

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK, NATIONAL ASSOCIATION,)	CASE NO. 2011-0218
)	
Plaintiff-Appellant,)	On Appeal from Cuyahoga County Court of
)	Appeals, Eighth Appellate District
vs.)	
)	Court of Appeals
ANTOINE DUVALL, et al.,)	Case No. CA-10-094714
)	
Defendants-Appellees.)	
)	

MOTION FOR RECONSIDERATION AND
REQUEST FOR ORAL ARGUMENT

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I. INTRODUCTION

This case involves a certified conflict question: “To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note and the mortgage when the complaint was filed?” On August 4, 2011, appellees, Antoine Duvall and Madinah S. Samad (the “Duvalls”), filed a “Notice of Suggestion of Mootness,” to bring to the Court’s attention that U.S. Bank National Association (“U.S. Bank”), as Trustee for CMLTI 2007-WFHE2, released the mortgage securing the property in this case. The Duvalls suggested that, as to them, this mooted the issues, and that this Court should dismiss the action.

This Court issued an Order permitting U.S. Bank to respond to the Notice of Suggestion of Mootness, which it did on August 12, 2011.

On August 15, and 16, the Duvalls and three other amici (Duane and Julie Schwartzwald, Ohiofraudclosure.blogspot.com), and ten of the civil legal service programs in Ohio (the “CLSPs”)¹ filed opposition briefs. On September 6, 2011, U.S. Bank, as well as the two amici supporting it in the initial briefing (Federal National Mortgage Association, “FNMA” and the Federal Mortgage Home Loan Corporation, “Freddie Mac”), filed a Reply Brief.

On September 21, 2011, without opinion, this Court dismissed this matter as moot.

U.S. Bank moves for reconsideration of that decision. U.S. Bank respectfully asks the Court to reconsider the dismissal, as it is in conflict with the previous precedent on identical issues, the same issue is before the Court in several different cases, and all that remains for this case is oral argument and decision.

¹ Advocates for Basic Legal Equality, Inc, Legal Aid Society of Cleveland, Community Legal Aid Services, Inc., Legal Aid Society of Columbus, Community Legal Aid Services, Inc., Legal Aid Society of Southwest Ohio, LLC, Southeastern Ohio Legal Services, Pro Seniors, Legal Aid of Western Ohio, and the Ohio Poverty Law Center.

II. DISCUSSION

In its Response to the Notice of Suggestion of Mootness, U.S. Bank called to this Court's attention to *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 4; citing *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 31, 505 N.E.2d 966. The factual circumstances of those cases are nearly identical issues to those here. In both *Massien* and *Franchise Developers*, after accepting the certified conflict (or jurisdiction), the underlying dispute became moot.

In both of those cases, this Court proceeded to determine the legal issues presented because the case presented a question of great general interest. This Court reasoned that in a certified conflict case, mootness is not grounds for dismissal "if a matter of great general interest remains." *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 4; citing *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 31, 505 N.E.2d 966. The Court has reached that conclusion a number of times.²

That is precisely this case here. The Court has already accepted and held for decision another case, *U.S. Bank v. Perry*, Case No. 11-0170, which presents the issues here.

There is a pending certification (and direct appeal) from the Second District, *Federal Home Loan Mortgage Corp. v. Schwartzwald*, Case Nos. 11-1201 and 11-1362.³ In *Schwartzwald*, the Second District found its decision was in conflict with that of the First and Eighth Districts:

² *Wallace v. University Hospitals of Cleveland* (1961), 171 Ohio St. 487, 172 N.E.2d 459; *State ex rel. Rudes, v. Rofkar* (1984), 15 Ohio St.3d 69, 472 N.E.2d 354; *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.* (1995), 73 Ohio St.3d 590, 653 N.E.2d 646; *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5.

³ A copy of the Order certifying the conflict is attached as "Exhibit A."

We therefore certify the following rule of law as being in conflict with the judgment on the same question by another court of appeals: “In a mortgage foreclosure action, the lack of standing or real party in interest defect can be cured by an assignment of mortgage prior to judgment.”

After this Court issued its dismissal, on September 22, 2011, the Twelfth District Court of Appeals certified a conflict between its decision in *Washington Mutual Bank v. Wallace*, Twelfth Dist. App. No. CA2010-10-103, 2011-Ohio-4174, and the Eighth District’s decision in this case.⁴ The question certified by the Twelfth District is:

“Can a bank that was not the mortgagee when it filed a foreclosure suit cure its lack of standing to bring the suit by subsequently obtaining an interest in the note and mortgage?”

While the Court has determined the dispute in this case is moot, the question which led the Eighth District to certify this case remains one of great general interest. In fact, the subsequent certifications by two other districts reflects that the frequency of these issues is growing. Under *Massien* and *Franchise Developers*, the Court should continue to assert jurisdiction to resolve that question for all Ohioans.

That is especially true given the procedural posture of this matter. Fannie Mae and Freddie Mac filed a brief in support of U.S. Bank’s position on this conflict. In response to these briefs, the Duvalls, numerous CLSPs, the Schwartzwalds, and Ohiofraudclosure.blogspot.com filed opposition briefs. U.S. Bank, Freddie Mac, and Fannie Mae all filed Reply Briefs, making this case otherwise ripe for argument and decision.

This case is ready for decision and presents issues also before the Court in several other cases. In these circumstances, U.S. Bank suggests that it is appropriate to reconsider the decision dismissing the action, reverse the dismissal, and schedule the case for oral argument. In the event that the Court is not inclined to follow this course, U.S. Bank respectfully requests that this

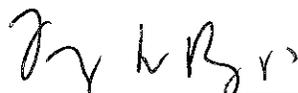
⁴ A copy of the Order certifying the conflict is attached as “Exhibit B.”

Court distinguish its prior precedent in *Massien* and *Franchise Developers* for the benefit of practitioners and parties whose cases become factually moot during appeal.

III. CONCLUSION

U.S. Bank respectfully requests that the dismissal be reconsidered and reversed. Even if the individual case is moot, the question which the Eighth District certified remains a continuing controversy and of vital importance. U.S. Bank respectfully urges the Court to take the opportunity to clarify Ohio law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 26th day of September, 2011.

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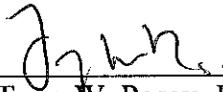
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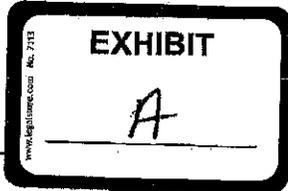
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671188.1



IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

FEDERAL HOME LOAN MORTGAGE :
CORP. :

Plaintiff-Appellee :

C.A. CASE NO. 2010 CA 41

v. :

T.C. NO. 09CV4380

DUANE SCHWARTZWALD, et al. :

Defendants-Appellants :
:

.....
DECISION AND ENTRY

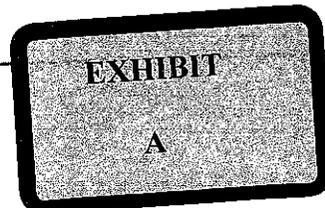
Rendered on the 27th day of July, 2011.
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PER CURIAM:

In accordance with App.R. 25(A), defendants-appellants, Duane and Julie Schwartzwald, have moved this court for an order certifying a conflict between our decision in *Federal Home Loan Mtge. Corp. v. Schwartzwald*, Greene App. No. 2010 CA 41, 2011-



Ohio-2681, and other Ohio appellate courts. Plaintiff-appellee Federal Home Loan Mortgage Corporation joins in the motion to certify a conflict, although it agrees with this court's holding.

Motions seeking an order to certify a conflict are governed by Section 3(B)(4), Article IV of the Ohio Constitution: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." See, also, *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, paragraphs one and two of the syllabus.

Three conditions must be met before and during certification of a case to the Supreme Court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis in original.) *Whitelock*, 66 Ohio St.3d at 596.

Cases cannot be certified as in conflict based on factual distinctions. *Id.* at 599. For a court of appeals to certify a case as being in conflict with another appellate case, "[i]t is not enough that the *reasoning* expressed in the opinions of the two courts of appeals be inconsistent; the *judgments* of the two courts must be in conflict." (Emphasis in original.) *State v. Hankerson* (1989), 52 Ohio App.3d 73.

Appellants propose the following question be certified:

"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 our Opinion, we answered the appellant's posed question in the negative, and held that the plaintiff has standing in a foreclosure action as long as it is the holder of both the note and the mortgage at the time of judgment. *Schwartzwald* at ¶75.

Our opinion is at odds with that of the First District Court of Appeals which held that the mortgagee was not a real party in interest at the time the foreclosure action was filed and lacked standing, and that this could not be cured by an assignment of the mortgage after filing. *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 291, 2008-Ohio-4603. In *Bank of New York v. Gindele*, Hamilton App. No. C-090251, 2010-Ohio-542, the First District reiterated this holding that joinder of the real party in interest did not cure standing problems that existed at the filing of the complaint. *Id.* at ¶4.

The Eighth District adopted a similar reasoning in *Wells Fargo Bank, N.A. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092. "Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed. E.g., *In re Foreclosure Cases*, (N.D. Ohio 2007), Case Nos. 1:07CV2282, et seq., (Boyko, J.); *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F. Supp.2d 650, (Rose, J.). Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law." *Id.* at ¶23, quoting *Deutsche Bank Natl. Trust Co. v. Steele* (S.D. Ohio Jan. 8, 2008), Case No. 2:07-CV-886.

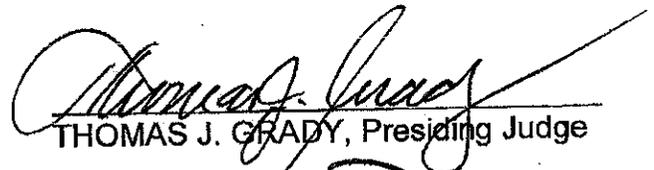
Further, the Ohio Supreme Court has accepted jurisdiction on this question. See

U.S. Bank N.A. v. Duvall, Cuyahoga App. No. 94714, 2010-Ohio-6478 (appeal accepted by Ohio Supreme Court on certification of conflict, Supreme Court Case No. 2011-218), *U.S. Bank N.A. v. Perry*, Cuyahoga App. No. 94757, 2010-Ohio-6171 (discretionary appeal accepted by the Ohio Supreme Court on June 8, 2011, Supreme Court Case No. 2011-0170, cause held pending decision in *U.S. Bank N.A. v. Duvall*, supra). We recognized this "uncertainty" in our decision and urged the appellants to join in the Ohio Supreme Court case. *Schwartzwald* ¶ 84.

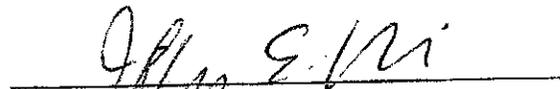
We therefore certify the following rule of law as being in conflict with the judgment on the same question by another district court of appeals:

"In a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment."

IT IS SO ORDERED.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge


JEFFREY E. FROELICH, Judge

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COURT OF APPEALS
IN THE COURT OF APPEALS OF THE STATE OF OHIO
WARREN COUNTY, OHIO
FILED

SEP 22 2011

James L. Spaeth, Clerk

WASHINGTON MUTUAL BANK, LEBANON OHIO CASE NO. CA2010-10-103

Appellee, : ENTRY GRANTING MOTION FOR
 : CERTIFICATION
vs. :
BETTY WALLACE, et al., :
Appellants. :

The above cause is before the court pursuant to a motion to certify filed by counsel for appellant, Betty Wallace, on August 29, 2011. Appellant contends that a conflict exists between this court's decision and decisions by the First and Eighth District Courts of Appeal on the question of whether a bank that was not the mortgagee when it filed a foreclosure suit can cure its lack of standing by subsequently obtaining an interest in the note and mortgage.

A court of appeal should certify cases to the Ohio Supreme Court for review and determination whenever the judges of the court of appeals find that a judgment upon which they have agreed is in conflict with a decision pronounced upon the same question by another court of appeals of the state. Ohio Constitution, Sec. 3(B)(4), Article IV. See *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223.

We agree with appellant that a conflict exists between this court's judgment and the judgments of the First District Court of Appeals in *Bank of New York v. Gindele*, Hamilton App. No. C-090251, 2010-Ohio-542, and *Wells Fargo Bank v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, and the judgments of the Eighth District Court of Appeals in *U.S. Bank, N.A. v. Duvall*, Cuyahoga App. No. 94714,

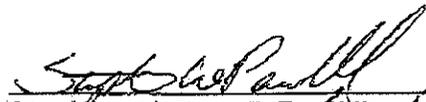
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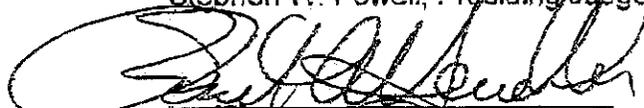
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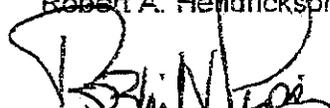
2010-Ohio-6478, *U.S. Bank, N.A. v. Perry*, Cuyahoga App. No. 94757, 2010-Ohio-6171, and *Wells Fargo Bank, N.A. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092. The question for certification is as follows:

Can a bank that was not the mortgagee when it filed a foreclosure suit cure its lack of standing to bring the suit by subsequently obtaining an interest in the note and mortgage?

IT IS SO ORDERED.


Stephen W. Powell, Presiding Judge


Robert A. Hendrickson, Judge


Robin N. Piper, Judge