mortgagee. The mortgagee then sent the title company the note, along with a letter stating the mortgagee was transferring ownership, but failed to indorse the note. Even though the title company did not qualify as a “holder” (because the note remained payable to the mortgagee), *Carlson* held that the title company’s possession of the note, when combined with the letter, was sufficient to provide standing to enforce the note.

In *Bank of N.Y. v. Dobbs*, Fifth Dist. App. No. 2009-CA-000002, 2009-Ohio-4742, the plaintiff was not the original creditor under the note, and there was no evidence that the note had been indorsed to the plaintiff. However, the record contained the note and an assignment of the mortgage to the plaintiff. The Fifth District found that this was sufficient to establish that the assignee of the mortgage was *also* the assignee of the note with standing to sue. *Id.*, ¶ 37.

In *Schwartzwald*, the Second District was presented with a case where the copy of the note with an allonge containing endorsements was not before the court at the time of the summary judgment. The record did support that the plaintiff possessed the physical note, and contained an assignment of all rights in the note and mortgage to the plaintiff from the entity which had been previously assigned the mortgage. The Second District, citing *Dobbs*, concluded that the plaintiff was a nonholder in possession with the rights of a holder, and was therefore, able to enforce the instrument. *Id.*, ¶¶ 53-56.

3. Lost or stolen instruments.

Although possession is a critical part of being a “holder” or “nonholder,” the U.C.C. creates a narrow class of persons who can enforce a promissory note without possession. R.C. 1303.38 (U.C.C. § 3-309). These claimants must prove “all of the following”:

- (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
- (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
- (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

R.C. 1303.38(A) (U.C.C. § 3-309). In addition to these requirements (and as explained below), a person seeking to enforce a lost, destroyed or stolen note must take special precautions to protect the obligor from someone who might later have possession of it.

4. The importance of possession.

Recent news reports have resulted in public concern as to whether mortgage foreclosure actions are being brought by the correct party. By enacting the U.C.C. (and as made clear in the PEB Report), the General Assembly has **already** passed legislation which ensures that only the correct party can enforce a note. Those protections focus on possession.

First, the U.C.C. requires that a person seeking to be paid on a note “present” the original note upon demand. R.C. 1303.61(B) (U.C.C. § 3-501). Upon payment, the obligor is entitled to the surrender of the original note. R.C. 1303.61(B)(2)(c). By limiting standing to either “holders” or “nonholders” in possession, the General Assembly has ensured that payments are made only to the persons entitled to enforce them.

The U.C.C. provides further protection. Payment to a “person entitled to enforce” an instrument discharges the obligation. R.C. 1303.67 (U.C.C. § 3-602). This is true even if another person is making a claim to the instrument. *Id.*

As noted above, in limited circumstances the U.C.C. allows a person claiming a lost, destroyed or stolen instrument to enforce it. R.C. 1303.31(A)(3) (U.C.C. § 3-301) and R.C. 1303.38 (U.C.C. § 3-309). However, and again reflecting the importance of possession, in addition to the stringent requirements to enforce a lost, destroyed or stolen note, the U.C.C. requires the claimant to protect the obligor from someone who later turns up with the note:

The court may not enter judgment in favor of the person seeking enforcement [of a lost, destroyed or stolen note] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection for the person required to pay the instrument may be provided by any reasonable means.

R.C. 1303.38(B).

Thus, the U.C.C. provides the answer to the first standing question before the Court. “To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note?” The answer to that question is “no.” Under the U.C.C., a claimant “may be a ‘person entitled to enforce’ the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.” R.C. 1303.31(B) (U.C.C. § 3-301). Instead, the U.C.C. provides standing to a person in possession of the instrument who is a “holder” or “nonholder,” or has a lost, destroyed or stolen instrument but posts adequate security.

C. In a foreclosure action, persons who are entitled to enforce the promissory note have standing to foreclose a mortgage securing its payment.

The second element of the certified conflict question is “To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned . . . the mortgage?” The answer to that question is also “no.”

A mortgage is a mere incident of the debt evidenced by a note. *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 52; citing *Edgar v. Haines* (1923), 109 Ohio St. 159, 141 N.E. 837; see, also *Noland v. Wells Fargo Bank, N.A. (In re Williams)* (Bankr. S.D. Ohio 2008), 395 B.R. 33; *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)* (Bankr. S.D. Ohio 2006), 350 B.R. 74, 84. “Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” *Marcino*, 2009-Ohio-1178, at ¶ 52; citing *Kuck v. Sommers* (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400.

This Court’s decision in *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258, is an excellent illustration of these principles. In *Kernohan*, Martin executed notes and a mortgage in favor of McGill. McGill recorded the mortgage with the recorder. *Kernohan* at 133. McGill transferred the original mortgage to Kernohan, along with *forged* copies of the notes. *Id.* McGill then transferred the *original* notes to Manss. *Id.* Martin died, his estate sold the land through probate, with Kernohan (who now had the original mortgage) and Manss (who now had the original notes) each claiming the proceeds.

The Court held that Manss, as the holder of the original notes, had the right to the proceeds, even though Kernohan had possession of the original mortgage, and McGill was the recorded mortgagee. “[A] transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage.” *Kernohan* at 133. “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* at 75. Succinctly, security follows the

debt, and, *as against the mortgagor*, the party entitled to enforce the note has the right to enforce the mortgage.

The U.C.C. reinforces the common law principles enunciated in *Kernohan* that the holder of a promissory note is the party entitled to enforce the mortgage that secures its payment, and that transfer of the note automatically transfers the right to enforce a mortgage. “[T]his 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.”). *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 53. Official Comment 9 to R.C. 1309.203 confirms that “[s]ubsection (G) 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.” *Id.* The PEB recently reaffirmed these principles:

“What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note? UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note.”

PEB Report, at 8. Succinctly, **security follows the debt**. Because security follows the debt, a person entitled to enforce a note has the right to enforce the mortgage securing its payment.

These principles are also advocated by the American Law Institute. The Third Restatement of Property (Mortgages) provides:

- (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.

- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.

Restatement of the Law 3d, Property (1997), Mortgages, § 5.4.

Although not controlling, the Court may find it worthwhile to examine how other states have resolved similar issues. American Jurisprudence reflects the general rule:

Generally, the transfer or assignment of a negotiable promissory note carries with it, as an incident, a deed of trust or mortgage upon real estate or chattels that secure its payment. The mortgage follows the debt, in the sense that the assignment of the note evidencing the debt automatically carries with it the assignment of the mortgage. Absent an effective transfer of the debt, the assignment of a mortgage is a nullity.

55 American Jurisprudence 2d (2011), Mortgages, § 927 (internal citations omitted). This rule is followed by a majority of jurisdictions:

Federal

Batesville Institute v. Kauffman (1873), 85 U.S. (18 Wall.) 151, 153, 21 L.Ed. 775, 776

(“no principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured. If a part only of the debt is assigned, a pro tanto portion of the security follows it.”).

Alabama

Armour Fertilizer Works v. Zills (1937), 235 Ala. 41, 43, 177 So. 136, 138 (“when the note is secured by a mortgage, such mortgage follows the note.”).²

² The majority of the following state law survey is found in American Securitization Forum, *Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market*, in ASF White Paper Series (dated November 16, 2010), available at http://www.americansecuritization.com/uploadedFiles/ASF_White_Paper_11_16_10.pdf.

Arizona

Ariz.Rev.Stat. Ann. 33-817 (“The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts.”).

Arkansas

Leach v. First Cmty. Bank (Ark. Ct. App. Oct. 3, 2007), No. CA 07-05, 2007 Ark. App. LEXIS 671, at *3 (“Arkansas has long followed the rule that, in the absence of an agreement or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof.”).

California

Cal.Civ.Code 2936 (“The assignment of a debt secured by mortgage carries with it the security”); *In re Staff Mortg. & Inv. Corp.* (9th Cir. 1980), 625 F.2d 281, 284 (in California, “[A] deed of trust is a mere incident of the debt it secures and . . . an assignment of the debt carries with it the security.” (internal quotation omitted)).

Colorado

Carpenter v. Longan (1873), 83 U.S. 271, 275 (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: “The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”).

Connecticut

Conn.Gen.Stat. Ann., Title 49-17 (“When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided

the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies.”); *In re AMSCO, Inc.* (Bankr. D. Conn. 1982), 26 B.R. 358, 361 (“An assignment of the note carries the mortgage with it . . .”).

District of Columbia

Hill v. Hawes (D.C. Cir. 1944), 144 F.2d 511, 513 (after mortgage note has been cancelled, cancellation of any “mortgage follows as a matter of course and does not require a separate action . . .”).

Florida

Capital Investors Co. v. Ex'rs of Estate of Morrison (4th Cir. 1973), 484 F.2d 1157, 1163 n.12 (“That the mortgage follows the note it secures and derives negotiability, if any, from the note is the rule in Florida where the land under mortgage in this case was located . . .”; citing *Daniels v. Katz* (Fla. App. 1970), 237 So.2d 58, 60.

Illinois

Fannie Mae v. Kuipers (2000), 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727 (“The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured . . . The assignee stands in the shoes of the assignor-mortgagee with regard to the rights and interests under the note and mortgage. . . . in Illinois, the assignment of the mortgage note is sufficient to transfer the underlying mortgage.”) (citations omitted).

Indiana

Lagow v. Badollet (Ind. 1826), 1 Blackf. 416, 419, 1826 Ind. LEXIS 1, at *7 (“a mortgage . . . follows the debt into whose hands soever it may pass.”).

Iowa

Bremer County Bank v. Eastman (1872), 34 Iowa 392, 394 (“The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.”).

Kansas

Kan.Stat.Ann. § 58-2323 (“The assignment of any mortgage as herein provided shall carry with it the debt thereby secured.”); *Bank W. v. Henderson* (1994), 255 Kan. 343, 354, 874 P.2d 632, 640 (“[T]he mortgage follows the note. A perfected claim to the note is equally perfected as to the mortgage.”).

Maryland

In re Bird (Bankr. D. Md. Sept. 7, 2007), No. 03-52010-JS, 2007 WL 2684265, at *2-4 (“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it . . .”).

Michigan

Prime Fin. Servs. LLC v. Vinton (2008), 279 Mich. App. 245, 257, 761 N.W.2d 694, 703 (“[T]he transfer of a note necessarily includes a transfer of the mortgage with it.”); citing *Ginsberg v. Capitol City Wrecking Co.* (1942), 300 Mich. 712, 717, 2 N.W.2d 892.

Minnesota

Jackson v. Mortg. Elec. Registration Sys. (Minn. 2009), 770 N.W.2d 487, 497 (“[A]bsent an agreement to the contrary, an assignment of the promissory note operates as an equitable assignment of the underlying security interest.”).

Mississippi

Holmes v. McGinty (1870), 44 Miss. 94, 99, 1870 Miss. LEXIS 88, at *9 (“[T]he mortgage . . . follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it.”).

Missouri

George v. Surkamp (Mo. 1934), 76 S.W.2d 368, 371 (when the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred).

Montana

First Nat’l Bank v. Vagg (1922), 65 Mont. 34, 39, 212 P. 509, 511 (“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. The mortgage can have no separate existence.”) (citations omitted).

Nebraska

In re Union Packing Co. (Bankr. D. Neb. 1986), 62 B.R. 96, 100 (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note).

New Hampshire

Southerin v. Mendum (1831), 5 N.H. 420, 430, 1831 WL 1104, at *7 (“When a mortgagee transfers to another person, the debt which is secured by the mortgage, he ceases to have any control over the mortgage. . . . And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt.”).

New Jersey

In re Kennedy Mortg. Co. (Bankr. D.N.J. 1982), 17 B.R. 957, 965 (“Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt.”).

New York

Mortgage Elec. Registration Sys., Inc. v. Coakley (N.Y. App. Div. 2d Dep’t 2007), 41 A.D.3d 674, 838 N.Y.S.2d 622, 623 (“[A]t the time of the commencement of this action, MERS was the lawful holder of the promissory note (see UCC 3-204[1]; *Franzese v. Fidelity N.Y. FSB* (N.Y. App. Div. 2d Dep’t 1995), 214 A.D.2d 646, 625 N.Y.S.2d 275), and of the mortgage, which passed as an incident to the promissory note (see *Payne v. Wilson*, 74 N.Y. 348, 354-355 [1878]; see also *Weaver Hardware Co. v. Solomovitz*, 235 N.Y. 321, 139 N.E. 353 [1923]; *Matter of Falls*, 31 Misc. 658, 660, 66 N.Y.S. 47, 1 Mills 558 [1900], *aff’d* 66 App. Div. 616, 73 N.Y.S. 1134 [1901].”); *Provident Bank v. Community Home Mortg. Corp.* (E.D.N.Y. 2007), 498 F. Supp.2d 558, 564-65 (applying principle that the mortgage follows the note).

North Carolina

Dixie Grocery Co. v. Hoyle (1933), 204 N.C. 109, 113, 167 S.E. 469, 471 (“The mortgage follows the debt.”).

Oklahoma

Zorn v. Van Buskirk (1925), 111 Okla. 211, 212, 239 P. 151, 153 (“[T]he mortgage follows the note”).

Pennsylvania

In re Miller (Bankr. W.D. Pa. Jan. 9, 2007), No. 99-25616 JAD, 2007 WL 81052, at *6 & n.7; citing and quoting with approval “Gray, *Mortgages in Pennsylvania* at § 1-3 (1985) (‘the mortgage follows the note’)”

South Carolina

Midfirst Bank v. C.W. Haynes & Co. (D.S.C. 1994), 893 F.Supp. 1304, 1318 (“South Carolina recognizes the ‘familiar and uncontroverted proposition’ that ‘the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.’ *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young*, 42 S.C. 170, 20 S.E. 84 (1894).”).

Texas

Kirby Lumber Corp. v. Williams (5th Cir. Tex. 1956), 230 F.2d 330, 333 (applying Texas law) (“The rule is fully recognized . . . that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note.”).

Utah

Smith v. Jarman (1922), 61 Utah 125, 137, 211 P. 962, 967 (“The modern doctrine that the mortgage follows the note as an incident was thus long ago recognized by this court . . .”).

Virginia

Yerby v. Lynch (1847), 3 Gratt. 460, 44 Va. 460, 489, 1847 WL 2384, at *8-10 (“[T]he mortgage follows the debt.”).

Virgin Islands

UMLIC VP LLC v. Matthias (D.V.I. 2002), 234 F.Supp.2d 520, 523; citing and quoting with approval the Restatement Third of Property.

Washington

Nance v. Woods (1914), 79 Wash. 188, 189, 140 P. 323, 323 (“[T]he mortgage follows the note.”).

Finally, U.S. Bank would be remiss if it failed to point out that not every state agrees with the “security follows the debt” rule. *United States Bank Nat’l Ass’n v. Ibanez* (2011), 458 Mass.

637, 638, 941 N.E.2d 40. In *Ibanez*, the Massachusetts Supreme Court upheld a ruling vacating a foreclosure sale because the assignments of the mortgages at issue were not recorded until the foreclosure sale had already occurred. In response to the mortgagees' arguments that they possessed the right to enforce the notes, the Massachusetts Supreme Court acknowledged that other jurisdictions have held that security follows the debt (*Id.* at 652), but concluded that under Massachusetts law, the party seeking to foreclose must be the "holder" of the mortgage at the time they effectuate foreclosure. *Id.* at 655.³

The *Ibanez* decision has been criticized by the PEB because the court "did not address the effect of Massachusetts's subsequent enactment of UCC § 9-203(g) on [previous common law] precedents." PEB Report, p. 8-9, fn. 37. As discussed above, U.C.C. § 9-203(g) expressly provides that evidence of the assignment of an obligation secured by a mortgage is sufficient to assign the security as well.

The better reasoned rule, and the one that is consistent with the U.C.C., the American Law Institute, the overwhelming majority of states and this Court's precedent is that "security follows the debt," with the result that whoever is entitled to enforce the debt is automatically entitled to enforce the security. The entire purpose of a mortgage is to ensure that collateral is available for payment of the debt. If the debt is satisfied, the mortgage no longer has any purpose. If the debt is transferred, then the ability to obtain its payment through the foreclosure sale of the collateral belongs to the obligee. A mortgage, without the underlying debt, is a nullity.

³ The *Ibanez* court did not mention the decision in *In re Ivy Properties, Inc.* (Bankr. D. Mass. 1989), 109 B.R. 10, 14, in which a bankruptcy judge analyzed Massachusetts law and concluded that the holder of the obligation did possess the right to enforce the mortgage securing the debt.

Thus, the answer to the second standing question before the Court—“To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the mortgage?”—is unequivocally “no.” The person entitled to enforce the mortgage is the person entitled to enforce the promissory note whose payment the mortgage secures. R.C. 1309.203. This is true even if someone else is the recorded mortgagee, and even if someone else has possession of the original mortgage. *Kernohan, supra*.

D. The recording of a mortgage or an assignment of mortgage is not necessary to have standing to sue on the note or to foreclose.

Lower courts are also struggling with the role of a recorded assignment of mortgage. The Eighth District believed that the failure to record an assignment of the mortgage deprived U.S. Bank of standing because, according to the Eighth District, even though U.S. Bank owned the Note, the original mortgagee, Wells Fargo, still “owned” the Mortgage because Wells Fargo was the mortgagee of record. Opinion, ¶ 15. In resolving the certified question, the Court should also touch on the role of recording, and clarify its relationship (or lack of relationship) to standing.

Ohio’s system for recording of mortgages and assignments of mortgage governs the priority of disputes between claimants competing to be the (normally first) mortgagee, and *not* disputes between the mortgagor and mortgagee. *Wead v. Kutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, ¶¶ 23-24. “Recording statutes are not enacted for the benefit of the mortgagor, but rather for the protection of third persons who might acquire legal interests in or

liens upon the property.” 69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 129.⁴

Recording of mortgages is governed by R.C. 5301.25, which states in relevant part:

(A) All deeds, land contracts referred to in division (A)(2)(b) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. *Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser* having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

R.C. 5301.25 (emphasis added).

To be recorded, R.C. 5301.25(A) requires that mortgages be “properly executed.” Proper execution is defined in R.C. 5301.01(A), and requires, among other things, acknowledgement before a notary. If a mortgage is not correctly notarized, then it is not properly recorded, and, therefore loses priority against a bankruptcy trustee or other creditors. *Mortg. Elec. Registration Sys. v. Odita*, 159 Ohio App.3d 1, 2004-Ohio-5546, 822 N.E.2d 821, ¶¶ 10-11; citing *Citizens Nat'l Bank v. Denison* (1956), 165 Ohio St. 89, 133 N.E.2d 329, syllabus, paragraph 2; and 69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 103.

But if a mortgage is not properly recorded, or even if it is not recorded at all, **as between the mortgagor and mortgagee**, the mortgage is enforceable. *Wood v. Smith* (Hamilton App. 1943), 38 Ohio Law Abs. 556, 50 N.E.2d 793; 69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 129. “Ohio law clearly holds that “[a] defectively executed conveyance of an interest in land is valid as between the parties thereto, in the absence of fraud.” *Lasalle*

⁴ In *Fannie Mae v. Kuipers* (2000), 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727, the court also discusses that the purpose of the recording act “is to protect subsequent purchasers against unrecorded prior instruments.”

Bank N.A. v. Zapata, 184 Ohio App.3d 571, 2009-Ohio-3200, 921 N.E.2d 1072, ¶ 21, (quoting *Citizens Nat'l Bank v. Denison* (1956), 165 Ohio St. 89, 95, 133 N.E.2d 329, superseded by statute as stated in *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 11).

Consistent with the principle that recording is not necessary for a mortgage to be effective against the mortgagor, assignments of mortgage also do not need to be recorded to be effective against the mortgagor:

[T]he issue of when the mortgage assignment was recorded becomes relevant only to the extent of establishing creditor priority and subsequent notice to a bona fide purchaser of the land. The validity of the mortgage itself remains unaffected by the timing of the assignment's recordation.

Wead, 161 Ohio App.3d at 584, 831 N.E.2d at 486. The American Law Institute agrees:

“Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.” Restatement of the Law 3d, Mortgages (1997), Section 5.4, at Comment b.

Because the recording of mortgages and their assignment only govern the priority between competing creditors, a mortgagor does not have standing to challenge the validity of the assignment. “Even if the Debtor could show that [the individual who executed the assignment] did not have authority to assign the mortgage, the Court does not need a valid written assignment where the Defendant has possession of the original note and mortgage.” *Feinberg v. Bank of N.Y. (In re Feinberg)* (Bankr. S.D.N.Y. 2010), 442 B.R. 215, 224; *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC* (6th Cir. 2010), 399 Fed.Appx. 97, 102, 2010 WL 4275305, at *4 (citations omitted); *Yuille v. Am. Home Mortg. Servicing, Inc.* (E.D. Mich. Sept. 22, 2010), No. 09-11203, 2010 U.S. Dist. LEXIS 113300, at *20 (finding that the mortgagor is without standing to challenge an assignment's validity); *Chase Home Fin., LLC v. Fequiere* (2010), 119 Conn. App. 570, 989 A.2d 606, 610.

In *Noland v. Wells Fargo Bank N.A. (In re Williams)* (Bankr. S.D. Ohio 2008), 395 B.R. 33, a bankruptcy trustee tried to invalidate a mortgage because a notice of its assignment had not been recorded prior to the bankruptcy. The court dismissed the complaint, holding that vis-à-vis the mortgagee (and therefore the mortgagee's bankruptcy trustee), and the notice of assignment was irrelevant:

For purposes of mortgage avoidance, it is irrelevant whether Wells Fargo or a third party holds the Note. The Mortgage was properly recorded in favor of MERS, as agent for UWM, its successors and assigns. MERS holds the legal interest in the Mortgage, as agent for the Note holder, whomever it may be, who, under Ohio law, because security follows the debt, holds the equitable title thereto.

In summary, the failure of Wells Fargo—or any other holder of the Note—to record an assignment of the Mortgage does not affect the validity of the Mortgage granted by the Debtors to UWM on May 2, 2005 and recorded on May 18, 2005 and of which the Trustee had constructive notice. It follows that the Trustee cannot avoid the Mortgage. Consequently, because the Trustee cannot avoid the Mortgage, he cannot recover the Property for the benefit of the estate.

Noland, 395 B.R. at 47; citing *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)* (Bankr. S.D. Ohio 2006), 350 B.R. 74.

This same point was reinforced in *Bridge v. Aames Capital Corp.* (N.D. Ohio Sept. 28, 2010), No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154. There the mortgagors sued to invalidate the notice of assignment. In dismissing the complaint with prejudice, Judge Soloman reasoned:

Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee. See, e.g., *Livonia Property Holdings v. Farmington Road Holdings*, [supra] (holding that the plaintiff borrower did not have standing to dispute the validity of an assignment between assignor and assignee because plaintiff was “a non-party to those documents.”); *Ifert v. Miller*, 138 B.R. 159 (Bankr. E.D. Pa. 1992). In *Ifert*, the court explained that a debtor lacks standing to challenge an assignment under Texas law because:

[The underlying contract] is between [Debtor] and [Assignor]. [Assignor's assignment contract is between [Assignor] and [Assignee]. The two contracts are

completely separate from one another. As a result of the assignment of the contract, [Debtor's] rights and duties under the [underlying] contract remain the same: The only change is to *whom* those duties are owed....[Debtor] was not a party to [the assignment], nor has a cognizable interest in it. Therefore, [Debtor] has no right to step into [Assignor's] shoes to raise [its] contract rights against [Assignee]. [Debtor] has no more right than a complete stranger to raise [Assignor's] rights under the assignment contract. *Id.* at 166 n. 13.

The Sixth Circuit reached a similar conclusion in *Rogan v. Bank One*, 457 F.3d 561 (6th Cir. 2006), where the plaintiff, acting as trustee for a bankruptcy estate, challenged the assignment of the original creditor's interest in the mortgage to another bank. The Sixth Circuit agreed with the bankruptcy court that found the assignment to be immaterial "because neither the debtors nor the Trustee [were] parties to the [assignment] They lack standing to enforce it; they cannot claim to have relied on it." *Id.* at 567; *See also; Liu v. T&H Mach., Inc.* 191 F.3d 790, 797 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."); Richard A. Lord, 29 *Williston on Contracts* § 74:50 (4th Ed.) ("[T]he debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignee is desirous of avoiding the assignment.")

Id. at *8-11.

The purpose of recording a mortgage is not to govern the relationship between the mortgagor and mortgagee, but rather to determine the relative priority of creditors. For a plaintiff to have standing to foreclose a mortgage, there is no requirement for the plaintiff to have filed a notice of assignment of mortgage, or even that the mortgage itself is recorded.

E. Standing only needs to be proven prior to judgment.

The final component of the certified question is **when** standing to enforce a note and mortgage must be proven. The Eighth District believes that standing must exist and be provable prior to the filing of the Complaint. In this context, that determination is incorrect.

Courts use the term "standing" to denote three separate concepts. The first is where no one—not the named plaintiff nor any other individual—has suffered a direct injury. *Sierra Club v. Morton* (1972), 405 U.S. 727; *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8

Ohio App.3d 420, 457 N.E.2d 878; *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St.3d 375, 381, 2007-Ohio-5024, 875 N.E.2d 550, *cert. denied*, 552 U.S. 1275 (2008) (no fireworks manufacturer had standing to challenge a fireworks permit to a third party). In this context, a lack of standing means that there is no “justiciable” controversy. As this Court explained:

“Standing” is defined at its most basic as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” Black’s Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088. “[T]he question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy” * * * 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.’” *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947.

Ohio Pyro, Inc., 2007-Ohio-5024 at ¶ 27.

The second context in which the phrase “standing” is used is where the named plaintiff is the one who has suffered a direct injury, but has not fulfilled procedural prerequisites to maintain the action. In this context, the plaintiff is the “correct” plaintiff, and “standing” is used to connote that the plaintiff has failed to jump through the procedural requirements. *See, e.g., Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207. The court has subject matter jurisdiction over the dispute, but the plaintiff cannot invoke it.

A third context in which courts use the phrase “standing” is to denote that there is a controversy, but that someone other than the named plaintiff is the “real party in interest.” The classic case is *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002. Lack of real party in interest standing is not a defect in subject matter jurisdiction:

Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. *The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.* Civ. R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. *Houser v. Ohio Historical Soc.* (1980), 62 Ohio St.2d 77, 16 Ohio Op. 3d 67, 403 N.E.2d 965. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Smith v. Smith* (1996), 75 Ohio St.3d 418, 420, 1996 Ohio 215, 662 N.E.2d 366, 369; *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 251, 1992 Ohio 20, 594 N.E.2d 616, 621.

Id. at 77 (emphasis added).

Because this form of standing does not affect subject matter jurisdiction, any defect in real party in interest standing may be cured. *Schwartzwald*, 2011-Ohio-2681, ¶ 75 (stating “[T]hat the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment. To hold otherwise would elevate lack of standing to a jurisdictional defect”); *Kline v. Mortgage Elec. Sec. Sys.* (S.D. Ohio March 22, 2010), Case No. 3:08cv408, 2010 U.S. Dist. LEXIS 26666, at *20 (“Thus, the Ohio Supreme Court has recognized that lack of standing to initiate a lawsuit can be cured by the substitution of the real party in interest for the named plaintiff. There is simply no reason to conclude that the Ohio Supreme Court would reach the opposite result, because the party initiating the lawsuit became the real party in interest, after the case had been filed.”); citing *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002; *Robbins v. Warren* (May 6, 1996), Twelfth Dist. No. CA95-11-200, 1996 Ohio App. LEXIS 1815, at *4-5 (holding “[t]he requirement that a suit be prosecuted by the real party in interest is procedural rather than jurisdictional”); *Kinder v. Zuzak*, Eleventh Dist. App. No. 2008-L-167, 2009-Ohio-3793 (when a tort claim is scheduled as an asset in plaintiff’s bankruptcy claim and defendant objects that plaintiff is not the real party in interest, plaintiff may obtain an after-acquired exemption from the trustee and cure the

standing defect); *McLynas v. Karr*, Tenth Dist. App. No. 03AP-1075, 2004-Ohio-3597 (similar—may obtain an after-acquired abandonment from trustee); *Johnson v. Cincinnati Gen. Hosp.* (Oct. 28, 1980), Tenth Dist. App. No. 80AP-480, 1980 Ohio App. LEXIS 13411 (may obtain an after-acquired appointment as administrator to cure standing defect).

The rule that standing may be cured is perfectly consistent with Civ.R.17:

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.

Civ.R. 17(A) (emphasis added). “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.’” *Bank of N.Y. v. Stuart*, Ninth Dist. App. No. 06CA008953, 2007-Ohio-1483, ¶ 9 (quoting *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24, 485 N.E.2d 701); *Schwartzwald*, 2011-Ohio-2681, ¶¶ 71-72.

Civil Rule 17 embodies the principle purpose of the Civil Rules—to get past unnecessary technicalities to enable courts to resolve the merits of disputes. “These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.” Civ.R. 1(B). This mandate carries throughout the Rules. *See, e.g.*, Civ.R. 21; *Bill Gates Custom Towing, Inc. v. Branch Motor Express Co.* (1981), 1 Ohio App.3d 149, 440 N.E.2d 61 (holding that it was appropriate for the trial court to grant a motion to amend the complaint and add new plaintiffs—*after the plaintiff*

had completed presenting its evidence at trial—to include the proper owners of the motor vehicle involved in the accident at issue).

Ohio courts have applied these rules in foreclosure actions. In *Stuart*, the borrower argued that the plaintiff was not entitled to foreclose the mortgage because the note was not assigned to the named plaintiff until five months after the foreclosure lawsuit was filed. *Stuart*, 2007-Ohio-1483 at ¶ 11. The court rejected this argument holding that “filing the assignment with the trial court *before judgment was entered* was sufficient to alert the court and [the borrowers] that [the named plaintiff] was the real party in interest.” *Id.* at ¶ 12 (emphasis added). Moreover, the borrowers failed to show that they were prejudiced by the assignment. *Id.* at ¶ 13. The Court affirmed summary judgment holding that the plaintiff was “a real party in interest for purposes of filing the foreclosure action.” *Id.*; *see also Wash. Mut. Bank, F.A. v. Green*, 156 Ohio App.3d 461, 464, 2004-Ohio-1555, 806 N.E.2d 604, ¶ 17 (denying a motion to dismiss on the standing issue where the complaint alleged that the plaintiff was the holder of the note and mortgage; following Civ.R. 17, “the trial court correctly refused to grant the motion to dismiss at a time before the allegations of the complaint were required to be proven.”). Similarly, in *Schwartzwald*, the plaintiff was not the recorded mortgagee until more than a month after the complaint was filed and consequently held that the relevant facts were that “[i]t is undisputed that Freddie Mac had been assigned the Schwartzwalds’ mortgage and was in possession of the note prior to the filing for and granting of summary judgment.” *Id.* at ¶ 76.

The court in *U.S. Bank Nat’l Ass’n v. Bayless*, Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115, addressed this issue as well, holding that Civ.R. 17 creates standing for the party entitled to *prosecute* the claim, and all that is required is evidence of ownership of the note and mortgage prior to judgment. This is because “[p]ursuant to Civ.R. 17(A), the real party of

interest shall “prosecute” the claim. The rule does not state ‘file’ the claim.” *Id.* at ¶ 22 (quoting *Wachovia Bank v. Cipriano*, Fifth Dist. App. No. 09CA007, 2009-Ohio-5470, ¶ 38). In *Bayless*, summary judgment was proper so long as evidence of the right to enforce the note and mortgage was established prior to judgment. *Bayless* at ¶ 20-23.

Federal courts in Ohio have also recognized that: “[i]n Ohio, . . . standing is not jurisdictional but may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.” *Whittiker v. Deutsche Bank Nat’l Trust Co.* (N.D. Ohio 2009), 605 F. Supp.2d 914, 929, n.18; citing *Suster*, 84 Ohio St.3d at 77; *Stuart, supra*; see also *Kline*, 2010 U.S. Dist. LEXIS 26666, at *20.

Other appellate districts in Ohio have come to this same conclusion by holding that all that is required to maintain a foreclosure action is evidence, prior to judgment, that the foreclosing party is currently entitled to enforce the note and mortgage. *LaSalle Bank Nat’l Ass’n v. Street*, Fifth Dist. App. No. 08 CA 60, 2009-Ohio-1855; *Stuart*, at ¶ 9-12.

Because it does not affect the court’s jurisdiction, any defect in real party in interest standing may be waived. *Aurora Loan Servs., LLC v. Cart*, Eleventh Dist. App. No. 2009-A-0026, 2010-Ohio-1157. In *Cart*, the court entered a default judgment of foreclosure. The defendant later filed a motion to vacate, stating that the plaintiff failed to prove it was the holder of the note and owner of the mortgage at the time the complaint was filed. The trial court denied the motion. The Eleventh District affirmed:

“Because compliance with Civ.R. 17 is not necessary to invoke the jurisdiction of the court of common pleas, ***, the failure to name the real party in interest is an objection or defense to a claim which is waived if not timely asserted.” *Washington Natl. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, at P16. See also *Freedom Mortgage Corp. v. Groom*, 10th Dist. Nos. 08AP-761 and 09AP-162, 2009-Ohio-4482, at P21 (“[a]lthough Freedom Mortgage may have lacked standing, that deficiency is not jurisdictional and, consequently, could not void the default judgment of foreclosure”); *Portfolio Recovery Associates, LLC v.*

Thacker, 2nd Dist. No. 2008 CA 119, 2009-Ohio-4406, at P14 (“the issue of standing or the ‘real-party-in-interest’ defense is waived if not timely asserted”) (citation omitted); *First Union Natl. Bank v. Hufford*, 146 Ohio App. 3d 673, 677, 2001-Ohio-2271, 767 N.E.2d 1206 (“several courts have indicated that failure to name the real party in interest is an objection or defense to a claim which is waived if not timely asserted”) (citations omitted).

Aurora Loan Servs., ¶ 18.

The Second District reached the same conclusion in *JPMorgan Chase Bank Tr. v.*

Murphy, Second Dist. App. No. 23927, 2010-Ohio-5285:

“It is well understood * * * that the lack of subject matter jurisdiction may be raised anytime.” *Hunt v. Hunt* (Oct. 28, 1994), Greene App. No. 93-CA-92. While [the homeowners] asserted that their motion to dismiss was a “jurisdictional motion,” we have previously held, “[b]ecause ‘[t]he issue of lack of standing ‘challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court,’ * * * the issue of standing or the ‘real-party-in-interest’ defense is waived if not timely asserted.’” *Countrywide Home Loans v. Swayne*, Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶ 29. In other words, “standing is not an issue of subject matter jurisdiction.” *Portfolio Recovery Assoc., L.L.C. v. Thacker*, Clark App. No. 2008 CA 119, 2009-Ohio-4406, ¶ 14. As noted above, [the homeowners] did not timely challenge the standing of JPMorgan Chase to prosecute the foreclosure action, and [] accordingly waived this argument.

Murphy, 2010-Ohio-5285 at ¶ 19.

Both the Eighth District (*Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092) and the First District (*Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722) have reached a contrary conclusion. *Jordan* based its standing-is-an-incurable-defect conclusion on *Byrd*. In turn, *Byrd* based its conclusion on *United States use of Wulff v. CMA, Inc.* (9th Cir. 1989), 890 F.2d 1070, 1074-75. See *Byrd* at ¶ 15.⁵ *Jordan*, of course, is the foundation of the Opinion in this case and the source of the conflict.

⁵ While *Wulff* discussed Fed.R.Civ.P. 17(A), that discussion was dicta as the court had already found that the assigned claim was barred by the statute of limitations and could not relate back under Fed.R.Civ.P. 15.

The first problem with both *Byrd* and *Jordan* is that neither bothers to distinguish (or even mention) this Court's decision in *Suster*. In *Suster*, this court held that any defect in real party in interest standing may be cured.

The second problem with both *Byrd* and *Jordan* is that they ignore the variety of cases interpreting Ohio law outside of the mortgage context. *Robbins, Kinder, McLynas, Gates* and *Johnson*, all *supra*, held that a defect in real party in interest standing is curable. This is now the view of a vast majority of Ohio and federal courts addressing this issue. *Bayless* at ¶ 20-23; *Stuart* at ¶ 11-13; *see also Kline*, 2010 U.S. Dist. LEXIS 26666, at *20; *Whittiker*, 605 F. Supp.2d at 929, n.18.

The third problem with *Byrd* or *Jordan* (and as aptly stated by the Fifth District) is that Civ.R. 17(A) specifically provides that cases are to be *prosecuted*—not filed—in the name of the real party in interest. Civ.R. 17(A) also provides that no case is to be dismissed on the grounds that it was not brought by the real party in interest until a reasonable time has been allowed to cure the defect. If—as *Byrd* and *Jordan* seemed to believe—real party in interest standing was an incurable defect, Civ.R. 17(A) would provide the opposite.

The final problem with *Byrd* and *Jordan* is that they simply ignore the history of the Rule. Civ.R. 17 is based on Fed.R.Civ.P. 17. The Advisory Committee notes for the 1966 Amendments to Fed.R.Civ.P. 17(a) confirm that Civ.R. 17 allows assignees to sue in their own name:

In its origin the rule concerning the real party in interest was permissive in purpose: **it was designed to allow an assignee to sue in his own name.** That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as *res judicata*.

(Emphasis added.)

As a result, “[t]here is no general requirement as to when an assignment must be made and it has been held that even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest and can maintain the action.” 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d Ed. 2007 update), Section 1545. *Byrd* and *Jordan* simply ignore that Civ.R. 17(A) was designed to allow an assignee to sue in his own name, and provide the appropriate documentation later.

Thus, the answer to the final component of the certified question—“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?”—is also “no.” If challenged, real party in interest standing need only be proven prior to judgment.

F. An analysis of the conflict cases.

With this background, analysis turns to the conflict cases. As shown below, the Fifth, Seventh, Ninth and Tenth Districts are following the correct rule. The Eighth District is not.

1. *Marcino*

In *Marcino*, the defendant executed a note in favor of BNC Mortgage; attached to the note was an allonge, indorsed in blank, making the note “bearer” paper. *Id.*, ¶ 4. However, an assignment of mortgage was never entered into the record.

The Seventh District first acknowledged that a blank indorsement created bearer paper, making the plaintiff, as the party in possession, a person entitled to enforce. *Id.*, ¶¶ 50-51. The Seventh District went on to hold that under both the U.C.C. and the common law “the owner of a promissory note should be recognized as the owner of the related mortgage.” *Id.*, ¶¶ 52-53; citing R.C. 1309.109(A)(3), R.C. 1309.102(A)(72)(d), and R.C. 1309.203(G); and *Edgar* and

Kuck, supra. The plaintiff was thus permitted to enforce the mortgage, even though its assignment had never been recorded. Both conclusions were correct under Ohio law.

2. *Bayless*

In *Bayless*, the defendant executed a note in favor of Norwest Bank, secured by a mortgage. On February 28, 2008, U.S. Bank filed a complaint to recover the balance due on the note and to foreclose the mortgage. The note was not formally transferred to U.S. Bank until April 1, 2008, and the assignment of mortgage was not recorded until April 14, 2008, both well after the date U.S. Bank filed the Complaint. *Bayless*, ¶ 5.

The Fifth District, applying its previous precedent in *Wachovia Bank v. Cipriano*, Fifth Dist. App. No. 09CA007, 2009-Ohio-5470, ¶ 38, held that any defect in standing was cured: “Pursuant to Civ.R. 17(A), the real party of interest shall ‘prosecute’ the claim. The rule does not state ‘file’ the claim.” The court affirmed judgment in favor of U.S. Bank. *Bayless*, ¶ 23. That conclusion was correct.

3. *Thomas*

In *Thomas*, the defendant executed a note in favor of America’s Wholesale Lender and a mortgage in favor of Mortgage Electronic Systems, Inc. (“MERS”). On December 10, 2008, Countrywide filed a complaint stating it held the note executed by Thomas. *Thomas*, ¶ 2. On December 11, 2008 (after the filing of the Complaint), MERS executed an assignment of the mortgage to Countrywide. On March 24, 2009, Ocwen was substituted as the plaintiff, premised on an assignment of the note and mortgage from Countrywide. *Id.*, ¶ 7.

On appeal, Thomas argued that because Countrywide was not the recorded assignee of the mortgage, it lacked standing to invoke the jurisdiction of the court at the time the complaint was filed. *Id.*, ¶ 8. The Tenth District held that it was undisputed that Countrywide held the note

and that Countrywide transferred it to Ocwen prior to summary judgment. *Id.*, ¶ 11. This was all that was required to enforce the mortgage. That conclusion was correct.

4. Duvall

That leaves this case. In 2006, Duvall executed the Note and Mortgage in favor of Wells Fargo. Wells Fargo indorsed the Note in blank, making it bearer paper. The evidence before the court was that possession of the Note was transferred to U.S. Bank on March 1 or April 1, 2007 (the creation and closing dates, respectively, of the Trust for which U.S. Bank serves as trustee).

On October 15, 2007, U.S. Bank filed the Complaint, attaching the indorsed Note as an exhibit. On February 5, 2008, Wells Fargo executed a notice of Assignment of Mortgage.

The trial court dismissed *both* the claim under the Note and the claim to foreclose the Mortgage because U.S. Bank was not the recorded mortgagee at the time of filing the action. In affirming, the Eighth District reasoned:

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.

Duvall at ¶¶ 14-15.

The Eighth District was wrong on every level. First, the Eighth District dismissed a claim to enforce a *note* because of a perceived defect in the ability to enforce the *mortgage*. No court has ever held that the inability to perfect a claim against the security bars the claim against the debt. Security follows the debt, not vice versa.

Second, standing to enforce a note is not based on “ownership” of the note, but rather on being a “person entitled to enforce” the note under the U.C.C. Here, the Note was indorsed in blank, making it bearer paper, and U.S. Bank was a person entitled to enforce merely by showing it possessed the Note. R.C. 1303.31(A). U.S. Bank showed that it had possession, initially by attaching a copy of the indorsed Note to the Complaint, and then by affidavit. The Eighth District simply disregarded the U.C.C. in its entirety.

Third, standing to enforce a mortgage lies in the person entitled to enforce the Note. R.C. 1309.203(G); *Kernohan, supra*. Here, by showing that U.S. Bank had possession of bearer paper, it automatically became entitled to enforce the mortgage, even if the Assignment of Mortgage had never been executed (*Marcino, supra*), and even if someone else actually was in possession of the original Mortgage. *Kernohan, supra*.

Fourth, to the extent that there was any requirement to record a notice of Assignment of Mortgage as a prerequisite for standing to enforce the Mortgage, defects in real party in interest standing can be cured prior to judgment, and U.S. Bank cured any defect prior to judgment. *Suster, supra*. The Eighth District’s analysis simply ignores the law.

G. Answering the question.

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?

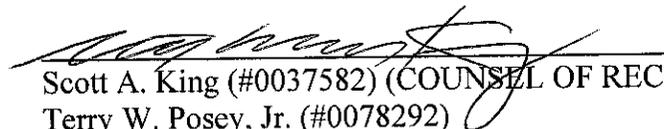
The answer to this question is “no.” Standing to enforce a note is not based on owning the note, but rather being a person entitled to enforce it as defined by R.C. 1303.31. Standing to enforce a mortgage is not based on owning the mortgage; rather, security follows the debt, giving the person entitled to enforce the note standing to enforce the mortgage. To enforce a mortgage against the mortgagor, neither the mortgage nor its assignment need be recorded. Real party in

interest standing need not be proven at the time of the filing of the complaint; if challenged, real party in interest standing need only be proven prior to the entry of judgment.

IV. CONCLUSION.

Mortgage foreclosures comprise a large portion of the civil dockets in Ohio and the law on who is entitled to bring them needs to be clear. This Court should answer each part of the certified question in the negative, adopt the rules being followed by the Fifth, Seventh, Ninth and Tenth Districts, affirm that the U.C.C. governs the right to enforce a promissory note, reaffirm the rule of *Kernohan* (and now of the U.C.C.) that whoever holds the note has the right to enforce a mortgage which secures its payment, and confirm that these rights need only to exist prior to judgment.

Respectfully submitted,


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
Terry.Posey@Thompsonhine.com
Scott.King@Thompsonhine.com

Counsel for Plaintiff-Appellant, U.S. Bank, National
Association, as Trustee for CMLTI 2007-WFHE2

CERTIFICATE OF SERVICE

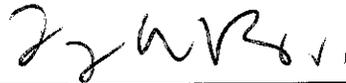
I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 24th day of June, 2011.

Gary Cook
3655 Prospect Avenue East, 3rd Floor
Cleveland, Ohio 45201

Michael Aten
3214 Prospect Avenue East
Cleveland, Ohio 44115

Alek El-Kamhawy
14837 Detroit Avenue
Suite 227
Lakewood, Ohio 44107

Rick DeBlasis
P.O. Box 5480
Cincinnati, Ohio 45201



Terry W. Posey, Jr.

658769.2

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.

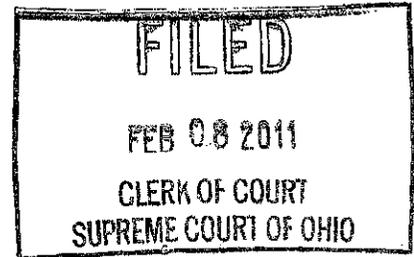
ANTOINE DUVALL, *et al.*,

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

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 CMLTI
2007-WFHE2

Gary Cook (#0021240)
3655 Prospect Avenue East
3rd Floor
Cleveland, Ohio 44115
Telephone: (216) 965-4410
Facsimile: (216) 431-6149
gcookesq@yahoo.com

Michael Aten (#0083386)
3214 Prospect Avenue East
Cleveland, Ohio 44115
Telephone: (216) 431-7400 x 117
Facsimile: (216) 431-6149
michaelaten@hotmail.com

Counsel for Defendants-Appellees
Antoine Duvall and Madinah Samad

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?

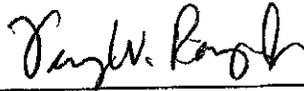
The Eighth District certified the conflict based on its decision in *U.S. Bank, N.A. v. Duvall* (Dec. 30, 2010), Cuyahoga App. No. 94714, Journal Entry and Opinion filed December 30, 2010 (“Exhibit B”). The conflict cases are:

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,



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 Association, as Trustee for CMLTI 2007-
WFHE2

CERTIFICATE OF SERVICE

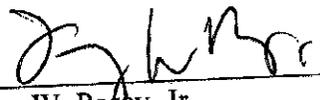
I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 7th day of February, 2011.

Gary Cook
3655 Prospect Avenue East, 3rd Floor
Cleveland, Ohio 45201

Michael Aten
3214 Prospect Avenue East
Cleveland, Ohio 44115

Alek El-Kamhawy
14837 Detroit Avenue
Suite 227
Lakewood, Ohio 44107

Deanna C. Stoutenborough
Rick DeBlasis
P.O. Box 5480
Cincinnati, Ohio 45201



Terry W. Pospy, Jr.

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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 12011

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

Presiding Judge SEAN C. GALLAGHER,
Concurs

Judge MARY DEGENARO, Concurs

James J. Sweeney
Judge JAMES J. SWEENEY

EXHIBIT

A

A-5

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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

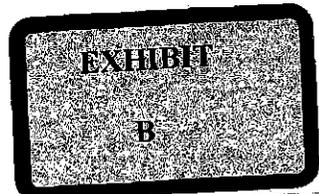
BEFORE: Sweeney, J., Gallagher, A.J. and DeGenaro, J.*

RELEASED AND JOURNALIZED: December 30, 2010

VOL 0720 PG 0158

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ATTORNEYS FOR APPELLANT

Deanna C. Stoutenborough, Esq.
Rick D. Deblasis, Esq.
Romi T. Fox, Esq.
Lerner, Sampson & Rothfuss
120 East Fourth Street, 8th Floor
Cincinnati, Ohio 45202

Scott A. King, Esq.
Victoria L. Nilles, Esq.
Thompson Hine
2000 Courthouse Plaza, N.E.
Dayton, Ohio 45401-8801

ATTORNEYS FOR APPELLEE ANTOINE DUVALL

Gary Cook, Esq.
3655 Prospect Avenue, East
Third Floor
Cleveland, Ohio 44115

Michael Aten, Esq.
3214 Prospect Avenue, East
Cleveland, Ohio 44115

ATTORNEY FOR SOM INVESTMENTS LLC

Alek El-Kamhawy, Esq.
14837 Detroit Ave., #227
Lakewood, Ohio 44107

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

DEC 30 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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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.

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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.

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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*

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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, ¶128. 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.

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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.)

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[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

APPEARANCES:

For Plaintiff-Appellee

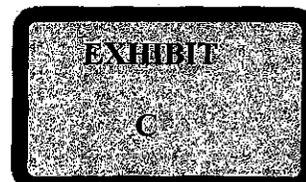
SCOTT A. KING
TERRY W. POSEY
THOMPSON HINE LLP
Post Office Box 8801
2000 Courthouse Plaza, NE
Dayton, Ohio 45401-8801

For Defendant-Appellant

BRIAN S. BAYLESS
PRO SE
231 Overtrick Drive
Delaware, Ohio 43015

For Defendant-Appellee Chase Bank

VLADIMIR P. BELO
JUSTIN W. RISTAU
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291



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.

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} 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*, Guemsey 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

JWW/d 1026

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION

Plaintiff-Appellee

-vs-

BRIAN S. BAYLESS, ET AL.

Defendant-Appellant

JUDGMENT ENTRY

Case No. 09 CAE 01 004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

/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:

Lerner, Sampson & Rothfuss, L.P.A., Deanna C. Stoutenborough, and M. Elizabeth Hils, for appellee.

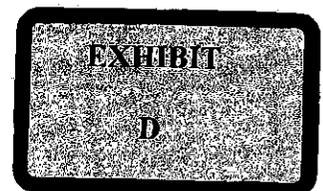
Anthony T. Marcino and Melissa C. Marcino, pro se.

JUDGES:

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

Dated: March 10, 2009

Waite, Judge.



{¶1} 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.

{¶2} 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

{¶3} 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.

{¶4} 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."

{¶5} 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.

{¶154} 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

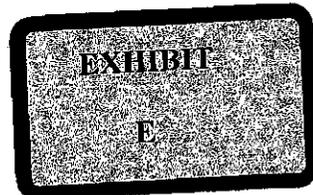
This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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



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. : No. 09AP-819
James D. Thomas, Jr. et al., : (C.P.C. No. 08CVE-12-17523)
Defendants-Appellants. : (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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A-46

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 ¶22. 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.

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

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ATTORNEYS FOR APPELLANT

Deanna C. Stoutenborough, Esq.
Rick D. Deblasis, Esq.
Romi T. Fox, Esq.
Lerner, Sampson & Rothfuss
120 East Fourth Street, 8th Floor
Cincinnati, Ohio 45202

Scott A. King, Esq.
Victoria L. Nilles, Esq.
Thompson Hine
2000 Courthouse Plaza, N.E.
Dayton, Ohio 45401-8801

ATTORNEYS FOR APPELLEE ANTOINE DUVALL

Gary Cook, Esq.
3655 Prospect Avenue, East
Third Floor
Cleveland, Ohio 44115

Michael Aten, Esq.
3214 Prospect Avenue, East
Cleveland, Ohio 44115

ATTORNEY FOR SOM INVESTMENTS LLC

Alek El-Kamhawy, Esq.
14837 Detroit Ave., #227
Lakewood, Ohio 44107

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

DEC 30 2010

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

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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.

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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.

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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*

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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.

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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.)

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

U.S. BANK NATIONAL ASSOCIATION
Plaintiff

Case No: CV-07-638676

Judge: RONALD SUSTER

ANTOINE DUVALL, ET AL
Defendant

JOURNAL ENTRY

87 DIS. W/O PREJ - FINAL

THE COURT HAS REVIEWED THE DOCUMENTS SUBMITTED BY PLAINTIFF TO ADDRESS THE ISSUE OF STANDING. AFTER FURTHER REVIEW, THE DOCUMENTS REMAIN DEVOID OF WHAT THE COURT IS REQUESTING. FIRST, THE ORIGINAL COMPLAINT DID NOT CONTAIN A BLANK ENDORSEMENT. THE BLANK ENDORSEMENT ONLY APPEARED AFTER THE FILING OF THE COMPLAINT. SECOND, THE MORTGAGE ASSIGNMENT WAS ALSO DATED AND SUBSEQUENTLY FILED WITH THE RECORDER AFTER THE FILING OF THE COMPLAINT. NEVERTHELESS, PLAINTIFF HAS SUBMITTED AN AFFIDAVIT ATTEMPTING TO VERIFY THE TRANSFER OF THE NOTE AND MORTGAGE PRIOR TO THE FILING OF THE COMPLAINT. THAT AFFIDAVIT REFERENCES A REDACTED COPY OF THE SCHEDULE OF MORTGAGE LOANS SHOWING THAT THE SUBJECT LOAN IS PART OF THE LOANS COMPRISING THE CMLTI MORTGAGE LOAN TRUST 2007-WFHE2. THAT WOULD BE SUFFICIENT IF THE ATTACHMENT WAS NOT SO VOLUMINOUS AND IDENTIFIED VIA TAB OR HIGHLIGHT WHERE THE SUBJECT LOAN THE COURT IS LOOKING FOR CAN BE FOUND. IF ANY OF THE OVER 500 PAGES OF DOCUMENTS WOULD IDENTIFY VIA TAB OR HIGHLIGHT WHERE THIS LOAN IS LOCATED, THAT WOULD BE SUFFICIENT. AS PLAINTIFF HAS FAILED TO SHOW STANDING PURSUANT TO WELLS FARGO BANK V. JORDAN, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009) THIS CASE IS DISMISSED IN ITS ENTIRETY.

COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

01/21/2010
CPTSG

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