

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Plaintiff-Appellant

v.

ANTOINE DUVALL, et al.

Defendants-Appellees

Case No. 2011-0218

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

Court of Appeals Case No. CA-10-094714

NOTICE OF SUGGESTION OF MOOTNESS

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2007-WFHE2

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## I. INTRODUCTION

The instant matter is before the Court pursuant to its certification of a conflict of authority among the Courts of Appeals of Ohio as to whether a plaintiff must own the subject note and mortgage as of the date it files suit in order to have standing to prosecute a foreclosure action. On June 3, 2011, Plaintiff-Appellant U.S. Bank National Association, as Trustee for CMLTI 2007-WFHE2 (hereinafter “Appellant”) executed, and on June 6 caused to be filed with the Recording Division of the Office of the Fiscal Officer of Cuyahoga County, a certificate of release with respect to the mortgage at issue herein in which it “acknowledge[d] that it has received full payment and satisfaction of the same, and in consideration thereof, does hereby cancel and discharge said Mortgage.” See *Certificate of Release*, attached hereto and marked as Exhibit A. As such, the issue of whether Appellant was required to own the mortgage as of the date on which it filed its complaint in order to have had standing to maintain the action is moot, and any decision rendered thereupon would constitute an advisory opinion as to Appellant’s foreclosure practices generally for want of any justiciable controversy between the parties to the present matter. As neither of the circumstances under which this Court will typically decide moot questions is present herein, the instant appeal should be dismissed.

## II. LAW AND ARGUMENT

“One commentator has defined mootness as ‘the doctrine of standing set in a time frame: The requisite personal interest that **must exist at the commencement of the litigation** (standing) must continue throughout its existence (mootness).” United States Parole Comm. V. Geraghty (1980), 445 U.S. 388, 397, quoting Monaghan, *Constitutional Adjudication: The Who and When* (1973), 82 Yale L. J. 1363, 1364 (emphasis added; it is perhaps worth noting for purposes of context that the very definition of standing cited by no less an authority on the

subject than the Supreme Court of the United States quite clearly suggests an answer to Appellant's proposed conflict question, "In a mortgage foreclosure action, is a plaintiff required to establish that it had standing as of the date that the Complaint was filed, or is a plaintiff only required to establish that it had standing prior to the entry of judgment?" that is dispositive of the instant appeal in its entirety on merit). Article III, Section 2 of the United States Constitution requires a "case or controversy" as a predicate for subject matter jurisdiction. In federal cases, mootness has been equated with the case or controversy jurisdictional requirement. In Liner v. Jafco, Inc. (1964), 375 U.S. 301, 306, fn. 3, the United States Supreme Court stated, "our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." See also Nebraska Press Assn. v. Stuart (1976), 427 U.S. 539, 546.

The case or controversy limits of the United States Constitution do not apply to cases brought under the authority of the Ohio Constitution. Nevertheless, Article IV, Section 4(B) of the Ohio Constitution gives the courts of common pleas original jurisdiction "over all justiciable matters" before them. This provision has been interpreted in a manner similar to the case or controversy limitation of the federal constitution: "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect." Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14.

"For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." See Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St.2d 93, 97-98. More recently, in State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty. (1996),

74 Ohio St.3d 536, 542, 1996-Ohio-286, the court stated, “[a]ctual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law.”

It follows that if the courts’ jurisdiction is limited to “justiciable matters,” the subject matter of the court – that is, “the power to hear and decide a case on the merits,” see Morrison v. Steiner (1972), 32 Ohio St.2d 86, paragraph one of the syllabus – is directly limited to justiciable matters. If what were once justiciable matters have been resolved to the point where they become moot, the courts no longer have subject matter jurisdiction to hear the case.

Although there exist exceptions to the mootness doctrine under which Ohio appellate courts will review nonjusticiable matters, neither is implicated in the present case. First, Courts of Appeals may consider such issues if they are “capable of repetition yet evading review.” See, e.g., Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho (1990), 52 Ohio St.3d 56. Such is plainly not the case here. There is no inherent tendency of the issue of a foreclosure plaintiff’s standing to render itself moot during the pendency of an appeal; the voluntary, affirmative act of Appellant in releasing the subject mortgage was required to render it so in the present case. Further, Ohio appellate courts may also review moot controversies which raise issues of great public importance, but no such issue is at stake herein. The conflict of authority certified herein concerns only foreclosure actions in which the plaintiff acquires its legal interest in the subject note and/or mortgage after filing its complaint. It carries no implications for foreclosure actions initiated by the original mortgagee or by plaintiffs who acquire their interests in the subject note and mortgage before suing to enforce them, and those plaintiffs who acquire their interests during the pendency of the initially-filed foreclosure may simply re-file.

### **III. CONCLUSION**

The instant matter is plainly moot. The mortgage upon which the foreclosure action from which this appeal is taken having been released as satisfied, the issue of when and whether Appellant might have had standing to enforce the mortgage is simply nonjusticiable as the parties are without the requisite adverse interests at law. The litigants herein are merely "in sharp and acrimonious disagreement" as to whether a party initiating a foreclosure action to enforce a mortgage it does not own is subject to the same threshold inquiry of its standing to do so as any other plaintiff seeking to invoke the courts' jurisdiction.

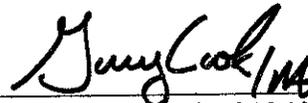
Based on the foregoing, Appellees Antoine Duvall and Madinah Samad hereby respectfully request that the instant appeal be dismissed as moot.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Notice of Suggestion of Mootness* was served via regular U.S. mail this 28<sup>th</sup> day of July, 2011 upon:

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