

IN THE SUPREME COURT OF OHIO

**FEDERAL HOME LOAN MORTGAGE *
CORP.**

Plaintiff-Appellee

-vs-

DUANE SCHWARTZWALD, et al.

Defendants-Appellants.

Case Nos. 2011-1201 and 2011-1362

*** On Appeal from the Greene County
* Court of Appeals, Second Appellate
* District**

*** Court of Appeals Case No. 2010 CA 0041**

*

MERIT BRIEF OF APPELLANTS DUANE AND JULIE SCHWARTZWALD

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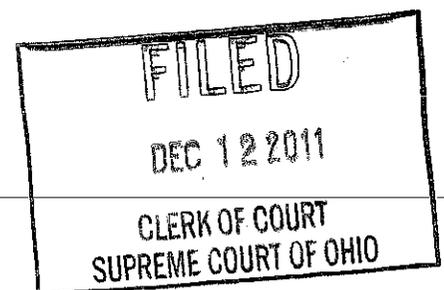


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INTRODUCTION

This case is before the Court pursuant to Article 4, Section 3(B)(4) and Article 4, Section 2(B)(2)(f) of the Ohio Constitution to resolve the conflicts among the First, Second and Eighth District Courts of Appeals on the requirements to commence a foreclosure action in Ohio. The Court also accepted the case on a discretionary appeal under Article 4, Section 2(B)(2)(e) and/or 2(B)(2)(a)(iii) of the Ohio Constitution. By its order of October 5, 2011, the Court consolidated the briefing of the two cases.

The Court accepted the following question certified by the Second District Court of Appeals:

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

This statement poses not a single question regarding mortgage foreclosure actions, but two distinct questions:

- A. Can the lack of standing be cured by assignment of the mortgage prior to judgment?
- B. Can a real party in interest defect be cured by assignment of the mortgage prior to judgment?

STATEMENT OF THE FACTS

The facts of the case are not in dispute:

In 2006, the Schwartzwalds issued a note payable to Legacy Mortgage to finance the purchase of a home. At the same time, the Schwartzwalds executed a mortgage in favor of Legacy Mortgage to secure payment of the note. Because of job loss, the Schwartzwalds defaulted on the loan and Freddie Mac filed a foreclosure case against them.

The foreclosure case was filed by Freddie Mac on April 15, 2009. When it filed its Complaint, Freddie Mac alleged that it was the "holder" of the note. COMPLAINT (filed April

15, 2009), ¶1. Despite this allegation, Freddie Mac did not attach to the Complaint a copy of the promissory note. *Id.* It claimed that a copy of the note was unavailable. *Id.* Freddie Mac also alleged that mortgage "was assigned to the plaintiff herein." *Id.* ¶ 3. Freddie Mac did not attach a copy of any assignment of mortgage to the Complaint.

Six months after the suit was filed, Freddie Mac filed with the trial court a Notice of Filing Assignment of Mortgage. NOTICE OF FILING ASSIGNMENT OF MORTGAGE (filed November 17, 2009). Attached to this Notice was a copy of an Assignment of Mortgage dated May 15, 2009 (one month after the lawsuit was filed). The Assignment of Mortgage was executed by Wells Fargo Bank, and purported to assign the mortgage to Freddie Mac, "together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon, . . ." No explanation was given by Freddie Mac as to what, if any, interest in the mortgage Wells Fargo had to assign.

Shortly thereafter, Freddie Mac filed a Notice of Filing Assignment of Mortgage Chain. NOTICE OF FILING ASSIGNMENT OF MORTGAGE CHAIN (filed December 14, 2009). In this filing, Freddie Mac provided the trial court with both the May 15, 2009 Assignment of Mortgage from Wells Fargo to Freddie Mac and an Assignment of Mortgage/Deed of Trust/Deed to Secure Debt executed November 27, 2006 from Legacy Mortgage to Wells Fargo Bank.¹ Unlike the assignment from Wells Fargo Bank to Freddie Mac, the assignment from Legacy Mortgage did not contain any language which purported to transfer the Promissory Note to Wells

¹ The mortgage assignment from Legacy Mortgage to Wells Fargo was dated November 27, 2006, the same date the Schwartzwalds executed the mortgage. Also, the assignment indicates that the mortgage was recorded with the county recorder on November 27, 2006, but the recording stamp on the mortgage indicates that the document was not recorded until December 4, 2006.

Fargo.²

After obtaining leave of Court, the Schwartzwalds filed an answer which raised defensively both Freddie Mac's lack of standing and its lack of real party in interest status. ANSWER OF DEFENDANTS DUANE AND JULIE SCHWARTZWALD (filed December 18, 2009) ¶¶ 6, 10. The parties filed cross-motions for summary judgment.

In support of its Motion for Summary Judgment, Freddie Mac submitted to the trial court an affidavit of Herman John Kennerty, an employee of Wells Fargo Bank. In his affidavit, Mr. Kennerty purported to authenticate the note signed by the Schwartzwalds. The note attached to Mr. Kennerty's affidavit was not endorsed on its face and had no allonges attached to it.³ Thus, on its face, the note authenticated by Kennerty was payable to Legacy Mortgage. Mr. Kennerty's affidavit did have attached to it the May 15, 2009 Assignment of Mortgage from Wells Fargo Bank to Freddie Mac, but not the prior assignment from Legacy Mortgage to Wells Fargo.

In their response and cross-motion for summary judgment, the Schwartzwalds sought dismissal of the Complaint for lack of standing, arguing that Freddie Mac was not, as it alleged in its Complaint, the holder of the promissory note when the suit was filed. The Schwartzwalds also asserted that the mortgage had not yet been assigned to Freddie Mac when the suit was filed. The Schwartzwalds argued that, without a current ownership interest in either the note or mortgage, Freddie Mac lacked standing to institute the foreclosure case, and was not the real party in interest to prosecute the case.

² The granting clause in Legacy Mortgage's Assignment of Mortgage/Deed of Trust/Deed to Secure Debt reads: "For Value received, Legacy Mortgage hereby selss, assigns, conveys ad transfers to Wells Fargo Bank, N.A., its successors and assigns [address omitted] all its right, title and interest in and to a certain mortgage/deed of trust to secure debt executed by Duane Schwartzwald and Julie G. Schwartzwald . . . on the 27th day of November, 2006."

³ An allonge is a piece of paper attached to a negotiable instrument for the sole purpose of holding indorsements.

Without issuing a decision which discussed any of the Schwartzwalds' arguments, the trial court entered summary judgment in favor of Freddie Mac on all issues.

On appeal, the Court of Appeals, conducted a more thorough review of the facts and legal issues. In its Opinion entered on June 3, 2011, the Court concluded that Freddie Mac was never the holder of the note it sought to enforce. OPINION, ¶¶ 41, 52. It went on to conclude, however, that Freddie Mac was a "person entitled to enforce the note" under R.C. 1303.31 at the time the trial court entered summary judgment.⁴ Although Freddie Mac brought suit as the "holder" of the note and assignee of the mortgage, the Court of Appeals held that Freddie Mac was, at the time judgment was entered, entitled to enforce the note under R.C. 1303.31(A)(2) because, based on Mr. Kennerty's affidavit, it was in possession of the original note and had received the rights of a holder through language contained in the assignment of the mortgage from Wells Fargo. *Id.*, at ¶76. This combination of facts, the Court reasoned, provided Freddie Mac with standing at the time judgment was entered.

Although the facts, as set forth above, are not in dispute, the Court of Appeals's decision regarding the nature of the legal concepts of standing and real party in interest status is hotly disputed. .

The Court of Appeals held that standing is the same as real party in interest status under Civ. R. 17. *Id.*, ¶74. It also stated that a lack of standing at the time suit was filed may be cured under Civ. R. 17 by the plaintiff taking an assignment of the mortgage prior to judgment being entered. *Id.*, at ¶75. The Court further held that standing is not a component of a common pleas court's jurisdiction, but was merely a procedural hurdle which Civ. R. 17(A) permits to be established prior to the entry of judgment. *Id.* ¶74. The Court of Appeals viewed the concept of

⁴ Freddie Mac's argument that it was a "person entitled to enforce the note" was never presented to the trial court. It raised the issue for the first time on appeal.

standing to be "ritualistic," OPINION ¶73, and permitting use of Civ. R. 17(A) to "cure" such deficiencies is desirable so that courts may rule on disputes.

Appellants appeal from the decision of the Court of Appeals.

ARGUMENT

I. The Difference Between Standing And Real Party In Interest.

PROPOSITION OF LAW NO. 1: A LACK OF STANDING MAY NOT BE CURED OR RATIFIED PURSUANT TO CIVIL RULE 17.

A month before issuing its decision in this case, the Second District Court of Appeals stated: "[C]ourts often conflate common law standing and Civ. R. 17, treating them as one and the same." *Abroms v. Synergy Building Systems*, Montgomery No. CA23944, 2011-Ohio-2180, ¶47. Indeed, in its decision in this matter, the Court of Appeals noted that "Common-law standing is similar to Civ. R. 17(A)'s real-party-in-interest requirement." *Opinion*, ¶60. Yet the Court went on to equate standing with real party in interest and held that a lack of standing may be cured under Civ. R. 17(A). *Id.* ¶75. Thus, the conflation is perpetuated.

For years, commentators have bemoaned the fact that judges and lawyers confuse standing with real party in interest status and vice versa. *See*, 6A Charles Allen Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil* §1542, at p. 472 (3d. 2010); A.J. Stephani & Glen Weissenberger, *Ohio Civil Procedure Litigation Manual*, p. 152 (2011); Howard P. Fink, Arthur F. Greenbaum & Charles E. Wilson, *Guide to the Ohio Rules of Civil Procedure*, §17:3, at p.17-9 (2006 ed.). Courts, too, have struggled defining these terms and their role in the judicial process. *See, Flast v. Cohen*, 392 U.S. 83, 98-99, 88 S.Ct. 1942, 20 L.Ed. 947 (1968). The confusion is, to some extent, understandable. But despite their facial similarity, the two concepts are quite distinct legal requirements.

A. Standing Requires Injury In Fact Traceable To The Defendant's Unlawful Conduct.

Standing relates to whether the suing plaintiff has suffered a legal injury - that is, an injury to a legally protected interest. It is injury which provides the basis for a person to institute a lawsuit. Without injury, there is no dispute to be resolved, and therefore, no right in the plaintiff to commence a lawsuit. In other words, the requirement of standing means that the Plaintiff has to be involved in a real dispute.

Last December, this Court considered the requirement of standing in Ohio and stated:

To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. *Ohio Pyro*, ¶ 27. This holding is based upon the principle that "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. See also Section 4(B), Article IV, of the Ohio Constitution.

An actual controversy is a genuine dispute between adverse parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas* (1996), 74 Ohio.St.3d 536, 542, 660 N.E.2d 458; *Corron v. Corron* (1988), 40 Ohio.St.3d 75, 79, 531 N.E.2d 708. It is more than a disagreement; the parties must have adverse legal interests. *Id.*; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio.St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036, at ¶¶9-10. In *Kincaid*, the Court ruled that the plaintiffs were not entitled to commence the lawsuit because they had not yet suffered an injury. Until Erie Insurance denied their claim for insurance benefits, there was no real controversy for the courts to adjudicate. *Id.* at ¶20. Thus, because the dispute was not yet a real one, the Court reinstated the trial court's dismissal of the case. *Id.*

Standing to prosecute a claim is a threshold question, one which "embodies general concerns about how courts should function in a democratic system of government." *State ex rel.*

Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 469. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio.St.3d 318, 320, 1994-Ohio-183, *see also*, *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 2007-Ohio-5024, 115 Ohio St.3d 375, ¶27.

The Court of Appeals ignored the absolute necessity of standing and held that "[t]he objective is for a court to be presented with a real controversy between parties actually affected by its outcome Permitting supplemental or amended filings, pursuant to Civ.R. 17(A), allows the court to properly exercise its jurisdiction and resolve the controversy on its merits." OPINION, ¶74. In other words, the Court of Appeals believes that the courthouse doors should be open to anyone with a beef, even if he is a stranger to the dispute.

This Court has previously recognized a different purpose of the standing requirement. It has stated that the well-established doctrine of standing is often used to deny litigants access to the courts. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 459 (1976). This is why courts often say that standing is a preliminary inquiry which must be made before a court may proceed to the merits of a case. *Kincaid, supra* at ¶9; *State ex rel. Merrill v. Ohio Dept. Natural Resources*, 130 Ohio St. 3d 30, 2011-Ohio-4612, ¶27.

"[T]he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' [citation omitted] * * * as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' [citation omitted]." *State ex rel. Dallman v. Court of Common Pleas, Franklin County*, (1973) 35 Ohio St.2d 176, 178-79 (quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 31 L.Ed.2d 636, 641). "Standing requires a demonstration of a concrete injury in fact, rather than an abstract or suspected injury." *Bicking*, 71 Ohio St.3d at p.

320; see also, *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, syll. ¶3.

The United States Supreme Court has stated that an inquiry into a plaintiff's standing asks "whether the dispute touches upon the legal relations of parties having adverse legal interests." *Flast v. Cohen*, 392 U.S. 83, 88 (1968) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)); see also, *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (stating "As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."). Standing determines whether the plaintiff is entitled to have an issue adjudicated, not whether the issue itself is justiciable. *Flast*, 392 U.S. at 99-100. Without an injury to a legal interest, a plaintiff does not have standing.

B. A Real Party In Interest Status Is Limited To The Person Entitled To Enforce The Right Sued Upon.

Civ. R. 17(A) is one of the several civil rules which addresses joinder of parties. As such, it should be considered in conjunction with the other joinder rules, such as Civ. R. 19 and Civ. 19.1. Its purpose, like those of all the joinder rules, is to promote efficiency and protect against conflicting decisions regarding the same issues.

An inquiry into whether a plaintiff is a real party in interest looks to whether the party suing is the one entitled to the relief sought. "To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing

the substantive right to relief.” *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25. The party suing has to be the one who is directly benefited or damaged by the case's decision. *West Clermont Ed. Ass'n v. West Clermont Local Bd. of Ed.*, 67 Ohio App.2d 160, syll. ¶1 (Clermont Co. 1980). Thus, while standing requires the plaintiff to have suffered an injury, the status of real party in interest is limited to those with the legally recognizable interest to be vindicated.

“The purpose behind the real party in interest rule is ” * * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.” *Shealy*, supra, at pp. 24-25 (citations omitted). For instance, if a woman is injured in an auto accident caused by the negligence of another, she has standing to sue. She suffered a direct, personal injury because of the other driver's actions. However, if she files bankruptcy, she is no longer the real party in interest. Under bankruptcy law, all of the debtor's assets, including personal injury claims, become property of the bankruptcy estate. Until the claim is no longer a part of the estate, only the bankruptcy trustee is entitled to pursue the chose in action. If the woman were to prosecute the injury claim herself, the tortfeasor could face a similar suit from the bankruptcy trustee. *See Mclynas v. Karr*, 2004-Ohio-3597, Franklin App. No. 03AP1075, ¶24 (finding that the debtor was not the real party in interest, but granting leave to obtain ratification of commencement of suit by the bankruptcy trustee under Civ. R. 17(A) in order to avoid an inequitable result).

Obviously, standing and real party in interest status are related. Those who are real parties in interest is a subset of those persons who have standing to pursue a claim. Put another way: all persons who are the real party in interest have standing, but not all those with standing are real parties in interest. Those with standing have been injured, but do not necessarily own the legal

right at issue.

It is this distinction between standing and real party in interest which is made in the conflict cases of *Wells Fargo Bank v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603 (Hamilton Co. 2008); *Wells Fargo Bank v. Jordan*, Cuyahoga App. 91675, 2009-Ohio-1092 (Cuyahoga Co. 2009); and *Bank of New York v. Gindele*, (Hamilton Co. 2010) 2010-Ohio-542, ¶¶2-6. Those cases held that a real party in interest analysis can not occur until the plaintiff has standing to invoke the court's jurisdiction in the first place.

And while the two concepts have their similarities, they also have at least one stark difference. A defense of real party in interest is waived if not asserted, yet standing can be raised at any time in the proceeding. *Buckeye Foods v. Cuyahoga County Bd. of Revision*, 1997-Ohio-199, 78 Ohio St.3d 459, 460; *Gildner v. Accenture, L.L.P.*, Franklin Co No. 09AP-167, 2009-Ohio-5335, ¶9 (citing *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio.St.3d 216, 218). In this regard, standing's role in the jurisdictional power of a court is apparent.

C. A Lack Of Standing May Not Be Cured Or Ratified Pursuant To Civil Rule 17.

The concept of standing has been discussed by this Court for decades, long before the Rules of Civil Procedure were adopted in Ohio. Had this Court wanted Civ.R. 17 to address the issue of standing, there is no reason for it to have instead used the phrase “real party in interest.” And yet, the Court of Appeals equated standing and real party in interest status, concluding that the two concepts were, in essence, the same.

Civ.R. 17 addresses only real party in interest status. It does not deal with standing at all. As will be discussed below, the reason for this is simple: standing is not a mere procedural issue. It goes to the very essence of a court's power.

For these reasons, this Court should hold that a lack of standing may not be cured under

Civ. R. 17(A).

II. Standing Is A Necessary Component Of The Jurisdiction Of Ohio's Common Pleas Courts.

PROPOSITION OF LAW NO. 2: IN ORDER TO INVOKE THE SUBJECT MATTER JURISDICTION OF THE COMMON PLEAS COURT, A PLAINTIFF MUST HAVE STANDING AT THE TIME THE COMPLAINT IS FILED.

Prior to 1968, Section 4, Article IV of Ohio's Constitution read as follows:

The jurisdiction of the courts of common pleas and of the Judges thereof, shall be fixed by law.

The current version of Section 4, Article IV was enacted in 1968 as part of the Modern Courts Amendment to the Constitution and states:

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

The amendment altered the jurisdiction of Ohio's common pleas courts. *Village of Monroeville v. Ward* (1971), 27 Ohio St.2d 179, 181.

The key words of the current provision are “justiciable matters.” The requirement of “justiciable matters” limits a common pleas court's original jurisdiction over only those cases which present real controversies. *Fortner v. Thomas*, 22 Ohio St. 2d 13, 20 (1970)(Duncan, J., concurring) (stating the 1968 amendment to Art. IV, sec. 4 was the enactment of the Supreme Court's justiciable case or controversy requirement). *See also, Lundblad v. Celeste*, 772 F.2d 907, (6th Cir. 1985).

A. Standing Is Necessary To Render A Dispute Justiciable.

“To be justiciable, a controversy must be grounded on a present dispute, not on a possible future dispute.” *Kincaid*, supra, 2010-Ohio-6036, at ¶17. This concept requires an immediacy of conflicting interests such that the matter is presented in an adversarial setting. *State ex rel.*

Dallman v. Franklin Cty. Court of Common Pleas (1973), 35 Ohio St.2d 176, 179. As the Court stated in *Fortner*:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

Fortner, supra, 22 Ohio St.2d at 14.

"Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary*, 501 U.S. 312, 320 (1991). Thus, the concepts of ripeness and mootness are also part of justiciability. *Id.*; *See also Kincaid, supra*, at ¶17. But of all of the elements of justiciability, standing is the most important. "The touchstone to justiciability is injury to a legally protected right . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 141 (1951); *see also, Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)(stating "[i]n its constitutional dimension, standing imports justiciability . . .")

Without a justiciable matter before it, a common pleas court cannot enter a valid judgment. *State ex rel. Draper v. Wilder* (1945), 145 Ohio St. 447, syll. ¶2 . A common pleas court's jurisdiction cannot be invoked just because there is a dispute, no matter how acrimonious. *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County, Ohio* (1996) 74 Ohio St.3d 536, syll ¶1. It takes two parties, with opposing interests which are legally recognized and capable of vindication. *Id.* syll ¶2. It is the justiciable dispute which permits a plaintiff to invoke the jurisdiction of an Ohio common pleas court. *Dallman, supra*, at p. 179; *Kincaid, supra* at ¶20.

Barclays, supra, is quite illustrative of this point even though it did not deal directly with the issue of standing. In that case, Barclays Bank sought a writ of prohibition from this Court directing the common pleas court to dismiss a case for lack of a justiciable matter, i.e. lack of subject matter jurisdiction. The writ was granted because the Court found that the common pleas court plaintiffs had failed to sue the proper party, i.e. the party with whom they had the real dispute. The Court ruled that, without the proper parties in the case – ones with adverse legal interests - there was no controversy to be resolved, and thus no subject matter jurisdiction. *Barclays*, supra, p. 542. This ruling, because of its nature (i.e. in prohibition) is a direct statement that the presence of a justiciable matter is required in order for the common pleas court to have subject matter jurisdiction.

Although *Barclays* addressed the defendant side of the case caption, its pronouncement is clear – both parties to a common pleas court case must have an interest in the case before the Court has jurisdiction. From the plaintiff's side of the case caption, that requirement is standing. And many Ohio courts have held as much.

As was succinctly stated in *Hirsch v. TRW, Inc.*, Cuyahoga Co. Case No 04-LW-0861, 2004-Ohio-1125

It follows that if the courts of common pleas' original jurisdiction is limited to "justiciable matters," the subject matter jurisdiction of the court -- that is, "the power to hear and decide a case on the merits," see *Morrison v. Steiner* (1972), 32 Ohio St. 86, paragraph one of the syllabus -- is directly limited to justiciable matters.

Id. at ¶11.

Therefore, standing is an element of the court's jurisdiction. *Rickard v. Trumbull Township Bd. Zoning Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶35; see also *Woods v. Oak Hill Community Med. Ctr, Inc.*, 134 Ohio App.3d 261, 271, 2000-Ohio-161 (1999) ("The requirement that a plaintiff have standing to sue is an indispensable element of

justiciability that we may not compromise."); *Helms v. Koncelik*, Franklin App. No. 08AP-323, 2008-Ohio-5073, ¶22 (stating that standing is a threshold jurisdictional issue); *Northland Ins. Co. v. Illuminating Co.*, Ashtabula App. No. 2002-A-0058, 2004-Ohio-1529, ¶17 (holding that a plaintiff's lack of standing to bring a suit necessitates dismissal of the case); *First Nat'l Bank v. Randal Homes Corp.*, Pike App. 05CA739, 2005-Ohio-6129 ¶11 (stating "the issue of standing is jurisdictional in nature and may be raised sua sponte by a court."). *In re Foreclosure of Parcel of Land Encumbered with Delinquent Tax Liens*, Lake App. No. 2007-L-02, 2007-Ohio-4377 ¶11 (holding that, without a current interest in the real property which was the subject of the case, a party had no standing to assert a claim regarding the property and the court was without jurisdiction to hear the claim).

B. To Invoke The Jurisdiction Of A Common Pleas Court In Ohio A Plaintiff Must Present A Justiciable Controversy Over Which The Court Has Statutory Jurisdiction.

In its Opinion, the Court of Appeals tacitly found that the trial court had subject matter jurisdiction over foreclosure actions. OPINION at ¶¶68-69. Based on that conclusion, the Court reasoned that the common pleas court had subject matter jurisdiction to hear the matter. This reasoning misses the point. An Ohio court's jurisdictional power has two sources: the Constitution and statute. Although common pleascourts do have statutory jurisdiction over all civil matters, including foreclosures, a plaintiff must still meet the the "justiciable matter" requirement of Art. IV, Section 4 of the Constitution. To rule otherwise would be to permit the legislature to expand the subject matter jurisdiction of Ohio's common pleas courts beyond what the Constitution grants them.

This Court recently addressed this issue in *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101. That case dealt with newly enacted legislation which purported to grant to

this Court original jurisdiction to hear a direct constitutional challenge to the law. This Court dismissed the suit for lack of subject matter jurisdiction. The Court reasoned that its jurisdictional power is set forth in Art. IV, Section 2(B)(1) of the Ohio Constitution, which does not grant jurisdiction to issue declaratory judgments and injunctive relief. The legislature's attempt to expand the Court's power was therefore unconstitutional. "[N]either statute nor rule of court can expand our jurisdiction." *Id.* at ¶4 (*quoting Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 41); *see also Brock v. Neimeyer*, 130 Ohio St.3d 80, 2011-Ohio-4704, ¶1 (affirming dismissal of complaint which did not invoke either the Court of Appeals's original or appellate jurisdiction as defined by Section 3(B)(1) and (2), Article IV, of the Ohio Constitution).

The Court of Appeals relegated standing to a mere procedural hurdle, instead of a necessary part of justiciability, and held that a plaintiff may "cure" the lack of standing through Civ.R. 17(A). OPINION, at ¶¶74-75. That holding permits the common pleas court's jurisdiction to be enlarged through application of the Civil Rules of Procedure. Such a result is expressly forbidden by the Civil Rules themselves. Civil Rule 82 states: "These rules shall not be construed to extend or limit the jurisdiction of the courts of this state." Civ. R. 82.

C. Standing May Be Based Only On The Plaintiff's Rights.

Because standing must be founded on an injury to the its own rights, a plaintiff may not seek to enforce of the rights or interests of a third party. *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 564 (5th Cir. 1990). It is plaintiff's personal stake in the lawsuit that renders it a justiciable dispute. The plaintiff's legal rights have to be at issue.

Only a party to a contract, or a third-party beneficiary, may sue to enforce the contract. *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220; *Heskett v. Van Horn Title Agency, Inc.*, 2006-Ohio-6900, Franklin App. No. 06AP-549, ¶14;

Grothaus v. Warner, 2008-Ohio-6683, Franklin App. No. 08AP-115 ¶14; *Caruso v. Natl. City Mtge. Co.*, 2010-Ohio-1878, 187 Ohio App.3d 329 (Hamilton Co. 2010) ¶23. *Village of Arlington Heights v. Metropolitan*, 429 U.S. 252, 263, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)(stating " In the ordinary case, a party is denied standing to assert the rights of third persons."); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

In breach of contract cases, it is the contractual right to performance that is being vindicated. The claimed injury is the breach of the contract. Who then, is injured by the breach? Unless there is an intended third-party beneficiary, only the party to whom performance is owed is injured. Only such a person has standing to sue.

D. In Order To Invoke The Subject Matter Jurisdiction Of The Common Pleas Court, A Plaintiff Must Have Standing At The Time The Complaint Is Filed.

Standing is determined as of the time the action is brought. *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (stating "we have an obligation to assure ourselves that [plaintiff] had Article III standing *at the outset of the litigation.*") (emphasis added); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (stating "Article III standing must be determined as of the time at which the plaintiff's complaint is filed."); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (stating "As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint.").

Because standing, and hence the court's jurisdiction, must be established when the case is

instituted, events subsequent to the filing of the complaint are not taken into account. *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 1101 (10th Cir. 2006) (holding that, because the plaintiff's injuries did not accrue until several months *after* the complaint was filed, he lacked standing to commence the lawsuit in the first place, and his subsequent realization of injury did not retroactively vest the court with jurisdiction).

This is the approach taken by the courts in the conflict cases. *Byrd, Jordan and Gindele*.

III. To Have Standing To Enforce A Negotiable Instrument A Plaintiff Must Be A Person Entitled To Enforce The Note Under R.C. 1303.31.

Proposition Of Law No. 3: In Order To Have Standing To Sue On A Defaulted Note, The Plaintiff Must Be A Person Entitled To Enforce The Instrument.

In its Complaint, Freddie Mac claimed it was the holder of the promissory note and had been assigned the mortgage. Both of these allegations were false. Freddie Mac never argued to the trial court, or presented any evidence, that it was entitled to enforce the promissory note for any reason other than its alleged holder status.

The Court of Appeals, on the other hand, made an express determination that Freddie Mac was not the holder of the promissory note when it filed this lawsuit. OPINION, ¶¶ 41, 52. It further found that the mortgage was not assigned to Freddie Mac until a month after the suit was commenced. OPINION, ¶8. Thus, the Court of Appeals found that Freddie Mac did not have standing to sue when it filed the complaint.

The Court found, however, that Freddie Mac became a person entitled to enforce the instrument under R.C. 1303.31(A)(2) when it took assignment of the mortgage. The Court of Appeals held that the mortgage assignment from Wells Fargo Bank vested Freddie Mac with the rights of a holder because it purported to transfer Wells Fargo's interest in the note secured by the mortgage. OPINION ¶76.

The Court of Appeals's decision is premised on the assumption that the promissory note at issue in this case is a negotiable instrument, as defined in R.C. 1303.03. Although the Schwartzwalds do not contest that assumption in this case, not all commentators agree that all residential mortgage notes are negotiable instruments as defined by the U.C.C. Thus, any decision of the Court should be limited to instances in which the promissory note is a negotiable instrument.

A. To Having Standing To Enforce A Negotiable Instrument, The Plaintiff Must Be A Person Entitled To Enforce The Instrument.

Revised Code 1303.31(A) states:

(A) "Person entitled to enforce" an instrument means any of the following persons:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

The Court of Appeals found that Freddie Mac was entitled to enforce the instrument under Subsection (A)(2). It is important to notice whence the right to enforce the note under that subsection. To have the rights of a holder, the transferee must have taken from a holder, or a holder must have transferred to someone in the chain of title.

This statute is the legal backdrop against which standing to enforce a negotiable instrument is determined. In other words, standing to enforce a negotiable instrument is granted by R.C. 1303.31(A). Only those persons who qualify as a person entitled to enforce an instrument possess standing to enforce an instrument. But when Freddie Mac filed its complaint in this case, it is undisputed that it did not qualify as a "person entitled to enforce the instrument."

B. To Establish Standing to Enforce An Instrument, A Plaintiff Must Prove A Complete Chain Of Title To The Instrument.

The Court of Appeals's decision missed a key fact when reaching its conclusion that the assignment of mortgage from Wells Fargo Bank was sufficient to vest Freddie Mac with holder status. Although the assignment of mortgage from Wells Fargo included language that the promissory note was also transferred, no such similar language is found in the assignment of mortgage from Legacy Mortgage by which Wells Fargo obtained the mortgage.

R.C. 1303.22(B) provides "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. . . ." This simple statement is consistent with the axiomatic premise that a transferor may only transfer such rights as he has in the subject transferred.

In cases in which a plaintiff seeks to enforce a debt assigned to it, Ohio courts have routinely required that the Plaintiff establish a complete chain of title to the assigned right. *National Check Bureau, Inc. v. Ruth*, 2009-Ohio-4171, Summit App. No. C.A. 24241, ¶10. *Retail Recovery Service of NJ v. Conley*, 2010-Ohio-1256, Mercer App. No. 10-09-15, ¶¶21-22.

In this case, no such chain of title was established by Freddie Mac. The most that can be said is that Wells Fargo intended to transfer the promissory note to Freddie Mac. No evidence was ever presented that Wells Fargo itself ever possessed the right to enforce the note.

C. In Order To Have Standing To Sue On A Defaulted Note, The Plaintiff Must Be A Person Entitled To Enforce The Instrument When The Complaint Is Filed.

If the note at issue is a negotiable instrument, R.C. 1303.31(A) governs who may seek enforcement of the instrument. If the Plaintiff is not such a person, it lacks standing to sue on the instrument. But in order to determine if a plaintiff is entitled to enforce the note under R.C.

1303.31(A)(2), a plaintiff must present an entire chain of title establishing that its title originates in one who is undisputedly a holder of the instrument. Without that proof, the plaintiff cannot establish standing.

IV. Assignment of the mortgage after suit is filed is not a "cure" recognized under Civil Rule 17(A).

PROPOSITION OF LAW NO. 4: A PLAINTIFF MAY NOT CURE A REAL PARTY IN INTEREST DEFECT PURSUANT TO CIV. R. 17 BY ACQUIRING AN INTEREST IN THE SUBJECT OF THE LITIGATION AFTER THE COMPLAINT IS FILED.

The Court of appeals held that Freddie Mac's lack of standing was "cured" under Civ. R.17 by taking an assignment of the mortgage. Obtaining an interest in the subject matter of the lawsuit after filing is not, however, one of the "cures" available under Civ. R. 17(A). That rule reads as follows:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Rule's "cure" provision permits one of three things to occur: ratification by, or substitution or joinder of, the real party in interest. *Byrd*, at ¶11; *see also*, *Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 2009-Ohio-3238, 915 N.E.2d 397, ¶ 33; *Mclynas v. Karr*, 2004-Ohio-3597, Franklin App. No. 03AP1075, 04-LW-2995, ¶22. The Rule does not contemplate the plaintiff acquiring the rights of the real party in interest during the

pendency of the case. Thus, Plaintiff did not avail itself of the possible remedies under the Rule, and its lack of real party in interest status remains, to this day, uncured.

The Court of Appeals erred in finding that Freddie Mac properly cured its real party in interest deficiency by acquiring an assignment of the mortgage prior to judgment. By so concluding, the Court of Appeals impermissibly expanded the scope of Civ.R. 17(A) beyond its plain language.

V. Answering The Certified Questions.

Standing is a legal requirement distinct from Civ. R. 17(A)'s real party in interest status. In fact, it goes to the very power of a court to hear any matter. As such, it is not a deficiency that Civ. R. 17(A) contemplates at all. Accordingly, a lack of standing cannot be cured under it. Therefore, the answer to the standing portion of the certified question is "No."

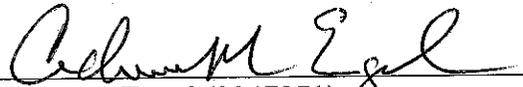
A lack of real party in interest status, however, may be cured through ratification by, or joinder or substitution of, the real party in interest. The Court of Appeals concluded that obtaining an assignment of the subject matter of the lawsuit after suit was filed, but prior to entry of judgment, was sufficient to cure the defect. That decision finds no support in the plain language of the Rule. Therefore, the answer to this portion of the certified question is also, "No."

CONCLUSION

For the foregoing reasons, Appellants Duane and Julie Schwartzwald request that the Court reverse the decision of the Greene County Court of Appeals, and remand the case with

instructions to dismiss the action.

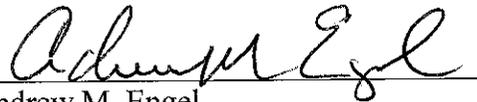
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CERTIFICATE OF SERVICE

I certify that the foregoing was served by ordinary mail on December 12, 2011 upon Scott A. King, Esq. and Terry Posey, Esq., Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio, 45342-4934.



Andrew M. Engel

A-1

IN THE SUPREME COURT OF OHIO

FEDERAL HOME LOAN MORTGAGE *
CORP.

Plaintiff-Appellee

-vs-

DUANE SCHWARTZWALD, et al. *

Defendants-Appellants. *

11-1201

* On Appeal from the Greene
* County Court of Appeals, Second
* Appellate District

* Court of Appeals Case No. 2010
* CA 0041

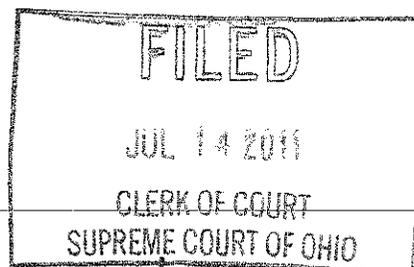
NOTICE OF APPEAL OF DUANE AND JULIE SCHWARTZWALD

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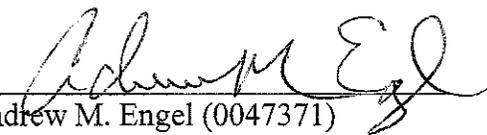
Attorneys for Appellee Federal
Home Loan Mortgage Corp.



Now come Appellants Duane and Julie Schwartzwald and give notice of their appeal to the Supreme Court of the State of Ohio from the Final Entry of the Court of Appeals for Greene County, Ohio, Second Appellate District, dated June 3, 2011.

This case presents issues of great general interest and involves substantial constitutional issues.

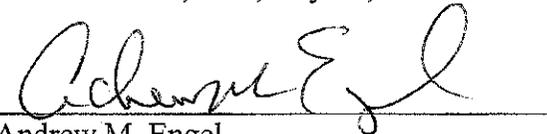
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail this 13th day of July 2011 upon Scott A. King, Esq., 2000 Courthouse Plaza, N.E., Dayton, OH 45402.


Andrew M. Engel

IN THE SUPREME COURT OF OHIO

11-1362

FEDERAL HOME LOAN MORTGAGE *
CORP.

Plaintiff-Appellee

-vs-

DUANE SCHWARTZWALD, et al.

Defendants-Appellants.

* On Appeal from the Greene
* County Court of Appeals, Second
* Appellate District
* Court of Appeals Case No. 2010
* CA 0041
*

NOTICE OF CERTIFIED CONFLICT OF APPELLANTS DUANE AND JULIE
SCHWARTZWALD

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Attorneys for Appellee Federal
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FILED
AUG 10 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Appellants Duane and Julie Schwartzwald give notice that, on July 27, 2011, the Greene County Court of Appeals, Second District Court of Appeals issued its Decision and Entry in Case No. 2010 CA 41 (Attached as Exhibit A) certifying the following question as a conflict pursuant to App. R. 25:

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

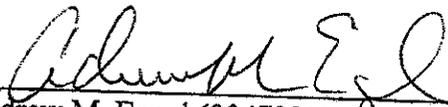
The Court of Appeals certified the conflict based on its decision in *Federal National Mortgage Corp. v. Schwartzwald* (June 3, 2011), Final Entry and Opinion, Case No. 2010 CA 41 (Exhibit B). The conflict cases are:

1. Wells Fargo Bank v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603 (1st Dist. 2008) (Exhibit C);
2. Bank of New York v. Gindele, Hamilton App. No. C-090251, 2010-Ohio-542 (1st Dist. 2010) (Exhibit D); and
3. Wells Fargo Bank v. Jordan, Cuyahoga App. 91675, 2009-Ohio-1092 (8th Dist. 2009) (jurisdiction denied 09/30/2009 *Case Announcements*, 2009-Ohio-5031, *Wells Fargo Bank, N.A. v. Jordan*, Case No. 2009-1030) (Exhibit E).

Pursuant to S. Ct. Prac. R. 4.1, a copy of the Decision and Entry certifying the conflict, the underlying decision, and the conflict cases are all attached.

A discretionary appeal from the underlying judgment in this action is also pending before this Court as Case No. 2011-1201.

Respectfully submitted,



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(937) 938-9412

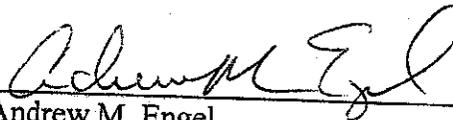
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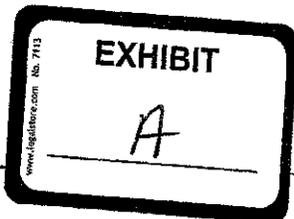
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail this 9th day of August 2011 upon Scott A. King, Esq., Thompson Hine LLP, 2000 Courthouse Plaza, N.E., Dayton, OH 45402.



Andrew M. Engel



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.

.....

SCOTT A. KING, Atty. Reg. No. 0037582 and TERRY W. POSEY, JR., Atty. Reg. No. 0078292, 2000 Courthouse Plaza, NE, P. O. Box 8801, Dayton, Ohio 45401
Attorney for Plaintiff-Appellee

ANDREW M. ENGEL, Atty. Reg. No. 0047371, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459
Attorney for Defendants-Appellants

.....

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-

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

FEDERAL HOME LOAN MORTGAGE
CORP. :

Plaintiff-Appellee :

v. :

DUANE SCHWARTZWALD, et al. :

Defendants-Appellants :

C.A. CASE NO. 2010 CA 41

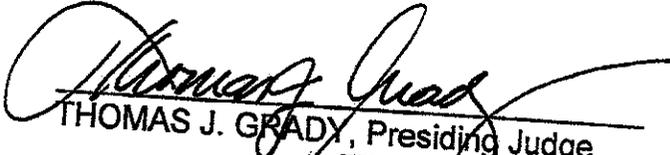
T.C. NO. 09CV4380

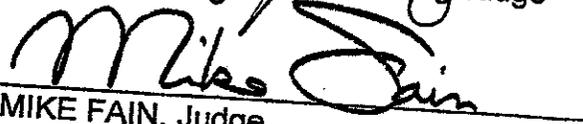
FINAL ENTRY

.....

Pursuant to the opinion of this court rendered on the 3rd day of
June, 2011, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge


JEFFREY E. FROELICH, Judge

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Hon. Stephen A. Wolaver
Common Pleas Court
45 N. Detroit Street
Xenia, Ohio 45385

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

FEDERAL HOME LOAN MORTGAGE :
CORP.

Plaintiff-Appellee :

v. :

DUANE SCHWARTZWALD, et al. :

Defendants-Appellants :

C.A. CASE NO. 2010 CA 41

T.C. NO. 09CV4380

(Civil appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 3rd day of June, 2011.
.....

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.....
FROELICH, J.

Duane and Julie Schwartzwald appeal from a judgment of the Greene County Court of Common Pleas, which granted summary judgment to the Federal Home Loan Mortgage

Corporation ("Freddie Mac"), denied the Schwartzwalds' cross-motion for summary judgment, and entered a judgment and decree of foreclosure.

The Schwartzwalds claim that Freddie Mac did not establish that it was the holder of the note and assignee of the mortgage, that Freddie Mac lacked standing to institute the foreclosure action, and that the trial court should not have granted Freddie Mac the equitable relief of foreclosure due to unclean hands. For the following reasons, the trial court's judgment will be affirmed.

I.

In November 2006, Duane and Julie Schwartzwald purchased the property located at 2202 East Spring Valley Painters Road in Xenia, Ohio. To finance the purchase, they executed a note in favor of Legacy Mortgage in the amount of \$251,250, and signed a mortgage granting Legacy Mortgage a security interest in the property.

According to Julie Schwartzwald's affidavit in response to Freddie Mac's summary judgment motion, the couple began to have concerns during the summer of 2008 that Mr. Schwartzwald might be laid off from his employment. The Schwartzwalds contacted Wells Fargo regarding their loan. (Mrs. Schwartzwald did not indicate whether Wells Fargo was contacted as the loan servicer or the owner of the note.) Mr. Schwartzwald obtained a new job in Indiana in September 2008, and they placed their home on the market. By early 2009, they could no longer afford the mortgage payments, and they spoke to Wells Fargo about a loan modification or a short sale of the property. In April 2009, the Schwartzwalds had a buyer for a short sale of the property; the closing was set for June 2009 to allow Wells Fargo sufficient time to review the proposed sale. Mrs. Schwartzwald repeatedly spoke with Wells Fargo representatives and received no indications that the request for a

short sale would be denied.

On April 15, 2009, Freddie Mac filed a foreclosure action, alleging that it was the holder of a note, that the note was secured by a mortgage, and that the Schwartzwalds had defaulted on the note and mortgage.¹ Freddie Mac sought judgment on the note in the amount of \$245,085.18, with interest at the rate of 6.25 percent, as well as any court costs and advances. Freddie Mac also sought a finding that the mortgage was a valid first lien upon the real estate and an order that the mortgage be foreclosed and the property sold.

Freddie Mac attached to the complaint as Exhibit A a purported copy of the mortgage. The mortgage identified the Schwartzwalds as the borrowers and Legacy Mortgage as the lender. The mortgage was recorded on December 4, 2006. A legal description of the property was attached to the complaint as Exhibit B. No copy of the note was attached; although the complaint alleged that Freddie Mac was the holder of the note, Freddie Mac further alleged that "a copy of [the note] is currently unavailable."

On April 24, 2009, Freddie Mac filed a "Notice of Filing of Note," which attached a purported copy of the note signed by the Schwartzwalds. The note reflected that the Schwartzwalds, as borrowers, agreed to pay \$251,250 to Legacy Mortgage, the lender. The note established a 30-year term, to be repaid with interest at a rate of 6.25 percent. Payments were to be made to Wells Fargo Home Mortgage, the loan servicer. The final page was blank except for two stamped apparent indorsements. The first stated:

"Without Recourse

¹Freddie Mac also named the Greene County Treasurer, the Ohio Department of Job and Family Services (ODJFS), and Wells Fargo Bank as party-defendants due to the possibility that those parties may claim an interest in the property. ODJFS subsequently indicated that it had no interest in the property.

" Pay to the Order of

"

"Wells Fargo Bank, N.A."

The indorsement was signed by Joan M. Mills, Vice President. The second stated:

"Pay to the Order of

"Wells Fargo Bank, N.A.

"Without Recourse

"Legacy Mortgage"

This indorsement was signed by Lynette Hanson, Vice President.²

On June 17, 2009, Freddie Mac filed a "Notice of Filing Assignment of Mortgage." The notice attached an assignment of mortgage, dated May 15, 2009 (after the complaint was filed), and recorded on May 27, 2009, which transferred the Schwartzwalds' mortgage from Wells Fargo Bank to Freddie Mac.

On July 6, 2009, Freddie Mac moved for a default judgment against the Schwartzwalds. The trial court denied the motion, because "[a]n examination of the file in this action reveals that the mortgage filed with the Greene County Recorder's Office on December 4, 2006, in Volume 2648, Page 149 was recorded with an incorrect legal description." The court granted leave to Freddie Mac to file an amended complaint in order to add a count for reforming the mortgage to match the legal description approved by the Greene County Tax Map Department. Freddie Mac subsequently filed an approved legal description, but indicated that it did not need to amend the complaint.

²The stamped name is difficult to read, but it appears the last name is "Hanson."

According to Mrs. Schwartzwald, in September 2009, the Schwartzwalds received a letter from Wells Fargo denying their request for a short sale. Mrs. Schwartzwald stated in her affidavit that "[a]t no time prior to the receipt of the letter denying approval of the short sale did Wells Fargo ever give me the impression that my short sale request would be denied. *** It was only when we received the Court's Judgment Entry of September 29, 2009 [denying the motion for default judgment], did I realize that I had been misled by Wells Fargo."

In October 2009, the Schwartzwalds moved to file an answer out-of-time. The motion was supported by an affidavit by Julie Schwartzwald, describing Wells Fargo's dilatory conduct in addressing the Schwartzwalds' request that Wells Fargo approve a short sale of their property and stating that Wells Fargo had told the Schwartzwalds "don't worry about" the foreclosure action. The Schwartzwalds also attached a proposed answer, which asserted a general denial and raised several defenses, including that Freddie Mac lacked standing, was not the real party in interest, and had "unclean hands."

Freddie Mac renewed its motions for default judgment and, separately, moved for summary judgment. Freddie Mac's summary judgment motion was supported by an affidavit by Xee Moua, Vice President of Loan Documentation for Wells Fargo, the servicing agent.

On December 2, 2009, the trial court notified the parties that "[a] review of the file in this action reveals an item missing and needed in order to issue a decision on the Motion for Default Judgment filed by Plaintiff on July 6, 2009." The court ordered Freddie Mac to file, within thirty days, "the assignment that evidences the transfer of the original mortgage from Legacy Mortgage to its assignee and any subsequent assignments."

On December 14, Freddie Mac filed two assignments of mortgage: (1) from Legacy Mortgage to Wells Fargo, dated November 27, 2006; and (2) from Wells Fargo to Freddie Mac, dated May 15, 2009. On the same date (December 14), the court filed an agreed entry granting leave to the Schwartzwalds to file an untimely answer. Freddie Mac withdrew its pending motion for summary judgment. The answer was filed on December 18, 2009.

In February 2010, Freddie Mac filed a new motion for summary judgment, supported by an affidavit from Herman John Kennerty, Vice President of Loan Documentation for Wells Fargo, the servicing agent. Kennerty stated that he had custody of the Schwartzwalds' account, that the records were compiled near the time of occurrence by persons with knowledge of the events, that the records were kept in the course of Wells Fargo's regularly conducted business, and that it was the regular practice to keep such records.

Kennerty further averred that "Plaintiff is the holder of the note and mortgage which are the subject of the within foreclosure action," and he authenticated copies of the original note and mortgage, which were attached. Kennerty also authenticated an Assignment of Mortgage from Wells Fargo to Freddie Mac, which "accounts for documented evidence that Plaintiff is the holder of the note and mortgage ***." Kennerty stated that the note and mortgage were in default, that payment was due for January 1, 2009, and all subsequent payments, and that Plaintiff had elected to accelerate the balance. Finally, Kennerty indicated that the principal balance of \$245,085.18 was due with interest from December 1, 2008, at a rate of 6.25 percent per annum, as well as advancements for taxes, insurance, and other expenses.

The Schwartzwalds opposed Freddie Mac's summary judgment motion on several grounds. First, they claimed that Freddie Mac had not established that it was the holder of the note and the mortgagee by assignment. They emphasized that the note attached to Kennerty's affidavit did not contain any indorsements on the note itself or any allonges. Similarly, the Schwartzwalds argued that Kennerty's affidavit did not explain "what right, if any, Wells Fargo bank had to assign the mortgage. On the face of the documents attached to Mr. Kennerty's affidavit, Legacy Mortgage is still the mortgagee under the Mortgage."

Second, the Schwartzwalds claimed that Kennerty's affidavit did not establish the amount that was due, because "all Mr. Kennerty can accomplish through his affidavit is to authenticate business records, and establish them as such for purposes of hearsay exclusion. He cannot simply testify to the content of those records." The Schwartzwalds further claimed that, because Freddie Mac did not hold the note and mortgage, it lacked standing to prosecute the case. Finally, the Schwartzwalds argued that Freddie Mac's conduct, through its servicing agent, constituted unclean hands and barred relief in foreclosure; they supported this argument with Julie Schwartzwald's affidavit describing her interactions with Wells Fargo regarding the proposed short sale of the property.

In addition to opposing Freddie Mac's motion, the Schwartzwalds sought summary judgment on the ground that Freddie Mac lacked standing to prosecute its claim. They argued that the trial court should dismiss the action without prejudice on that basis.

Freddie Mac responded to the Schwartzwalds' opposition memorandum, stating that it was the holder of the note via a blank indorsement affixed to the back of the note. It stated that it was assigned the mortgage, as indicated in its assignments filed on

December 14, 2009, as Exhibit A to the Notice of Filing Assignment of Mortgage Chain. Freddie Mac further argued that Kennerty's affidavit did not violate the hearsay rule, that it implicitly established Kennerty's personal knowledge, and that the affidavit was sufficient to establish the Schwartzwalds' default. Although Freddie Mac argued that it need not produce the loan history to support its motion for summary judgment, it provided a copy of the Schwartzwalds' payment history as an attachment to a supplemental affidavit from Jennifer Payne, Vice President of Loan Documentation. As to the Schwartzwalds' unclean hands argument, Freddie Mac stated that it was permitted to advance its own interests and to enforce its contractual rights.

The court scheduled a hearing before a magistrate for April 1, 2010, on the cross-motions for summary judgment. The record does not contain a transcript of that hearing, and it is unclear from the record what occurred.

In April 6, 2010, Freddie Mac again filed an Assignment of Mortgage chain.

On June 1, 2010, the trial court granted Freddie Mac's motion for summary judgment and denied the Schwartzwalds' motion for summary judgment. The trial court found that the allegations contained in Freddie Mac's complaint and the affidavit in support of its summary judgment motion were true and that the Schwartzwalds had defaulted on the note and mortgage. The court entered judgment on the note in the amount of \$245,085.18, plus interest and advancements, and ordered that the equity of redemption be foreclosed and the property sold. The court did not address the various legal arguments raised by the parties.

The Schwartzwalds appeal from the trial court's judgment, claiming that the trial court erred in granting Freddie Mac's motion for summary judgment and in denying their

motion for summary judgment.

II.

We begin with the Schwartzwalds' claim that the trial court should have denied Freddie Mac's summary judgment motion. The Schwartzwalds state that Freddie Mac, in relying on Kennerty's affidavit, failed to meet its burden of proof for four reasons. First, they claim that Freddie Mac failed to establish that it was the holder of the note. Second, they argue that Freddie Mac lacked standing to institute the foreclosure action. Third, they contend that genuine issues of material fact existed as to whether Freddie Mac had unclean hands. Finally, the Schwartzwalds assert that Kennerty did not aver that he had reviewed their account, did not attach the loan payment history, and provided only legal conclusions.

Summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. Civ.R. 56; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. An appellate court reviews summary judgments de novo, meaning that we review such judgments independently and without deference to the trial court's determinations. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588.

Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of that party's pleadings. *Id.*; Civ.R. 56(E). Rather, the burden then shifts to the non-moving party to

respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the non-moving party. *Id.*

With that standard in mind, we turn to the Schwartzwalds' arguments.

A. *Kennerty's Affidavit*

Civ.R. 56(C) provides, in relevant part: "**** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. ****" Although courts are generally confined to the types of evidence identified in Civ.R. 56(C) in ruling on a summary judgment motion, the trial court may consider other types of evidence if there is no objection on that basis by the opposing party. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶17.

Civ.R. 56(E) sets forth the requirements for affidavits. It states that supporting and opposing affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Civ.R. 56(E). "The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions."

State ex rel. Corrigan v. Seminatore (1981), 66 Ohio St.2d 459, 467; *Cincinnati Bar Assn. v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, ¶7.

In filing its motion for summary judgment in February 2010 (having withdrawn its previous motion), Freddie Mac relied upon Kennerty's affidavit and the exhibits attached thereto. Kennerty's affidavit does not state that he had reviewed the documents in the Schwartzwalds' account. However, personal knowledge may be inferred from the contents of an affidavit. *Bush v. Dictaphone Corp.*, Franklin App. No. 00AP1117, 2003-Ohio-883, ¶73; *CitiMortgage, Inc. v. Potvin*, Stark App. No. 2010CA112, 2010-Ohio-6561, ¶45; *Beneficial Mortgage Co. v. Grover* (June 2, 1983), Seneca App. No. 13-82-41. Although Kennerty's affidavit is terse, the information regarding the Schwartzwalds' account coupled with Kennerty's statement that he had custody of the Schwartzwalds' account was sufficient to demonstrate personal knowledge of the account's contents.³ And at no point during the summary judgment procedure did the Schwartzwalds claim that the account information was incorrect.

Kennerty's affidavit further stated that an accurate reproduction of the mortgage was attached to the affidavit as Exhibit B and that "[a] copy of the Assignment, which accounts for documented evidence that the Plaintiff is the holder of the note and mortgage *** is attached hereto as Exhibit C." The mortgage attached to Kennerty's affidavit indicated that the Schwartzwalds executed a mortgage in favor of Legacy Mortgage. Exhibit C indicated

³In a footnote in their reply brief, the Schwartzwalds state that Kennerty was a "robo-signer" of documents for Wells Fargo. Citing a May 2010 deposition of Kennerty posted on <http://stopforeclosurefraud.com/depositions/>, they assert that Kennerty routinely signed 50 to 150 documents per day and verified only the date on the document before signing. While this information may be true and raises other issues, it is not properly before us; it was not raised in the trial court and cannot be considered on appeal of the summary judgment.

that the mortgage was later assigned to Freddie Mac by Wells Fargo. Kennerty did not reference or attach the assignment from Legacy Mortgage to Wells Fargo, dated November 27, 2006, which would evidence Wells Fargo's right to assign the mortgage.

Nevertheless, the trial court did not err in considering the entire mortgage chain. The assignments of mortgage from Legacy to Wells Fargo and from Wells Fargo to Freddie Mac was filed with the trial court, at the court's request, on December 14, 2009. The assignments had been notarized and were self-authenticating. Evid.R. 902(8). The Schwartzwalds did not object to or contest the accuracy of those assignments. The assignment of mortgage chain was again filed on April 6, 2010, after the hearing on the cross-motions for summary judgment, without any apparent objection.

B. Freddie Mac's Right to Enforce the Note

We turn to whether Freddie Mac met its burden on summary judgment of showing that it was the holder of the note and the assignee of the mortgage. Freddie Mac argues that, even if it were not the holder of the Schwartzwalds' note, it was a nonholder in possession of the instrument with the rights of a holder. Thus, Freddie Mac argues that it was entitled to enforce the note and mortgage in this foreclosure action.

R.C. 1303.31(A) identifies three classes of persons who are "entitled to enforce" an instrument, such as a note: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D).

With respect to negotiable instruments, "holder" means either:

"(a) If the instrument is payable to bearer, a person who is in possession of the

instrument;

"(b) If the instrument is payable to an identified person, the identified person when in possession of the instrument." R.C. 1301.01(T)(1).

"An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A). The transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument. R.C. 1303.22(B).

"Negotiation" is a particular type of transfer. Specifically, "negotiation" means "a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). "Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." R.C. 1303.21(B).

Here, Kennerty stated that Freddie Mac was the "holder" of the Schwartzwalds' note and mortgage and that "accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto ***." The note attached to Kennerty's affidavit indicated that the Schwartzwalds executed a note in favor of Legacy Mortgage in the amount of \$251,250. However, nothing on the note reflected that the note was subsequently negotiated by Legacy Mortgage. There are no indorsements on the note and the copy attached to the affidavit did not include an allonge. Thus, although Freddie Mac is apparently now in possession of the note, the lack of indorsements suggests that Freddie Mac received the note through transfer, but not negotiation. Accordingly, the note, on its face, contradicts

Kennerty's statement that Freddie Mac was the "holder" of the note.

Even if we were to consider the alleged allonge, which was attached to the copy of the note filed in April 2009, the final page is insufficient to prove that Freddie Mac was the holder of the note. The final page is blank, other than two indorsements. There is nothing that identifies the page as an allonge, nor does the page identify the note to which that page was allegedly affixed. And, the two stamped indorsements appear to be in reverse order. The first indorsement appears to be a blank indorsement from Wells Fargo to Freddie Mac, and the second appears to be an indorsement from Legacy Mortgage to Wells Fargo. Neither of the indorsements is dated.

We addressed a similar occurrence in *HSBC Bank USA, N.A. v. Thompson*, Montgomery App. No. 23761, 2010-Ohio-4158, as follows:

"The first allonge is endorsed from Delta to 'blank,' and the second allonge is endorsed from Fidelity to Delta. If the endorsement⁴ in blank were intended to be effective, the endorsement from Fidelity to Delta should have preceded the endorsement from Delta to 'blank' because the original promissory note is made payable to Fidelity, not to Delta. Delta would have had no power to endorse the note before receiving the note and an endorsement from Fidelity.

"HSBC contends that the order of the allonges is immaterial, while Thompson claims that the order is critical. At the oral argument of this appeal, HSBC appeared to be arguing that the order of allonges would never be material. This is easily refuted by the example of two allonges, one containing an assignment from the original holder of the note to A, and the other containing an assignment from the original holder of the note to B. Whichever

⁴The Uniform Commercial Code uses "indorsement," the alternate spelling.

allonge was first would determine whether the note had been effectively assigned to A, or to B.

"Thompson contends that because the last-named endorsement is made to Delta, Delta was the proper holder of the note when this action was filed, since the prior, first-named endorsement was from an entity other than the current holder of the note. In *Adams v. Madison Realty & Development, Inc.* (C.A.3, 1988), 853 F.2d 163, the Third Circuit Court of Appeals stressed that from the maker's standpoint:

"it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title.' *Id.* at 168.

"The Third Circuit Court of Appeals further observed that:

"Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that "[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol.'" 853 F.2d at 169 (citation omitted).

"Because the last allonge endorses the note to Delta, and no further endorsement to HSBC was provided, the trial court did not err in concluding that HSBC was not the holder of the note when the litigation was commenced against Thompson." *Thompson* at ¶169-76 (footnote added).

In this case, the first indorsement was by Wells Fargo, which (as far as the record demonstrates) did not hold the note when the indorsement was made. The second indorsement was from Legacy Mortgage to Wells Fargo. Because there is no subsequent indorsement from Wells Fargo, the alleged allonge does not establish that Freddie Mac was ever the holder of the note.

Freddie Mac claims that the assignments of mortgage from Legacy Mortgage to Wells Fargo and from Wells Fargo to Freddie Mac are sufficient to establish its right to enforce the note as a nonholder in possession. Freddie Mac cites *Bank of New York v. Dobbs*, Knox App. No. 2009-CA-2, 2009-Ohio-4742, and Section 5.4 of the Third Restatement of Property (Mortgages), arguing that the assignment of a mortgage is sufficient to establish the transfer of the note, and vice versa.

In *Dobbs*, the Fifth District noted that, "[i]n Ohio it has been held that transfer of the note implies transfer of the mortgage. *** 'Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.'" (Internal citations omitted.) *Dobbs* at ¶¶29-30. The *Dobbs* court extended that rationale, holding that the assignment of a mortgage, without an express transfer of the note, was also sufficient to transfer both the mortgage and the note, if the record indicated that the parties intended to transfer both. *Id.* at ¶31.

The assignment of mortgage from Legacy to Wells Fargo assigned, sold, and transferred all of Legacy's "rights, title and interest in and to a certain mortgage/deed of trust to secure the debt executed by Duane Schwartzwald and Julie O. Schwartzwald ***." The assignment from Wells Fargo to Freddie Mac stated that Wells Fargo "does hereby

sell, assign, transfer, and set over until Federal Home Loan Mortgage Corporation [the Schwartzwalds' mortgage] ***, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon, and secured by the following real estate ***." In addition, although the indorsements on the allonge to the note are inadequate to constitute negotiation under the UCC, the indorsements involved the same entities as were involved in the mortgage assignments and thus suggest that Legacy and Wells Fargo intended to transfer ownership of the note and mortgage together.

In our view, the assignments reflect the intent of Legacy and Wells Fargo to convey both the mortgage and the note, along with the attendant right to enforce the note. We therefore conclude that Freddie Mac, as assignee of the Schwartzwalds' mortgage, was entitled to bring a foreclosure action, due to the Schwartzwalds' default, as a nonholder in possession with a right to enforce the note.

C. Standing to Bring Foreclosure Action

The Schwartzwalds further claim that Freddie Mac lacked standing to prosecute the case, because it did not establish that it held the note or was the mortgagee by assignment at the time the complaint was filed.

"Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. It is an issue of law, so we review the issue de novo. To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. This holding is based upon the principle that 'it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled

judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.' *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. ***

"An actual controversy is a genuine dispute between adverse parties. It is more than a disagreement; the parties must have adverse legal interests. ***" (Internal citations omitted) *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶9-10.

Common-law standing is similar to Civ.R. 17(A)'s real-party-in-interest requirement. The phrase "real party in interest" means "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is *directly* benefitted or injured by the outcome of the case." *Countrywide Home Loans, Inc. v. Swayne*, Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶28, quoting *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24 (emphasis in original). Indeed, one who has standing by possessing a "personal stake" in a lawsuit undoubtedly also has a "real interest in the subject matter of the litigation."

The parties disagree on whether standing must be established when the complaint is filed. Freddie Mac asserts that standing is not jurisdictional and that the lack of standing may be cured, consistent with Civ.R. 17, which states in part: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Freddie Mac contends that it was permitted to cure any

standing defect prior to judgment and that it had done so by having a separately executed assignment of mortgage (assigning the mortgage from Wells Fargo to Freddie Mac) recorded before the filing for and granting of judgment.

In contrast, the Schwartzwalds contend that standing and real party in interest status are not synonymous. They assert that the plaintiff must be the real party in interest (consistent with Civ.R. 17) when judgment is entered, but standing is a threshold matter that must exist at the time the complaint is filed. In short, the Schwartzwalds view standing as a jurisdictional prerequisite, i.e., that "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210.

Some Ohio appellate districts have held, as Freddie Mac claims, that the lack of ownership of a mortgage or note at the time a complaint is filed does not preclude judgment in favor of the plaintiff, so long as the plaintiff is the owner of the note and/or assignee of the mortgage at the time the summary judgment is entered. See *LaSalle Bank Natl. Assn. v. Street*, Licking App. No. 08 CA 60, 2009-Ohio-1855 (affirming judgment for bank as the "real party in interest" when the assignment of the mortgage and the note occurred one week after the complaint was filed); *Bank of New York v. Stuart*, Lorain App. No. 06 CA 8953, 2007-Ohio-1483, at ¶¶12-13 (plaintiff-lender was real party in interest for foreclosure even though it was assigned mortgage five months after complaint filed); *Wachovia Bank v. Cipriano*, Guernsey App. No. 09CA007A, 2009-Ohio-5470, ¶36.

Other districts have taken a different view, requiring the plaintiff to own the note and the mortgage at the time that the complaint is filed. See *Wells Fargo Bank v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092 (holding that Civ. R. 17(A) does not apply

unless a plaintiff has standing in the first place to invoke the jurisdiction of the court); *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, ¶24 (plaintiff could not cure lack of real party in interest status at the time the complaint was filed by its subsequent acquisition of the note and mortgage).

We have yet to take a position on this issue, and the Supreme Court of Ohio has accepted this issue for review in *U.S. Bank, N.A. v. Duvall*, Sup.Ct. No. 2011-218.

The term "jurisdiction" is used in several contexts. "Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.' The term encompasses jurisdiction over the subject matter and over the person. *** It is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'

"The term 'jurisdiction' is also used when referring to a court's exercise of its jurisdiction over a particular case. The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11-12. (Citations omitted.)

"Jurisdiction over a particular case is an elusive concept, defined best by example. A common pleas court is a court of general jurisdiction and has subject matter jurisdiction over crimes committed by an adult. Nevertheless, where the common pleas court fails to strictly comply with procedures in a capital case, such as the failure to utilize a statutorily mandated three judge panel, it is an improper exercise of jurisdiction over the case. *Id.*, syllabus." *T.M. v. J.H.*, Lucas App. Nos. L-10-1014, L-10-1034, 2011-Ohio-283, ¶66.

"Although a court may have subject matter jurisdiction over an action, if a claim is

asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." (Internal citations and footnote omitted) *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275.⁵

If there is no jurisdiction in the court, then the judgment is void and can be challenged at any time. One could speculate on the effect of a holding that any judgment and decree of foreclosure ever granted wherein it can be shown that the mortgagee did not, at the time of the initial complaint, have standing and thus was not the real party in interest, results in the court's not having jurisdiction.

The distinction is between lacking jurisdiction and improperly exercising the jurisdiction conferred on it. If a court improperly exercises its jurisdiction by granting foreclosure to a plaintiff lacking standing, the judgment would not be void but, rather, voidable on appeal.

This appears to be why Civ.R. 17 allows amendment. The 1970 Staff Notes to the Rule give the example of an administrator who sues, in good faith, but under an invalid appointment or a bankrupt who sues without the trustee's permission. In each case, the plaintiff is given the opportunity to amend the pleadings and the court is given the opportunity to exercise its jurisdiction.

⁵We acknowledge that *Suster* has been distinguished in certain foreclosure cases. E.g., *MERS v. Mosley*, Cuyahoga App. No. 93170, 2010-Ohio-2886.

Lenders may "feel" that debtors should not avoid their debts or maintain the security they pledged only because a paperwork chain was not completed prior to the filing of a complaint; borrowers may "believe" that, before their homes can be taken from them, a creditor must punctiliously comply with the "ritualistic formalities" to which they (the title owners) have been held almost since the "memory of man runneth not to the contrary."

The objective is for a court to be presented with a real controversy between parties actually affected by its outcome (i.e., "have a personal stake in the outcome of a legal controversy with an adversary," *Kincaid*, supra). Permitting supplemental or amended filings, pursuant to Civ.R. 17(A), allows the court to properly exercise its jurisdiction and resolve the controversy on its merits.

Thus, in our view, the required analysis is the one put forth by Freddie Mac, i.e., that the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment. To hold otherwise would elevate lack of standing to a jurisdictional defect, a position that the Ohio Supreme Court has thus far rejected.

It is undisputed that Freddie Mac had been assigned the Schwartzwalds' mortgage and was in possession of the note prior to the filing for and granting of summary judgment. Accordingly, the trial court did not err in implicitly rejecting the Schwartzwalds' standing argument.

D. Doctrine of Unclean Hands

Finally, the Schwartzwalds claim that they raised a genuine issue of material fact as to whether Wells Fargo had "unclean hands." They state that Wells Fargo, as servicing agent for Freddie Mac, induced the Schwartzwalds into marketing their property, but failed to act in good faith when presented with an offer for a short sale. They claim that Wells

Fargo prevented them "from limiting or eliminating their liability to Freddie Mac."

"The maxim, 'he who comes into equity must come with clean hands,' requires only that the [party invoking equity] must not be guilty of reprehensible conduct with respect to the subject matter of [the] suit." *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45, citing *Kinner v. Lake Shore & M.S. Ry. Co.* (1904), 69 Ohio St. 339, paragraph one of the syllabus. "For the doctrine of unclean hands to apply, the party against whom it is asserted must be at fault in relation to the other party and in relation to the transaction upon which the claims are based." *Fiore v. Larger*, Montgomery App. No. 22949, 2009-Ohio-5408, ¶31, citing *Trott v. Trott*, Franklin App. No. 01AP-852, 2002-Ohio-1077.

In her affidavit, Julie Schwartzwald stated that Wells Fargo encouraged the Schwartzwalds to pursue a short sale of their property.⁶ She asserted that, upon notification to Wells Fargo that they had a buyer, Wells Fargo acted in a dilatory manner in reviewing the Schwartzwalds' request for approval of their short sale and led them to believe that the short sale would be approved. The request for a short sale was denied in September 2009, more than 120 days after the request was made.

Even accepting Mrs. Schwartzwald's allegations as true, we cannot conclude that Freddie Mac had unclean hands that would preclude this foreclosure action. Once the Schwartzwalds defaulted on their note and the balance was accelerated, the lender was entitled to pursue a foreclosure action against them. See *Gaul v. Olympia Fitness Center, Inc.* (1993), 88 Ohio App.3d 310, 315. "A lender's decision to enforce its contract rights

⁶By definition, a short sale involves a purchase price less than the amount owed to the lender.

is not considered an act of 'bad faith.'" Id. at 320. Well Fargo's inefficiency, incompetence, or disregard for its customers and the public notwithstanding, Wells Fargo was under no obligation to approve the Schwartzwalds' short sale request.

There is no indication that Wells Fargo led the Schwartzwalds to believe that they were not required to make mortgage payments while their request for approval of the short sale was pending. And, to the extent that Wells Fargo told the Schwartzwalds not to worry about the foreclosure action that had been filed, any prejudice that might have resulted from those statements was negated by the trial court's granting of the Schwartzwalds' motion to file an answer out of time. No other prejudice is alleged by the Schwartzwalds.

The trial court did not err in granting Freddie Mac's motion for summary judgment.

III.

The Schwartzwalds also claim that the trial court should have granted their cross-motion for summary judgment due to Freddie Mac's failure to establish standing. In light of our reasoning regarding Freddie Mac's motion for summary judgment, this argument is not well taken.

IV.

The uncertainty regarding standing and real party in interest, if not obvious from this opinion, is inherent in the Ohio Supreme Court's recognizing a conflict among the districts. The Schwartzwalds are urged to join in the Supreme Court case.

V.

The assignment of error is overruled.

The trial court's judgment will be affirmed.

.....

GRADY, P.J. and FAIN, J., concur.,

Copies mailed to:

Scott A. King
Terry W. Posey, Jr.
Andrew M. Engel
Hon. Stephen A. Wolaver

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Wells Fargo Bank, N.A. v. Byrd, 2008-Ohio-4603, 178 Ohio App.3d 285, 897 N.E.2d 722 (Ohio App. 1 Dist. 2008)

178 Ohio App.3d 285 (Ohio App. 1 Dist. 2008)

897 N.E.2d 722, 2008-Ohio-4603

WELLS FARGO BANK, NATIONAL ASSOCIATION et al., Appellants,

v.

BYRD et al., Appellees; et al.

Nos. C-070889, C-070890.

Court of Appeals of Ohio, First District, Hamilton.

September 12, 2008

[897 N.E.2d 723] The Law Offices of John D. Clunk, Jason A. Whitacre, Michael L. Wiery, and Laura C. Landor, Hudson, for appellants.

Legal Aid Society of Southwest Ohio, Noel M. Morgan, and Elizabeth Tull, Columbus, for appellees.

DINKELACKER, Judge.

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{¶ 1} Since plaintiff-appellant Wells Fargo was not a real party in interest at the time it filed suit in this foreclosure action, the trial court properly dismissed the case. But the dismissal should have been without prejudice. Further, the trial court lacked authority to sanction counsel by requiring counsel to adhere to additional pleading requirements in future cases.

Putting the Cart Before the House

{¶ 2} On January 23, 2007, Wells Fargo filed a foreclosure action against defendants-appellees, Gloria and Ellsworth Byrd. Wells Fargo claimed that it was " the holder and owner of a certain promissory note" and " the owner and holder of a certain mortgage deed, securing the payment of said note." But both the note and the mortgage identified in the complaint named WMC Mortgage Corporation as the lender.

{¶ 3} Wells Fargo filed a motion seeking summary judgment. Attached to the motion for summary judgment was an " Assignment of Note and Mortgage" that acknowledged that WMC had sold, assigned, transferred, and set over the mortgage deed and promissory note to Wells Fargo. The assignment was dated March 2, 2007-over a month after the complaint had been filed.

{¶ 4} The case was referred to a magistrate who entered summary judgment for Wells Fargo. The trial court sustained the Byrds' subsequent objections to that decision. The trial court then took two additional steps not requested by the Byrds: (1) it dismissed the case with prejudice and (2) it ordered the law firm representing Wells Fargo, appellant Law Offices [897 N.E.2d 724] of John D. Clunk Co., L.P.A., to submit "proof that their client is, in fact, a real party in interest at the time of the filing" of any future foreclosure complaints that the firm might file.

{¶ 5} Wells Fargo requested findings of fact and conclusions of law. In response, the trial court issued an entry titled "Findings of Fact, Conclusions of Law, and Amended Judgment Entry," in which it said that the dismissal was "not a dismissal on the merits." The trial court explained the Clunk firm's future

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obligations to the court by stating that "at the time of the filing of a foreclosure action, [the Clunk firm must] file documentation showing that their client is the real party in interest as of the date of the filing of the lawsuit."

{¶ 6} Both Wells Fargo and the Clunk firm have appealed. Wells Fargo argues that (1) the trial court erred in dismissing the case with prejudice on jurisdictional grounds, (2) the trial court erred in dismissing the case without notice, (3) the trial court should have adopted the decision of the magistrate granting its motion for summary judgment, (4) the trial court misapplied Civ.R. 17, (5) the trial court lacked authority to convert its original dismissal with prejudice to a dismissal without prejudice, and (6) the trial court improperly used its subsequent entry to modify the substance of its prior decision. The Clunk firm argues, in two assignments of error, that the trial court improperly sanctioned it.

The Dismissal Issue: To Dismiss or Not

{¶ 7} There is little case-law guidance on the issue whether Wells Fargo, which was clearly not a real party in interest when the suit was filed, could later have cured the defect by producing an after-acquired interest in the litigation. We hold that the defect could not have been cured in that way.

{¶ 8} Civ.R. 17(A) says that "[e]very action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶ 9} 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.^[1] The Eleventh Appellate District has held that "Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court."^[2] The court also noted that "Civ.R. 17(A) was not applicable 'unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter.' Civ.R. 17 only applies if

the action is commenced by one who is sui juris or the proper party to bring the action." [3]

[897 N.E.2d 725] ¶ 10} The Twelfth Appellate District agrees. In 2007, the court held that " [t]he ' real party in interest is generally considered to be the person who can discharge the claim on which the suit is brought * * * [or] is the party who, by substantive law, possesses the right to be enforced.' " [4] Unless a party has some real interest in the subject matter of the action, that party will lack standing to invoke the jurisdiction of the court. The court concluded that " [i]n a breach of contract claim, only a party to the contract or an intended third-party beneficiary of the contract may bring an action on a contract in Ohio." [5]

¶ 11} Such a rule would seem to be in the spirit of Civ.R. 17, which only allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest. [6]

¶ 12} Since WMC was not joined or substituted in this case, the only argument Wells Fargo could have made was that WMC had ratified its actions. Ratification is a way that an agent can bind a principal. [7] But ratification will not apply when the actor is not acting as the agent of the principal. [8]

¶ 13} In this case, Wells Fargo admitted to the trial court that it was not the real party in interest when the suit was filed. Wells Fargo filed suit on its own behalf and acquired the mortgage from WMC later. It was not acting as WMC's agent. There was no evidence that WMC had " ratified" the commencement of the action-only that it had sold the mortgage to Wells Fargo. None of the documents indicated that WMC even knew about this case. For ratification

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to occur, the ratifying party must know what actions it is ratifying. [9] While Wells Fargo repeatedly argued that ratification had occurred, it seemed to be confused as to which party had to ratify. Below, it argued that " Plaintiff, being a real party in interest, did ratify the commencement of this action * * *." But Civ.R. 17 makes clear that it was WMC, not Wells Fargo, that had to ratify the commencement of the action.

¶ 14} Wells Fargo has found one decision that holds to the contrary. In *Bank of New York v. Stuart*, [10] the Ninth Appellate District held that a bank that had filed a foreclosure action could cure a real-party-in-interest problem by subsequently obtaining [897 N.E.2d 726] the mortgage. [11] But the only authority for this holding was two federal cases from 1966 and 1979. And the two cases are distinguishable. In the first case, the plaintiff was the one who had done all the work that was the subject of the litigation, and the " real party in interest" was " a mere ' straw man' throughout." [12] In the second case, the plaintiff was already a party in his own right and was assigned the claims of another plaintiff. [13]

¶ 15} We find instructive a more recent federal case addressing the application of the rule (but in the context of a statute of limitations). [14] In that case, the party suing did not have a claim at the time suit was filed but received an assignment of the claim after it had commenced the litigation. The court held that " [Civ.R.] 17(a) does not apply to a situation where a party with no cause of action files a lawsuit to toll the statute of limitations and later obtains a cause of action through assignment." [15] In that case, the court concluded that " B & K's assignment to the Wulffs of its claim against CMA cannot ratify the Wulffs' commencement of suit on a claim which theretofore did not exist." [16]

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{¶ 16} In light of the foregoing authority, we must respectfully disagree with the Ninth Appellate District. We hold 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. Wells Fargo's third, fourth, and sixth assignments of error are overruled.

The Dismissal Issue: Sua Sponte Dismissal

{¶ 17} Having determined that the trial court could have properly dismissed the case for lack of standing when the suit was filed, we must next determine if dismissal was proper when, as here, it was not requested by the Byrds. Sua sponte dismissals ordinarily prejudice appellants, because they deny any opportunity to respond to the alleged insufficiencies.^[17] But here both parties argued the real-party-in-interest issue, and the facts were clear in the record. Wells Fargo did not have standing at the time the complaint was filed. The record unequivocally indicates that WMC did not assign its rights under the mortgage to Wells Fargo until March 2, 2007. Under these circumstances, there was nothing left for the trial court to address. We overrule Wells Fargo's second assignment of error.

[897 N.E.2d 727] *The Dismissal Issue: With or Without Prejudice*

{¶ 18} A dismissal of a claim other than on the merits should be a dismissal without prejudice.^[18] We agree with Wells Fargo that a dismissal that is premised on jurisdiction "operate[s] as a failure otherwise than on the merits" and should be a dismissal without prejudice.^[19] The dismissal of an action because one of the parties is not a real party in interest or does not have standing is not a dismissal on the merits.^[20]

{¶ 19} But the trial court dismissed this case with prejudice. While it attempted to correct this with a subsequent entry, a trial court is without

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jurisdiction to modify an order dismissing a cause with prejudice to one without prejudice, unless the requirements of Civ.R. 60 are met.^[21]

{¶ 20} In this case, the requirements of Civ.R. 60 were not met, and, therefore, the trial court could not have changed its final decision from a dismissal with prejudice to one without prejudice. We sustain Wells Fargo's first and fifth assignments of error. But since the case should have been dismissed without prejudice, we modify the decision of the trial court from a dismissal with prejudice to a dismissal without prejudice. Wells Fargo, now a proper party to initiate a foreclosure action against the Byrds, is free to do so.

The Sanction Issue

{¶ 21} The Clunk firm, in two related assignments of error, claims that the trial court improperly ordered it to "file documentation showing that their client is the real party in interest as of the date of the filing of the lawsuit" in all future foreclosure actions filed by the firm. We agree.

{¶ 22} There is no authority for what the trial court did. The Byrds did not seek sanctions, there was no notice of the possibility that this firm would be sanctioned, and there was no hearing on sanctions. The trial court did not limit the sanction to this case but sanctioned the firm for all of its future conduct. In essence, the trial court crafted an additional pleading requirement that would apply only to one law firm. Apart from the vexatious-litigator statute, there is no authority that would allow a trial court to impose additional pleading requirements on an individual-let alone a law firm-in future litigation. The Byrds have cited no such authority and, in fact, have not addressed these assignments of error in their brief. We sustain the law firm's two assignments of error.

Conclusion

{¶ 23} The trial court properly dismissed the foreclosure complaint filed by Wells Fargo in this case because, at the time the complaint was filed, it did not own the mortgage that was the basis for the suit. Acquiring the mortgage by assignment after the suit was commenced could not have cured the jurisdictional defect arising from the fact that, at the time the lawsuit was filed, Wells Fargo had no claims to make against the Byrds. But while the dismissal was proper, it should have been, and is now ordered to be, without prejudice.

[897 N.E.2d 728] {¶ 24} The trial court lacked authority to order the Clunk firm, upon the filing of future foreclosure complaints, to present additional documentation demonstrating that its clients are the real parties in interest.

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{¶ 25} The judgment of the trial court is affirmed in part as modified with respect to dismissal of the action, and reversed in part with respect to the imposition of sanctions.

Judgment accordingly.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Notes:

[1] *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 64 O.O.2d 103, 298 N.E.2d 515, syllabus.

[2] (Citations omitted.) *Northland Ins. Co. v. Illum. Co.*, 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, 2004 WL 612889, at ¶ 17.

[3] *Travelers Indemn. Co. v. R.L. Smith Co.* (Apr. 13, 2001), 11th Dist. No. 2000-L-014, 2001 WL 369677, quoting *Franzese v. Falcon* (Nov. 19, 1979), Lake App. No. 7-071, 1979 WL 208213.

[4] *Discover Bank v. Brockmeier*, 12th Dist. No. CA2006-07-078, 2007-Ohio-1552, 2007 WL 959907, at ¶ 7, quoting *In re Highland Holiday Subdiv.* (1971), 27 Ohio App.2d 237, 240, 56 O.O.2d 404, 273 N.E.2d 903.

[5] *Id.*, citing *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220.

[6] Civ.R. 17(A).

[7] See *Morr v. Crouch* (1969), 19 Ohio St.2d 24, 48 O.O.2d 43, 249 N.E.2d 780.

[8] See *Alban Equip. Co. v. MPH Crane, Inc.* (June 2, 1989), 4th Dist. No. 424, 1989 WL 62860 (" ' Ratification does not result from the affirmance of a transaction with a third person unless the one acting purported to be acting for the ratifier "), quoting 1 Restatement of the Law 2d, Agency (1958) 217, Section 85; see also *Williams v. Steams* (1898), 59 Ohio St. 28, 51 N.E. 439.

[9] See *Lithograph Bldg. Co. v. Watt* (1917), 96 Ohio St. 74, 85, 117 N.E. 25 (Before the principal can be held to ratify the unauthorized acts of his agent, it must appear that he had knowledge of all material facts).

[10] 9th Dist. No. 06CA008953, 2007-Ohio-1483, 2007 WL 936706.

[11] *Id.* at ¶ 12.

[12] *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.* (D.S.C.1979), 515 F.Supp. 64, 84-85.

[13] *Dubuque Stone Prods. Co. v. Fred L. Gray Co.* (C.A.8, 1966), 356 F.2d 718, 723-724.

[14] *United States v. CMA, Inc.* (C.A.9, 1989), 890 F.2d 1070, 1074.

[15] *Id.*

[16] *Id.* See also *Feist v. Consolidated Freightways Corp.* (E.D.Pa.1999), 100 F.Supp.2d 273, 274 (plaintiff's filing of suit in his own name after his Chapter 7 case was closed, and after having failed to list injury claim as estate asset, was not result of honest mistake and thus warranted dismissal rather than substitution of bankruptcy trustee as real party in interest); *Automated Information Processing, Inc. v. Genesys Solutions Group, Inc.* (D.N.Y.1995), 164 F.R.D. 1, 3 (The rule permitting substitution of real party in interest when necessary to avoid injustice did not permit substitution of newly formed corporation as plaintiff after it was discovered that corporation that originally brought action had been dissolved).

[17] *MBNA Am. Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, 2007 WL 2318095, at ¶ 14.

[18] See *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222, 226, 23 O.O.3d 232, 431 N.E.2d 660.

[19] See Civ.R. 41(B)(4).

[20] See *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, at ¶ 51.

[21] *Young v. Ohio Adult Parole Auth.* (Apr. 27, 2001), 2nd Dist. No. 2001 CA 3, 2001 WL 427563.

Bank of New York v. Gindele, 2010-Ohio-542, C-090251 (OHCA1)

2010-Ohio-542**BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC.,
ALTERNATIVE LOAN TRUST 2006-40T1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2006-40T1, Plaintiff-Appellee,****v.****JAMIE L. GINDELE****and****GARY GINDELE, Defendants-Appellants.****No. C-090251****Court of Appeals of Ohio, First District, Hamilton****February 19, 2010**

Civil Appeal From: Hamilton County Common Pleas Court, TRIAL NO. A-0710723

James S. Wertheim, Rose Marie L. Fiore, and McGlinchey Stafford, PLLC, for Plaintiff-Appellee

James J. Slattery, Jr., for Defendants-Appellants.

DECISION

William L. Mallory, Judge.

{¶1} Defendants-appellants Jamie and Gary Gindele appeal the summary judgment entered for plaintiff-appellee Bank of New York on its foreclosure complaint. On appeal, the Gindeles argue that Bank of New York did not acquire its interest until after the foreclosure complaint had been filed, and that under our holding in *Wells Fargo Bank, NA. v. Byrd*,^[1] Bank of New York's complaint should have been dismissed without prejudice. We agree.

{¶2} In *Byrd*, we 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."^[2] At oral argument in this case, Bank of New York has repeated its assertion that it had an existing interest in the property at issue when it filed suit, but the record does not support this assertion.

{¶3} A thorough review of the record reveals that the sole indication of its interest as mortgagee is an after-acquired assignment; and the bank failed to produce any evidence in the trial court affirmatively establishing a preexisting interest. Bank of New York has also asserted both that it had acted as an agent, and that its predecessor in interest had later ratified its foreclosure complaint. But because at the time of filing neither agency nor ratification had been alleged or documented, we will not entertain this argument on appeal.

{¶4} We likewise reject Bank of New York's argument that the real party in interest when the

lawsuit was filed was later joined by the Gindeles. We are convinced that the later joinder of the real party in interest could not have cured the Bank of New York's lack of standing when it filed its foreclosure complaint. This narrow reading of Civ.R. 17 comports with the intent of the rule. As other state and federal courts have noted, Civ.R. 17 generally allows ratification, joinder, and substitution of parties "to avoid forfeiture and injustice when an understandable mistake has been made in selecting the parties in whose name the action should be brought."^[3] "While a literal interpretation of * * * Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff was named, the Advisory Committee's Notes make it clear that this provision is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed."^[4]

{¶15} In this case, the record does not reflect any understandable mistake by Bank of New York; there is no indication that the identity of the proper party was difficult to ascertain; and there is no documentary proof that Bank of New York owned an enforceable interest when it filed its foreclosure complaint.

{¶16} 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. Bank of New York failed to establish an enforceable interest that existed at the time it filed suit, and it has not alleged or proved understandable mistake or that the identity of the proper party was not readily ascertainable. Bank of New York's complaint in foreclosure should have been dismissed without prejudice under *Byrd*.

{¶17} The Gindeles' assignment of error is sustained, the judgment favoring Bank of New York is reversed, and this cause is remanded for further proceedings in accordance with this decision.

Judgment reversed and cause remanded.

Cunningham, P.J., and Dinkelacker J., concur.

Notes:

[1] 178 Ohio.App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.

[2] *Id.* at ¶16.

[3] *Ohio Central RR. Sys. v. Mason LawFirm Co., LPA*, 182 Ohio.App.3d 814, 2009-Ohio-3238, 915 N.E.2d 397, quoting *Agri-Mark, Inc. v. Niro, Inc.* (D.Mass.2000), 190 F.R.D. 293; see, also, Fed.R.Civ.P. 17 Advisory Committee Note.

[4] *Id.*

Wells Fargo Bank, N.A. v. Jordan, 2009-Ohio-1092, 91675 (OHCA8)

2009-Ohio-1092**WELLS FARGO BANK, N.A. PLAINTIFF-APPELLEE****v.****OTIES JORDAN, ET AL. DEFENDANTS-APPELLANTS****No. 91675****Court of Appeals of Ohio, Eighth District, Cuyahoga****March 12, 2009**

2009-Ohio-1092

Civil Appeal from the Cuyahoga County Court of Common Pleas Case No. CV-631753

ATTORNEY FOR APPELLANTS Oties Jordan (pro se) Sylvia Jordan (pro se)

ATTORNEY FOR APPELLEE Benjamin D. Carnahan Shapiro, Van Ess, Phillips & Barragate,
L.L.P.

BEFORE: Celebrezze, J., Rocco, P.J., and Kilbane, J.

JOURNAL ENTRY AND OPINION

FRANK D. CELEBREZZE, JR., JUDGE

{¶ 1} Appellants, Oties Jordan, Sylvia Jordan, and Stay Focused, L.L.C., a company for which Oties Jordan is the statutory agent (collectively referred to as "Jordan"), bring this appeal challenging the trial court's entry of summary judgment in favor of appellee, Wells Fargo Bank ("WFB").

{¶ 2} On January 15, 2009, WFB filed a motion to dismiss for lack of a final appealable order. After a thorough review of the record, and for the reasons set forth below, we deny WFB's motion to dismiss and hold that the trial court erred by granting summary judgment.

{¶ 3} On January 3, 2003, Jordan executed a note and mortgage ("the Mortgage") with Delta Funding Corporation for property located on Wade Park Avenue in Cleveland, Ohio ("the Property"). On or about March 1, 2007, Jordan defaulted on the loan. On August 3, 2007, WFB filed a complaint against Jordan for money judgment, foreclosure, and relief. Attached to the complaint was a copy of the note and mortgage naming Delta Funding Corporation as the holder of the Mortgage. On November 8, 2007, Jordan filed his answer and counterclaim against WFB for fraud, negligence, and violations of federal and state creditor lending laws.

{¶ 4} On February 26, 2008, WFB filed a motion for summary judgment and a motion to dismiss Jordan's counterclaim. Despite extensions of time granted by the magistrate assigned to hear the case, Jordan did not file a timely opposition to WFB's motions. On April 7, 2008, the magistrate issued the following order: "As Plaintiffs motion to dismiss counterclaim presents matters outside the pleadings, said motion is

deemed part of plaintiffs motion for summary judgment. Therefore, inasmuch as reasonable minds could conclude from the evidence submitted only that plaintiff is entitled to judgment and a decree of foreclosure, plaintiffs motion for summary judgment is granted. ***." Jordan filed objections to the magistrate's order.

{¶ 5} In its May 21, 2008 judgment entry, the trial court adopted the magistrate's decision in an entry that read: "The objection to the Magistrate's Decision is overruled. The Court adopts the Magistrate's Decision attached hereto and incorporated herein. Judgment for the substitute plaintiff against Oties Jordan, aka Oties Jordan, Jr., in the sum of \$72,690.93 with interest thereon at the rate of 9.24 [percent] per annum from March 1, 2007. Decree of foreclosure for substitute plaintiff. Pursuant to Civ.R. 54(B) the court finds no just cause for delay."

Final Appealable Order

{¶ 6} In its motion to dismiss, WFB argues that the trial court's entry is not a final appealable order because it does not set forth its own judgment. We disagree.

{¶ 7} Pursuant to Section 3 (B) (2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of final orders of lower courts. A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *In re Adoption of M.P.*, Franklin App. No. 07AP-278, 2007-Ohio-5660, ¶15, citing *Denham v. City of New Carlisle*, 86 Ohio.St.3d 594, 596, 1999-Ohio-128, 716 N.E.2d 184.

{¶ 8} R.C. 2505.02(B) defines a final order, in pertinent part, as follows: "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]"

{¶ 9} "For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Natl. City Commer. Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio.St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663.

{¶ 10} WFB takes issue here with whether the trial court's entry adopting the magistrate's decision is a final appealable order. "Civ.R. 53(E)(5) contains the following instruction: The court shall enter its own judgment on the issues submitted for action and report by the referee. Incorporating the referee's report without separately stating its own judgment does not constitute a final appealable order." *In re Michael* (1991), 71 Ohio.App.3d 727, 595 N.E.2d 397. A trial court order stating merely that it is adopting a magistrate's decision is not a final appealable order. *Harkai v. Scherba Indus.* (2000), 136 Ohio.App.3d 211, 736 N.E.2d 101. To constitute a final appealable order, a court's entry reflecting action on a magistrate's decision must be a separate and distinct instrument from the decision and must grant relief on the issues originally submitted to the court. *In re Jesmone Dortch* (1999), 135 Ohio.App.3d 430, 734 N.E.2d 434.

{¶ 11} "[T]he trial court must *** enter its own independent judgment disposing of the matters at issue between the parties, such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined. In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court." *Burns v. Morgan*, 165 Ohio.App.3d 694, 2006-Ohio-1213, 847 N.E.2d 1288, quoting *Yahraus v. City of Circleville*, 4th Dist. No. 00CA04, 2000-Ohio-2019, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist.

No. 90-T-4396.

{¶ 12} We find that the trial court's entry in this case is a final appealable order. In light of the fact that the magistrate incorporated WFB's motion to dismiss Jordan's counterclaim into its summary judgment motion, the judgment entry sets forth its judgment and a judgment amount in favor of WFB. Furthermore, the trial court order included the requisite Civ.R. 54(B) language, which grants this court jurisdiction to hear the appeal. WFB's motion to dismiss is denied.

Review and Analysis

{¶ 13} We next address the merits of Jordan's appeal, in which he raises three assignments of error for our review. We find Jordan's first assignment of error dispositive of the case.

{¶ 14} "I. The trial court erred in granting summary judgment to the substitute party plaintiff as genuine issues of material fact remained outstanding to be determined."

{¶ 15} In his first assignment of error, Jordan argues that summary judgment is improper because there was no evidence presented that WFB owned the Mortgage. Although we disagree with Jordan's claim that summary judgment was improper due to a lack of ownership evidence, we find that WFB did not have standing when it filed the complaint; therefore, the trial court erred by granting summary judgment in favor of WFB and should have dismissed this case without prejudice.

{¶ 16} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 17} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio.St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio.St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 18} In *Dresher v. Burt*, 75 Ohio.St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio.St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." *Id.* at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a genuine issue for trial exists. *Id.*

{¶ 19} This court reviews the lower court's granting of summary judgment de novo. *Brown v. County Commrs.* (1993), 87 Ohio.App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***. [T]he motion must be overruled if reasonable

minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio.App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio.App.3d 735, 741, 607 N.E.2d 1140.

{¶ 20} Civ.R. 17(A) states that "[e]very action shall be prosecuted in the name of the real party in interest. *** No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶ 21} "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. *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 298 N.E.2d 515, syllabus. The Eleventh Appellate District has held that 'Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.' *Northland Ins. Co. v. Illuminating Co.*, 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, at ¶17 (internal quotations and citations omitted). The court also noted that 'Civ.R. 17(A) was not applicable unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. Civ.R. 17 only applies if the action is commenced by one who is sui juris or the proper party to bring the action.' *Travelers Indemn. Co. v. R. L. Smith Co.* (Apr. 13, 2001), 11th Dist. No. 2000-L-014." *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio.App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.

{¶ 22} The holder of rights or interest in property is a necessary party to a foreclosure action. See *Hembree v. Mid-America Fed. Sav. & Loan Assn.* (1989), 64 Ohio.App.3d 144, 152, 580 N.E.2d 1103.

{¶ 23} In *Deutsche Bank National Trust Co. v. Steele* (6th Cir., Jan. 8, 2008), Case No. 2:07-CV-886, the court held: "While a court has no duty to search the record and may properly limit its review of an unopposed motion for summary judgment to the facts relied on by defendant, *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-05 and 407 (6th Cir. 1992), it cannot enter judgment if the moving party is not entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. 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."

{¶ 24} In *Wells Fargo Bank, N.A. v. Byrd*, *supra*, where Wells Fargo filed suit on its own behalf but acquired the mortgage from the original lender after filing, the 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."

{¶ 25} Our facts are exactly the same here. Delta Funding Corporation owned the Mortgage for the Property on August 3, 2007, the date WFB filed its complaint against Jordan. On September 24, 2007, WFB filed a Notice of Filing of Final Judicial Report. Attached to the Notice were a Final Judicial Report and an Assignment of Mortgage, indicating the Mortgage had been assigned to WFB on August 22, 2007, nearly three weeks after it filed its complaint. In short, WFB was not the real party in interest on the date it filed its complaint-seeking-foreclosure-against Jordan.

{¶ 26} Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan's first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint without prejudice.

{¶ 27} Having sustained Jordan's first assignment of error, we find his remaining assignments of error are moot.^[1]

{¶ 28} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J., and MARY EILEEN KILBANE, J., CONCUR

APPENDIX

Appellant's remaining Assignments of Error:

II. That the trial court erred in granting the motion of Wells Fargo Bank to substitute party plaintiff filed 11/16/07 on 11/21/07 without hearing, substantial basis therefore, or even providing the defendant with an opportunity to receive, review or reply to the motion.

III. That the trial court erred in determining it had jurisdiction to proceed in this foreclosure contrary to the Federal Court determinations and the standard within the Court of Common Pleas Cuyahoga County.

Notes:

^[1]Appellant's remaining Assignments of Error are included in the Appendix to this Opinion.

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. :

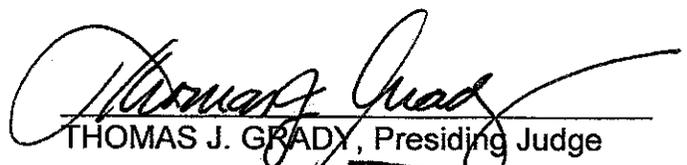
FINAL ENTRY

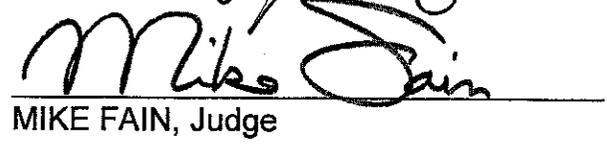
Defendants-Appellants :

.....

Pursuant to the opinion of this court rendered on the 3rd day of
June, 2011, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.


THOMAS J. GRADY, Presiding Judge


MIKE FAIN, Judge


JEFFREY E. FROELICH, Judge

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Hon. Stephen A. Wolaver
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Xenia, Ohio 45385

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. :

(Civil appeal from
Common Pleas Court)

Defendants-Appellants :

.....
OPINION

Rendered on the 3rd day of June, 2011.
.....

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.....

FROELICH, J.

Duane and Julie Schwartzwald appeal from a judgment of the Greene County Court of Common Pleas, which granted summary judgment to the Federal Home Loan Mortgage

Corporation ("Freddie Mac"), denied the Schwartzwalds' cross-motion for summary judgment, and entered a judgment and decree of foreclosure.

The Schwartzwalds claim that Freddie Mac did not establish that it was the holder of the note and assignee of the mortgage, that Freddie Mac lacked standing to institute the foreclosure action, and that the trial court should not have granted Freddie Mac the equitable relief of foreclosure due to unclean hands. For the following reasons, the trial court's judgment will be affirmed.

I.

In November 2006, Duane and Julie Schwartzwald purchased the property located at 2202 East Spring Valley Painters Road in Xenia, Ohio. To finance the purchase, they executed a note in favor of Legacy Mortgage in the amount of \$251,250, and signed a mortgage granting Legacy Mortgage a security interest in the property.

According to Julie Schwartzwald's affidavit in response to Freddie Mac's summary judgment motion, the couple began to have concerns during the summer of 2008 that Mr. Schwartzwald might be laid off from his employment. The Schwartzwalds contacted Wells Fargo regarding their loan. (Mrs. Schwartzwald did not indicate whether Wells Fargo was contacted as the loan servicer or the owner of the note.) Mr. Schwartzwald obtained a new job in Indiana in September 2008, and they placed their home on the market. By early 2009, they could no longer afford the mortgage payments, and they spoke to Wells Fargo about a loan modification or a short sale of the property. In April 2009, the Schwartzwalds had a buyer for a short sale of the property; the closing was set for June 2009 to allow Wells Fargo sufficient time to review the proposed sale. Mrs. Schwartzwald repeatedly spoke with Wells Fargo representatives and received no indications that the request for a

short sale would be denied.

On April 15, 2009, Freddie Mac filed a foreclosure action, alleging that it was the holder of a note, that the note was secured by a mortgage, and that the Schwartzwalds had defaulted on the note and mortgage.¹ Freddie Mac sought judgment on the note in the amount of \$245,085.18, with interest at the rate of 6.25 percent, as well as any court costs and advances. Freddie Mac also sought a finding that the mortgage was a valid first lien upon the real estate and an order that the mortgage be foreclosed and the property sold.

Freddie Mac attached to the complaint as Exhibit A a purported copy of the mortgage. The mortgage identified the Schwartzwalds as the borrowers and Legacy Mortgage as the lender. The mortgage was recorded on December 4, 2006. A legal description of the property was attached to the complaint as Exhibit B. No copy of the note was attached; although the complaint alleged that Freddie Mac was the holder of the note, Freddie Mac further alleged that "a copy of [the note] is currently unavailable."

On April 24, 2009, Freddie Mac filed a "Notice of Filing of Note," which attached a purported copy of the note signed by the Schwartzwalds. The note reflected that the Schwartzwalds, as borrowers, agreed to pay \$251,250 to Legacy Mortgage, the lender. The note established a 30-year term, to be repaid with interest at a rate of 6.25 percent. Payments were to be made to Wells Fargo Home Mortgage, the loan servicer. The final page was blank except for two stamped apparent indorsements. The first stated:

"Without Recourse

¹Freddie Mac also named the Greene County Treasurer, the Ohio Department of Job and Family Services (ODJFS), and Wells Fargo Bank as party-defendants due to the possibility that those parties may claim an interest in the property. ODJFS subsequently indicated that it had no interest in the property.

" Pay to the Order of

"

"Wells Fargo Bank, N.A."

The indorsement was signed by Joan M. Mills, Vice President. The second stated:

"Pay to the Order of

"Wells Fargo Bank, N.A.

"Without Recourse

"Legacy Mortgage"

This indorsement was signed by Lynette Hanson, Vice President.²

On June 17, 2009, Freddie Mac filed a "Notice of Filing Assignment of Mortgage."

The notice attached an assignment of mortgage, dated May 15, 2009 (after the complaint was filed), and recorded on May 27, 2009, which transferred the Schwartzwalds' mortgage from Wells Fargo Bank to Freddie Mac.

On July 6, 2009, Freddie Mac moved for a default judgment against the Schwartzwalds. The trial court denied the motion, because "[a]n examination of the file in this action reveals that the mortgage filed with the Greene County Recorder's Office on December 4, 2006, in Volume 2648, Page 149 was recorded with an incorrect legal description." The court granted leave to Freddie Mac to file an amended complaint in order to add a count for reforming the mortgage to match the legal description approved by the Greene County Tax Map Department. Freddie Mac subsequently filed an approved legal description, but indicated that it did not need to amend the complaint.

²The stamped name is difficult to read, but it appears the last name is "Hanson."

According to Mrs. Schwartzwald, in September 2009, the Schwartzwalds received a letter from Wells Fargo denying their request for a short sale. Mrs. Schwartzwald stated in her affidavit that “[a]t no time prior to the receipt of the letter denying approval of the short sale did Wells Fargo ever give me the impression that my short sale request would be denied. *** It was only when we received the Court’s Judgment Entry of September 29, 2009 [denying the motion for default judgment], did I realize that I had been misled by Wells Fargo.”

In October 2009, the Schwartzwalds moved to file an answer out-of-time. The motion was supported by an affidavit by Julie Schwartzwald, describing Wells Fargo’s dilatory conduct in addressing the Schwartzwalds’ request that Wells Fargo approve a short sale of their property and stating that Wells Fargo had told the Schwartzwalds “don’t worry about” the foreclosure action. The Schwartzwalds also attached a proposed answer, which asserted a general denial and raised several defenses, including that Freddie Mac lacked standing, was not the real party in interest, and had “unclean hands.”

Freddie Mac renewed its motions for default judgment and, separately, moved for summary judgment. Freddie Mac’s summary judgment motion was supported by an affidavit by Xee Moua, Vice President of Loan Documentation for Wells Fargo, the servicing agent.

On December 2, 2009, the trial court notified the parties that “[a] review of the file in this action reveals an item missing and needed in order to issue a decision on the Motion for Default Judgment filed by Plaintiff on July 6, 2009.” The court ordered Freddie Mac to file, within thirty days, “the assignment that evidences the transfer of the original mortgage from Legacy Mortgage to its assignee and any subsequent assignments.”

On December 14, Freddie Mac filed two assignments of mortgage: (1) from Legacy Mortgage to Wells Fargo, dated November 27, 2006; and (2) from Wells Fargo to Freddie Mac, dated May 15, 2009. On the same date (December 14), the court filed an agreed entry granting leave to the Schwartzwalds to file an untimely answer. Freddie Mac withdrew its pending motion for summary judgment. The answer was filed on December 18, 2009.

In February 2010, Freddie Mac filed a new motion for summary judgment, supported by an affidavit from Herman John Kennerty, Vice President of Loan Documentation for Wells Fargo, the servicing agent. Kennerty stated that he had custody of the Schwartzwalds' account, that the records were compiled near the time of occurrence by persons with knowledge of the events, that the records were kept in the course of Wells Fargo's regularly conducted business, and that it was the regular practice to keep such records.

Kennerty further averred that "Plaintiff is the holder of the note and mortgage which are the subject of the within foreclosure action," and he authenticated copies of the original note and mortgage, which were attached. Kennerty also authenticated an Assignment of Mortgage from Wells Fargo to Freddie Mac, which "accounts for documented evidence that Plaintiff is the holder of the note and mortgage ***." Kennerty stated that the note and mortgage were in default, that payment was due for January 1, 2009, and all subsequent payments, and that Plaintiff had elected to accelerate the balance. Finally, Kennerty indicated that the principal balance of \$245,085.18 was due with interest from December 1, 2008, at a rate of 6.25 percent per annum, as well as advancements for taxes, insurance, and other expenses.

The Schwartzwalds opposed Freddie Mac's summary judgment motion on several grounds. First, they claimed that Freddie Mac had not established that it was the holder of the note and the mortgagee by assignment. They emphasized that the note attached to Kennerty's affidavit did not contain any indorsements on the note itself or any allonges. Similarly, the Schwartzwalds argued that Kennerty's affidavit did not explain "what right, if any, Wells Fargo bank had to assign the mortgage. On the face of the documents attached to Mr. Kennerty's affidavit, Legacy Mortgage is still the mortgagee under the Mortgage."

Second, the Schwartzwalds claimed that Kennerty's affidavit did not establish the amount that was due, because "all Mr. Kennerty can accomplish through his affidavit is to authenticate business records, and establish them as such for purposes of hearsay exclusion. He cannot simply testify to the content of those records." The Schwartzwalds further claimed that, because Freddie Mac did not hold the note and mortgage, it lacked standing to prosecute the case. Finally, the Schwartzwalds argued that Freddie Mac's conduct, through its servicing agent, constituted unclean hands and barred relief in foreclosure; they supported this argument with Julie Schwartzwald's affidavit describing her interactions with Wells Fargo regarding the proposed short sale of the property.

In addition to opposing Freddie Mac's motion, the Schwartzwalds sought summary judgment on the ground that Freddie Mac lacked standing to prosecute its claim. They argued that the trial court should dismiss the action without prejudice on that basis.

Freddie Mac responded to the Schwartzwalds' opposition memorandum, stating that it was the holder of the note via a blank indorsement affixed to the back of the note. It stated that it was assigned the mortgage, as indicated in its assignments filed on

December 14, 2009, as Exhibit A to the Notice of Filing Assignment of Mortgage Chain. Freddie Mac further argued that Kennerty's affidavit did not violate the hearsay rule, that it implicitly established Kennerty's personal knowledge, and that the affidavit was sufficient to establish the Schwartzwalds' default. Although Freddie Mac argued that it need not produce the loan history to support its motion for summary judgment, it provided a copy of the Schwartzwalds' payment history as an attachment to a supplemental affidavit from Jennifer Payne, Vice President of Loan Documentation. As to the Schwartzwalds' unclean hands argument, Freddie Mac stated that it was permitted to advance its own interests and to enforce its contractual rights.

The court scheduled a hearing before a magistrate for April 1, 2010, on the cross-motions for summary judgment. The record does not contain a transcript of that hearing, and it is unclear from the record what occurred.

In April 6, 2010, Freddie Mac again filed an Assignment of Mortgage chain.

On June 1, 2010, the trial court granted Freddie Mac's motion for summary judgment and denied the Schwartzwalds' motion for summary judgment. The trial court found that the allegations contained in Freddie Mac's complaint and the affidavit in support of its summary judgment motion were true and that the Schwartzwalds had defaulted on the note and mortgage. The court entered judgment on the note in the amount of \$245,085.18, plus interest and advancements, and ordered that the equity of redemption be foreclosed and the property sold. The court did not address the various legal arguments raised by the parties.

The Schwartzwalds appeal from the trial court's judgment, claiming that the trial court erred in granting Freddie Mac's motion for summary judgment and in denying their

motion for summary judgment.

II.

We begin with the Schwartzwalds' claim that the trial court should have denied Freddie Mac's summary judgment motion. The Schwartzwalds state that Freddie Mac, in relying on Kennerty's affidavit, failed to meet its burden of proof for four reasons. First, they claim that Freddie Mac failed to establish that it was the holder of the note. Second, they argue that Freddie Mac lacked standing to institute the foreclosure action. Third, they contend that genuine issues of material fact existed as to whether Freddie Mac had unclean hands. Finally, the Schwartzwalds assert that Kennerty did not aver that he had reviewed their account, did not attach the loan payment history, and provided only legal conclusions.

Summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. Civ.R. 56; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. An appellate court reviews summary judgments de novo, meaning that we review such judgments independently and without deference to the trial court's determinations. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588.

Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of that party's pleadings. *Id.*; Civ.R. 56(E). Rather, the burden then shifts to the non-moving party to

respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the non-moving party. *Id.*

With that standard in mind, we turn to the Schwartzwalds' arguments.

A. Kennerty's Affidavit

Civ.R. 56(C) provides, in relevant part: “*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. ***” Although courts are generally confined to the types of evidence identified in Civ.R. 56(C) in ruling on a summary judgment motion, the trial court may consider other types of evidence if there is no objection on that basis by the opposing party. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶17.

Civ.R. 56(E) sets forth the requirements for affidavits. It states that supporting and opposing affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.” Civ.R. 56(E). “The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.”

State ex rel. Corrigan v. Seminatore (1981), 66 Ohio St.2d 459, 467; *Cincinnati Bar Assn. v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, ¶7.

In filing its motion for summary judgment in February 2010 (having withdrawn its previous motion), Freddie Mac relied upon Kennerty's affidavit and the exhibits attached thereto. Kennerty's affidavit does not state that he had reviewed the documents in the Schwartzwalds' account. However, personal knowledge may be inferred from the contents of an affidavit. *Bush v. Dictaphone Corp.*, Franklin App. No. 00AP1117, 2003-Ohio-883, ¶73; *CitiMortgage, Inc. v. Potvin*, Stark App. No. 2010CA112, 2010-Ohio-6561, ¶45; *Beneficial Mortgage Co. v. Grover* (June 2, 1983), Seneca App. No. 13-82-41. Although Kennerty's affidavit is terse, the information regarding the Schwartzwalds' account coupled with Kennerty's statement that he had custody of the Schwartzwalds' account was sufficient to demonstrate personal knowledge of the account's contents.³ And at no point during the summary judgment procedure did the Schwartzwalds claim that the account information was incorrect.

Kennerty's affidavit further stated that an accurate reproduction of the mortgage was attached to the affidavit as Exhibit B and that "[a] copy of the Assignment, which accounts for documented evidence that the Plaintiff is the holder of the note and mortgage *** is attached hereto as Exhibit C." The mortgage attached to Kennerty's affidavit indicated that the Schwartzwalds executed a mortgage in favor of Legacy Mortgage. Exhibit C indicated

³In a footnote in their reply brief, the Schwartzwalds state that Kennerty was a "robo-signer" of documents for Wells Fargo. Citing a May 2010 deposition of Kennerty posted on <http://stopforeclosurefraud.com/depositions/>, they assert that Kennerty routinely signed 50 to 150 documents per day and verified only the date on the document before signing. While this information may be true and raises other issues, it is not properly before us; it was not raised in the trial court and cannot be considered on appeal of the summary judgment.

that the mortgage was later assigned to Freddie Mac by Wells Fargo. Kennerty did not reference or attach the assignment from Legacy Mortgage to Wells Fargo, dated November 27, 2006, which would evidence Wells Fargo's right to assign the mortgage.

Nevertheless, the trial court did not err in considering the entire mortgage chain. The assignments of mortgage from Legacy to Wells Fargo and from Wells Fargo to Freddie Mac was filed with the trial court, at the court's request, on December 14, 2009. The assignments had been notarized and were self-authenticating. Evid.R. 902(8). The Schwartzwalds did not object to or contest the accuracy of those assignments. The assignment of mortgage chain was again filed on April 6, 2010, after the hearing on the cross-motions for summary judgment, without any apparent objection.

B. Freddie Mac's Right to Enforce the Note

We turn to whether Freddie Mac met its burden on summary judgment of showing that it was the holder of the note and the assignee of the mortgage. Freddie Mac argues that, even if it were not the holder of the Schwartzwalds' note, it was a nonholder in possession of the instrument with the rights of a holder. Thus, Freddie Mac argues that it was entitled to enforce the note and mortgage in this foreclosure action.

R.C. 1303.31(A) identifies three classes of persons who are "entitled to enforce" an instrument, such as a note: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D).

With respect to negotiable instruments, "holder" means either:

"(a) If the instrument is payable to bearer, a person who is in possession of the

instrument;

“(b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.” R.C. 1301.01(T)(1).

“An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” R.C. 1303.22(A). The transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument. R.C. 1303.22(B).

“Negotiation” is a particular type of transfer. Specifically, “negotiation” means “a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument.” R.C. 1303.21(A). “Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.” R.C. 1303.21(B).

Here, Kennerty stated that Freddie Mac was the “holder” of the Schwartzwalds’ note and mortgage and that “accurate reproductions of the originals as they exist in Plaintiff’s files are attached hereto ***.” The note attached to Kennerty’s affidavit indicated that the Schwartzwalds executed a note in favor of Legacy Mortgage in the amount of \$251,250. However, nothing on the note reflected that the note was subsequently negotiated by Legacy Mortgage. There are no indorsements on the note and the copy attached to the affidavit did not include an allonge. Thus, although Freddie Mac is apparently now in possession of the note, the lack of indorsements suggests that Freddie Mac received the note through transfer, but not negotiation. Accordingly, the note, on its face, contradicts

Kennerty's statement that Freddie Mac was the "holder" of the note.

Even if we were to consider the alleged allonge, which was attached to the copy of the note filed in April 2009, the final page is insufficient to prove that Freddie Mac was the holder of the note. The final page is blank, other than two indorsements. There is nothing that identifies the page as an allonge, nor does the page identify the note to which that page was allegedly affixed. And, the two stamped indorsements appear to be in reverse order. The first indorsement appears to be a blank indorsement from Wells Fargo to Freddie Mac, and the second appears to be an indorsement from Legacy Mortgage to Wells Fargo. Neither of the indorsements is dated.

We addressed a similar occurrence in *HSBC Bank USA, N.A. v. Thompson*, Montgomery App. No. 23761, 2010-Ohio-4158, as follows:

"The first allonge is endorsed from Delta to 'blank,' and the second allonge is endorsed from Fidelity to Delta. If the endorsement⁴ in blank were intended to be effective, the endorsement from Fidelity to Delta should have preceded the endorsement from Delta to 'blank' because the original promissory note is made payable to Fidelity, not to Delta. Delta would have had no power to endorse the note before receiving the note and an endorsement from Fidelity.

"HSBC contends that the order of the allonges is immaterial, while Thompson claims that the order is critical. At the oral argument of this appeal, HSBC appeared to be arguing that the order of allonges would never be material. This is easily refuted by the example of two allonges, one containing an assignment from the original holder of the note to A, and the other containing an assignment from the original holder of the note to B. Whichever

⁴The Uniform Commercial Code uses "indorsement," the alternate spelling.

allonge was first would determine whether the note had been effectively assigned to A, or to B.

"Thompson contends that because the last-named endorsement is made to Delta, Delta was the proper holder of the note when this action was filed, since the prior, first-named endorsement was from an entity other than the current holder of the note. In *Adams v. Madison Realty & Development, Inc.* (C.A.3, 1988), 853 F.2d 163, the Third Circuit Court of Appeals stressed that from the maker's standpoint:

"it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title.' *Id.* at 168.

"The Third Circuit Court of Appeals further observed that:

"Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that "[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol." ' 853 F.2d at 169 (citation omitted).

"Because the last allonge endorses the note to Delta, and no further endorsement to HSBC was provided, the trial court did not err in concluding that HSBC was not the holder of the note when the litigation was commenced against Thompson." *Thompson* at ¶¶69-76 (footnote added).

In this case, the first indorsement was by Wells Fargo, which (as far as the record demonstrates) did not hold the note when the indorsement was made. The second indorsement was from Legacy Mortgage to Wells Fargo. Because there is no subsequent indorsement from Wells Fargo, the alleged allonge does not establish that Freddie Mac was ever the holder of the note.

Freddie Mac claims that the assignments of mortgage from Legacy Mortgage to Wells Fargo and from Wells Fargo to Freddie Mac are sufficient to establish its right to enforce the note as a nonholder in possession. Freddie Mac cites *Bank of New York v. Dobbs*, Knox App. No. 2009-CA-2, 2009-Ohio-4742, and Section 5.4 of the Third Restatement of Property (Mortgages), arguing that the assignment of a mortgage is sufficient to establish the transfer of the note, and vice versa.

In *Dobbs*, the Fifth District noted that, “[i]n Ohio it has been held that transfer of the note implies transfer of the mortgage. *** ‘Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.’” (Internal citations omitted.) *Dobbs* at ¶29-30. The *Dobbs* court extended that rationale, holding that the assignment of a mortgage, without an express transfer of the note, was also sufficient to transfer both the mortgage and the note, if the record indicated that the parties intended to transfer both. *Id.* at ¶31.

The assignment of mortgage from Legacy to Wells Fargo assigned, sold, and transferred all of Legacy’s “rights, title and interest in and to a certain mortgage/deed of trust to secure the debt executed by Duane Schwartzwald and Julie O. Schwartzwald ***.” The assignment from Wells Fargo to Freddie Mac stated that Wells Fargo “does hereby

sell, assign, transfer, and set over until Federal Home Loan Mortgage Corporation [the Schwartzwalds' mortgage] ***, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon, and secured by the following real estate ***." In addition, although the indorsements on the allonge to the note are inadequate to constitute negotiation under the UCC, the indorsements involved the same entities as were involved in the mortgage assignments and thus suggest that Legacy and Wells Fargo intended to transfer ownership of the note and mortgage together.

In our view, the assignments reflect the intent of Legacy and Wells Fargo to convey both the mortgage and the note, along with the attendant right to enforce the note. We therefore conclude that Freddie Mac, as assignee of the Schwartzwalds' mortgage, was entitled to bring a foreclosure action, due to the Schwartzwalds' default, as a nonholder in possession with a right to enforce the note.

C. Standing to Bring Foreclosure Action

The Schwartzwalds further claim that Freddie Mac lacked standing to prosecute the case, because it did not establish that it held the note or was the mortgagee by assignment at the time the complaint was filed.

"Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. It is an issue of law, so we review the issue de novo. To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. This holding is based upon the principle that 'it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled

judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.’ *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. ***

“An actual controversy is a genuine dispute between adverse parties. It is more than a disagreement; the parties must have adverse legal interests. ***” (Internal citations omitted) *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶¶9-10.

Common-law standing is similar to Civ.R. 17(A)’s real-party-in-interest requirement. The phrase “real party in interest” means “one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is *directly* benefitted or injured by the outcome of the case.” *Countrywide Home Loans, Inc. v. Swayne*, Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶¶28, quoting *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24 (emphasis in original). Indeed, one who has standing by possessing a “personal stake” in a lawsuit undoubtedly also has a “real interest in the subject matter of the litigation.”

The parties disagree on whether standing must be established when the complaint is filed. Freddie Mac asserts that standing is not jurisdictional and that the lack of standing may be cured, consistent with Civ.R. 17, which states in part: “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” Freddie Mac contends that it was permitted to cure any

standing defect prior to judgment and that it had done so by having a separately executed assignment of mortgage (assigning the mortgage from Wells Fargo to Freddie Mac) recorded before the filing for and granting of judgment.

In contrast, the Schwartzwalds contend that standing and real party in interest status are not synonymous. They assert that the plaintiff must be the real party in interest (consistent with Civ.R. 17) when judgment is entered, but standing is a threshold matter that must exist at the time the complaint is filed. In short, the Schwartzwalds view standing as a jurisdictional prerequisite, i.e., that “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case.” *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210.

Some Ohio appellate districts have held, as Freddie Mac claims, that the lack of ownership of a mortgage or note at the time a complaint is filed does not preclude judgment in favor of the plaintiff, so long as the plaintiff is the owner of the note and/or assignee of the mortgage at the time the summary judgment is entered. See *LaSalle Bank Natl. Assn. v. Street*, Licking App. No. 08 CA 60, 2009-Ohio-1855 (affirming judgment for bank as the “real party in interest” when the assignment of the mortgage and the note occurred one week after the complaint was filed); *Bank of New York v. Stuart*, Lorain App. No. 06 CA 8953, 2007-Ohio-1483, at ¶¶12-13 (plaintiff-lender was real party in interest for foreclosure even though it was assigned mortgage five months after complaint filed); *Wachovia Bank v. Cipriano*, Guernsey App. No. 09CA007A, 2009-Ohio-5470, ¶36.

Other districts have taken a different view, requiring the plaintiff to own the note and the mortgage at the time that the complaint is filed. See *Wells Fargo Bank v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092 (holding that Civ. R. 17(A) does not apply

unless a plaintiff has standing in the first place to invoke the jurisdiction of the court); *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, ¶24 (plaintiff could not cure lack of real party in interest status at the time the complaint was filed by its subsequent acquisition of the note and mortgage).

We have yet to take a position on this issue, and the Supreme Court of Ohio has accepted this issue for review in *U.S. Bank, N.A. v. Duvall*, Sup.Ct. No. 2011-218.

The term “jurisdiction” is used in several contexts. “‘Jurisdiction’ means ‘the courts’ statutory or constitutional power to adjudicate the case.’ The term encompasses jurisdiction over the subject matter and over the person. *** It is a ‘condition precedent to the court’s ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.’

“The term ‘jurisdiction’ is also used when referring to a court’s exercise of its jurisdiction over a particular case. The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court’s authority to determine a specific case within that class of cases that is within its subject matter jurisdiction.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶¶11-12. (Citations omitted.)

“Jurisdiction over a particular case is an elusive concept, defined best by example. A common pleas court is a court of general jurisdiction and has subject matter jurisdiction over crimes committed by an adult. Nevertheless, where the common pleas court fails to strictly comply with procedures in a capital case, such as the failure to utilize a statutorily mandated three judge panel, it is an improper exercise of jurisdiction over the case. *Id.*, syllabus.” *T.M. v. J.H.*, Lucas App. Nos. L-10-1014, L-10-1034, 2011-Ohio-283, ¶¶66.

“Although a court may have subject matter jurisdiction over an action, if a claim is

asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” (Internal citations and footnote omitted) *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275.⁵

If there is no jurisdiction in the court, then the judgment is void and can be challenged at any time. One could speculate on the effect of a holding that any judgment and decree of foreclosure ever granted wherein it can be shown that the mortgagee did not, at the time of the initial complaint, have standing and thus was not the real party in interest, results in the court’s not having jurisdiction.

The distinction is between lacking jurisdiction and improperly exercising the jurisdiction conferred on it. If a court improperly exercises its jurisdiction by granting foreclosure to a plaintiff lacking standing, the judgment would not be void but, rather, voidable on appeal.

This appears to be why Civ.R. 17 allows amendment. The 1970 Staff Notes to the Rule give the example of an administrator who sues, in good faith, but under an invalid appointment or a bankrupt who sues without the trustee’s permission. In each case, the plaintiff is given the opportunity to amend the pleadings and the court is given the opportunity to exercise its jurisdiction.

⁵We acknowledge that *Suster* has been distinguished in certain foreclosure cases. E.g., *MERS v. Mosley*, Cuyahoga App. No. 93170, 2010-Ohio-2886.

Lenders may “feel” that debtors should not avoid their debts or maintain the security they pledged only because a paperwork chain was not completed prior to the filing of a complaint; borrowers may “believe” that, before their homes can be taken from them, a creditor must punctiliously comply with the “ritualistic formalities” to which they (the title owners) have been held almost since the “memory of man runneth not to the contrary.”

The objective is for a court to be presented with a real controversy between parties actually affected by its outcome (i.e., “have a personal stake in the outcome of a legal controversy with an adversary,” *Kincaid*, supra). Permitting supplemental or amended filings, pursuant to Civ.R. 17(A), allows the court to properly exercise its jurisdiction and resolve the controversy on its merits.

Thus, in our view, the required analysis is the one put forth by Freddie Mac, i.e., that the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment. To hold otherwise would elevate lack of standing to a jurisdictional defect, a position that the Ohio Supreme Court has thus far rejected.

It is undisputed that Freddie Mac had been assigned the Schwartzwalds’ mortgage and was in possession of the note prior to the filing for and granting of summary judgment. Accordingly, the trial court did not err in implicitly rejecting the Schwartzwalds’ standing argument.

D. *Doctrine of Unclean Hands*

Finally, the Schwartzwalds claim that they raised a genuine issue of material fact as to whether Wells Fargo had “unclean hands.” They state that Wells Fargo, as servicing agent for Freddie Mac, induced the Schwartzwalds into marketing their property, but failed to act in good faith when presented with an offer for a short sale. They claim that Wells

Fargo prevented them “from limiting or eliminating their liability to Freddie Mac.”

“The maxim, ‘he who comes into equity must come with clean hands,’ requires only that the [party invoking equity] must not be guilty of reprehensible conduct with respect to the subject matter of [the] suit.” *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45, citing *Kinner v. Lake Shore & M.S. Ry. Co.* (1904), 69 Ohio St. 339, paragraph one of the syllabus. “For the doctrine of unclean hands to apply, the party against whom it is asserted must be at fault in relation to the other party and in relation to the transaction upon which the claims are based.” *Fiore v. Larger*, Montgomery App. No. 22949, 2009-Ohio-5408, ¶31, citing *Trott v. Trott*, Franklin App. No. 01AP-852, 2002-Ohio-1077.

In her affidavit, Julie Schwartzwald stated that Wells Fargo encouraged the Schwartzwalds to pursue a short sale of their property.⁶ She asserted that, upon notification to Wells Fargo that they had a buyer, Wells Fargo acted in a dilatory manner in reviewing the Schwartzwalds’ request for approval of their short sale and led them to believe that the short sale would be approved. The request for a short sale was denied in September 2009, more than 120 days after the request was made.

Even accepting Mrs. Schwartzwald’s allegations as true, we cannot conclude that Freddie Mac had unclean hands that would preclude this foreclosure action. Once the Schwartzwalds defaulted on their note and the balance was accelerated, the lender was entitled to pursue a foreclosure action against them. See *Gaul v. Olympia Fitness Center, Inc.* (1993), 88 Ohio App.3d 310, 315. “A lender’s decision to enforce its contract rights

⁶By definition, a short sale involves a purchase price less than the amount owed to the lender.

is not considered an act of 'bad faith.'" Id. at 320. Well Fargo's inefficiency, incompetence, or disregard for its customers and the public notwithstanding, Wells Fargo was under no obligation to approve the Schwartzwalds' short sale request.

There is no indication that Wells Fargo led the Schwartzwalds to believe that they were not required to make mortgage payments while their request for approval of the short sale was pending. And, to the extent that Wells Fargo told the Schwartzwalds not to worry about the foreclosure action that had been filed, any prejudice that might have resulted from those statements was negated by the trial court's granting of the Schwartzwalds' motion to file an answer out of time. No other prejudice is alleged by the Schwartzwalds.

The trial court did not err in granting Freddie Mac's motion for summary judgment.

III.

The Schwartzwalds also claim that the trial court should have granted their cross-motion for summary judgment due to Freddie Mac's failure to establish standing. In light of our reasoning regarding Freddie Mac's motion for summary judgment, this argument is not well taken.

IV.

The uncertainty regarding standing and real party in interest, if not obvious from this opinion, is inherent in the Ohio Supreme Court's recognizing a conflict among the districts. The Schwartzwalds are urged to join in the Supreme Court case.

V.

The assignment of error is overruled.

The trial court's judgment will be affirmed.

.....

GRADY, P.J. and FAIN, J., concur.,

Copies mailed to:

Scott A. King

Terry W. Posey, Jr.

Andrew M. Engel

Hon. Stephen A. Wolaver

A-4

GREENE COUNTY, OHIO
FILED

2010 JUN -1 PM 2:34

TERRI A. MAZUR, CLERK
COMMON PLEAS COURT
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO
CIVIL DIVISION

FEDERAL HOME LOAN MORTGAGE
CORPORATION,

Plaintiff

v.

DUANE SCHWARTZWALD, et al.

Defendants

CASE NO. 2009 CV 0438

JUDGE STEPHEN A. WOLAVER

JUDGMENT ENTRY GRANTING
FEDERAL HOME LOAN MORTGAGE
CORPORATION'S
MOTION FOR SUMMARY
JUDGMENT AND DECREE IN
FORECLOSURE

**FINAL APPEALABLE
ORDER**

This matter is before the Court upon the Motion of Plaintiff, Federal Home Loan Mortgage Corporation ("Plaintiff"), to obtain Summary Judgment in its favor for the relief prayed for in its Complaint filed on February 4, 2010 along with the Affidavit in Support of Motion for Summary Judgment also filed on February 4, 2010. Defendants Duane and Julie Schwartzwald filed a Memorandum Contra Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment on February 18, 2010 along with affidavits of both Duane and Julie Schwartzwald.

The Court finds that all necessary parties have been served and are properly before the Court. Defendant Wells Fargo Bank, N.A. is in default for Answer and/or appearance.

The Court has reviewed the pleadings in this matter and finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the Defendants Duane and Julie Schwartzwald. Therefore, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendants Duane and Julie Schwartzwald's Motion for Summary Judgment is OVERRULED.

Accordingly, the Court finds that the allegations contained in the Complaint and the Affidavit

10-06-0172

in support of Plaintiff's Motion are true and that there is due and owing to Plaintiff, from Duane Schwartzwald and Julie G. Schwartzwald, upon the subject Note, the amount of \$245,085.18, for which amount Judgment is hereby rendered in favor of Plaintiff, plus interest thereon at the rate of 6.25% per annum from December 1, 2008, plus advances for taxes, assessments, insurance, and other fees expended, plus costs.

The Court finds that the Note is secured by the Mortgage held by Plaintiff, which Mortgage constitutes a valid and first lien upon the premises described on the attached Exhibit "A".

The Court finds that the Mortgage was filed for record on December 4, 2006 at Volume 2648, Page 149 of the Mortgage Records of Greene County, Ohio; that the conditions of the Mortgage have been broken and that Plaintiff is entitled to have the equity of redemption of Duane and Julie Schwartzwald foreclosed.

The Court finds that Defendant, James W. Schmidt, Treasurer of Greene County, Ohio, has filed an Answer herein asserting an interest in the real estate which is the subject of this action, which interest is senior in priority to Plaintiff's interest as set forth above.

It is therefore ORDERED that unless the sums hereinabove found to be due to Plaintiff, and 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 of Duane and Julie G. Schwartzwald, in said real estate be foreclosed and the real estate sold, free and clear of the interests of all parties herein, and an Order of Sale shall issue to the Sheriff of Greene County, Ohio, directing him to appraise, advertise and sell the said real estate, according to law and the Orders of this Court, and report his proceedings to the Court.

It is further ORDERED that the Sheriff promptly send counsel for Plaintiff a copy of the publication notice upon its first publication.

It is further ORDERED that the Sheriff, upon confirmation of the said sale, shall pay from the proceeds of the sale, upon the claims found, the amounts thereof in the following order of priority:

1. To the Clerk of this Court, the costs of this action, including the fees of the appraisers.
2. To the Treasurer of Greene County, Ohio, the taxes and assessments, due and payable as of the date of the transfer of the real property after Sheriff's sale.
3. To Plaintiff, the sum of \$245,085.18, plus interest thereon at the rate of 6.25% per annum from December 1, 2008, plus advances for taxes, assessments, insurance and

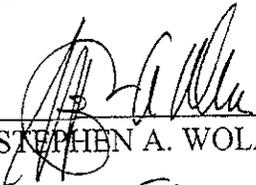
10-06-0173

other fees expended, plus costs.

4. The balance of the sale proceeds, if any, shall be paid by the Sheriff to the Clerk of this Court to await further Orders of the Court.

The Court further finds that there is no just reason for delay.

SO ORDERED:



JUDGE STEPHEN A. WOLAVER
5/26/10

10-06-0174

EXHIBIT



LSR#200918796

A

LEGAL DESCRIPTION

Situate in the State of Ohio, County of Greene and Township of Caesarcreek in Virginia Military Survey No. 2473 and being part of an 84.027 acre tract as conveyed by deed to Bessie Lou Bryant as recorded in Volume 495, page 260 of the Greene County Deed Records and being more particularly described as follows:

Commencing for reference at a PK nail found at the intersection of the centerlines of U.S. Route 68 and the Spring Valley Paintersville Road; thence with the centerline of the Spring Valley Paintersville Road, South 89° 48' 15" East, 319.44 feet to the true point of beginning for this tract herein described; thence by new division line through the lands of said Bryant, North 0° 16' 46" East, (passing an iron pin set at 30.00 feet), 1166.95 feet to an iron pin set in the southerly line of John D. Middleton and M.F. Middleton's 82.90 acre tract (Deed Book 552, page 679); thence with said southerly line, South 89° 44' 57" East, 380.00 feet to an iron pin set; thence by new division line, South 0° 16' 46" West (passing an iron pin set at 1136.59 feet), 1166.59 feet to the centerline of Spring Valley Paintersville Road, thence with said centerline North 89° 48' 15" West, 380.00 feet to the true point of beginning containing 10.178 acres of land, more or less.

This description is based upon a field survey conducted by R. Douglas Sutton, Ohio Professional Surveyor No. 7124 in July, 1992. Iron pins referred to as set are 5/8" diameter steel 30 inches in length with a yellow cap stamped "Sutton 7124". Bearings are based upon an assumed azimuth and are for angular measurement purposes only. Recorded in Volume 26, page 19 of the Greene County Surveyor's records.

10-06-0175

10-04-1589

Subject to all easements, covenants, conditions, restrictions,
rights-of-way and reservations of record and all zoning and legal
highways.

Parcel No. C05-1-7-112

Property address: 2202 E Spring Valley Paintersville Rd, Xenia, OH
45385

Prior Deed Reference: Volume 2648, page 147

Titleholders: Duane Schwartzwald and Julie G. Schwartzwald

Description Check
Greene County Engineer's Tax Map Dept.
 Legally Sufficient As Described
 Legally Sufficient With Corrections Noted
 Legally Insufficient, New Survey Required
By: CPD
Date: 10/20/09
Par ID Dist C05 BK 1 PG 7 PAR 112

10-06-017610-04-1590

ARTICLE IV: JUDICIAL

or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgement that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of the article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) 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.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals. (1968, am. 1994)

ORGANIZATION AND JURISDICTION OF COMMON PLEAS COURT.

§4 (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas court of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise

such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(1968, am. 1973)

POWERS AND DUTIES OF SUPREME COURT; RULES.

§5 (A)(1) In addition to all other powers vested by this article in the Supreme Court, the Supreme Court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with

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Ohio Rules**RULES OF CIVIL PROCEDURE****Title IV. PARTIES***As amended through July 1, 2011***Rule 17. Parties Plaintiff and Defendant; Capacity**

(A) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(B) Minors or incompetent persons. Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

History. Effective: July 1, 1970; amended effective July 1, 1975; July 1, 1985.

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1303.31 Person entitled to enforce instrument - UCC 3-301.

(A) "Person entitled to enforce" an instrument means any of the following persons:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Effective Date: 08-19-1994