

IN THE SUPREME COURT OF OHIO

FEDERAL HOME LOAN MORTGAGE)	CASE NO.: 2011-1362
CORP.)	
	ON APPEAL FROM THE
APPELLANT,)	GREENE COUNTY COURT
VS.)	OF APPEALS, SECOND
	APPELLATE DISTRICT
DUANE SCWARTZWALD, ET AL)	CASE NO.: 2010 CA 0041
APPELLEES,)	

MERIT BRIEF OF AMICI CURIAE HOMEOWNERS OF THE STATE OF OHIO,
AND Ohiofraudclosure.blogspot.com

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ARGUMENT IN SUPPORT OF AMICUS CURIAE'S POSITION

Proposition of Law No. 1:

In a mortgage foreclosure action, the lack of standing or a real party in interest defect cannot be cured by assignment of the mortgage prior to judgment

The Court of Appeals for the Second Appellate District certified a conflict between its decision in *Federal National Mortgage Corp. vs. Schwartzwald* (June 3, 2011), Greene App. No. 2010 CA 41, with three other appellate decisions:

1. *Wells Fargo Bank vs. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603 (1st Dist. 2008);
2. *Bank of New York vs. Gindele*, 2010-Ohio-542 (1st Dist. 2010); and
3. *Wells Fargo Bank vs. Jordan*, 2009-Ohio-1092 (8th Dist. 2009).

Each of the four appellate decisions involves the filing of a foreclosure complaint by an entity that did not hold an interest in the mortgage at the time the foreclosure complaint was filed. Each of the four appellate decisions agrees that in some instances Civil Rule 17(A) allows the real party in interest to be substituted for the plaintiff or joined to the action. Each of the four appellate decisions agrees that in some instances Civil Rule 17(A) allows the real party in interest to ratify the conduct of the Plaintiff.

In *Federal National Mortgage Corp. vs. Schwartzwald* (June 3, 2011), Greene App. No. 2010 CA 41, the Court of Appeals allows the Plaintiff to “cure” the real party in interest problem by simply filing a notice of filing Assignment of Mortgage. The *Schwartzwald* Court analyzes the arguments regarding whether standing and capacity to sue are jurisdictional defects; determines that they are not jurisdictional defects, and then determines that Civil Rule 17 allows amendment to “cure” this non-jurisdictional defect. The *Schwartzwald* carefully analyzes the ability to amend, but then ignores the required analysis of who may amend, when they may

amend and how they may amend under Civil Rule 17. Instead, the *Schwartzwald* Court simply determines that the trial court did not err in rejecting the argument of lack of standing as Plaintiff possessed the promissory note and had been assigned the mortgage prior to the entry of summary judgment.

In *Wells Fargo Bank vs. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603 (1st Dist. 2008), the Plaintiff filed a motion for summary judgment attaching thereto an Assignment of Mortgage stating that WMC Mortgage Corporation was the lender and it “sold, assigned, transferred, and set over the mortgage deed and promissory note” to Plaintiff more than a month after the complaint was filed. The *Byrd* Court determined that the real party in interest defect could not be “cure” in that manner. The *Byrd* Court first pointed out that the real party in interest had not been joinder or substituted for the Plaintiff. Pursuant to Civil Rule 17, this left the real party in interest to ratify the conduct of the Plaintiff.

The *Byrd* Court first determined that ratification applies only to agents. Thus, the Plaintiff must be acting as an agent in a representative capacity for the real party in interest. “Ratification will not apply when the actor is not acting as the agent of the principal.” *Byrd*, at ¶12. The *Byrd* Court held that the assignment of mortgage merely demonstrated that the real party in interest sold the mortgage. The assignment did not demonstrate that the real party in interest knew of the conduct of Plaintiff and ratified the conduct. The Court determined that a Plaintiff that was not the mortgagee could not correct the lack of standing by subsequently obtaining an interest in the mortgage.

In *Bank of New York vs. Gindele*, 2010-Ohio-542 (1st Dist. 2010), the Court of Appeals for the First Appellate District expanded upon its holding in *Byrd*, stating that a literal interpretation of Civil Rule 17 would make it applicable to every case, but that the Advisory

Committee Notes make it clear that Civil Rule 17 was intended to prevent forfeiture only in those instances when the a determination of the proper party to bring suit is difficult.

“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.”

Bank of New York vs. Gindele, at ¶4, citing *Ohio Central RR Sys. Vs. mason Law Firm Co., LPA*, 182 Ohio App.3d 814, 2009-Ohio-3238.

The *Gindele* Court determined that a bank that was not the mortgagee at the time the complaint was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage, “in the absence of understandable mistake or circumstances where the identity of a party is difficult or impossible to ascertain. *Gindele*, at ¶6.

In *Wells Fargo Bank vs. Jordan*, 2009-Ohio-1092, the Eighth Appellate District found that its fact pattern was identical to those of *Wells Fargo Bank vs. Byrd* and similarly held that a Plaintiff could not “cure” the lack of standing by acquiring an interest in the mortgage after the filing of the complaint.

Civil Rule 17(A) has been used throughout foreclosure actions as a means to justify a Plaintiff acquiring an interest in the action after the complaint has been filed. Typically, a complaint is filed and sometime thereafter Plaintiff is assigned the promissory note and mortgage. Plaintiffs then assert that they are now the real party in interest. In support of this position, Plaintiffs argue that Civil Rule 17(A) states merely that every action shall be **prosecuted** in the name of the real party in interest. Foreclosure Plaintiffs argue that Civil Rule 17(A) does not require the action be **commenced** by the real party in interest.

The Ohio Rules of Civil Procedure do address the issue of an interest in the litigation being transferred. Ohio Civil Rule 25(C) provides:

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be

substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (A) of this rule.

However, the transfer contemplated by the Civil Rules is **out** of the hands of the original party. Accordingly, there is no provision in the Ohio Civil Rules for the Plaintiff to become the real party in interest after the complaint has been filed and the action has been commenced.

Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A., 182 Ohio App.3d 814, 2009-Ohio-3238, at ¶¶ 39 and 40, relying upon interpretation of the Federal Civil Rules, warns against Civil Rule 17(A) being distorted, stating:

“Many federal courts have held that ratification is still not an appropriate alternative to naming the real party in interest because Rule 17(a) authorizes ratification only “to avoid forfeiture and injustice when an understandable mistake has been made in selecting the parties in whose name the action should be brought.” *Agri-Mark*, 190 F.R.D. at 296, quoting 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *827 Federal Practice and Procedure (1990), Section 1555, 412; *Hobbs v. Police Jury of Morehouse Parish* (E.D.La.1970), 49 F.R.D. 176, 180; *Del Re v. Prudential Lines, Inc.* (C.A.2, 1982), 669 F.2d 93, 96.

The Fed.R.Civ.P. 17 advisory committee's note accompanying the 1966 amendment stated, “Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. * * * The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.” FN6
FN6. Professor Entman notes that “[r]atification is an anomaly that slipped into Rule 17(a) in 1966 when admiralty actions were brought under the Federal Rules of Civil Procedure. Prior to the 1966 amendments, courts * * * had taken a lax approach to the naming of parties plaintiff because of the difficulty of identifying, at least prior to the expiration of applicable statutes of limitation, the numerous parties who may have enforceable claims arising from the loss of a ship's cargo. * * * So long as the proper plaintiff or plaintiffs ratified the action before judgment, the action could be saved and judgment entered in the name of the plaintiff on the basis of the unnamed parties' claims. * * * In 1964 the Advisory Committee on Admiralty Rules proposed the merger of civil and admiralty practice under the Federal Rules of Civil Procedure. The Committee * * * recommended several amendments to the Federal Rules of Civil Procedure to preserve, after the merger, certain distinct admiralty practices. Among the recommendations by the committee was an amendment to Rule 17(a) that would have preserved the practice of relation-back of claims through the formerly unnamed parties' ratification, joinder or substitution. * * * What apparently passed unnoticed, however, was that the provision for ratification, as an alternative to joinder or substitution, introduced into Rule 17(a) a practice that was fundamentally at odds with the rule's basic proposition that every action shall be prosecuted in the name of the real party in interest. The device of ratification * * * was the very practice, however, that the real party in interest rule was intended to abolish.” (Citations omitted.)

Entman, Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law, 45 Case W.Res.L.Rev. at 62-64.

If an understandable mistake has occurred in naming the proper party as the Plaintiff, then Civil Rule 17(A) can be used to either substitute the real party in interest or join the real party in interest as a plaintiff. A complaint should not be dismissed for failure to bring the complaint in the name of the real party in interest until sufficient time has been given to allow for such substitution or joinder. Accordingly, when the issue whether Plaintiff is the real party in interest is raised, the Court should allow sufficient time to substitute or join the proper party. However, before joinder or substitution should be allowed, the Plaintiff should be required to demonstrate that an understandable mistake occurred.

It is anticipated that Appellee Federal Home Mortgage Corporation will contend that the real party in interest is a mere technicality that can be summarily corrected by an assignment of mortgage. Appellee will likely argue that the issue of standing to bring a foreclosure action can be resolved solely by looking at the law of negotiable instruments. The argument will be that the note is enforceable by the holder; the mortgage follows the note. Accordingly, Appellee will argue that the holder of the note has standing to bring a foreclosure action.

In *Citizens Bank v. Cinema Park L.L.C.*, 2010 WL 420019, at *3 (N.D. Ohio Jan. 29, 2010), the court stated that [e]stablishing an entitlement to foreclosure, in turn, requires proof of the following elements: (1) execution and delivery of a valid note and mortgage, which instruments are now held by plaintiff; (2) the recorded mortgage is a valid lien on the property at issue; (3) the maker of the note and mortgage has defaulted on its obligation under those instruments; (4) resulting in an established amount due. (internal citation omitted).

Wells Fargo Bank, N.A., v. Favino, Case No. 1:10 CV 571, (N.D. Ohio E.D. March 31, 2011).

In continuing to gloss over the details and to further buttress its "Note Holder" distraction, in the past Foreclosure Plaintiffs have relied upon a draft report authored by the Permanent Editorial Board for The Uniform Commercial Code, which is a part of the American

Law Institute, "The UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them, Draft Report (March 29, 2011)". The purpose of the article is stated as "[a]lthough the UCC provisions have been settled law for a number of years, it has become apparent that not all courts and attorneys are familiar with them." The article discusses the Permanent Editorial Board's opinion on the effect of the sale of a promissory note secured by a mortgage, stating:

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note? UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note: "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." (As noted previously, a "security interest" in a note includes the right of a buyer of the note.)

Thus, while this matter has engendered some confusion, the law is clear, and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note.

The application of UCC Section 9-203(g) would have a similar effect in Ohio as R.C.

1309.203(g) has the identical language:

The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

All of the Foreclosure Plaintiffs will assert that this is a rather simple issue that has been needlessly confused by the courts. A mortgage note is a negotiable instrument and the mortgage follows the note. However, UCC Section 9-203(g) and R.C. 1309.203(g) do not specifically address the issue of mortgage backed securities and the conduct of the Lender that immediately takes steps to separate the mortgage from the note in the process of creating a mortgage backed security.

Their arguments ignore the fact that the UCC sets forth the default provisions **in the absence of an agreement between the parties**. R.C. 1309.201 provides that a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. A security agreement, i.e. mortgage, which immediately names an entity other than the Lender as mortgagee should not be subject to the default provisions of the UCC.

Foreclosure Plaintiffs argue that the law of negotiable instruments and real property law have for centuries recognized that the promissory note is the evidence of the debt and that the mortgage is merely security for the debt. As a mere “incident of the debt” the mortgage necessarily follows the debt. While the traditional law of negotiable instruments and real property may support the proposition that the mortgage necessarily follows the note, there is nothing traditional about the manner in which mortgages are transferred in mortgage backed securities. The agreement of the parties or the conduct of a party to the transaction rebuts the presumption that the mortgage follows the note.

[T]he law is clear, and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note. PEB, Draft Report, March 29, 2011.

The corollary statement must also be clear. The sale of a mortgage note accompanied by a separate conveyance of the mortgage securing the note **does** result in a separation of the mortgage from the note. When (1) the Lender retains possession of the note or transfers the note by endorsing the note, and (2) the Lender identifies a separate entity as the mortgagee or transfers the mortgage to a different entity, then the mortgage does not follow the note. This precise issue was addressed by the court in *CitiMortgage, Inc. v. Bischoff*, Vermont Superior Court of Rutland Case No. 255-4-09 Rdcv (Cohen, J., Oct. 28, 2009), which states at page 3 of the opinion:

Regarding the mortgage deed, “[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Restatement (Third) of Property, Mortgages § 5.4(a). The objective of this rule is to keep the obligation and the mortgage in the same hands unless the parties wish to separate them. *Id.* at cmt. b. Here, the parties split the Note and Mortgage Deed; Flagstar Bank retained the Note, which it later indorsed to CitiMortgage, while MERS held the mortgage deed, becoming the mortgagee of record.

If Plaintiff’s standing to file a foreclosure complaint is put at issue, Plaintiff must do more than assert that it holds the promissory note which is secured by a mortgage. Plaintiff must demonstrate that the mortgage note is a negotiable instrument; that the note has been properly endorsed payable to Plaintiff or endorsed in blank; and that plaintiff holds the note or is a person entitled to enforce the note. Plaintiff must also demonstrate that the mortgage was never split from the promissory note and therefore the mortgage follows the note. Alternatively, Plaintiff must demonstrate that the mortgage once split from the promissory note has been reunited by Plaintiff’s simultaneous possession of both the note and the mortgage. Accordingly, an action to foreclose upon a promissory note secured by a mortgage against real property requires (1) the person or entity filing the complaint to be a person entitled to enforce the note, (2) and the person or entity filing the complaint must be owner of the mortgage.

In order to be the real party in interest, the person or entity filing the complaint must fulfill the two above requirements at the time the complaint is filed. The two requirements must be fulfilled at the time the complaint is filed because Civil Rule 17(a) was not designed to allow an improper Plaintiff to repeatedly file complaints and then correct the problem, when, if at all, the issue is brought to the Court’s attention.

The issue of real party in interest and Civil Rule 17(a) has been thoroughly addressed in *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, at ¶8, as follows:

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.”

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. 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.” 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.”

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.”

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.

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. But ratification will not apply when the actor is not acting as the agent of the principal.

The rationale or reasoning behind Foreclosure Plaintiff’s choosing to assign an interest to a person or entity who improperly filed a complaint may never be fully understood. However, Foreclosure Plaintiffs who repeatedly file complaints when they do not own an interest in either the promissory note or mortgage should understand that that acquiring the note, the mortgage or both after the complaint is filed will not cure the problem they created. However, legal maxims and axioms should not be relied upon to avoid the reality that is occurring in foreclosure actions on a regular basis. Foreclosure Plaintiffs who do not own an interest in the promissory note, who do not own an interest in the mortgage are filing complaints. When and if the Foreclosure

Plaintiff's interest in the action is questioned the note, the mortgage or both will be assigned to the Foreclosure Plaintiff. Civil Rule 17 is distorted and argued as an acceptable means to correct the problem. The problem is created by the entities seeking to collect the payments on the promissory note and seeking to foreclose on the mortgage securing those payments. The problem can be easily corrected by those same entities. File the complaint in the name of the entity who holds the promissory note and who owns an interest in the mortgage.

CONCLUSION

Foreclosure Plaintiffs must be the holder of the promissory note, or a person entitled to possess the note at the time the complaint is filed. Foreclosure Plaintiffs must be the owner of an interest in the mortgage at the time the complaint is filed. Foreclosure Plaintiffs who want to correct the problem pursuant to Civil Rule 17(A) must join or substitute the real party in interest. Foreclosure Plaintiffs must demonstrate that an understandable mistake occurred at the time the complaint was filed in order to avail themselves of Civil Rule 17(A). This is not about giving someone a free house or allowing mortgages to go unpaid. This is about the judicial system requiring rules to be followed rather than making the rules fit the expediency of business.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the amicus brief was served upon Andrew Engel, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, and Scott A. King, Attorney for Appellant, of Thompson Hine LLP, 2000 Courthouse Plaza, NE, P.O. Box 8801, Dayton, Ohio 45401-8801, by regular U.S. Mail, on this 12th day of December, 2011.

1s/ Bruce M. Broyles
Bruce M. Broyles

A handwritten signature in black ink, appearing to read 'Bruce M. Broyles', with a long horizontal line extending to the right.