

ORIGINAL

IN THE SUPREME COURT OF OHIO

EVERHOME MORTGAGE COMPANY )

Plaintiff-Appellee, )

v. )

DOUG A. BAKER )

Defendant-Appellant, )

And )

MIRANDA G. SMITH )

Intervener-Appellee, et al., )

Case No. 11-1398

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

Court of Appeals  
Case No. 10AP-534

MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF  
JURISDICTION OF APPELLEE EVERHOME MORTGAGE COMPANY

Phillip Barragate (0063017)  
Shapiro, Van Ess, Phillips &  
Barragate, LLP  
4805 Montgomery Road, Suite 320  
Cincinnati, Ohio 45212  
Telephone (216) 373-3116  
Facsimile (847) 627-8805  
Email pbarragate@logs.com  
Counsel for Appellee Everhome Mortgage  
Company

Karl H. Schneider (0012881)  
McGuire & Schneider, LLP  
250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215  
Telephone (614) 224-1222  
Facsimile (614) 224-1236  
Email khschneider@ms-lawfirm.com  
Counsel for Intervener-Appellee Miranda G. Smith

Rick L. Brunner (0012998)  
Patrick M. Quinn (0081692)  
Michael E. Carleton (0083352)  
Brunner Quinn  
35 North 4<sup>th</sup> Street, Suite 200  
Columbus, Ohio 43215  
Telephone (614) 241-5550  
Facsimile (614) 241-5551  
Email rlb@brunnerlaw.com  
pmq@brunnerlaw.com  
mec@brunnerlaw.com  
Counsel for Appellant Doug A. Baker

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

Appellants Doug Baker and Nancy Baker (“Baker”) submit that this case is of great general interest by suggesting that the standing issue presented in this case is the same as the standing issue this Honorable Court has accepted for review in *U.S. Bank v. Duvall*, Case Number 2011-0218 and *U.S. Bank v. Perry*, Case Number 2011-0170. Appellee Everhome Mortgage Company (“Everhome”) argues that while all three cases involve mortgage foreclosures, the similarities end there. Any perceived standing issue in this case was resolved when Everhome took the remedial step of amending its complaint to include a properly indorsed promissory note and mortgage assignment that demonstrated its right to file the foreclosure.

In *U.S. Bank v. Duvall* a conflict was certified to answer the 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?” Briefly stated, the facts in *Duvall* demonstrate that on the date the foreclosure complaint was filed U.S. Bank held the promissory note that had been indorsed in blank by the original payee, Wells Fargo Bank, NA. The mortgage assignment in favor of U.S. Bank was filed three months after the foreclosure action was commenced. U.S. Bank did not file an amended complaint to include the mortgage assignment and demonstrate its right to foreclose.

In *U.S. Bank v. Perry* this Court accepted jurisdiction to determine whether “the holder of a promissory note has standing to enforce a mortgage which secures its payment” and “whether standing need only to be proven prior to the entry of judgment.” The complaint in *Perry* was filed on July 10, 2008. Attached to the complaint was a promissory note indorsed in blank, but no mortgage assignment. A mortgage assignment was produced in response to a Motion to Dismiss. The mortgage assignment was recorded shortly after the complaint was filed.

Although the Court ultimately granted judgment in favor of U.S. Bank, there was never an amended complaint filed to address the standing issue.

The law in Ohio is clear that an amended complaint supersedes and replaces the original complaint. Thus, Everhome cured any alleged defect when it filed the amended complaint. That fact sets it apart from *Duvall* and *Perry*.

Baker presents a second issue for this Court to consider, but that too is hardly an issue of great general interest. The second issue involves service of the amended complaint and whether the defense of insufficiency of service of process is waived if not specifically raised in the answer to the complaint or by separate motion. Everhome argues that this issue is not of great general interest for two reasons: First, the issue has already been decided by this Court in the case of *Maryhew v. Yova* (1984) 11 Ohio St.3d 154; 464 N.E.2d 538. Second, Baker's interpretation of Rule 5 results in a classic form over substance argument that is of dubious value outside the facts of this case.

At the heart of this issue is the long standing concept that service of any pleading should be made in a way that informs the interested party of the claims so they may have an opportunity to respond. Everhome's alleged error in this case was to serve the amended complaint on the Bakers as opposed to their counsel. Indeed, one can argue that by doing so, Everhome went above and beyond the protections mandated in the Ohio Rules of Civil Procedure. Nonetheless, there is no dispute that both Baker and his counsel ultimately received the amended complaint. In fact, the trial court ordered Baker to file a responsive pleading to the amended complaint, which he did. In summary, Baker had every opportunity to fully defend the case and there was no harm or prejudice that resulted from the manner in which the amended complaint was served. Where the issue resulted in no harm and is of limited precedential value outside of the facts of

this case, it cannot be one that is of great general interest. Consequently, Everhome submits that this Honorable Court should reject jurisdiction of this matter and not hold this case in abeyance until the decision is rendered in *Duvall* and *Perry*.

### **Statement of the Case and the Facts**

On June 24, 2002 Appellant Doug A. Baker executed a promissory note in favor of Union Federal Bank of Indianapolis. The promissory note was subsequently transferred via blank indorsement. On June 24, 2002 Appellant Doug A. Baker and Appellant Nancy C. Baker executed an Open-End Mortgage in favor of Union Federal Bank of Indianapolis. The mortgage was recorded on June 26, 2002. The Mortgage was assigned from Union Federal Bank of Indianapolis, the originating lender, to Mortgage Electronic Registration Systems, Inc. ("MERS") on January 12, 2006, with recording of the assignment occurring on April 21, 2006. The mortgage was then assigned from MERS to Appellee Everhome Mortgage Company ("Everhome") on January 8, 2009, with recording of the assignment occurring on January 20, 2009.

On January 8, 2009 Everhome filed its foreclosure complaint against Doug A. Baker, Nancy C. Baker and other interested parties. In the complaint Everhome alleged that is the payee of the promissory note executed solely by Doug A. Baker, and holder of the mortgage deed executed by both Doug A. Baker and Nancy C. Baker. Everhome further alleged that it had properly accelerated the debt and it was owed the sum of \$44,377.59 plus interest at the note rate of 7% from July 1, 2008. Finally, Everhome alleged that a copy of the promissory note was unavailable at the time the complaint was filed, but that it would be provided once it was available. Both Doug Baker and Nancy Baker were served with the summons and complaint on January 18, 2009 by a private process server appointed by the trial court.

On January 30, 2009, Baker filed a Motion to Dismiss, and/or, For a More Definite Statement, arguing that Everhome was not the real party in interest and that the case should be dismissed. In response to Baker's Motion, Everhome moved for leave to amend its complaint on February 17, 2009 to attach a copy of the promissory note and a copy of the mortgage assignment. Everhome's Motion was granted on March 3, 2009. The amended complaint was filed on March 11, 2009. Everhome served the amended complaint once again via private process server that was appointed by the trial court. The summons and amended complaint were served upon both Doug Baker and Nancy Baker on March 19, 2009.

On July 22, 2009, Baker filed an answer to the amended complaint. In the answer, Baker did not assert any affirmative defense regarding insufficiency of process and/or service in regard to the amended complaint, thereby waiving the ability to use such a defense in later proceedings.

On September 1, 2009, Everhome filed its Motion for Summary Judgment and a Motion for Default Judgment with respect to the non-answering parties. Baker responded filing a Motion Pursuant to Civ. R. 56(F) and a Memorandum Contra to the Motion for Summary Judgment. Though the case had been pending for months prior to Baker's Civ. R. 56(F) motion, Baker never submitted any discovery to Everhome at any point in the trial court proceedings.

On September 22, 2009, Everhome filed a Memorandum Contra to Baker's Motion Pursuant to Rule 56(F) and Reply to Baker's Memorandum Contra Everhome's Motion for Summary Judgment. On October 7, 2009 the trial court entered its Final Judgment Entry granting Everhome's Motion for Summary Judgment.

The subject property went to Sheriff's Sale on January 8, 2010, but did not sell due to lack of bidders. On January 14, 2010, Everhome filed and served opposing counsel with its Motion to Set Minimum Bid Price at Sheriff's Sale, which was granted by the trial court on

January 22, 2010. The property was sold on April 9, 2010 to Miranda G. Smith for the sum of \$103,000.00.

On May 5, 2010, the court entered a Judgment Entry Confirming Sale and Ordering Distribution. The distribution of this order paid Everhome in full and left a balance of \$42,419.96 for Baker. The purchaser, Miranda G. Smith has been residing in the subject property and has subsequently intervened in this action to protect her interest. Baker subsequently appealed the sale confirmation and judgment entry. The 10<sup>th</sup> District Court of Appeals affirmed the decision of the trial court on June 30, 2011.

### Law and Argument

#### 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 mortgage when the complaint was filed.*

Everhome argues that this Court should decline jurisdiction and decline to hold the decision in this case in abeyance because it is markedly different from *U.S Bank v. Duvall* and *U.S. Bank v. Perry*. Unlike the Plaintiffs in *Duvall* and *Perry*, Everhome took the remedial step of filing an amended complaint to demonstrate ownership of the note and mortgage at the time the complaint was filed.

Everhome submits that the amended complaint it filed cured any perceived standing issue. To decide otherwise would undermine the purpose of the rule regarding amended complaints. Civ. R. 15 governs the filing of an amended complaint. In *Peterson v. Teodosio* (1973) 34 Ohio St. 2d 161; 297 N.E.2d 113, this Court stated:

**The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied "to effect just results." Pleadings are simply an end to that objective. The mandate of Civ. R. 15(A) as to amendments requiring leave of court, is that leave 'shall be freely given when justice so requires.**

Once filed, the effect of the amended complaint is to supersede the previously filed complaint. As this Court has held, “when a party substitutes an amended petition for an earlier one, this constitutes an abandonment of the earlier pleading and a reliance upon the amended one. The earlier pleading becomes *functus officio*.” *Grimm v. Modest* (1939) 135 Ohio St. 275; 20 N.E.2d 527. In other words, the amendment of a complaint results in the abandonment of the original complaint, *Wrinkle v. Trabert* (1963) 174 Ohio St. 233; 188 N.E.2d 587.

In this case Everhome filed its complaint and alleged in Count 1 that a copy of the promissory note was currently unavailable. In Count 2 Everhome alleged that it was the holder of a mortgage, but only the mortgage was attached as an exhibit. When Baker filed his Motion to Dismiss, and/or, For a More Definite Statement, Everhome responded by filing an amended complaint.

Attached as Exhibit A to the amended complaint was a copy of the promissory note indorsed to Everhome via a blank indorsement. A blank indorsement is “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.” ORC §1303.25

ORC 1303.31 provides that a holder is entitled to enforce the promissory note. Therefore, as of the date the amended complaint was filed Everhome demonstrated that it owned the note and was entitled to enforce the note.

Attached as Exhibit B to the amended complaint is a copy of the mortgage executed by Baker to the Union Federal Bank of Indianapolis and a copy of the assignment of mortgage from MERS to Everhome. There was an intervening assignment of mortgage from the Union Federal Bank of Indianapolis to MERS that was not attached as part of Exhibit B, but that mortgage

assignment was clearly shown in the title commitment that was filed with the complaint. Therefore, by filing the amended complaint Everhome demonstrated that it owned the note and the mortgage. Since the law is clear that the amended complaint supersedes the original complaint, *Grimm, supra*, then Everhome demonstrated standing from the very beginning of this case. Consequently, Everhome states that this case is clearly distinguishable from *Duvall* and *Perry* and jurisdiction should be denied. Likewise, and for the reasons stated above this Court should reject Baker's request to hold this case pending a decision in *Duvall* and *Perry*.

### **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."*

In Baker's second Proposition of Law he questions whether the defense of insufficiency of service of process is waived if not specifically raised in the answer to the complaint or by separate motion. Everhome maintains that this issue has already been addressed in Civ. R. 12 and in the case of *Maryhew v. Yova* (1984) 11 Ohio St.3d 154; 464 N.E.2d 538.

Civ.R. 12 (B) states in relevant part:

**Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process . . . .**

Moreover, In *Maryhew* this Court stated with regard to the defense of insufficiency of service of process:

**Civ. R. 12(B) prescribes the manner of presenting affirmative defenses. The rule provides that "[e]very defense, in law or fact, to a claim for relief in any pleading \* \* \* shall be asserted in the responsive pleading thereto if one is**

**required, except that the following defenses may at the option of the pleader be made by motion \* \* \* ." The excepted defenses are lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, failure to join a party under Civ. R. 19 or 19.1. Therefore, the rule gives the pleader an option to assert the defense of lack of jurisdiction over the person either by way of a motion prior to any pleading or in the responsive pleading to the complaint.**

Based on Civ. R. 12(B) and the *Maryhew* decision Baker had two opportunities to raise the defense of insufficiency of service of process or that defense was waived. Baker could have raised the defense in his answer to Everhome's amended complaint. A review of Baker's answer to the amended complaint reveals that Baker raised fifteen defenses, but in none of those defenses did he claim insufficiency of service of process. In addition the trial court docket does not reflect a separate motion filed by Baker where he raises the defense of insufficiency of service of process. In fact, the first time he mentioned the defense is on appeal with the 10<sup>th</sup> District Court of Appeals. Therefore, it is clear that he waived the defense.

In addition, Everhome submits that the due process protections afforded by the Civil Rules and the Ohio Constitution were satisfied in this case and Baker had a full and fair opportunity to defend the case. Baker maintains that although he was personally served with the amended complaint by a special process server, that the trial court should not have considered the amended complaint because it was not served upon his counsel. There is no claim by Baker or his counsel that they did not receive the amended complaint. In fact, the trial court ordered Baker to file an answer to the amended complaint, which he did on July 22, 2009. Baker then filed a Motion to delay a ruling on Everhome's Motion for Summary Judgment while he conducted discovery (which he never did) and a Memorandum in Opposition to Everhome's Motion for Summary Judgment. Finally, Baker unsuccessfully appealed to the 10<sup>th</sup> District Court of Appeals. Given the defense that he mounted to the foreclosure at the trial court level

and on appeal Baker cannot argue that he was prejudiced in any way when Everhome's amended complaint was served upon him as opposed to his counsel.

Finally, Baker's position is not strengthened by the numerous cases he cites. In many of the cases the various courts found that the failure to comply with Civ.R. 5 resulted in the aggrieved party having received an adverse judgment because they were not served by any means with the pleading in question. In other cases cited by Baker the court's decision did not indicate whether the pleading in question was served or whether it was solely the proof of service that was omitted. In fact, one of the cases relied upon by Baker seems to support the manner in which Everhome served the amended complaint. In *O'Brien v. Citicorp Mortgage, Inc.* (Feb. 24, 1994), 10<sup>th</sup> Dist. No. 93AP-1074 the Court stated:

Plaintiff's amended complaint does not contain a certificate of service as required by Civ.R. 5(D) (**nor was a new summons served**), and the record does not reflect a certificate of service was separately filed. **Neither does the record reflect that any other method of service was attempted or obtained.** [Emphasis added]

It is clear from the above that Civ. R. 5 is in place to protect those from judgment who have not been served at all with the pleading. That is not the case with the matter before this Court. Thus, this Court should not be persuaded by Baker's argument.

### **Conclusion**

Everhome submits that this is not a case of great general interest. First, this case is clearly distinguishable from *U.S. Bank v. Duvall* and *U.S. Bank v. Perry*. Everhome resolved the alleged standing issue in this case by filing an amended complaint that included a note indorsed in blank and a mortgage assignment. The plaintiffs in *Duvall* and *Perry* did not take this remedial action. Second, the procedural issue raised by Baker has already been resolved by this Court and the clear language of Civ. R. 12. Finally, Baker was neither harmed, nor was he prejudiced by the manner in which the amended complaint was filed. Baker has fully defended

this case and it has been decided on the merits. Therefore, Everhome respectfully requests that this Court decline jurisdiction and decline to hold this case in abeyance pending the decision in *Duvall and Perry*.

Respectfully submitted,



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Phillip Barragate (0063017)  
Shapiro, Van Ess, Phillips  
& Barragate, LLP  
4805 Montgomery Road, Suite 320  
Cincinnati, Ohio 45212  
Telephone (216) 373-3116  
Facsimile (847) 627-8805  
pbarragate@logs.com

**Proof of Service**

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum was served upon the following by US Mail, postage prepaid, this 13<sup>th</sup> day of September 2011:

Rick L. Brunner  
Patrick M. Quinn  
Michael E. Carleton  
Brunner Quinn  
35 North 4<sup>th</sup> Street, Suite 200  
Columbus, Ohio 43215

Counsel for Appellant Doug A. Baker

Karl H. Schneider (0012881)  
McGuire & Schneider, LLP  
250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215

Counsel for Intervener-Appellee Miranda G. Smith



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Phillip Barragate (0063017)  
Counsel for Everhome Mortgage Company