

IN THE SUPREME COURT OF OHIO

EVERHOME MORTGAGE COMPANY)

Case No.

11-1398

Plaintiff-Appellee,)

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District)

v.)

DOUG A. BAKER)

Court of Appeals Case No. 10AP-534)

Defendant-Appellant,)

and)

MIRANDA G. SMITH)

Intervenor-Appellee,)

and)

Lawrence D. Baker, et al.)

Defendants-Appellees)

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
DOUG A. BAKER

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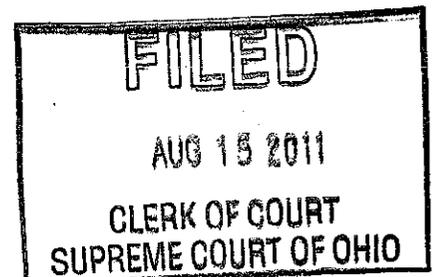
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EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST

This case, along with *U.S. Bank v. Duvall*, Eighth Dist. App. No. 94714, 2010-Ohio-6478, Case No. 2011-0218 and *U.S. Bank v. Perry*, Eighth Dist. App. No. 94757, 2010-Ohio-6171, which have already been accepted by the Court for review, presents the Court not only with the most important mortgage foreclosure issue in more than a century, but an additional controversy particularly relevant to foreclosure cases. This case involves not only an issue that has resulted in conflicting lines of precedent in the District Courts of Appeal and other state supreme courts, but a unique question that goes to the very heart of how judgments are entered.

Simply stated, the first issue is what are the requirements for a lender to have standing to sue a borrower for foreclosure of a residential mortgage? That question involves: (a) is standing to sue measured by holding the promissory note or being the recorded mortgagee? and (b) in an Ohio court, can defects in standing be cured prior to judgment? In this case, the specific issue resolves to whether the lender must hold the note or record the mortgage at all in order to have standing before an Ohio court to foreclose?

The second issue is whether the requirements of Civ. R. 5(D) for a certificate of service and of Civ. R. 5(A) and (B) that all documents subsequent to the original complaint be served on counsel can be waived by a party's failure to specifically identify Civ. R. 12(B)(5) – “insufficiency of service of process” – as the basis for the objection.

The Court has already accepted *Duvall* and *Perry* regarding the first issue involving standing to prosecute foreclosure claims. In *Duvall*, pending before this Court is the certified conflict question of whether “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.” In *Perry*¹, this Court has accepted jurisdiction to adjudicate two propositions of law: (1) The holder of a promissory note has standing to enforce a mortgage which secures its payment, and (2) Standing need only be proven prior to the entry of judgment.

The standing issue presented by this case is the same as that at issue in *Duvall* and *Perry*. The assignment of the mortgage to the Plaintiff in this case was purportedly executed sometime on January 8, 2009, the original complaint was filed (with the assignment neither attached nor referenced) at 11:04 a.m. on January 8, and the assignment was recorded on January 20, 2009. Plaintiff’s amended complaint, the first time in which the existence of the assignment was disclosed to the trial court or the parties, was filed March 11, 2009. The issue of timing here is the same as the Court is already faced with in *Duvall* and *Perry*.

Therefore, Appellants respectfully suggest that the proper disposition here is for the Court to accept review, hold the case for decision in *Duvall* or *Perry*, and stay the briefing schedule. Once this Court has ruled on the question of standing, it can then, if necessary, proceed to consider the second question presented regarding the interplay between Civ. R. 5 and Civ. R. 12(B)(5).

¹ In accepting review in *Perry*, this Court ordered the briefing schedule be stayed and held the case pending resolution of *Duvall*.

Should this Court rule – as it should – in *Duvall* and *Perry* that a foreclosure plaintiff must demonstrate the existence of a properly recorded mortgage assignment prior to the filing of their complaint, then the proper disposition of this case is a reversal and remand with instructions that the case be dismissed. Should this Court rule in *Duvall* and *Perry* to the contrary, however, it should then proceed to consider Appellant’s second proposition of law.

That second proposition appears to be one that is quite novel. The Tenth District Court of Appeals ruled in this case that a party’s failure to serve pleadings and certify that service was made, as required by Civ. R. 5, subsequent to the original complaint on counsel is waived if the responding party does not affirmatively plead in accordance with Civ. R. 12(B)(5) the defense of “failure to service of process.” But by its plain language, Rule 12(B)(5) applies only to service of an original pleading pursuant to Civ. R. 4 because “process” refers to an original complaint and a summons. Service of pleadings or filings after the original complaint must to be served on counsel pursuant to Civ. R. 5. In this case filings and pleadings were not served on counsel. Thus, the requirements of Civ. R. 5(A), (B), and (D) would be raised pursuant to Civ. R. 12(B)(6) failure to state a claim upon which relief can be granted.

Although a novel issue that this Court has not been confronted with in the past, it is by no means an esoteric issue that is unlikely to repeat itself. This Court is well familiar with the every-growing number of foreclosure cases filed throughout this state. With lenders and note-holders seeking the drastic remedy of foreclosure

with increasing frequency, it is inevitable that the sorts of errors that occurred in this case – when an amended complaint was not even served on counsel for the primary defendant who had already appeared in the action – will repeat themselves time and time again.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

On January 8, 2009, Appellee Everhome Mortgage Company filed a Complaint in Foreclosure against Appellants Doug A. and Nancy C. Baker seeking judgment on a Note and to foreclosure on a mortgage on a rental property owned by Appellant Doug A. Baker individually.

The Bakers eventually learned of the foreclosure and filed a Motion to Dismiss and/or For a More Definite Statement, raising among other items: (i) that no note was attached to the Complaint and (ii) that Everhome did not hold title to the mortgage in question and had never held title. The Bakers' Motion to Dismiss and For a More Definite Statement contained a property executed Certificate of Service.² Three attorneys were identified as appearing on behalf of the Bakers on this Motion to Dismiss, and at least two of them received separate references in the record as appearance of counsel. Everhome did not respond to this motion.

Instead, on February 17, 2009, Everhome filed a Motion for Leave to File Amended Complaint. Everhome's Motion for Leave contains a blank proof of service

² The Bakers did not raise the improper service of process at this time or really any time thereafter because the Bakers were more focused on determining who in fact held the mortgage in question and who had a right to collect on the payments.

with no indication of the day or month of service of the motion, nor does it have attached to it any proposed Complaint.³

On March 3, 2009 Everhome's Motion Leave to File an Amended Complaint was granted, and Everhome filed its Amended Complaint on March 11, 2009. The Amended Complaint had no certificate of service endorsed on it or filed separately, and Everhome later admitted that its counsel never served the Amended Complaint on Mr. Baker's counsel.

On July 10, 2009, the Court denied the Bakers' Motion to Dismiss and for More Definite Statement based on the Amended Complaint filed by Everhome March 11, 2009, but never served upon the Bakers' Counsel. The Bakers were ordered to file an answer to the Amended Complaint and did so July 22, 2009. The answer filed by the Bakers did not raise insufficiency of service of process under Civ. R. 12(B)(5) because they had in fact been served with "process." That is, they received the original complaint and a summons. Instead, the answer specifically pled that the amended complaint failed to state a claim upon which relief can be granted. Since Civ. R. 5(D) directs that courts are not to consider pleadings filed with a certificate of service, it necessarily follows that the amended complaint – which had no such certificate – did not state a claim, insofar as it could not be "considered" by the trial court.

³ Everhome's Motion for Leave to File Amended Complaint, in fact, was never served upon counsel. Apparently no attention was paid to the fact that the Certificate of Service was not completed in compliance with Civ. R. 5 or Loc. R. 19 of the Franklin County Ohio Court of Common Pleas Rules. This is and has been a pattern of conduct on the part of counsel for Everhome throughout the trial court proceedings. Processing of foreclosures where the party is in default have become so routine that all foreclosures are treated as if the Defendant property holders are in default of answering.

On September 1, 2009, Everhome moved for Summary Judgment against the Bakers. In response, the Bakers filed a Motion Pursuant to Civ. R. 56(F), and a Memorandum Contra to the Motion for Summary Judgment. The Bakers argued, in part, that judgment on the amended complaint would be improper because, in violation of Civ. R. 5, the amended complaint was not served on counsel for the Bakers and did not contain a certificate of service.

On October 7, 2009, judgment was entered against the Bakers on Plaintiff's claims. The trial court never issued any decision from which its judgment entry flowed; instead, the judgment entry was prepared by counsel for Everhome, not circulated to counsel for the Bakers, and was signed by the trial court without the Bakers even knowing that the judgment entry had been submitted⁴. This judgment entry was purportedly circulated by the Plaintiff to counsel for the Bakers and the remaining defendants on June 15, 2009. At that point in time, the Bakers had not yet answered the complaint or the amended complaint; they had moved to dismiss the original complaint, and that motion was still pending. Thus, when the October 7 entry refers to "the Complaint" (not the Amended Complaint) and refers to an Answer filed by the Bakers (which they did not file until July 22, 2009), it seriously calls into question whether the proposed judgment really was circulated to the other parties prior to it being presented to the judge for signature. In reality, it was not.

No notice pursuant to Civ. R. 58 was sent by the clerk regarding the October 7 entry. On November 5, 2009, the trial court entered a *nunc pro tunc* order which

⁴ This Judgment Entry indicates that it was circulated to the parties some 77 days before the motion for summary judgment was served or filed. It, like many other filings, was not so circulated. The judgment entry does not mention summary judgment anywhere within the body of the entry.

reiterated the judgment in Everhome's favor, but again, was not served on or sent to the Bakers or their counsel.

Upon eventually learning that (a) judgment had been entered against them, and (b) that the property had been sold at foreclosure sale, the Bakers timely appealed the trial court's judgment. On appeal, the Bakers raised the issues of failure of Everhome to hold any interest in the Note and/or Mortgage, and failure to circulate or submit an entry with a decision, decree or judgment of the trial court. The Tenth District affirmed the judgment of foreclosure, holding that Everhome filed evidence subsequent to its Complaint that it was the "proper holder" of the mortgage, and that the trial court could properly employ another procedure other than circulation for signature of the judgment entry submitted by the prevailing party. The Court did not address that there was no decision, decree or judgment in favor of Everhome at the time the entry was purportedly circulated.

Statement of the Facts

This action concerns a Mortgage executed on or about June 24, 2002, by Appellant Doug A. Baker and Nancy C. Baker, his spouse, on a piece of rental property owned by Mr. Baker individually.

The Note and Mortgage were originally signed in favor of Union Federal Bank of Indianapolis. At some time uncertain, the Note was endorsed in blank by Union Federal Bank of Indianapolis. The mortgage, however, was never assigned to the Plaintiff until January 20, 2009 when it was filed with the Franklin County Recorder.

Attached to the Amended Complaint is an “Assignment of Note and Mortgage” which purports to transfer the mortgage and the underlying note to Everhome. The assignment was purportedly signed in Dakota County, Minnesota on January 8, 2009 – the same day that the complaint in this case was filed. On its face, the assignment demonstrates that it was not filed with the Franklin County Recorder until January 20, 2009 – twelve days after Everhome commenced this action.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I

In order to have standing to prosecute a foreclosure case, a Plaintiff must demonstrate that it owned the note and the mortgage when the complaint was filed.

As the Eighth District has held “a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed.” *Wells Fargo v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092. Thus, as in this matter, if the 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. The First District follows a similar view of standing. *Wells Fargo v. Byrd*, 178 Ohio App.3d 285, 897 N.E.2d 722 citing *Bank of New York v. Gindele*, First Dist. Ap. No. C-090251, 2010-Ohio-542, ¶6 (“In a foreclosure action, absent understandable mistake or circumstances where the identity of a party is difficult or impossible to ascertain, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.”)

The Tenth District disregarded these holdings in this case. As noted above, Everhome did – and cannot – demonstrate that it held a recorded assignment of the mortgage at the time that it filed its Complaint, because the assignment was not recorded until nearly two weeks after the commencement of this action. Consistent with *Jordan* and *Byrd*, this case should have been dismissed because Everhome lacked standing to prosecute a foreclosure action.

In this case, the trial court's judgment entry of October 7, 2009, states it is granting judgment on Everhome's Complaint, yet the document filed as Everhome's Complaint states in the very first paragraph thereof, "Plaintiff says that it is *the owner and holder* of a certain promissory note, which is currently unavailable..." Then, in the second paragraph of Everhome's Complaint, it states, "... [Everhome] further says that it is *the owner and holder* of a certain mortgage deed... marked Exhibit 'A' and made a part hereof..." That mortgage states that mortgagee is "Union Federal Bank of Indianapolis." On the fourth page of Plaintiff-Appellee's Complaint, under § 8, the mortgagee is listed as Union Federal Bank of Indianapolis. No assignment was noted on the judicial report obtained pursuant to Loc. R. 96. Indeed, the Bakers' Motion to Dismiss and/or for More Definite Statement raised these issues on January 30, 2009, some 22 days after the original case was filed and the judicial report was filed.

Even if one were to assume *arguendo* that the Judgment Entry of October 7, 2009 was meant to refer to Everhome's Amended Complaint, filed on March 11, 2009, that document did not show a valid assignment of the mortgage to Everhome.

Instead, attached to a portion of Exhibit B was a two page document prepared by Everhome's counsel and allegedly executed on the day the Complaint was filed, January 8, 2009 and recorded on January 20, 2009.

That document provides in its relevant part as follows:

"That Mortgage Electronic Registrations Systems, Inc. for valuable consideration... does hereby sell, assign and transfer and set over onto Everhome Mortgage Company, a certain Mortgage Deed bearing the date of June 24, 2002, *executed to and delivered to it* by Doug A. Baker and Nancy C. Baker and recorded in as Document No. 200206260157245..." [emphasis supplied]

There are two significant problems with that assignment. First, no mortgage of that reference was ever delivered to Mortgage Electronic Registration Systems, Inc., but instead to Union Federal Bank of Indianapolis. Second, nowhere has Mortgage Electronic Registration Systems, Inc. ever held a mortgage executed in its favor by Everhome, nor was it ever assigned the mortgage by Union Federal Bank of Indianapolis, the mortgagee mentioned in Exhibit B to the original Complaint or Amended Complaint.

Quite simply, there is no assignment between Union Federal Bank of Indianapolis, the mortgagee, to Mortgage Electronic Registration Systems, Inc., and there is not a mortgage executed by Everhome in favor of Mortgage Electronic Registration Systems, Inc. as alleged in the putative assignment recorded on ~~January 20, 2009.~~

This proposition presents a clear conflict between the appellate districts as well as a question of great general interest, in a dispute that only this Court can resolve.

Proposition of Law No. II

The requirements of Civ. R. 5(D), as well as actual compliance with Civ. R. 5(A) and (B) concerning service on Counsel and Certificate of such service is not waivable by the Court or parties, nor is the lack of compliance with Civ. R. 5(D) raised pursuant to Civ. R. 12(B)(5) as "insufficiency of service of process."

Proper service upon counsel of papers subsequent to the original complaint is governed by Civil Rule 5. Civ. R. 5(D) states that "every pleading subsequent to the original complaint....shall be served on each of the parties," while Civ. R. 5(A) clarifies that service "shall be made upon the attorney" who represents the party to be served. Civ. R. 5(D) is quite clear as to what the consequences are of a failure to serve a document subsequent to the complaint on a party's counsel: "Papers filed with the court *shall not be considered* until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11."

Here, Everhome's Amended Complaint is a pleading subsequent to the original complaint. At the time the Amended complaint was filed, counsel for the Bakers had filed a Notice of Appearance with the trial court, and service should have been directed to the Bakers' attorney representation pursuant to Civ. R. 5(B). Everhome did not attach any certificate of service to the Amended Complaint as required by Civ. R. 5(D). In turn, Everhome's Amended Complaint was never ~~properly served upon the Bakers as required by the Civil and Local Rules.~~

The Bakers answered the amended complaint, pursuant to court order, on July 22, 2009, raising the defense of failure to state a claim upon which relief can be

granted because, pursuant to Civ. R. 5, the Amended Complaint could not be considered by the Court.

The requirements of Civ. R. 5 are mandatory and are not waivable. *First Resolution Corp. v. Salem*, Ninth Dist. App. No. 24049, 2008 WL 2192814, *3 (“Although this Court has never specifically addressed whether a trial court may consider a motion filed by a pro se litigant that failed to contain a certificate of service as required by Civ. R. 5(D), the language of the Civil Rules is mandatory in this regard.”). See, also, *Erie Ins. Co. v. Bell*, Fourth Dist. App. No 01 CA 12, 2002-Ohio-6139.

In *Erie, supra*, a pro se defendant filed an answer to a complaint that lacked a certificate of service, in violation of Civ.R. 5(A). The trial court, despite the defendant's failure to comply with Civ .R 5(A), treated the answer as properly served upon the plaintiffs. The plaintiffs filed a motion for default judgment in which they argued that the defendant's answer did not comport with Civ.R. 5(A). The trial court denied this motion. A trial was held and the trial court found in favor of the defendant. The plaintiff appealed. The issue before the appellate court was whether ‘[b]ecause [the defendant's] Answer did not comply with Civ.R. 5(A) [,] * * * the [trial court] erred by considering it.’ (Alterations sic.) *Erie*, 2002-Ohio-6139, at ¶ 21.

The *Erie* court found that the defendant's answer did not comply with Civ.R. 5(A) because the answer did not contain a certificate of service. *Id.* at ¶ 24. The *Erie* court concluded that because the defendant's answer lacked

a certificate of service, and one was never filed with the trial court, the trial court could not have properly considered the defendant's answer. *Id.* at ¶ 25. As a result, the *Erie* court held that the trial court erred in proceeding to trial on the merits. *Id.* at ¶ 29." *Martin* at ¶ 15. See, also, *Schmuck v. Schmuck*, 8th Dist. No. 85793, 85864, 2005-Ohio-6357, at ¶ 9 (holding that trial "court properly ignored appellant's answer because it lacked a proof of service"); *O'Brien v. Citicorp Mort., Inc.* (Feb. 24, 1994), 10th Dist. No. 93AP-1074, at *4 (holding that amended complaint not properly before the trial court where it failed to contain a certificate of service as required by Civ.R. 5(D)); *Nosal v. Szabo*, 8th Dist. No. 83974, 83975, 2004-Ohio-4076, at ¶ 21 (holding that "where there is no proof of service either attached to the filing or separately filed with the trial court, the trial court simply may not consider the filing"); *Watson v. Cedardale Homes, (NC) Inc.* (Aug. 20, 1993), 4th Dist. No. 92-CAE-11040, at *2 (holding that the trial court erroneously considered a motion for default where the motion contained "no certificate or proof of service"); *Ruper v. Smith* (1983), 12 Ohio App.3d 44, 45, 465 N.E.2d 927 (finding "exception" to an arbitrators' report not properly before the court because motion failed to indicate proper service per Civ.R. 5(D)).

In direct contrast to prior case law, in this matter, the Tenth District held that Everhome's failure to include a certificate of service, or even serve the Amended Complaint, was not fatal to the trial court's consideration of that pleading. Further, the Tenth District essentially found that such a failure did not

cause harm to the Bakers. Such a holding is simply not contemplated by the Civil Rules and is unsupported by the case law.

The Tenth District held that the Bakers had waived the claim that the amended complaint could not be considered because, the court reasoned, the Bakers did not raised “insufficiency of service of process” under Civ. R. 12(B)(5). But this plainly cannot be the law. The “process” to which Civil Rule 12 refers is “a summons or writ, especially to appear or respond in court.” *Black’s Law Dictionary*, 7th Ed., p. 1222. The reason the trial court could not have considered the amended complaint was not because it lacked a summons, it is because it was never served on the Baker’s counsel.

The confusion surrounding the trial court’s Judgment Entry is indeed symptomatic of Everhome’s failure, throughout the course of litigation, to properly serve documents upon opposing counsel. And most critically, pursuant to the mandatory requirements of Civil Rule 5, the amended complaint was never properly before the Court because it was not served on the Bakers’ counsel. To grant judgment on that amended complaint was therefore error.

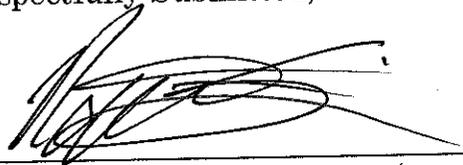
This proposition of law presents an additional question of great general interest which should be determined by this Court. This Court is certainly aware of the high volume of foreclosure cases brought throughout the state of Ohio, and is undoubtedly aware that the prosecution of these cases are – by necessity borne of the high volume – handled in a largely assembly-line fashion. This case presents this Court with the opportunity to tell the bench, the bar, and the public that the

mandatory nature of the Civil Rules which this Court has enacted may not be cast aside or disregarded in favor of expediency.

CONCLUSION

For all of the foregoing reasons, this Court should Court to accept review, hold the case for decision in *Duvall* or *Perry*, and stay the briefing schedule. Once this Court has ruled on the question of standing, it can then, if necessary, proceed to consider the second question presented regarding the interplay between Civ. R. 5 and Civ. R. 12(B)(5).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served upon the following by regular United States Mail, postage prepaid, this 15th day of August, 2011.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
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FRANKLIN CO. OHIO

2011 JUN 30 PM 2:18

CLERK OF COURTS

Everhome Mortgage Company, :
Plaintiff-Appellee, :

v. :

Doug A. Baker et al., :
Defendants-Appellants, :

No. 10AP-534
(C.P.C. No. 09CVE-01-274)

Lawrence D. Baker et al., :
Defendants-Appellees, :

(REGULAR CALENDAR)

(Miranda G. Smith, :
Intervenor-Appellee). :

D E C I S I O N

Rendered on June 30, 2011

Shapiro, Van Ess, Phillips & Barragate, LLP, and Benjamin D. Carnahan, for Everhome Mortgage Company.

The Brunner Firm Co., LPA, Rick L. Brunner, Patrick M. Quinn, and Michael E. Carleton, for appellants.

Maquire & Schneider, L.L.P., Karl H. Schneider, and Mark R. Meterko, for Miranda G. Smith.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendants-appellants, Doug A. Baker and Nancy C. Baker ("the Bakers"), appeal from a judgment of the Franklin County Court of Common Pleas granting

summary judgment in favor of plaintiff-appellee, Everhome Mortgage Company, in Everhome's action to foreclose upon a note and mortgage.

{¶2} Everhome filed its complaint on January 8, 2009. The complaint names Doug Baker as the obligor on a note in default and both Doug and Nancy Baker as mortgagors of the property securing the note. From this and later filings, it appears that Nancy Baker was not a record owner of the mortgaged real estate and signed the mortgage solely to pledge her dower interest. The complaint also lists as defendants various potential competing lien holders and two further individuals, Lawrence D. Baker, and Mary J. Baker, whose interest in the property is not defined.

{¶3} The Bakers responded with a motion to dismiss and a motion for more definite statement, relying on various perceived flaws in the chain of title for the mortgage and underlying note. Based upon these, the Bakers asserted that Everhome was not the real party in interest and could not prosecute the foreclosure. Everhome filed by leave of court an amended complaint on March 11, 2009, attaching a copy of the promissory note that was lacking in the original complaint and other documents establishing assignment of the mortgage and supporting Everhome as the holder in due course of the note and mortgage. While the amended complaint adds as a party the "unknown spouse, if any, of Doug A. Baker," it also maintains Nancy Baker as a defendant. On July 10, 2009, the trial court denied the Bakers' pending motions for a more definite statement and to dismiss the original complaint.

{¶4} The Bakers filed an answer to the amended complaint on July 22, 2009. Everhome proceeded with a motion for summary judgment against the Bakers filed September 1, 2009, and a separate motion for default judgment against other defendants.

The Bakers filed their memorandum contra summary judgment and a Civ.R. 56(F) motion to allow further discovery prior to addressing the summary judgment issue.

{¶5} Everhome filed on September 22, 2009, a memorandum opposing the Bakers' Civ.R. 56(F) motion and a reply memorandum to the Bakers' memorandum opposing summary judgment. On September 25, 2009, the trial court entered an order indicating that all pending motions by all parties had been ruled upon. The object of this last entry is unclear, but it is undisputed that, on October 7, 2009, the trial court entered final judgment against Doug Baker on the underlying note and foreclosure in favor of Everhome on the mortgage. On November 5, 2009, the trial court entered a brief nunc pro tunc entry correcting a clerical error in the preceding final order but noting no alteration to the basis of the prior judgment.

{¶6} On January 14, 2010, Everhome filed with the court and served on opposing counsel a motion to set a minimum bid price at the impending sheriff's sale. This was granted by the trial court on January 22, 2010. The property sold at the sheriff's sale on April 9, 2010 to third-party purchaser Miranda G. Smith. On May 5, 2010, the trial court entered judgment confirming the sale, allocating distributions among lien holders, and specifying that, after payment of liens and costs, there remained a balance of \$42,419.96 payable to the Bakers. The Bakers have declined to claim this check from the clerk of court and, as a result, the present appeal is not mooted by satisfaction of judgment.

~~{¶7} The Bakers have appealed and bring the following assignments of error:~~

First Assignment of Error:

The trial court erred and the October 7, 2009 Judgment Entry is void because Appellants appeared and the trial court failed

to serve any written notice or hold a hearing in compliance with Rule 55(A), Ohio Rules of Civil Procedure.

Second Assignment of Error:

The trial court erred in entering a Judgment Entry that was submitted without a decision in favor of Appellee, or without holding a trial on the merits, and which clearly failed to identify any motion that was pending at the time it was granted or at the time it was allegedly circulated to counsel.

Third Assignment of Error:

The trial court erred in considering and acting upon Appellee's Amended Complaint which had no Certificate of Service endorsed thereon or separately filed.

Fourth Assignment of Error:

The trial court erred in denying Appellants' Motion to Dismiss and/or For a More Definite Statement based on Appellee's Amended Complaint.

Fifth Assignment of Error:

The trial court erred by granting judgment to Appellee, which is not a party to the Original Recorded Mortgage and never had an interest in the Mortgage.

Sixth Assignment of Error:

The trial court erred in entering its Confirmation of Judgment of May 5, 2010.

{¶8} The first matter to address in this appeal is a motion by proposed intervenor Miranda G. Smith, the purchaser of the property at the sheriff's sale, for leave to file an appellate brief or, in the alternative, intervene in the appeal. The Bakers have moved to strike the brief filed by Smith and oppose her intervention in the appeal.

{¶9} Smith was not a party in the trial court at the time the current notice of appeal was filed. Seeking to protect her interest in the subject property, Smith moved to

Intervene in the trial court on June 2, 2010, after the Bakers filed a motion to vacate the trial court's judgment of foreclosure. The Bakers filed their notice of appeal to this court on June 4, 2010, abandoning pursuit of their motion to vacate in the trial court. Not until four days later, on June 8, 2010, did the trial court grant Smith's motion to intervene at the trial level. As an initial determination addressing Smith's intervention in the case, we note that the trial court's order permitting Smith to intervene was "inconsistent with [our] jurisdiction to reverse, modify or affirm the judgment." *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44. That order is without effect upon Smith's participation in this case. If Smith is to present an argument in this appeal, she must do so by way of appellate intervention.

{¶10} Once a case proceeds to appeal, intervention by a stranger to proceedings in the trial court is not typical. "The proper parties to an appeal to this court are determined by the parties to the proceeding in the court from which the appeal is taken to this court. Ordinarily, no new or additional parties can be added upon appeal." *Miller v. Bd. of Review, Ohio Bur. Emp. Servs.* (May 24, 1979), 10th Dist. No. 79AP-179. However, in an exceptional case, to defend interests that are both imperative and otherwise unrepresented, a non-party "may intervene in a case after jurisdiction has been transferred to an appellate court." *Queen City Lodge No. 69 Fraternal Order of Police v. State Emp. Relations Bd.*, 1st Dist. No. C-060530, 2007-Ohio-170, ¶17. The appellate rules do not provide an explicit mechanism for such a procedure, but courts have used Civ.R. 24, governing intervention in trial courts, as guidance, applying it under Civ.R. 1(C) which provides that the civil rules will apply in an appeal when they are not "by their nature * * * clearly inapplicable." *Id.* at ¶17, quoting Civ.R. 1(C). Since the interests of a

purchaser at a sheriff's sale are inextricably intertwined with the foreclosure proceeding, and the challenge to the underlying foreclosure proceeding would of necessity implicate matters to which the purchaser could not have yet been a party, we have at least in dicta contemplated joinder by intervention of such purchasers in the subsequent appeal of the foreclosure action. See, e.g., *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68, 2004-Ohio-6725, ¶5. Because Smith has claimed "an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that disposition of the action may as a practical matter impair or impede [her] ability to protect that interest," Civ.R. 24(A), we grant Smith's motion to intervene in the appeal to the extent that we will consider her brief.

{¶11} Next, we consider Everhome's argument that the present appeal must be dismissed because it was not timely filed. Everhome argues that the October 7, 2009 final judgment was not appealed until June 2010, well beyond the 30-day limit permitted for appeal under App.R. 4. Because App.R. 4 is jurisdictional, Everhome argues, the appeal must be dismissed. However, App.R. 4(A) provides that the time to appeal is extended when notice of judgment is not provided to a party within the three-day period in Civ.R. 58(B). In the present case, the record reflects that the clerk of the trial court did not serve the Bakers with a copy of the final judgment of foreclosure. The fact that the Bakers were served with subsequent documents and even responded to them is irrelevant for purposes of tolling the time to appeal. *Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482. The present appeal is timely.

{¶12} Finally, we address the assertion by intervener Smith that the appeal must be dismissed as moot because the confirmation of sale has resulted in irrevocable

disposal of the property and distribution of funds and this court can no longer provide a judicial remedy. There is authority for this proposition. *Charter One Bank v. Mysyk*, 11th Dist. No. 2003-G-2528, 2004-Ohio-4391, ¶4 ("Once the Sheriff's sale occurred, the merits of the trial court's foreclosure order became moot. * * * No relief can be afforded once the property has been sold at foreclosure sale because an appellate court is unable to grant any effectual relief at that point"); *Alegis Group L.P. v. Allen*, 11th Dist. No. 2002-P-0026, 2003-Ohio-3501, ¶14 ("[E]ven if we were to ultimately conclude that the trial court did err in entering judgment for appellee, our decision would only be advisory as this court lacks the authority to return the parties to their original positions").

{¶13} Other cases, however, have disagreed with *Mysyk* and *Alegis*. In *Ameriquest Mtge. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576, the Eleventh Appellate District abandoned its own precedent in *Mysyk* and *Alegis* and recognized that, even where the real property itself is no longer recoverable, the case is not moot because the court is not without power to offer a remedy: "[D]ebtors may still obtain relief in the form of restitution from judgment creditors. Restitution is appropriate in cases such as these, where the foreclosed property has been sold." *Id.* at ¶19, citing *Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. No. 19904, 2003-Ohio-6665; *MIF Realty L.P. v. K.E.J. Corp.* (May 19, 1995), 6th Dist. No. 94WD059; and *Chupp v. Thomas* (Dec. 8, 1997), 6th Dist. No. H-97-027.

{¶14} In choosing between these conflicting cases, we begin by noting that we ~~find no conflict on the proposition that, where the defendant in a foreclosure action has accepted the funds disbursable to him under the confirmation order, further attack on the foreclosure judgment is barred under the doctrine of satisfaction of judgment.~~ *Villas at*

Pointe of Settlers Walk Condominium Assn. v. Coffman Dev. Co., 12th Dist. No. CA2009-12-165, 2010-Ohio-2822. However, the broader application of mootness proposed in *Mysyk* is neither tenable nor desirable, and the reasoning in *Wilson* is more persuasive. It is a suspect argument to assert that a void, voidable, or merely erroneous judgment might evade appellate review simply because it was rendered rapidly, completely, and without notice. If we test the *Mysyk* rule by taking it to its logical extreme, such a holding would allow no recourse in a case in which a foreclosure action proceeded, completely in error and without any notice to the property owner, from complaint to default to foreclosure and sale. Admittedly, as we will discuss below, that is not the posture of the present case, but adopting mootness as a rule of convenience here would invite injustice in future cases presenting harsher facts.

{¶15} While it is true that, pursuant to R.C. 2329.45 and 2325.03, Smith has taken title as purchaser in good faith at the sheriff's sale of the subject property and her interest is no longer subject to attack by any subsequent modification of the underlying judgment of foreclosure, this court can still offer a meaningful remedy. As stated in *Wilson*, the plain language of R.C. 2329.45 clearly contemplates that a trial court, in the event of reversal of the underlying foreclosure judgment, may craft a suitable monetary remedy. Reversal of a wrongful foreclosure would not only be necessary to allow the trial court to revisit the merits and determine such a remedy if warranted, but would also be an important predicate to any defense or recovery by the original property owner in collateral proceedings or companion cases. Even less speculatively, reversal would avoid any execution on a deficiency judgment arising out of the foreclosure, although again this

case does not present that difficulty as the sale resulted in a surplus payable to the Bakers.

{¶16} We therefore find that the matter is by no means moot merely by virtue of the subsequent sale of the property; if the Bakers succeed on appeal in setting aside the judgment of foreclosure, they could, if Everhome were unable to obtain a new judgment of foreclosure after proceedings on remand, propose to the trial court a variety of monetary remedies in satisfaction of the damages incurred by the Bakers through Everhome's foreclosure action.

{¶17} We now turn to the Bakers' first assignment of error, which asserts that the trial court erred in granting "default" judgment against them. This is based upon language in the trial court's October 7, 2009 judgment entry, presented as follows in the Bakers' appellate brief: "The Court finds that all necessary parties have been served with summons according to law and are properly before the Court; that the Defendants * * * are in default of Answer or other pleadings."

{¶18} This argument more than somewhat distorts the text of the trial court's judgment entry. More completely stated, the pertinent text of the first two paragraphs of the entry read as follows: "THIS CAUSE was submitted to the Court and heard upon the Complaint of the Plaintiff, the Answer of Defendants Doug Baker, Nancy Baker, State of Ohio Department of Taxation, United States of America, and the evidence. * * * The Court finds that all necessary parties have been served with summons according to law * * *, that the Defendants, Jane Doe, Unknown Spouse of Douglas A. Baker, Richard Roe, Unknown Occupant, Union Federal Savings and Loan Association, Lawrence D. Baker and Mary J. Baker, are in default of Answer or other pleading and thereby confess

the allegations of the Complaint to be true, and said Defendants are forever barred from asserting any right, title or interest in and to the hereinafter described premises."

{¶19} The court's entry clearly is not intended to grant *default* judgment against Doug and Nancy Baker. The decision notes that Doug and Nancy Baker filed an answer and that only various other parties, including Lawrence D. Baker and Mary J. Baker, were in default of answer. As to the parties present in this appeal, therefore, the judgment entered by the trial court is consistent with summary judgment pursuant to the filings then before the court.

{¶20} We do note the concern raised by the Bakers at oral argument that the trial court's judgment could be misconstrued to grant summary judgment against Nancy Baker on the underlying note, rather than simply upon her mortgaged interest in the property. Although this argument was not raised by assignment of error and is therefore not properly before us in a posture that would support reversal of the trial court order, we take the opportunity to clarify that the trial court could not and did not enter any judgment that would render Nancy Baker liable on the note itself, which Nancy never signed. The concern is less urgent than it would be in a case that generated a deficiency judgment, but nonetheless worth clarifying.

{¶21} The Bakers also argue under this assignment of error that the trial court's entry does not comply with Loc.R. 25.04 of the Franklin County Court of Common Pleas. This rule requires all entries to either state the reason for the entry or relate the entry to the motion decided. The text of the trial court decision in the present case clearly indicates that it is a final judgment of foreclosure in favor of Everhome, granted upon the

complaint, answer, and evidence before the court. The entry therefore complies with Loc.R. 25.04.

{¶22} In summary, after consideration of the above arguments the Bakers' first assignment of error is overruled.

{¶23} The Bakers' second assignment of error asserts the trial court erred in entering a judgment entry that was not circulated by counsel for the parties as described in Loc.R. 25.01 of the Franklin County Court of Common Pleas. This rule, by its own language, allows the trial court to employ another procedure other than circulation for signature among the parties of the proposed judgment entry submitted by the prevailing party. Moreover, we find no authority for the proposition that non-compliance with Loc.R. 25.01, of itself, would constitute reversible error in the absence of some real and discernible prejudice to a party, such as a deprivation of procedural due process rising to the level of a constitutional violation. The Bakers articulate no alternative course of action that they would have undertaken had the entry circulated to counsel. The Bakers' second assignment of error is accordingly overruled.

{¶24} The Bakers' third assignment of error asserts that the trial court should not have considered Everhome's amended complaint in the matter because this complaint was not properly served upon the Bakers. The record clearly indicates that the Bakers filed their answer to the amended complaint on July 22, 2009. This answer does not set forth an affirmative defense of insufficiency of service of process, and, as a result, all such arguments are waived for the balance of the action. Civ.R. 12(H)(1); *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-57. The Bakers' third assignment of error is overruled.

{¶25} The Bakers' fourth assignment of error asserts that the trial court erred in denying their motion to dismiss the action and their motion for a more definite statement. Both were based upon reported inadequacies in the initial complaint in this action, all of which were essentially rectified by subsequent filing of the amended complaint. A motion to dismiss an original complaint is rendered moot by subsequent filing of an amended complaint. *State v. Weir* (Aug. 29, 1978), 10th Dist. No. 78AP-359; *DVCC, Inc. v. Med. College of Ohio*, 10th Dist. No. 05AP-237, 2006-Ohio-945. The holder-in-due-course arguments addressed in these motions, as well as questions over the non-inclusion of a copy of the underlying financial note, were resolved by the amended complaint. The Bakers' fourth assignment of error is overruled.

{¶26} The Bakers' fifth assignment of error asserts the trial court erred in granting summary judgment to Everhome. Summary judgment 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 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 non-moving 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 non-moving party has no evidence to support his or her claims. *Id.*

{¶27} 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. Soc. Natl. Bank* (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 have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶28} Both in their memorandum contra summary judgment and in their argument before this court, the Bakers rely solely upon the premise that Everhome is not the real party in interest because it has failed to establish that it is the actual holder of the note and mortgage. The documentation filed by Everhome in support of summary judgment evinces a chain of title with an initial transfer by United Federal Bank of Indianapolis assigning its mortgage interest to the Mortgage Electronic Registration System ("MERS"), and then a subsequent transfer from MERS to Everhome. The trial court correctly could conclude there remains no genuine issue of material fact that Everhome is the proper holder of the mortgage. The Bakers' fifth assignment of error is accordingly overruled.

{¶29} The Bakers' sixth assignment of error argues that, should the underlying judgment of foreclosure be reversed, the order confirming the subsequent sheriff's sale should be vacated. They raise no further argument regarding the sale proper or the distribution of funds therefrom. In light of our disposition of the preceding assignments of error, this assignment of error is rendered moot.

{¶30} In conclusion, the Bakers' first, second, third, fourth, and fifth assignments of error are overruled, and the Bakers' sixth assignment of error is rendered moot. The

judgment of foreclosure entered by the the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
COURT OF APPEALS

TENTH APPELLATE DISTRICT

FILED
2011 JUN 30 PM 2:31
CLERK OF COURTS

Everhome Mortgage Company, :
 :
Plaintiff-Appellee, :
 :
v. :
 :
Doug A. Baker et al., :
 :
Defendants-Appellants, :
 :
Lawrence D. Baker et al., :
 :
Defendants-Appellees, :
 :
(Miranda G. Smith, :
 :
Intervenor-Appellee). :

No. 10AP-534
(C.P.C. No 09CVE-01-274)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2011, the Bakers' first, second, third, fourth, and fifth assignments of error are overruled, and the Bakers' sixth assignment of error is rendered moot. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against the Bakers.

BROWN, SADLER, & TYACK, JJ.



Judge Susan Brown

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

EVERHOME MORTGAGE COMPANY
Plaintiff

CASE NO. 09 CV 000274

-vs-

JUDGE: KIMBERLY COCROFT

DOUG A. BAKER et al.

Defendants

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 OCT -7 PM 3:25
CLERK OF COURTS CV

FINAL JUDGMENT ENTRY

THIS CAUSE was submitted to the Court and heard upon the Complaint of the Plaintiff, the Answer of Defendants, Doug Baker, Nancy Baker, State of Ohio Department of Taxation, United States of America and the evidence. The Treasurer of Franklin County by counsel hereby enters his appearance herein for all purposes and approves these proceedings.

The Court finds that all necessary parties have been served with summons according to law and are properly before the Court; that the Defendants, Jane Doe, Unknown Spouse of Douglas A. Baker, Richard Roe, Unknown Occupant, Union Federal Savings and Loan Association, Lawrence D. Baker and Mary J. Baker, are in default of Answer or other pleading and thereby confess the allegations of the Complaint to be true, and said Defendants are forever barred from asserting any right, title or interest in and to the hereinafter described premises.

The Court finds that there is due the Treasurer of Franklin County Ohio, taxes, accrued taxes, assessments and penalties on the premises hereinafter described, as shown on the County Treasurer's tax duplicate, the exact amount being unascertainable at the

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[Handwritten Signature]

present time, but which amount will be ascertainable pursuant to O.R.C. §323.47 which are valid and subsisting liens thereon for that amount so owing.

The Court further finds that Defendants State of Ohio, Department of Taxation and the United States of America do not have an interest in the subject premises as they have filed an answer disclaiming interest in said property.

The Court finds on the evidence adduced that there is due the Plaintiff on the promissory note set forth in the First Count of the Complaint, the sum of \$44,377.59 plus interest thereon at the rate of 7% per annum from July 1, 2008.

The Court further finds that Plaintiff shall have no right to pursue a deficiency judgment against any Defendant that has been discharged from the debt by a United States Bankruptcy Court.

In addition, there may be due to Plaintiff sums advanced by it under the terms of the note and Mortgage to pay real estate taxes, insurance premiums, and property protection, which sums are to be determined by further order of this Court.

The Court further finds that, to secure the payment of the promissory note aforesaid, Doug A. Baker and Nancy C. Baker executed and delivered a certain mortgage deed as in the Second Count of the said Complaint described, thereby conveying to Plaintiff or Plaintiff's predecessor the following described premises:

See attached Exhibit "A"

Said premises also known as: 5639 Shannon Heights, Columbus, OH
43220

Permanent Parcel Number: 590-198248-00

That said mortgage was duly filed with the Recorder of Franklin County on June 26, 2002, and was thereafter recorded as Instrument No. 200206260157245, of the Mortgage Records of said County, and thereby became and is a valid first mortgage lien

upon said premises, subject only to the lien of the Treasurer for taxes; that said mortgage deed was subsequently assigned to Plaintiff, that said conditions in the mortgage deed have been broken and the same has become absolute and the Plaintiff is entitled to have the equity of redemption and dower of all the Defendants in and to said premises foreclosed.

Further, any parties that have filed an answer asserting a valid and subsisting lien are hereby transferred to proceeds. If the United States of America has asserted an interest in the subject premises, then it shall have the right to redeem as set forth in 28 USC §2410.

It is therefore ORDERED, ADJUDGED AND DECREED that unless the sums hereinabove found due, together with the costs of this action, be fully paid within three (3) days from the date of the entry of this decree, the equity of redemption and dower of all the Defendants in and to said premises shall be foreclosed, and said premises sold; that, only upon the issuance of a Praecipe for Order of Sale by Plaintiff's attorney, shall an order of sale thereafter issue to the Sheriff of Franklin County directing him to appraise, advertise in a paper of general circulation within the County, and sell said premises as upon execution and according to law, free and clear of the interest of all parties to this action.

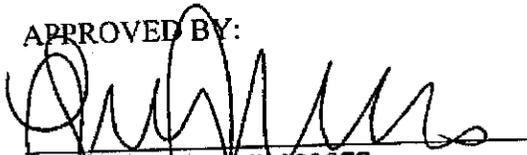
It is further Ordered that the Sheriff of Franklin County shall provide counsel for Plaintiff with notice of the sale date and appraisal in accordance with ORC §2329.26 by mailing a copy of the first advertisement of sale to counsel for Plaintiff within seven (7) days of the date of the first publication.

RECORD IS HEREBY ORDERED.

TO THE CLERK:

Pursuant to Civil Rule 58(B), the Clerk is directed to serve upon the parties a notice of the filing of this Judgment Entry and the date of entry upon the Journal.


JUDGE KIMBERLY COCROFT

APPROVED BY:

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Submitted 6/10/09, no response received
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Assistant Prosecuting Attorney
373 South Street, 17th Floor
Columbus, Ohio 43215
Attorney for Defendant
Treasurer of Franklin County

LEGAL DESCRIPTION

SITUATED IN THE STATE OF OHIO, COUNTY OF FRANKLIN, AND IN THE CITY OF COLUMBUS:

BEING LOT NUMBER FIFTY-FIVE (55), IN SHANNON HEIGHTS, SECTION 2, AS THE SAME IS NUMBERED AND DELINEATED UPON THE RECORDED PLAT THEROF, OF RECORD IN PLAT BOOK 61, PAGE 78, RECORDER'S OFFICE, FRANKLIN COUNTY, OHIO.

PRIOR DEED REFERENCE: VOLUME 14245, PAGE B17

PROPERTY ADDRESS: 5639 SHANNON HEIGHTS, COLUMBUS OHIO 43220

PARCEL NUMBER: 590-198248-00

N-048-AA
ALL OF
(590)
198248

DEPARTMENT OF REVENUE
FRANKLIN COUNTY
BY: RDN
DATE: 03-12-2009

* NO ENG APPROVAL
RECORDED

A-20