

ORIGINAL

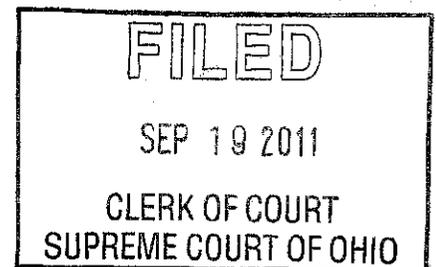
IN THE SUPREME COURT OF OHIO

INDYMAC FEDERAL BANK, FSB :
Plaintiff-Appellee : Case No. 11-1581
vs. : On Appeal from the Medina
County Court of Appeals
OTM INVESTMENTS, INC., et al : Ninth Appellate District
ROBERT DARRELL ANTHONY ESTATE dba
ROBERT D ANTHONY : C.A. Case No. 10CA0056-M
Defendant-Appellant :

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANT OTM INVESTMENTS INC, ET AL, ROBERT DARRELL ANTHONY ESTATE dba ROBERT D ANTHONY

ROBERT DARRELL ANTHONY ESTATE dba
ROBERT D ANTHONY Pro Per
1296 River Woods drive
Hinckley, Ohio [44233]
216-496-4256
Defendant-Appellant



LAW OFFICES OF JOHN D. CLUNK CO. LPA
4500 COURTHOUSE BLVD, STE 400
STOW, OH 44244
330-436-0301

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

| | |
|--|-------------------|
| EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSITITUTIONAL QUESTION | 3 |
| STATEMENT OF THE CASE AND FACTS | 7 |
| III. CONSTITUTIONAL PROTECTED LAW..... | 11 |
| A BRIEF OVERVIEW OF THE LAW OF VOIDS IN OHIO..... | 13 |
| ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW | 14 |
| <u>Proposition of Law No.1:</u> | |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 16 |
| APPENDIX | <u>Appx. Page</u> |

**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

I ROBERT D ANTHONY have demanded my rights in the beginning of this case, I have demand all my rights at all times and do not refuse no rights at any time, and each and every document that appears upon the court record is very clear to me. It was and always will be my will in the name of God Almighty to never give up any of my rights especially my rights protected by the Federal Constitution, the Constitution of Ohio and the Bill of Rights.

I ROBERT D ANTHONY never volunteered to participate in any proceeding where the attempted administering of the claim was held in such that the alleged claimant/plaintiff would be allowed file and not immediately be dismissed by the court a case in which there was not entitlement right, or interest held over that thing to which was the subject of the suit. Furthermore there could then be no perceived personum jurisdiction, or power of a court to render a judgment against a particular defendant. It has been widely upheld by the Supreme Courts that subject matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter i.e. any promissory note, and or mortgage deed in the name of the claimant/plaintiff at the immediate time of the filing of a case. Territorial jurisdiction is the power of the court to render a judgment concerning events that have occurred within a well defined territory. Let it be by the will of God Almighty I have objected to, and my intent is to forever sustain a standing objection now for then and evermore the fraudulent

commencement of this original legal action filed against I, ROBERT D ANTHONY by a party lacking any interested in the very subject of the suit upon filing of the foreclosure case .

This case presents two critical constitutionally issues (1), whether a public servant(s) did allow and cause my Due Process of Law rights protected by the Federal Constitution, the Constitution of Ohio and the Bill of Rights to be blatantly disregarded and usurped during any court administrated procedure(s). (2) If and when during the court(s) process the occurrence or abandon any and all personum jurisdiction, subject matter jurisdiction, and territorial jurisdiction first took place.

In this case, the Court of Appeals talk about the issue explaining how, "in April 2007, Mr. Anthony signed a promissory note for \$1,000,000.00 plus 6.25% interest in favor of All State Mortgage Corporation. The note was secured by a mortgage on real property located on River Woods Drive in Hinckley, Ohio. The mortgage deed listed Mortgage Electronic Registration Systems Inc. as the mortgagee and nominee for the lender, All State Home Mortgage Corporation", as quoted from decision and journal entry entered by Ninth Judicial District Court of Appeals. By their own acknowledgement in this statement we can see INDYMAC FEDERAL BANK, FSB was not mentioned as a nominee of the original lender All State Home Mortgage Corporation nor assignee with any standing to bring forth a complaint, yet they were allowed to do that very thing. A case that is totally void lacking personum jurisdiction, subject matter jurisdiction and territorial jurisdiction cannot be argued. Thus with the courts lost

jurisdiction the judge(s) would not have subject matter which cannot be waived, leading us to the facts and conclusion the case could not have been heard, further leaving everything from that point forever a nullity.

The decision of the Ninth District Court of Appeals presents a ruling that rocked the very core foundation of all jurisdiction used to govern over administrative proceedings for society, and the Constitution itself. Our forefathers structure for our country was in such a way that it would be impossible to have a tyranny within our society, unless we the people voluntarily participate. Our forefathers structured one the best countries in the world, and we have the best court systems within the free world and the forefathers gave us "we the people" a tremendously amount of rights, inherent rights, God given rights, constitutional rights, civil rights and numerous other rights, but we were also informed that these rights were not free and that we would have to fight in order to keep them, many of our brothers and sisters have fought and died for those rights. They have also taken oaths. The joint or military, and their oaths were not to protect us nor our country, but that they would die to defend and protect the Constitutions that is how important the Constitutions are but yet, the appellate court would seem to had lost site of some of those very rights.

The implication of the decision of the Court of Appeals could have an egregious affect on other people of our state, and country who seek the light of truth and justice through legal system. The public interest in the orderly operations of the Government is on the effective. Such a ruling as was handed down is sabotage to the integrity of government and interfere with the sovereignty of individuals we the people.

The enabling statute for federal question jurisdiction, 28 U.S.C. § 1331, provides that the courts have subject-matter jurisdiction in *all civil actions arising under the Constitution, laws, or treaties of the United States*. This jurisdiction is ordinarily not exclusive; states can hear claims based on federal law. The enabling statute for diversity jurisdiction, 28 U.S.C. § 1332, grants the district courts jurisdiction in an action that meets two basic conditions:

- Complete diversity requirement. No defendant is a citizen of the same state as any plaintiff
- Amount in controversy requirement. The matter in controversy exceeds \$75,000.

According to Rule 12(h)(3) of the Federal Rules of Civil Procedure, a federal court has the authority to dismiss a case for lack of subject-matter jurisdiction upon motion of a party or *sua sponte*, upon its own initiative.

STATEMENT OF THE CASE AND FACTS

- 1) It is a fact continually admitted to that INDYMAC FEDERAL BANK, FSB never had any assignment of a note, and/or mortgage deed initially upon filing the complaint Nov 05, 2008 as evidenced by the fraudulent filing of a generic mortgage deed not notarized til Nov 14, 2008 and not filed with Medina County Recorders til Nov 26, 2008. Now App .C. did once say, " Section 2706.26 is also of no assistance to Mr. Anthony. Under this section, "[w]hen a complaint is filed, the action pending so as to charge a third person with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title."R.C. 2703.26. Is it not a fact there can be no initial pendency to protect without initial interest in the subject of the action i.e. this would be an oxymoron at best.
- 2) The App.C. has further sited in its own words, "Under section 2701.19, "[if] the party whom a judgment is render appeals his cause, the lien of the opposite party . . . that was created by the judgment, shall not be removed or vacated. The real estate shall be bound in the same manner as if the appeal had not been taken, until final determination of the cause. This section does not entitle Mr. Anthony to the relief he has requested. Rather, it preserves the judgment lien acquired by IndyMac until this appeal is decided. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Starck*, 75 Ohio App. 3d 611 (1991) ("[A] judgment lien is not affected by an appeal of the underlying judgment- *during the*

pendency of the appeal. However, the implicit language of R.C. 2701.19 and **common sense** dictate that when the appellate court determines the underlying judgment to be erroneous and reverses, the judgment lien is no longer valid.”). It is my will and right to differ from that opinion based on one simple fact, which consist of how could an interest be created, or gained in the subject matter when at the point of creation i.e. filing of the case there was no apparent interest possessed or recorded with the trial court demonstrating that interest. Can I claim I own your property, file a case knowing I possess no lien, and then after the filing of the case go out and seek to create an interest i.e. lien no I say because then the sum total of my accusation would had been based on a foundation of deceptions and blatant lies creating a nullity.

- 3) R. 17a teaches us ratification of commencement can only occur through the real party of interest, and that is why the courts can act by sua sponte in correcting, adding, or changing any decisions rendered in regards to a case where due process of law rights have been not only violated, but even not claimed inadvertently. Furthermore real party of interest can only occur with a interest in that thing that is at the center of that very claim enforce by the original party All State Home Mortgage Company.
- 4) The one great shining light in the interest of justice was voiced by Belfance, P.J. dissent, in saying:” {¶25} I respectfully dissent as I would conclude that Mr. Anthony’s second of assignment of error warrants reversal.

{¶26} In the instant matter, IndyMac filed its complaint in foreclosure on Nov 5, 2008, but did not possess a valid interest in the note and mortgage deed until November 14, 2008. I acknowledge that the majority's conclusion that IndyMac had standing to file suit against Mr. Anthony is in conformance with the court's precedent, see *Deutsche Bank Nat'l Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940, at ¶11. Nonetheless, I would conclude that *Bank of New York v. Stuart*, 9th Dist. NO. 06CA008953, 2007-Ohio1483, the case relied on by *Traxler*, was wrongly decided. Instead, I believe the analysis of the First District Court of Appeals in *Wells Fargo Ban, Nat'l Assn. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, provides the current approach. The *Bird* court held that, "in a foreclosure action, a bank that was not the mortgagee when the suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage." *Id.* at ¶16. This makes sense because "[a] party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action." *Id.* at ¶9. Thus, IndyMac lacked standing to even invoke the jurisdiction of the trial court at all because, at the time it filed the complaint, it had no interest in the mortgage or the note. Thus, I would sustain Mr. Anthony's second assignment of error."

- 5) The mere fact IndyMac only filed the assignment of a mortgage and not both the assignment of the note and the mortgage is a nullity of the contract, for the pledge asset of the original note is in fact the the assignment of a mortgage which IndyMac never possessed either at the opening of the original trial court complaint, even after the opening of the original complaint was never even fully cured as it can be said with only IndyMac recording an alleged assignment of a mortgage and not possessing an original assignment of both note and mortgage.

6) Let it be known without possess of original notes and original mortgage which have never been shown which we know are deeds which are refer to as security instruments, any subsequent copies or re-creations of the original are at best security fraud and forgeries being committed on the part of that party presenting said deeds as security instruments.

Thus we can then look at all involve of parties participating and allowing these acts to be committed. "Fraud upon the court" is a scheme to interfere with the judicial machinery, performing a task of impartial adjudication, as to preventing the opposing party from fairly presenting his case or defense. It consists of conduct so egregious in nature that it completely undermines the presumed integrity of the judicial process or its officers who have sworn oaths of office.¹

Appellant/Defendant counts on the Constitutional protections including the United States Declaration of Independence and the preamble to the Great State of Ohio's Constitution concerning life, liberty, and happiness. The United States Constitution Art VI Sec 3: Ohio Constitution Art XV Sec 7 states

"Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or (AND) affirmation, to support the Constitution of the United States, and of this State, and also an oath of office."

¹State v. Gardner, 54 OS 24, 42 NE 999, 31 LRA 660

III. CONSTITUTIONAL PROTECTED LAW

Butz v. Economou, 98 S. Ct. 2894 (1978); United States v. Lee, 106 U.S. at 220, 1 S. Ct. at 261 (1882)

"No man [or woman] in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

Cannon v. Commission on Judicial Qualifications, (1975) 14 Cal. 3d 678, 694

Acts in excess of judicial authority constitutes misconduct, particularly where a judge deliberately disregards the requirements of fairness and due process.

Geiler v. Commission on Judicial Qualifications, (1973) 10 Cal.3d 270, 286

Society's commitment to institutional justice requires that judges be solicitous of the rights of persons who come before the court.

Gonzalez v. Commission on Judicial Performance, (1983) 33 Cal. 3d 359Y 371, 374

Acts in excess of judicial authority constitutes misconduct, particularly where a judge deliberately disregards the requirements of fairness and due process.

Olmstad v. United States, (1928) 277 U.S. 438

"Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Owen v. City of Independence

"The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury."

U.S. v. Lee, 106 U.S. 196, 220 1 S. Ct. 240, 261, 27 L. Ed 171 (1882)

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, are bound to obey it."

"It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives."

Downs v. Bidwell, 182 U.S. 244 (1901)

"it will be an evil day for American Liberty if the theory of a government outside supreme law finds lodgment in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violations of the principles of the Constitution."

***Gomillion v. Lightfoot*, 364 U.S. 155 (1966), cited also in *Smith v. Allwright*, 321 U.S. 649.644**

"Constitutional 'rights' would be of little value if they could be indirectly denied."

***Mallowy v. Hogan*, 378 U.S. 1**

"All rights and safeguards contained in the first eight amendments to the federal Constitution are equally applicable."

***Miranda v. Arizona*, 384 U.S. 426, 491; 86 S. Ct. 1603**

"Where rights secured by the Constitution are involved, there can be no 'rule making' or legislation which would abrogate them."

***Norton v. Shelby County*, 118 U.S. 425 p. 442**

"An unconstitutional act is not law; it confers no rights; it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed."

***Sherar v. Cullen*, 481 F. 2d 946 (1973)**

"There can be no sanction or penalty imposed upon one because of his exercise of constitutional rights."

***Picking v. Pennsylvania Railway*, 151 F.2d. 240, Third Circuit Court of Appeals**

The plaintiff's civil rights pleading was 150 pages and described by a federal judge as "inept". Nevertheless, it was held "Where a plaintiff pleads pro se in a suit for protection of civil rights, the Court should endeavor to construe Plaintiff's Pleadings without regard to technicalities."

***Puckett v. Cox*, 456 F. 2d 233 (1972) (6th Cir. USCA)**

It was held that a pro se complaint requires a less stringent reading than one drafted by a lawyer per Justice Black in *Conley v. Gibson* (see case listed above, Pro Se Rights Section).

***Shuttlesworth v. City of Birmingham, Alabama*, 373 U.S. 262**

"if the State converts a right (liberty) into a privilege, the citizen can ignore the license and fee and engage in the right (liberty) with impunity."

A BRIEF OVERVIEW OF THE LAW OF VOIDS IN OHIO

Irrespective of whether a party moves to vacate a judgment, Ohio courts have inherent authority to vacate a *void judgment*. *Patton v. Diemer* (1988), 35 Ohio St.3d 68.

A *void judgment* is one that is rendered by a court that is "wholly without jurisdiction or power to proceed in that manner." *In re Lockhart* (1952), 157 Ohio St. 192, 195, 105 N.E.2d 35, 37.

A judgment is void *ab initio* where a court rendering the judgment has no jurisdiction over the person. *Records Deposition Service, Inc. v. Henderson & Goldberg, P.C.* (1995), 100 Ohio App.3d 495, 502; *Compuserve, Inc. v. Trionfo* (1993), 91 Ohio App.3d 157, 161; *Sperry v. Hlutke* (1984), 19 Ohio App.3d 156. In *Van DeRyt v. Van DeRyt* (1966), 6 Ohio St. 2d 31, 36, 35 Ohio Op. 2d 42, 45, 215 N.E.2d 698,704,

A court has an inherent power to vacate a *void judgment* because such an order simply recognizes the fact that the judgment was always a nullity." Service of process must be reasonably calculated to notify interested parties of the pendency of an action and afford them an opportunity to respond. A default judgment rendered without proper service is void. A court has the inherent power to vacate a *void judgment*; thus, a party who asserts improper service need not meet the requirements of Civ. R. 60(B). (Emphasis added.) *Emge*, 124 Ohio App.3d at 61, 705 N.E.2d at 408.

A Civ. R. 60(B) motion to vacate a judgment is not the proper avenue by which to obtain a vacation of a *void judgment*. See *Old Meadow Farm Co. v. Petrowski* (Mar. 2, 2001), *Geauga* App. No. 2000-G-2265, unreported; *Copelco Capital, Inc. v. St. Mark's Presbyterian Church* (Feb. 1, 2001), *Cuyahoga* App. No. 77633, unreported.

Rather, the authority to vacate void judgments is derived from a court's inherent power. *Oxley v. Zacks* (Sept. 29, 2000),

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.1: Promotions are a mandatory subject of the Ohio Const. art. 15 section 7 and the Ohio Revised Codes.

Validity of Acts of Intruder or Usurper; Criminal Liability

The acts of an intruder or usurper are absolutely void.¹ Furthermore, the Code makes it a criminal offense for any person in an office place of authority without being lawfully authorized to do so, by color of his office, to willfully oppress another under pretence of acting in his official capacity.² But the mere fact of officiating in an office without legal authority is not, under all circumstances, a crime within the pure view of this provision. To constitute the offense a person must do something more than the mere discharge of the duties of an office without legal authority; he must take upon himself official functions in such a manner as implies an assumption of the office without the color of right, and thus a de facto officer is not within the purview of the statute.³

¹ State v. Gardner, 54 OS 24, 42 NE 999, 31 LRA 660

² RC# SYMBOL 167 \f "Tahoma" \s 10# 2919.17 (GC# SYMBOL 167 \f "Tahoma" \s 10# 12925)

³ Kreidler v State, supra. Annotation: De facto status of officer as affecting criminal responsibility, 64

CONCLUSION

For the foregoing reasons, the petition for appeal and relief from the Ninth District Court of Appeals Decision and Journal Entry dated Aug-4, 2011 should be granted.

RESPECTFULLY SUBMITTED BY AND THROUGH THE WILL OF GOD this 19th day of September, 2011

Robert Darrell Family Anthony, EX

ROBERT DARRELL ANTHONY ESTATE dba,

ROBERT D ANTHONY

River Woods Drive-1296

Hinckley, Ohio [44233-9998]

CERTIFICATE OF SERVICE

Memorandum in Support of Jurisdiction

I hereby certify that a copy of the fore going ~~Notice of Appeal~~ was forwarded by hand delivery, or regular U.S.P.S. Mail to JOHN D. CLUNK CO. LPA 4500 COURTHOUSE BLVD, STE 400 STOW, OH [44224] Attorney for Appellee, MEDINA COUNTY COURT OF APPEALS NINTH JUDICIAL DISTRICT, 93 PUBLIC SQUARE MEDINA, OH [44256], this 19th day of September, 2011.

Robert Darrell Samiley Anthony, EX

DEFENDANT-APPELLANT, PRO PER

Court of Appeals
Ninth Judicial District
Medina County

Telephone (330) 725-9722

Office of
David B. Wadsworth
Clerk of Courts
Medina County Court of Appeals
Legal Division
93 Public Square
Medina, OH 44256

Case #10CA0056-M

**INDYMAC FEDERAL BANK FSB
PLAINTIFF/APPELLEE**

VS

**OTM INVESTMENTS INC. ET AL
DEFENDANTS/APPELLANTS**

Please be advised that a Decision/Order of Judgment was filed in the above entitled case on AUGUST 4, 2011.

DAVID B. WADSWORTH
CLERK OF COURTS

By: Mitchel W. Vles
Deputy Clerk

Notice was sent to Counsel of Record and/or Parties not represented by Counsel on August 4, 2011.

Cc: ROBERT ANTHONY; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC.; OTM INVESTMENTS INC.; ROBERT R. HOOSE; CHRISTINE M. BROTHAG; EUGENE W. WHEELER JR; LAW OFFICES OF JOHN D. CLUNK CO. LPA; JASON A. WHITACRE; KATHRYN M. EYSTER; LAURA C. INFANTE

STATE OF OHIO)
COUNTY OF MEDINA)

COURT OF APPEALS
THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ss: 11 AUG -4 AM 11:43

INDYMAC FEDERAL BANK, FSB

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 10CA0056-M

Appellee

v.

OTM INVESTMENTS, INC., et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08 CIV 2019

DECISION AND JOURNAL ENTRY

Dated: August 1, 2011

DICKINSON, Judge.

INTRODUCTION

{¶1} Robert Anthony has appealed the Medina County Common Pleas Court's grant of summary judgment in favor of IndyMac Federal Bank FSB in this foreclosure action. Mr. Anthony's pro se appellate brief is difficult to follow, but it appears that he has assigned four errors. This Court affirms because: (1) verified complaints are not required to institute a foreclosure action in Ohio; (2) IndyMac did not have to present proof of assignment at the time that it filed suit; (3) Mr. Anthony forfeited his opportunity to assert the defense of failure to join a party under Rule 19(A) of the Ohio Rules of Civil Procedure; and (4) he did not show that he was prejudiced by the delay in instituting his appeal.

BACKGROUND

{¶2} In April 2007, Mr. Anthony signed a promissory note for \$1,000,000.00 plus 6.25% interest in favor of All State Home Mortgage Corporation. The note was secured by a

mortgage on real property located on River Wood Drive in Hinckley, Ohio. The mortgage deed listed Mortgage Electronic Registration Systems Inc. as the mortgagee and nominee for the lender, All State Home Mortgage Corporation.

{¶3} On November 5, 2008, IndyMac filed a complaint in foreclosure naming as defendants OTM Investments, which held a quit-claim deed from Mr. Anthony, as well as Mr. Anthony and various others. IndyMac alleged that it was owed \$1,000,000.00 plus interest on the note, in addition to other charges and fees, as a result of Mr. Anthony's default. IndyMac attached copies of the note and mortgage to its complaint, but did not include any evidence of an assignment. Mr. Anthony, acting pro se, filed a pleading he captioned "Answer to Complaint in Foreclosure; Conditional Acceptance for Value for Proof of Claim; Affidavit." Although not in the form of a typical answer, this pleading asserted that IndyMac was neither the lawful holder of the note nor the assignee of the mortgage. Based on these assertions, Mr. Anthony argued that IndyMac had no legal right to foreclose on the residential property that was the subject of the note and mortgage.

{¶4} IndyMac moved for summary judgment and attached an assignment dated November 14, 2008, by which Mortgage Electronic Registration Systems, as nominee for All State Home Mortgage, assigned all of its interest in the mortgage to IndyMac. Mr. Anthony opposed the motion, and IndyMac replied. On June 17, 2009, the trial court granted IndyMac summary judgment. Mr. Anthony timely filed a notice of appeal in the trial court, but the clerk of courts did not file the notice with this Court until May 2010. In the interim, IndyMac twice attempted to complete a sheriff's sale of the property, but it was stayed on both occasions.

VERIFIED COMPLAINT

{¶5} Mr. Anthony's first assignment of error is that the trial court incorrectly allowed this matter to be initiated without a verified complaint. Mr. Anthony has not cited any authority for the proposition that a verified complaint was mandatory, and the Ohio Rules of Civil Procedure do not require one. Civil Rule 11 provides that, "[e]xcept when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit." Under that rule, the signature of the attorney of record or pro se party is all that is required to certify that the person has read the document, it is not interposed for delay, and to the best of the person's knowledge, information, and belief there is good ground to support it. Civ. R. 11. Mr. Anthony's first assignment of error is overruled.

REAL PARTY IN INTEREST

{¶6} Mr. Anthony's second assignment of error is that IndyMac lacked standing to file this foreclosure action against him because it did not show that it was the owner and holder of the note and mortgage deed at issue at the time it filed the complaint. IndyMac filed its complaint on November 5, 2008, with the relevant note and mortgage attached. Neither the note nor the mortgage refer to IndyMac. Mr. Anthony has argued that, without a valid assignment from the original lender, IndyMac lacked standing to file suit against him. Mr. Anthony has acknowledged, however, that, along with its motion for summary judgment, IndyMac filed an assignment to IndyMac dated November 14, 2008.

{¶7} Mr. Anthony has cited the First District Court of Appeals' decision in *Wells Fargo Bank N.A. v. Byrd*, 178 Ohio App. 3d 285, 2008-Ohio-4603, for the proposition that, in a foreclosure action, a company that did not hold a mortgage when suit was filed cannot cure the defect by later obtaining an interest in the mortgage. This Court, however, has held that "a bank

need not possess a valid assignment at the time of filing suit so long as the bank procures the assignment in sufficient time to apprise the litigants and the court that the bank is the real party in interest.” *Deutsche Bank Nat’l Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940, at ¶11. In *Traxler*, this Court relied on its earlier decision in *Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483. In *Stuart*, this Court looked to federal cases and based its decision, at least in part, on the fact that the assignment precluded the assignor from bringing suit against the defendants and the defendants had not shown they were prejudiced by the subsequent assignment. *Id.* at ¶13. In this case, Mr. Anthony has not shown that he was prejudiced by the subsequent assignment of the mortgage to IndyMac. Furthermore, the assignment to IndyMac precludes the prior holders of the note and mortgage from filing suit against Mr. Anthony. Therefore, under *Stuart* and *Traxler*, IndyMac was the real party in interest for purposes of filing this foreclosure action. Mr. Anthony’s second assignment of error is overruled.

JOINDER: CIVIL RULES 12 AND 19

{¶8} Mr. Anthony’s third assignment of error is that the trial court incorrectly failed to allow Eugene Wheeler to be joined in this matter. The preliminary judicial report filed by IndyMac shows that Mr. Anthony quit-claimed his right, title, and interest in the Hinckley property to OTM investments. According to Mr. Anthony, the final judicial report of February 27, 2009, shows that OTM Investments quit-claimed all of its right, title, and interest in the property to Mr. Wheeler on October 3, 2008, about one month before IndyMac filed this action. The quit-claim deed from OTM Investments to Mr. Wheeler was not recorded until November 14, 2008, nine days after IndyMac filed its complaint.

{¶9} The record reflects that IndyMac moved for summary judgment on February 17, 2009. On February 24, a magistrate ordered IndyMac to file a final judicial report in compliance with Section 2329.19.1(B) of the Ohio Revised Code. IndyMac filed its final judicial report on February 27, 2009. According to the report, an updated title search revealed that the only activity between October 30, 2008, and the date of the report was a “Quit-Claim Deed, from OTM Investments, Inc. . . . Grantor, to Eugene Winston Wheeler, Grantee, recorded November 14, 2008 as Instrument 2008OR024422 of Medina County, OHIO Records.” IndyMac attached a copy of Mr. Wheeler’s notarized quit-claim deed to the final judicial report.

{¶10} Mr. Wheeler, a non-party to this action, filed a “Judicial Notice” on May 29, 2009, asserting that he had an interest in the case under the October 3, 2008, deed and requesting to be allowed to enter the case as “a necessary and indispensable party.” The trial court granted IndyMac’s motion to strike Mr. Wheeler’s notice because he was not a party to the case nor licensed to practice law in Ohio. IndyMac has argued that Mr. Anthony failed to preserve his third assignment of error because it “relates to the ‘Judicial Notice’ filed by [Mr.] Wheeler on May 29, 2009[,]” and Mr. Anthony never asserted this affirmative defense prior to the trial court’s ruling on the summary judgment motion.

Civil Rule 19: Failure to Join a Party

{¶11} Rule 19 of the Ohio Rules of Civil Procedure is titled, “Joinder of persons needed for just adjudication.” Contrary to popular belief, the word “necessary” does not appear anywhere in Rule 19. Rule 19(A) describes “[p]ersons to be joined if feasible[,]” and Rule 19(B) outlines the analysis a court should apply when a person or persons described in Rule 19(A) “cannot be made a party.” Thus, the distinction between subsection (A) and subsection (B) of the rule is merely whether the person can be made a party to the suit.

{¶12} Under subsection (A) of Rule 19, “[a] person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.” Parties meeting this definition must be joined to the suit “if feasible.” Civ. R. 19(A).

{¶13} If, however, such a person “cannot be made a party, the court shall determine[, under Rule 19(B),] whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” Civ. R. 19(B). Therefore, the question under Rule 19(B) is not whether the person should be joined, but whether the case must be dismissed because the person cannot be joined. In making the indispensability determination, the court is to consider the factors listed in Rule 19(B), such as, for example, “to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties . . . [and] whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.” According to the 1970 Advisory Committee Notes to Rule 19, “[R]ule [19] does not arbitrarily denominate persons who should be joined in the action as ‘indispensable,’ ‘necessary’ or ‘proper’ parties. The effect of the rule is that the court should order the joinder of a person needed for ‘just adjudication’ if he can be served with process or, depending on variable factors, proceed with or dismiss the action if the person needed for ‘just adjudication’ cannot be served with process.”

Forfeiture of the Failure to Join a Party Defense

{¶14} A party may assert the affirmative defense of “failure to join a party under Rule 19” in his answer or, in accordance with Rule 12(B)(7) of the Ohio Rules of Civil Procedure, in a pre-answer motion. Civ. R. 12(B)(7). Although most of the defenses listed in Civil Rule 12(B) are forfeited if not asserted in the answer or a pre-answer motion, Civil Rule 12(H)(2) provides an exception to forfeiture for certain defenses. Civ. R. 12(G), (H). Rule 12(H)(2) provides protection against forfeiture for the more substantial Rule 12(B) defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Civil Rule 19, and an objection of failure to state a legal defense to a claim. Under Rule 12(H)(2), the defense of “failure to join a party indispensable under Civil Rule 19 . . . may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.” The first question for this Court is whether Mr. Anthony forfeited his opportunity to assert his defense regarding the absence of Mr. Wheeler from the lawsuit.

{¶15} Contrary to IndyMac’s argument that Mr. Anthony’s third assignment of error relates only to Mr. Wheeler’s “Judicial Notice,” Mr. Anthony asserted the affirmative defense of failure to join a party under Rule 19 at least twice prior to the trial court’s ruling on his motion for summary judgment. On March 2, 2009, Mr. Anthony filed a document he called, “Third Party Claim 10 John and Jane Does to be Determined Through Depositions and Interrogatories.” On page five of that document, he asserted that IndyMac had “left out necessary an[d] [ir]replaceable defendants on the alleged complaint[.]” Further, in his response to IndyMac’s motion for summary judgment, filed the same day, he argued that “[IndyMac] and [its] counsel should have . . . ensure[d] that all necessary parties were named within this alleged complaint attached hereto and incorporated herein copies of quitclaim deed from OTM Investments Inc. to

Eugene Winston Wheeler a[] necessary an[d] indispensable part[y]” Although Mr. Anthony did not file a copy of Mr. Wheeler’s quit-claim deed at that time, a copy of the deed had appeared in the record since IndyMac had filed it along with the final judicial report in February 2009. The question for this Court, therefore, is not whether Mr. Anthony raised his failure to join defense in the trial court, but whether he forfeited it by not raising it early enough.

{¶16} Even reading both of Mr. Anthony’s initial filings quite broadly, in deference to his status as a pro se defendant, this Court cannot discern an effort to assert the affirmative defense of failure to join a party needed for just adjudication under Rule 19 of the Ohio Rules of Civil Procedure in Mr. Anthony’s first pleading or the one he called an answer to the complaint. Because Mr. Anthony did not assert the defense of failure to join a party under Rule 19 in his answer or in a pre-answer motion, he forfeited the opportunity to raise it unless it falls within the forfeiture exception in Rule 12(H)(2).

{¶17} The language of the exception to forfeiture found in Rule 12(H)(2) is not as broad as the language used in Rule 12(B)(7) to authorize a defendant to raise a failure to join defense in a pre-answer motion. Rule 12(B)(7) authorizes a defendant to raise any Rule 19 failure to join defense in a pre-answer motion while Rule 12(H)(2) only saves from forfeiture a defense of failure to join those parties deemed “indispensable” under Rule 19. Despite referring to Rule 19 generally, by using the word “indispensable,” Rule 12(H)(2) only saves from forfeiture the Rule 19(B) affirmative defense and not the Rule 19(A) affirmative defense. According to the plain language of Rule 19(B), a person is deemed indispensable if he is someone who “shall be joined as a party” “if feasible” under Rule 19(A), but “cannot be made a party” and, in addition, the court determines “in equity and good conscience [that] the action . . . should be dismissed” in his absence.

{¶18} Ohio eliminated any possible confusion created by Rule 12(H)(2) by discussing the forfeiture issue in Civil Rule 19. Civil Rule 19(A) requires a trial court to order the joinder of a person who is subject to service of process and, either, “(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.” Civ. R. 19(A). Rule 19(A) further specifically provides that the trial court “shall order” that such a person be joined only “upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). [That is, either in an answer or a pre-answer motion.] If the defense is not timely asserted, [forfeiture] is applicable as provided in Rule 12(G) and (H).”

{¶19} In addition to the plain language of Civil Rule 19(A), the Advisory Committee Notes emphasize that timely assertion of a Rule 19(A) defense is required in order to protect it from forfeiture. Section two of Ohio’s 1970 Advisory Committee Notes to Rule 19 points out that Ohio’s “Rule 19(A) provides that a failure to join a party who should be joined is [forfeited] if not timely asserted.” On the other hand, according to section three of the Committee Notes, “Rule 12(H) [provides that] the absence of an indispensable party is not waived during the course of a trial.” That explanation comports with the plain language of Rule 12. Under Rule 12(H)(2), only the defense of failure to join a party deemed “indispensable” under Rule 19(B) is protected from forfeiture. The exception does not include assertion of the defense of failure to join those parties described in subsection (A) of the rule who are to be joined “if feasible.” It

only protects from forfeiture the failure to timely assert that a party needed for just adjudication cannot be joined so that the case must be dismissed. See Civ. R. 19(B). Therefore, whether Mr. Anthony may benefit from the Rule 12(H)(2) forfeiture exception depends on whether he asserted the defense of failure to join a party “if feasible” under Rule 19(A) or a party “indispensable” under Rule 19(B).

{¶20} When Mr. Anthony raised the issue of Rule 19, he first wrote that IndyMac failed to join an “[ir]replaceable” party and later wrote that Mr. Wheeler was a “necessary an[d] indispensable part[y].” Substantively, he argued that the trial court should order that Mr. Wheeler be joined in this matter because he is the title owner of the property that is the subject matter of this foreclosure action. This may have been a good argument that Mr. Wheeler qualified under Rule 19(A) as a party “needed for just adjudication” and who, therefore, had to be joined “if feasible.” Neither Mr. Anthony nor IndyMac, however, argued that Mr. Wheeler “[could] []not be made a party” or that the case had to be dismissed for that reason. Civ. R. 19(B). In fact, the record indicates that Mr. Wheeler was ready and willing to join in the suit. Mr. Anthony never asserted the defense of failure to join an “indispensable” party under Civil Rule 19(B). Thus, he cannot take advantage of the forfeiture exception provided in Civil Rule 12(H)(2). Mr. Anthony forfeited his opportunity to assert the defense of failure to join a party needed for just adjudication under Rule 19(A) by failing to timely assert it in his answer or in a pre-answer motion. Civ. R. 12(B), (G), (H).

{¶21} Litigants may choose to represent themselves in court, but they will be held to the same standard as represented parties. *Smith v. Downs*, 9th Dist. No. 25021, 2010-Ohio-2571, at ¶7 (quoting *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, at ¶3)). Although this Court has held that pro se litigants “should be granted reasonable leeway” in the construction of

their pleadings and motions in order to ensure that courts address issues on their merits if possible, “a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that he remains subject to the same rules and procedures to which represented litigants are bound.” *Id.* (quoting *Sherlock*, 2004-Ohio-5178, at ¶3). A pro se litigant “is not given greater rights than represented parties, and must bear the consequences of his mistakes.” *Id.* (quoting *Sherlock*, 2004-Ohio-5178, at ¶3). Mr. Anthony’s third assignment of error is overruled.

DELAY OF APPEAL

{¶22} Mr. Anthony’s fourth assignment of error is that the delay in instituting his appeal caused him “severe[] damage[].” Mr. Anthony has asserted that the clerk of the trial court did not transmit the notice of appeal to the appellate court until ten months after he filed it. The record reflects that Mr. Anthony’s notice of appeal was filed in the Medina County Common Pleas Court on July 17, 2009, but not filed with the clerk of the appellate court until May 13, 2010.

{¶23} Under Rule 3(A) of the Ohio Rules of Appellate Procedure, in order to take an appeal as of right, a party must file a notice of appeal with the clerk of the trial court within the time allowed. Mr. Anthony timely filed his notice of appeal under Rule 3(A), and this Court permitted his appeal to continue when it belatedly received the document from the trial court clerk. The only argument Mr. Anthony has made regarding how he was damaged by the delay is that it violated his right to a speedy trial. Section 2945.71 governs the right to a speedy trial, but it does not support Mr. Anthony’s argument. The statute applies only to criminal matters pending in trial courts. There is no right to a “speedy appeal” in a civil case. Mr. Anthony’s fourth assignment of error is overruled.

CONCLUSION

{¶24} Mr. Anthony's first assignment of error is overruled because verified complaints are unnecessary to initiate a lawsuit in Ohio's state courts. His second assignment of error is overruled because under this Court's precedent, IndyMac was the real party in interest for purposes of filing this foreclosure action. His third assignment of error is overruled because he waived his opportunity to assert the defense of failure to join a party needed for just adjudication. His fourth assignment of error is overruled because he did not show that the delay in initiating his appeal caused him prejudice. The judgment of the Medina County Common Pleas Court is affirmed.

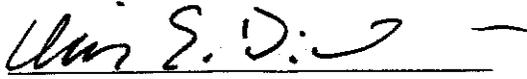
Judgment affirmed.

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 Medina, 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 Appellant.


CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶25} I respectfully dissent as I would conclude that Mr. Anthony's second assignment of error warrants reversal.

{¶26} In the instant matter, IndyMac filed its complaint in foreclosure on November 5, 2008, but did not possess a valid interest in the note and mortgage deed until November 14, 2008. I acknowledge that the majority's conclusion that IndyMac had standing to file suit against Mr. Anthony is in conformance with this Court's precedent, see *Deutsche Bank Nat'l Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940, at ¶11. Nonetheless, I would conclude that *Bank of New York v. Stuart*, 9th Dist. NO. 06CA008953, 2007-Ohio-1483, the case relied on by *Traxler*, was wrongly decided. Instead, I believe the analysis of the First District Court of Appeals in *Wells Fargo Bank, Nat'l Assn. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, provides the correct approach. The *Byrd* court held that, "in a foreclosure action, 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." *Id.* at ¶16. This makes sense because "[a] party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action." *Id.* at ¶9. Thus, IndyMac lacked standing to even invoke the jurisdiction of the trial court at all because, at the time it filed the

complaint, it had no interest in the mortgage or the note. Thus, I would sustain Mr. Anthony's second assignment of error.

{¶27} As my resolution of Mr. Anthony's second assignment of error would render the remaining assignments of error moot, I would decline to address them.

APPEARANCES:

ROBERT D. ANTHONY, pro se, Appellant.

JASON A. WHITACRE, and KATHRYN M. EYSTER, Attorneys at Law, for Appellee.