

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

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**

**APPELLANTS DUANE AND JULIE SCHWARTZWALD'S
MEMO CONTRA MOTION TO RECONSIDER**

Appellants, Duane and Julie Schwartzwald, submit their memo contra Appellee Federal Home Loan Mortgage Corporation's motion to reconsider this Court's Opinion issued herein on October 31, 2012.

Federal Home Loan Mortgage Corporation ("Freddie Mac") seeks this Court's reconsideration of the Opinion reversing the decision of the Greene County Court of Appeals and dismissing this case. Its motion to reconsider asks the Court to address various concerns it has about the ruling. First, it asks the Court to clarify the meaning of its ruling, specifically whether the Court's reference to jurisdiction implicates subject matter jurisdiction. Second, Freddie Mac asks the Court to direct that the holding in this case be applied prospectively only. Finally, it asks the Court to grant it a second bite at the apple by remanding the case to the trial court so that it might try again to prove that it had standing when it filed the complaint.

None of these arguments for reconsideration warrant the Court revisiting its clear and

concise statements of long-standing Ohio law.

I. The Court Does Not Need To Clarify The Meaning Of The Term “Jurisdiction.”

Freddie Mac first claims it does not understand what the Court meant by the phrase “invoke the jurisdiction” of the common pleas court. It claims to be uncertain if the jurisdiction to which the Court refers is subject matter jurisdiction or some other kind of jurisdiction. It goes on to accuse the Court of conflating the concepts of standing and subject matter jurisdiction, thus causing confusion to the whole of Ohio’s legal community.

In making its plea for reconsideration, Freddie Mac’s concern is not really about the outcome of this case. Rather, it invites the Court to provide premature guidance on how Ohio courts should apply the ruling to other fact patterns in other cases. It is asking the Court for an advisory opinion, and the Court should decline the invitation

Freddie Mac attempts to hide this request by feigning confusion by asking whether the Court's reference to “jurisdiction” was to a common pleas court’s “subject matter jurisdiction.” But whether it is called "jurisdiction" or "subject matter jurisdiction," or "purple jurisdiction," the only possible meaning of the word as used in the Opinion is the fundamental, constitutional grant of judicial power.

The Court made it clear that the word “jurisdiction,” as used in the Opinion, has the same meaning as the word has in Art. IV, Sec. 4(B) of Ohio’s Constitution. And that provision is the initial grant of judicial power to Ohio’s common pleas courts. It defines the parameters of a common pleas court’s power to hear and rule on disputes. That grant is limited to “justiciable matters” over which the General Assembly decides to grant common pleas courts power. In other words, there are two components of a common pleas court’s jurisdiction – the requirements of justiciability and the statutory grant of authority. Without either one of those components, a common pleas court does not have the constitutional power to decide a case.

Freddie Mac's claimed confusion over the meaning of the term "jurisdiction" is disingenuous. It is trying to create confusion through semantics where none exists in substance. For example, throughout its merit brief, Freddie Mac itself repeatedly used "jurisdiction" and "subject matter jurisdiction" interchangeably and made no effort to differentiate between the two. Additionally, R.C. 2305.01, which is the initial *legislative* grant of jurisdiction to common pleas courts, states: "[T]he court of common pleas has original jurisdiction in all civil cases in which . . ." The qualifying words "subject matter" do not appear in that statute, just as they do not appear in Art. IV, sec. 4(B) of Ohio's Constitution. And yet, courts throughout the state cite to R.C. 2305.01 as the statutory grant of a common pleas court's "subject matter jurisdiction." *JP Morgan Chase Bank, N.A. v. Brown*, 2008-Ohio-200, (2nd Dist. Nos. 21853, 22359) ¶42; *Hall v. Tucker*, 829 N.E.2d 1259, 161 Ohio App.3d 245, 2005-Ohio-2674 (4th Dist. No. 04CA2), ¶3; *Arlington Bank v. Bee, Inc.*, 2010-Ohio-6040, (10th Dist. No. 10AP-41) ¶12; *Huntington Mtge. Co. v. Shanker*, 634 N.E.2d 641, 92 Ohio App.3d 144, 152 (Ohio App. 8 Dist. 1993).

On the contrary, this Court's decision was not confusing in the least. The Court merely restated the long-standing rule that a plaintiff must have standing at the time suit is commenced in order for the common pleas court to have the power to hear and decide a case. And contrary to Freddie Mac's assertion, there is no suggestion in the Opinion that the Court believes that standing and subject-matter are synonymous. To the contrary, the Court's analysis was straightforward and concise, and it can lead to no conclusion other than that standing is an essential element to render a matter justiciable. Standing is a necessary part of justiciability, and justiciability is part of a common pleas court's constitutional jurisdiction.

The Court need not revisit its decision, and no clarification is required.

II. The Court's Decision Will Not Open A Pandora's Box.

Freddie Mac next argues that the Court's opinion opens up the possibility of collateral

attack on hundreds of thousands of default judgments in foreclosure cases in Ohio. It suggests that the Court's decision in this case fundamentally alters the law of Ohio, and it asks that the Court limit its decision so that it will be applied only prospectively. It clothes its request in the sanctity of the finality of judgments, and warns of the chaos that would accompany retroactive application of the decision.

As a preliminary matter, Freddie Mac understates the scope of issue. It suggests only default judgments can be collaterally attacked because of a plaintiff's lack of standing; but that is not true. Every foreclosure judgment in Ohio, whether granted by default judgment, summary judgment, or trial, can be collaterally attacked. In fact, every judgment ever entered by any court in Ohio is subject to attack for lack of jurisdiction. But such has always been true. This Court has repeatedly stated that a judgment entered by a court without jurisdiction is a nullity. The Court's decision in this case does not alter, let alone expand, the bases to attack judgments entered without jurisdiction.

And the Court should not be drawn in by Freddie Mac's prediction of an avalanche of challenges to foreclosure judgments. In *Cheap Escape Co., Inc. v. Haddox, LLC*, 900 N.E.2d 601, 120 Ohio St.3d 493, 2008-Ohio-6323 (Ohio 2008), this Court addressed a very similar issue to the one presented here. That case dealt with a municipal court's jurisdiction, as defined by statute. Although a municipal court's jurisdiction is granted by statute, not by the Ohio Constitution, the issue was identical to that in this case: does a court have jurisdiction to decide a case if the requirements of the initial grant of that court's jurisdiction are not satisfied?

In *Cheap Escape*, the Court answered that query in the negative. And just like in this case, it was clear that the Court's decision could be used to attack judgments previously issued. And as Freddie Mac is doing in this case, in the aftermath of the *Cheap Escape* decision, plaintiffs sought only prospective application of the decision.

The Cuyahoga County Court of Appeals considered the retroactive application of the *Cheap Escape* holding and found that there was no basis to apply the decision only prospectively:

Retrospective application of the holding in *Cheap Escape* would actually promote, not retard, the operation of R.C. 1901.18. The statute establishes the subject-matter jurisdiction of the municipal courts. Subject-matter jurisdiction is fundamental. It defines the court's power to decide cases. Subject-matter jurisdiction can never be waived; any decision entered without subject-matter jurisdiction is void. *Pratts v. Hurley*, 102 Ohio.St.3d 81, 2004-Ohio-1980, ¶11. If we were to apply *Cheap Escape* prospectively we would, in effect, grant municipal courts jurisdiction which *Anello* tells us they never had.

Finally, it will not be inequitable to apply *Cheap Escape* retrospectively. Appellee's protestations to the contrary, no one has a vested right or interest in a judgment that was void ab initio, no matter how much time elapses before it is challenged. Plaintiffs who chose to file their cases in courts whose subject-matter jurisdiction was questionable were not forced to do so; they were not prevented from filing in a court whose jurisdiction was clear. Their voluntary decision to file in a court of questionable subject-matter jurisdiction makes more palatable the few cases in which the passage of time may bar the plaintiff from refiling in the proper jurisdiction now.

Francis David Corp. v. Scrapbook Memories & More, 2010-Ohio-82, (8th Dist Case No. 93376)

¶¶17-18.

And where is the avalanche of actions to vacate municipal court judgments entered without jurisdiction? It never happened. Nonetheless, Freddie Mac invokes this bogey man to scare the Court into taking the unusual step of revisiting its decision.

And it supports its argument not with fact, but with innuendo. It seems to suggest that every default judgment entered in foreclosure cases in Ohio over the past ten years has been granted to a bank that lacked standing to file suit – that the mortgage servicing industry has taken more than 320,000 homes from Ohio families without possessing the right to do so. If this suggestion is true, a sin far greater than the inconvenience of correcting improperly granted judgments has been committed on the public.

But the Schwartzwalds do not believe that every bank that obtained one of those 320,000 default judgments had as much wanton disregard for the rule of law as did Freddie Mac in this case. Freddie Mac has no one to blame but itself if its business practices in this case give rise to inconvenience and expense for it. And there is nothing to suggest that the Court's decision in this case will visit any evil at all on Ohio.

In fact, the very principle espoused by Freddie Mac – finality of judgments – will ensure that Ohio's courts carefully examine the underlying facts of each case to determine if the plaintiff lacked standing. Judges will be rightfully skeptical of motions to vacate judgments for lack of standing. The fact that some attorneys are now using the Court's Opinion in this case to seek relief for their clients should not concern the Court. That is why the Court issues decisions after all – so that attorneys and judges can rely on them in representing their clients. And as with every other decision this Court issues, those judges will be in the best position to apply the Court's decision to the facts of individual cases.

III. Freddie Mac Does Not Deserve a Second Bite at the Apple In This Case.

Although earlier in its motion, Freddie Mac espoused the sanctity of final judgments, it apparently believes that only those judgments in its favor should be forever final and free from attack. A judgment in favor of a homeowner, on the other hand, is of little moment and should be immediately revisited. Freddie Mac then places its temerity on full display by blaming the Schwartzwalds for the fact that it proceeded with the foreclosure sale when the case was still pending on appeal. In essence, Freddie Mac asks the Court to relieve it of the mess it, through its own actions, has created. It asks the Court to give it another chance to prove it had standing to invoke the common pleas court's jurisdiction.

Indeed, Freddie Mac asks the Court to ignore the very concession it made at oral argument that this Court relied on in rendering its decision – that it did not have the right to

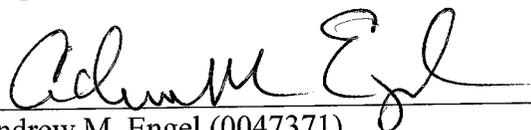
enforce the note and mortgage when it filed the complaint in this case. It blames the poor record it developed in the trial court, and its misapprehension of the law, for the result of this appeal. But as the Court pointed out in its decision, Freddie Mac is free to refile its case. The Court's Opinion did not relieve the Schwartzwalds of any obligation owed to Freddie Mac.

Freddie Mac is free to take a second bite at the apple, but not in the present case. It may only do so in a new case, which it files when it possesses standing to do so.

CONCLUSION

For the foregoing reasons, the Court should overrule Appellee's Motion to Reconsider.

Respectfully Submitted,



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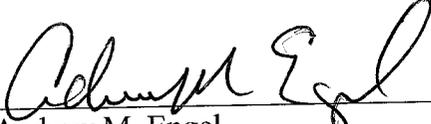
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