

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC.

* Supreme Court Case No.

13-0128

Plaintiff-Appellee

* On appeal from the Cuyahoga County
Court of Appeals, 8th Appellate District

vs.

DAVID L. PATTERSON, et al.

* Appeals Case CA-12-98360

Defendant-Appellant.

*

**APPELLANTS DAVID AND MARVA PATTERSON'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

GRACE DOBERDRUK (0085547) (COUNSEL OF RECORD)
DOBERDRUK & HARSHMAN
4600 Prospect Avenue
Cleveland, Ohio 44103
(216) 373-0539 Office
(216) 373-0536 Facsimile
grace@dannlaw.com

Counsel for Appellants David and Marva Patterson

John C. Greiner (0005551)
Harry W. Cappel (0066513)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202
Tel: (513) 621-6464
Fax: (513) 651-3836

Counsel for Plaintiff-Appellee CitiMortgage, Inc.

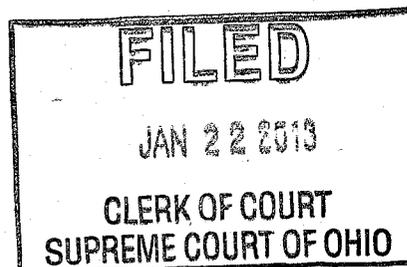


TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW5

Proposition of Law 1: A Plaintiff that files a complaint in foreclosure without an assignment of mortgage attached to the complaint lacks standing to foreclose because an assignment of the mortgage is an interest in land and must be in writing to comply with the Statute of Frauds, R.C. 1335.04.....5

Proposition of Law 2: It is error to reverse the decision granting a 60(B) motion to vacate a judgment of foreclosure when the opposing party does not point to anywhere in the record to indicate that the trial judge abused his discretion.....14

CONCLUSION15

CERTIFICATE OF SERVICE15

APPENDIX

Appx. Page

Opinion of the Eighth District Court of Appeals
(December 13, 2012)1

Judgment of Cuyahoga County Court of Common Pleas.....15
(April 19, 2012)

EXPLANATION OF WHY THIS CASE INVOLVES GREAT GENERAL INTEREST AND A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellants David and Marva Patterson's case is of great general interest and involves substantial constitutional questions because they and possibly tens of thousands of other homeowners were systematically deprived of their due process rights when foreclosures were filed by plaintiffs without standing (See *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017) and their homes were sold at sheriff's sale by Plaintiffs that were not assigned the mortgage until after the complaint was filed. The trial court properly vacated the judgment of foreclosure against the Pattersons and dismissed the foreclosure action without prejudice as the Plaintiff, at the time of filing did not hold both the note signed by the Pattersons and the Mortgage. The Eighth District Court of Appeals misinterpreted this court's decision in *Schwartzwald, supra*, by finding that only the note *or* mortgage was required to demonstrate standing. See *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, ¶21. It is well established law in Ohio under the Statute of Frauds that a mortgage on real property may only be assigned in writing (*R.C. 1355.04*). The fact that the assignment of mortgage was not executed until after the complaint was filed prevented CitiMortgage, Inc. from invoking the subject matter jurisdiction of the court on its count for foreclosure. Any other interpretation deprives the Pattersons and similarly situated homeowners of their right to due process of law.

Article 4 of the Ohio Constitution only grants the Common Pleas Courts of Ohio jurisdiction only over justiciable matters. See Section 4(B), Article 4, Ohio Constitution. A justiciable matter involves an actual controversy. See *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 ("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 render

judgments which can be carried into effect."); *Schwartzwald, supra*. For a cause to be justiciable, there must exist a real controversy presenting issues ripe for judicial resolution and which will have a direct and immediate impact on the parties. See *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98. It is undisputed that when the complaint in the underlying case was filed the Plaintiff CitiMortgage, Inc. was not yet assigned the Pattersons' mortgage. Thus, the complaint for foreclosure was not ripe for adjudication.

On October 31, 2012 this Court held that invoking the jurisdiction of the court "depends on the state of things at the time of the action brought... demonstration that the original allegations were false will defeat jurisdiction." .” *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017, ¶ 25.

In addition to there being lack of standing because the Mortgage was not assigned at the time of filing, it is not even clear that the note was properly held by the Plaintiff at the time of filing. CitiMortgage, Inc. filed a complaint for foreclosure against Appellants David and Marva Patterson and attached as an exhibit a note that was originally payable to First National Bank of Arizona. There was no indorsement on the note. An allonge was included as part of the complaint and was signed by Debbie Lovett as Assistant Vice President of two different banks in two indorsements on the same allonge. There was no assignment of mortgage to CitiMortgage, Inc. After the foreclosure complaint was filed the Pattersons filed bankruptcy and in CitiMortgage, Inc.'s motion for relief from stay filed in the bankruptcy court the note was made an exhibit and there was no allonge.

CitiMortgage, Inc. did not have an assignment of mortgage at the time the complaint was filed so there was no justiciable controversy between the plaintiff and the defendant homeowners, and thus no subject matter jurisdiction.

A substantial constitutional question arises as to whether or not a justiciable controversy exists when a Plaintiff files a complaint in foreclosure without a written assignment of the mortgage. The right to due process of law guaranteed by amendments five and fourteen of the United State Constitution were also violated in this case and potentially in thousands of other cases where judgments of foreclosure were obtained when the complaint was filed before the mortgage was assigned.

STATEMENT OF THE CASE AND FACTS

On September 20, 2006 Appellant CitiMortgage, Inc. filed a complaint foreclosure against Appellees David and Marva Patterson. On February 28, 2007 CitiMortgage, Inc. filed a Notice of Filing Note and Allonge of Note. On April 10, 2007 the Court stayed all proceedings due to bankruptcy case 07-11720. On March 31, 2008 Appellant filed a motion to reactivate the proceeding that was granted on April 14, 2008. On June 25, 2008 Appellant filed a Motion for Default Judgment. On August 14, 2008 a default judgment was granted. On November 24, 2008 Appellees' home was sold and the sale was confirmed on December 4, 2008. Appellant CitiMortgage, Inc. filed a motion to vacate the sale on December 12, 2008. On December 23, 2008 the Court vacated the sale and confirmation of sale. On June 28, 2010 Appellant sold Appellee's home again. On September 9, 2010 Appellant filed a motion to vacate the sale which the Court granted on September 27, 2010. On June 16, 2011 Appellant filed a notice of Sale. Appellees, through counsel filed a motion to vacate the judgment on July 8, 2011. A hearing was held on April 19, 2012 where the Court viewed all the evidence and granted Appellees' motion with the following journal entry:

HEARING HELD ON DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT.

ATTORNEY KIMBERLY BAGA APPEARED ON BEHALF OF PLAINTIFF, ATTORNEYS

DOBERDRUK AND DANN APPEARED ON BEHALF OF MR. AND MRS. PATTERSON, WHO ALSO APPEARED. UPON REVIEW OF THE FILE, THE MOTION FOR RELIEF FROM JUDGMENT, AND PLAINTIFF'S BRIEF IN OPPOSITION THERETO, AND PURSUANT TO PRECEDENT (WELLS FARGO BANK V. JORDAN, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009)), THE MOTION FOR RELIEF FROM JUDGMENT OF MR. AND MRS. PATTERSON IS GRANTED. PLAINTIFF FILED THE INSTANT ACTION ON 09/20/2006, AND ATTACHED COPIES OF THE NOTE AND MORTGAGE UPON WHICH THE CASE WAS BASED. UNFORTUNATELY FOR PLAINTIFF, HOWEVER, THE EVIDENCE PROVIDED INDICATES THAT THE MORTGAGE WAS NOT ASSIGNED TO PLAINTIFF CITIMORTGAGE, INC. UNTIL 10/13/2006, AFTER THE CASE WAS FILED. PLAINTIFF, THEREFORE, HAS NOT PROVIDED SUFFICIENT EVIDENCE OF STANDING AS REQUIRED BY WELLS FARGO V. JORDAN. AS A CONSEQUENCE, THE SHERIFF'S SALE HELD 10/03/2011 IS HEREBY VACATED; THE JUDGMENT RENDERED 09/11/2008 IS ALSO VACATED; AND THE CASE IS DISMISSED, WITHOUT PREJUDICE. FINAL. COURT COST ASSESSED TO THE PLAINTIFF(S). NOTICE ISSUED

On May 15, 2012 Appellant CitiMortgage, Inc. filed a Notice of Appeal and asserted three assignments of error.

On December 13, 2012 the Eighth District Court of Appeals erroneously reversed the decision vacating the judgment because the Ohio Supreme Court used the words "note or mortgage" in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017. See *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, ¶21.

In support of its position on these issues, the Appellants David and Marva Patterson present the following argument:

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: A Plaintiff that files a complaint in foreclosure without an assignment of mortgage attached to the complaint lacks standing to foreclose because an assignment of the mortgage is an interest in land and must be in writing to comply with the Statute of Frauds, R.C. 1335.04

Under Ohio's version of the Statute of Frauds, R.C. 1335.04 an interest in land is to be granted in writing. R.C. 1335.04. An assignment of mortgage is an interest in land so when a Plaintiff files a complaint in foreclosure and does not have a written assignment of mortgage that Plaintiff lacks standing to obtain a judgment of foreclosure.

“Ohio law holds that “[a]n action on a note and an action to foreclose a mortgage are two different beasts.” *Gevedon v. Hotopp*, Montgomery App. No. 20673, 2005-Ohio-4597, ¶28. See, also, *Third Fed. Savs. Bank v. Cox*, Cuyahoga App. No. 93950, 2010-Ohio-4133; *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65.” *U.S. Bank Natl. Assn. v. Duvall*, 2010-Ohio-6478, ¶ 13.

Whether or not the Plaintiff has an interest in the note, if the Plaintiff has not been assigned the mortgage then Plaintiff lacks standing to foreclose.

The note is the debt and the mortgage is security for the debt. If the note and mortgage ever become separated, the note, as a practical matter becomes unsecured. Restatement (Third) of Property (Mortgages) §5.4. Comment.

A Plaintiff that only possesses the note could have standing to bring action for money. However, without being assigned the mortgage the Plaintiff could not foreclose. Since the assignment of the mortgage is an interest in land that assignment must be in writing. R.C. 1335.04. If there is no written assignment of mortgage at the time the foreclosure complaint is filed then the party who filed the foreclosure lacks standing to foreclose because that party does

not have a legal interest in the mortgage. The requirement that the assignment be in writing prevents a Plaintiff from obtaining a valid judgment of foreclosure when the assignment of mortgage is executed after the complaint was filed.

It is necessary to have a written assignment of mortgage in order to comply with the Statute of Frauds. Judge Boyko recognized the importance of written assignments and stated that the Court “is obligated to carefully scrutinize all filings and pleadings in foreclosure actions, since the unique nature of real property requires contracts and transactions concerning real property to be in writing.” *In re Foreclosure Cases*, 2007 U.S. Dist. LEXIS 84011, (N.D. Ohio, Oct. 31, 2007) citing R.C. § 1335.04. Because an assignment of mortgage is an interest in real property the courts must require a foreclosing plaintiff to attach a written assignment of mortgage prior to filing a complaint. Since the Statute of Frauds requires an interest in land to be in writing, a plaintiff without an assignment of mortgage that pre-dates the filing of the complaint lacks standing to foreclose.

The trial court correctly vacated the judgment of foreclosure in the Pattersons’ case because the assignment of mortgage was executed after the complaint was filed.

“The current holder of the note and mortgage is the real party in interest in a foreclosure action.” *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15, citing *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C-061069, 2007-Ohio-5874.”

CitiMortgage, Inc. v. Patterson, 2012-Ohio-5894, ¶ 11.

Civil Rule 17 requires action to be prosecuted in the name of the real party in interest. When Appellee CitiMortgage, Inc. filed a complaint for foreclosure against Appellants David and Marva Patterson, the mortgage was granted to Mortgage Electronic Registration Systems, Inc. as nominee for First National Bank of Arizona so the case was clearly not being prosecuted

in the name of the real party in interest. Since an assignment of mortgage was missing CitiMortgage, Inc. lacked of standing to foreclose.

“Every action shall be prosecuted in the name of the real party in interest. Civ.R. 17. In a foreclosure case the real party in interest is the holder of the note and mortgage at the time the complaint is filed. *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092. The Eighth District Court of Appeals based its analysis in *Wells Fargo Bank, N.A. v. Jordan* on the following passage cited by the First District Court of Appeals when it dismissed a foreclosure case due to lack of standing in *Wells Fargo Bank, N.A. v. Byrd*,

“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 at ¶9, 897 N.E.2d 722.

A foreclosing plaintiff that not hold the mortgage and note at the time of filing the Complaint is not the proper party to bring the case, and thus, Civ. R. 17 which makes reference to ratification, joinder or substitution is inapplicable. “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 Bank, N.A. v. Byrd*, 2008-Ohio-4603 at ¶16.

A sua sponte dismissal by the Court for lack of standing is appropriate because the Advisory Committee's Notes to Civ.R. 17 "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." *Bank of New York v. Gindele*, 2010-Ohio-542, ¶ 4 citing *Wells Fargo Bank, N.A. v. Byrd*, 2008-Ohio-4603.

No excusable mistake was made when Appellee filed a foreclosure case against the Appellants. Appellee CitiMortgage, Inc. lacked any evidence of ownership of the mortgage and then created that evidence to procure a default judgment through fraud. This result was not intended by the Civil Rules.

The question certified to this Court in *Schwartzwald* involved a conflict with the First District Court of Appeals and the Eighth District Court of Appeals on the following issue: "In a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment." *Schwartzwald, supra*, ¶ 1. On October 31, 2012 this Court ruled that it could not be. *Schwartzwald, supra*, ¶ 38-40 ("Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance. Accordingly, a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest. The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint...")

From 2006 until the present day there have been rising foreclosures throughout the United States which have created an economic crisis. Once homeowners started contesting these foreclosures, courts were shocked to learn that many documents submitted by attorneys for foreclosure plaintiffs were fabricated, robo-signed, and that the plaintiffs lacked standing to foreclose. Ohio first recognized this problem starting in 2007 with the now often quoted decision of Judge Boyko who called the integrity of the court "Priceless" and dismissed 14 foreclosure cases on the same day due to lack of standing. *See In re Foreclosure Cases*, 2007 U.S. Dist. LEXIS 84011, (N.D. Ohio, Oct. 31, 2007). Two weeks after Judge Boyko's decision, Judge Kathleen McDonald O'Malley dismissed thirty two (32) foreclosure actions in the Northern District of Ohio for lack of standing, and concluded that "a foreclosure plaintiff...especially who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit is filed. In other words, a foreclosure plaintiff must provide documentation that it is the holder and owner of the note and mortgage as of the date the foreclosure action is filed." *In Re:Foreclosure Actions*, 2007 WL 4034554 (N.D. Ohio Nov 14, 2007).

The Southern District of Ohio came to the same conclusion regarding lack of standing and ruled that in a foreclosure that the plaintiff must be the holder of both the note and mortgage at the time the complaint is filed. *In re Foreclosure Cases*, 3:07CV043, (S.D. Ohio, Nov. 15, 2007). The federal courts measure ownership by a written assignment of mortgage. So does Ohio Revised Code 1335.04 which requires interests in land to be in writing.

The Cuyahoga County Court of Common Pleas also measured ownership by a written assignment of mortgage. See *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092 (There is no

standing to foreclose when the assignment of mortgage was signed nearly three weeks after the complaint was filed).

The Eighth District Court of Appeals erred because the Pattersons' mortgage was not assigned to CitiMortgage, Inc. when the complaint was filed. Thus, CitiMortgage, Inc. did not have a legal interest in the Pattersons' mortgage, was not the real party in interest, and was not entitled to a judgment of foreclosure.

In the 8th district the Plaintiff must own the note and mortgage prior to the foreclosure complaint being filed. *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092; *Deutsch Bank Natl. Trust Co. v. Triplett*, 2011-Ohio-478; *U.S. Bank Natl. Assn. v. Duvall*, 2010-Ohio-6478.

“Ohio law holds that “[a]n action on a note and an action to foreclose a mortgage are two different beasts.” *Gevedon v. Hotopp*, Montgomery App. No. 20673, 2005-Ohio-4597, ¶28. See, also, *Third Fed. Savs. Bank v. Cox*, Cuyahoga App. No. 93950, 2010-Ohio-4133; *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65.

In *Jordan*, supra, this court held that “[t]he owner of rights or interest in property is a necessary party to a foreclosure action. * * * Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law.” *Id.*, ¶¶22-23.”

U.S. Bank Natl. Assn. v. Duvall, 2010-Ohio-6478, ¶¶13-14.

In Appellants David and Marva Pattersons' case the Eighth District Court of Appeals misinterpreted the language used in the Supreme Court of Ohio's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017. While the Supreme Court of Ohio was stating that at the time the complaint was filed that Federal Home Loan Mortgage Corporation did not have an interest in the note or mortgage of the Schwartzwalds, that was a commentary on the evidence produced specifically in that case and not a declaration that a foreclosing plaintiff needed only the note or mortgage to foreclose. Such an interpretation would be inconsistent with Ohio's statute of frauds, R.C. 1335.04 and *Schwartzwald*.

The Eighth District Court of Appeals erred in its analysis of *Schwartzwald*:

“As discussed, the Ohio Supreme Court concluded in *Schwartzwald* that Federal Home Loans did not have standing to invoke the jurisdiction of the common pleas court because “it failed to establish an interest in the note *or* mortgage at the time it filed suit.” (Emphasis added.) *Id.* at ¶ 28. Significant to the court’s holding is its deliberate decision to use the disjunctive word “or” as opposed to the conjunctive word “and” when discussing the interest Federal Home Loans was required to establish at the time it filed the complaint. The language depicts an apparent distinction from our holding in *Jordan*, where we held that a party only has standing to invoke the jurisdiction of the court when the plaintiff has offered evidence that “it owned the note *and* mortgage when the complaint was filed.” (Emphasis added.) *Jordan* at ¶ 23. In our view, *Schwartzwald* extends the limitations of our holding in *Jordan* and stands for the proposition that a party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned *or* (2) is the holder of the note.”

CitiMortgage, Inc. v. Patterson, 2012-Ohio-5894, ¶ 21.

Appellants David and Marva Patterson respectfully request that this Court accept jurisdiction over their appeal to clarify the way that *Schwartzwald* should be interpreted not only in their case, but in the cases of all the homeowners who have been similarly deprived of due process by a bank that foreclosed without a written assignment of mortgage in violation of the Statute of Frauds, R.C. 1335.04.

A justiciable matter involves an actual controversy and when the foreclosing Plaintiff has not been assigned the mortgage at the time the complaint is filed there is no justiciable controversy between the plaintiff and the defendant homeowners in a complaint for foreclosure, and thus no subject matter jurisdiction.

"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 render judgments which can be carried into effect." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14.

For a cause to be justiciable, there must exist a real controversy presenting issues that are ripe for

judicial resolution and which will have a direct and immediate impact on the parties. See *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98. More recently, in *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty* (1996), 74 Ohio St.3d 536, 542, 1996-Ohio-286, the court stated, "[a]ctual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law." If at the time that Appellee filed a complaint for foreclosure and the Appellee misrepresented its legal status by falsely alleging it was entitled to foreclose on the mortgage when the mortgage had not yet been assigned to CitiMortgage, Inc. then there was no property interest for Appellee to claim protection from because the mortgage was not held by Appellee.

Appellee CitiMortgage, Inc. simply had no dispute with Appellants David and Marva Patterson. Since the Ohio Constitution grants the Common Pleas Courts jurisdiction only over justiciable matters, the Court did not have jurisdiction to render a judgment in this case. At the time this case was filed, Appellee did not produce evidence of ownership of Appellants' note and mortgage. Thus, no actual controversy existed between Plaintiff and the Defendants. Without ownership, Appellee suffered no harm by an alleged default in payment and no justiciable controversy existed. Although the trial court had subject matter jurisdiction over the general topic area of foreclosures, the trial court lacked subject matter jurisdiction over the Appellants' foreclosure case because Appellee failed to attach valid proof of ownership at the time the complaint was filed. The recent decision in *Deutsche Bank National Trust Company v. Popov*, Cuyahoga County Case No. CV-09-691971 held:

THE DISMISSAL OF A FORECLOSURE ACTION IS REQUIRED UPON FINDING THAT PLAINTIFF WAS NOT REAL PARTY IN INTEREST AT THE TIME IT FILED THE ACTION. IF A PARTY LACKS STANDING, BY EXTENSION, THE TRIAL COURT LACKS SUBJECT MATTER JURISDICTION OVER THE ACTION.

CitiMortgage, Inc. filed a complaint in foreclosure against the Pattersons and attached as an exhibit a mortgage granted to Mortgage Electronic Registration Systems, Inc. as nominee for First National Bank of Arizona . There was no assignment of mortgage. Thus, Plaintiff CitiMortgage, Inc., from the face of its own pleadings, was not entitled to enforce the Patterson's mortgage. In order to have a justiciable controversy there must be a current injury. Since Appellee did not own the Appellants note and mortgage, there is no justiciable controversy between Appellee CitiMortgage, Inc. and Appellants David and Marva Patterson and the trial court lacks subject matter jurisdiction under the Ohio Constitution to render a judgment.

The Supreme Court of Ohio ruled that "A judgment rendered by a court lacking subject matter jurisdiction is *void ab initio*." *Patton v. Diemer*, 35 Ohio St. 3d 68, 70 (Ohio 1988). "Consequently, the authority to vacate a void judgment is not derived from Civ. R. 60(B), but rather constitutes an inherent power possessed by Ohio courts. See Staff Notes to Civ. R. 60(B); *Lincoln Tavern, Inc. v. Snader* (1956); 165 Ohio St. 61, 59 O.O. 74, 133 N.E. 2d 606, paragraph one of the syllabus; *Westmoreland v. Valley Homes Corp.* (1975), 42 Ohio St. 2d 291, 294, 71 O.O. 2d 262, 264, 328 N.E. 2d 406, 409. It was neither incumbent upon appellee to establish a basis for relief under Civ. R. 60(B) nor was it necessary for the common pleas court to derive its authority therefrom. Rather, the "judgment" sought to be vacated constituted a nullity. It was therefore within the inherent power of the trial court to vacate the judgment. *Patton v. Diemer*, 35 Ohio St. 3d 68, 70 (Ohio 1988). The trial court correctly vacated the judgment of foreclosure in the Pattersons' case for lack of jurisdiction.

Proposition of Law 2: It is error to reverse the decision granting a 60(B) motion to vacate a judgment of foreclosure when the opposing party does not point to anywhere in the record to indicate that the trial judge abused his discretion

The judgment of foreclosure in the Pattersons' case was vacated after a hearing and cited to *Wells Fargo Bank v. Jordan*, 2009 Ohio 1092 (8th Dist. Ct. App. Mar. 12, 2009) which was binding case law in the Eighth District Court of Appeals. The judgment was vacated on April 19, 2012 which was over six months before *Schwartzwald* was decided on October 31, 2012. Appellee CitiMortgage, Inc.'s argument in 2012 that it could cure its lack of standing had been rejected as the law in the Eighth District since March 12, 2009. See *Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092, ¶ 23 (if a foreclosing plaintiff "offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment...").

In addition to presenting a meritorious defense under Civil Rule 60(B) by demonstrating at the hearing that CitiMortgage, Inc. was not the holder of the note when the complaint was filed because the allonge attached to the complaint was not filed as an exhibit in the Pattersons subsequent bankruptcy case, there was no justiciable controversy between Appellee and Appellants, and thus no subject matter jurisdiction for this particular foreclosure case, making the judgment *void ab initio*. The Second District Court of Appeals in *Countrywide Home Loans Servicing, L.P. v. Burden*, 2011-Ohio-5949, ¶ 8 recently stated that "A judgment entered by a court that proceeded without jurisdiction is void ab initio. *Dollar Savings & Trust Co. v. Trocheck* (1999), 132 Ohio App.3d 531, 535, and is a legal nullity for all purposes. *Hayes v. Kentucky Joint Stock Land Bank of Lexington* (1932), 125 Ohio St. 359."

Without identifying an abuse of discretion, the Eighth District Court of Appeals erred by reversing the trial court's decision to vacate the judgment of foreclosure and sale.

By the same logic that was used to come to a decision in *Wachovia Bank of Delaware, N.A. v. Jackson*, 2011-Ohio-3203 a court is required to examine the documents set before it and verify that the exhibits attached to the complaint support a claim and when a 60(B) motion to vacate alerts the court to defects in the documents used to fraudulently procure a judgment the Court of Appeals errs by reversing a decision that granted a motion to vacate the judgment.

CONCLUSION

CitiMortgage, Inc. lacked standing to file a claim for foreclosure against Appellants David and Marva Patterson because the Pattersons' mortgage was not assigned to CitiMortgage, Inc. at the time the complaint was filed. A written assignment of mortgage is necessary in order to comply with the Statute of Frauds, R.C. 1335.04. In order to invoke the Court's jurisdiction the Ohio Constitution requires a justiciable controversy which was lacking in Appellants David and Marva Patterson's case. Appellants David and Marva Patterson request that the Supreme Court of Ohio accept jurisdiction over this case and vacate the judgment of foreclosure.

Respectfully submitted,

DOBERDRUK & HARSHMAN

Grace Doberdruk
Grace Doberdruk (0085547) (Counsel of Record)
Counsel for Appellants David and Marva Patterson

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2013 a copy of the foregoing document as served by ordinary U.S. mail upon the following:

John C. Greiner (0005551)
Harry W. Cappel (0066513)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202

Grace M. Doberdruk
GRACE M. DOBERDRUK (0085547)

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98360

CITIMORTGAGE, INC.

PLAINTIFF-APPELLANT

vs.

DAVID L. PATTERSON, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-601901

BEFORE: Celebrezze, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 13, 2012

ATTORNEYS FOR APPELLANT

John C. Greiner
Harry W. Cappel
Graydon Head & Ritchey, L.L.P.
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157

ATTORNEYS FOR APPELLEES

For David L. Patterson, et al.

Grace Doberdruk
Dann, Doberdruk & Wellen, L.L.C.
4600 Prospect Avenue
Cleveland, Ohio 44103

For Allstate Insurance Company

Allstate Insurance Co., pro se
280 Executive Parkway West
Hudson, Ohio 44236

**FILED AND JOURNALIZED
PER APP.R. 22(C)**

DEC 13 2012

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.**

FRANK D. CELEBREZZE, JR., J.:

{¶1} Plaintiff-appellant, CitiMortgage, Inc. (“CitiMortgage”), appeals the judgment of the Cuyahoga County Court of Common Pleas granting a motion to vacate a foreclosure judgment and sheriff’s sale brought pursuant to Civ.R. 60(B) in favor of defendants-appellees, David and Marva Patterson (collectively “the Pattersons”). After careful review of the record and relevant case law, we reverse the trial court’s judgment and remand for further proceedings consistent with this opinion.

{¶2} This is an action in foreclosure stemming from a promissory note and mortgage on which the Pattersons defaulted. On September 20, 2006, CitiMortgage filed a complaint in foreclosure against the Pattersons. Attached to the complaint was a copy of the note and mortgage naming First National Bank of Arizona as the lender. The attached note also included an allonge of note bearing a blank indorsement. On February 28, 2007, CitiMortgage filed a notice of filing note and allonge of note evidencing the assignment of the mortgage to CitiMortgage. The assignment of the mortgage to CitiMortgage was executed on September 29, 2006, and filed with the Cuyahoga County Recorder on October 13, 2006.

{¶3} On April 10, 2007, the trial court entered a stay pursuant to the Pattersons’ Chapter 7 bankruptcy proceedings. The stay was lifted on April 14, 2008, and the case was reactivated. On June 25, 2008, CitiMortgage moved for

default judgment. Following the Pattersons' failure to appear at the default hearing, the magistrate granted CitiMortgage's motion for default judgment on August 15, 2008. Without objection, the trial court adopted the magistrate's decision on September 11, 2008.

{¶4} On November 24, 2008, the property was sold at sheriff's sale, and the sale was confirmed on December 4, 2008. On December 12, 2008, CitiMortgage filed a motion to vacate the sale, and the trial court granted the motion on December 23, 2008. Subsequently, the property was sold at sheriff's sale on June 28, 2010.

{¶5} On June 28, 2010, the Pattersons filed a motion to stay the confirmation of sale. In response, CitiMortgage filed a motion to vacate the June 28, 2010 sale, which the trial court granted on September 27, 2010. On June 16, 2011, CitiMortgage filed a notice of sale with the trial court and scheduled a new sheriff's sale for July 11, 2011. On July 8, 2011, the Pattersons filed an emergency motion to stay the sheriff's sale and a Civ.R. 60(B) motion to vacate the default judgment. The property was not sold at the July 11, 2011 sheriff's sale.¹ However, the property was ultimately sold at sheriff's sale on October 3, 2011.

¹ The trial court found the Pattersons' July 8, 2011 emergency motion to stay the sheriff's sale to be moot based on CitiMortgage's failure to sell the property at the July 11, 2011 sheriff's sale.

{¶6} On March 5, 2012, the trial court held a hearing on the Pattersons' motion to vacate the default judgment. On April 19, 2012, the trial court granted the motion to vacate, stating in relevant part:

Upon review of the file, the motion for relief from judgment, and Plaintiff's brief in opposition thereto, and pursuant to precedent 2009-Ohio-1092,^[2] the motion for relief from judgment of Mr. and Mrs. Patterson is granted. Plaintiff filed the instant action on 09/20/2006, and attached copies of the Note and Mortgage upon which the case was based. Unfortunately for plaintiff, however, the evidence provided indicates that the mortgage was not assigned to Plaintiff CitiMortgage, Inc., until 10/13/2006, after the case was filed. Plaintiff, therefore, has not provided sufficient evidence of standing as required by *Wells Fargo v. Jordan*. As a consequence, the sheriff's sale held 10/03/2011 is hereby vacated; the judgment rendered 09/11/2008 is also vacated; and the case is dismissed; without prejudice; final.

{¶7} CitiMortgage now brings this timely appeal, raising three assignments of error for review:

I. The trial court erred as a matter of law by granting the Pattersons' motion to vacate the judgment pursuant to Ohio Civ.R. 60(B).

II. The trial court abused its discretion in granting the Pattersons' motion to vacate the judgment under Ohio Civ.R. 60(B).

III. The trial court erred as a matter of law by ruling that it lacked standing to prosecute the foreclosure action.

Law and Analysis

{¶8} For the purposes of this appeal, we review CitiMortgage's assignments of error out of order because its third assignment of error is

² *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092.

dispositive. CitiMortgage argues here that the trial court erred as a matter of law by ruling that CitiMortgage lacked standing to prosecute the case.

I.

{¶9} Initially, CitiMortgage contends that if there were defects in its standing at the time it filed the foreclosure action on September 20, 2006, those purported defects were cured prior to the judgment of foreclosure pursuant to Civ.R. 17(A).

{¶10} In Ohio, Civ.R. 17(A) governs the procedural requirement that a complaint be brought in the name of the real party in interest. Civ.R. 17(A) states in relevant part:

Every 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.

{¶11} The real party in interest requirement “enable[s] 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 v. Campbell*, 20 Ohio St.3d 23, 24-25, 485 N.E.2d 701 (1985), quoting *In re Highland Holiday Subdivision*, 27 Ohio App.2d 237, 273 N.E.2d

903 (4th Dist.1971). “The current holder of the note and mortgage is the real party in interest in a foreclosure action.” *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15, citing *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C-061069, 2007-Ohio-5874.

{¶12} As stated, the trial court concluded that CitiMortgage did not have standing to prosecute the foreclosure action in this matter because it was not assigned the mortgage until approximately nine days after it filed the complaint for foreclosure against the Pattersons. Relying on Civ.R. 17(A), CitiMortgage contends that any purported defect in its standing at the commencement of the foreclosure action was cured once it obtained the assignment of mortgage prior to the entry of judgment in this matter. This court has held, however, that a plaintiff's lack of standing at the time a complaint is filed in a foreclosure action cannot be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 24. In *Jordan*, we explained that

“Civ.R. 17(A) is 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.”

Id. at ¶ 21, citing *Travelers Indemn. Co. v. R. L. Smith Co.*, 11th Dist. No. 2000-L-014, 2001 Ohio App. LEXIS 1750 (Apr. 13, 2001). We concluded that “in a foreclosure action, a bank that was not the mortgagee when suit was filed

cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.” *Id.* at ¶ 24; *see also Deutsche Bank Natl. Trust Co. v. Triplett*, 8th Dist. No. 94924, 2011-Ohio-478, ¶ 12; *Wells Fargo Bank N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.).³

{¶13} Recently, the Ohio Supreme Court addressed the issues of standing and real party in interest as they relate to foreclosure actions in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017 (Oct. 31, 2012). Specifically, the court reviewed whether, “[i]n a mortgage foreclosure action, the lack of standing or a real party interest defect can be cured by the assignment of the mortgage prior to judgment.” *Id.* at ¶ 19.

{¶14} In discussing the requirement of standing, the Ohio Supreme Court stated, “[i]t is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” *Id.* at ¶ 22, citing *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio

³ CitiMortgage challenges the validity of our holding in *Jordan* and asks this court to apply the analysis developed in the Fifth, Sixth, Seventh, Ninth, Tenth, and Twelfth districts, which allows a party to cure any potential defect in standing prior to the entry of judgment pursuant to Civ.R. 17(A). *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115; *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976; *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032 (7th Dist.); *BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413; *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. No. 09AP-819, 2010-Ohio-3018; *Wash. Mut. Bank, F.A. v. Wallance*, 194 Ohio App.3d 549, 2011-Ohio-4174, 957 N.E.2d 92 (12th Dist.).

St.2d 176, 179, 298 N.E.2d 515 (1973). The court explained, “[b]ecause standing to sue is required to invoke the jurisdiction of the common pleas court, ‘standing is to be determined as of the commencement of suit.’” *Id.* at ¶ 24, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5. “Thus, ‘post-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress.’” *Id.* at ¶ 26, citing 13A Wright, Miller & Cooper, *Federal Practice and Procedure* 9, Section 3531 (2008).⁴

⁴ This principle accords with decisions from other states holding that standing is determined at the time the complaint is filed. *See, e.g., Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 (“If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder after the foreclosure action was filed, then the case may be dismissed without prejudice * * *.”); *U.S. Bank Natl. Assn. v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 (“U.S. Bank was required to show that at the time the complaint was filed it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank.”); *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 287, ¶ 15 (“Without possession of or any interest in the note, MERS lacked standing to institute foreclosure proceedings and could not invoke the jurisdiction of our trial courts.”); *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 307 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) (explaining that “[s]tanding is the legal right to set judicial machinery in motion” and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action); *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) (“the plaintiff must prove that it had standing to foreclose when the complaint was filed”); *see also Burley v. Douglas*, 26 So.3d 1013, 1019 (Miss.2009), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5 (“standing is to be determined as of the commencement of suit”); *In re 2007 Administration of Appropriations of Waters of the Niobrara*, 278 Neb. 137, 145, 768 N.W.2d 420 (2009) (“only a party that has standing may invoke the jurisdiction of a court or tribunal. And the junior

{¶15} Applying these principles to the facts before it, the Ohio Supreme

Court held:

Here, Federal Home Loan concedes that there is no evidence that it had suffered any injury at the time it commenced this foreclosure action. Thus, because it failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.

Id. at ¶ 28.

{¶16} Next, the Ohio Supreme Court discussed the application of Civ.R. 17(A) and, as this court articulated in *Jordan*, the Ohio Supreme Court rejected the notion that Civ.R. 17(A) allows a party to cure the lack of standing after the commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest. *Id.* at ¶ 39.

According to the court:

Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.

* * *

The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint, however, that dismissal is not an adjudication on the merits and is therefore without prejudice.

Id. at ¶ 38, 40.

appropriators did not lose standing if they possessed it under the facts existing when they commenced the litigation" [Footnote omitted.]. *Schwartzwald* at ¶ 27.

{¶17} Significantly, the court declined to follow its previous plurality opinion in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002, which suggested that “[t]he 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.” In choosing not to apply *Suster*, the court noted that “four justices declined to join [the standing] portion of the opinion, and therefore it is not a holding of this court.” *Id.* at ¶ 29, citing Ohio Constitution, Article IV, Section 2(A) (“A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment”).

{¶18} In dismissing Federal Home Loan’s foreclosure action against the Schwartzwalds without prejudice, the court concluded:

It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

Id. at ¶ 41.

{¶19} Thus, in light of the Ohio Supreme Court’s decision in *Schwartzwald*, we find no merit to CitiMortgage’s arguments regarding Civ.R. 17(A) and its purported ability to cure potential defects in standing.

II.

{¶20} Alternatively, CitiMortgage argues that, despite the trial court's holding to the contrary, it did have standing to prosecute the foreclosure action against the Pattersons, as evidenced by its possession of the promissory note indorsed in blank at the time the complaint was filed on September 20, 2006. We find the language utilized in *Schwartzwald* to be vital to our review of whether the trial court properly relied on *Jordan* in determining that CitiMortgage did not have standing in this matter.

{¶21} As discussed, the Ohio Supreme Court concluded in *Schwartzwald* that Federal Home Loans did not have standing to invoke the jurisdiction of the common pleas court because "it failed to establish an interest in the note *or* mortgage at the time it filed suit." (Emphasis added.) *Id.* at ¶ 28. Significant to the court's holding is its deliberate decision to use the disjunctive word "or" as opposed to the conjunctive word "and" when discussing the interest Federal Home Loans was required to establish at the time it filed the complaint. The language depicts an apparent distinction from our holding in *Jordan*, where we held that a party only has standing to invoke the jurisdiction of the court when the plaintiff has offered evidence that "it owned the note *and* mortgage when the complaint was filed." (Emphasis added.) *Jordan* at ¶ 23. In our view, *Schwartzwald* extends the limitations of our holding in *Jordan* and stands for the proposition that a party may establish its interest in the suit, and therefore

have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned or (2) is the holder of the note.

{¶22} Based on our interpretation of *Schwartzwald*, the fact that CitiMortgage was not assigned the mortgage until September 29, 2006, and did not record the assignment with the Cuyahoga County Recorder until October 13, 2006, does not preclude a finding of standing. Here, the record reflects that, unlike the plaintiffs in *Schwartzwald* and *Jordan*, CitiMortgage was the holder of the note at the time it filed the foreclosure action on September 20, 2006, based on CitiMortgage's possession of the bearer paper that secured the defendants' mortgage.⁵ As a holder, CitiMortgage was entitled to enforce the note, and thereby had a real interest in the subject matter of the instant foreclosure action. See R.C. 1303.31(A)(1). As such, we conclude that CitiMortgage's complaint and its attached documents sufficiently established CitiMortgage's standing to invoke the jurisdiction of the common pleas court in this matter.

{¶23} Based on the foregoing, we find that the trial court erred in granting the Pattersons' motion to vacate the foreclosure judgment and sheriff's sale.

⁵ Pursuant to R.C. 1303.25(B) a "[b]lank indorsement" means an instrument that is made by the holder of the instrument and that is not a special indorsement. When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." (Emphasis added.)

CitiMortgage's third assignment of error is sustained. Based on this finding, the remaining assignments of error are moot.

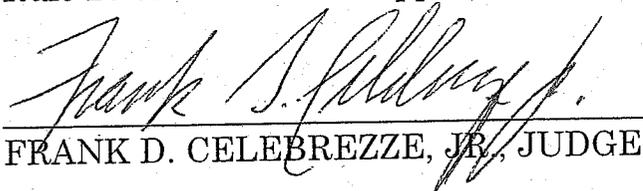
{¶24} This cause is reversed and remanded to the Cuyahoga County Court of Common Pleas so that it may reinstate the foreclosure judgment and sheriff's sale.

It is ordered that appellant and appellees share the 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.


FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR



73365542

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CITIMORTGAGE INC.
Plaintiff

DAVID L. PATTERSON ETAL
Defendant

Case No: CV-06-601901

Judge: JANET R BURNSIDE

JOURNAL ENTRY

87 DIS. W/O PREJ - FINAL

HEARING HELD ON DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT. ATTORNEY KIMBERLY BAGA APPEARED ON BEHALF OF PLAINTIFF, ATTORNEYS DOBERDRUK AND DANN APPEARED ON BEHALF OF MR. AND MRS. PATTERSON, WHO ALSO APPEARED. UPON REVIEW OF THE FILE, THE MOTION FOR RELIEF FROM JUDGMENT, AND PLAINTIFF'S BRIEF IN OPPOSITION THERETO, AND PURSUANT TO PRECEDENT (WELLS FARGO BANK V. JORDAN, 2009 OHIO 1092 (8TH DIST. CT. APP., MAR. 12, 2009)), THE MOTION FOR RELIEF FROM JUDGMENT OF MR. AND MRS. PATTERSON IS GRANTED. PLAINTIFF FILED THE INSTANT ACTION ON 09/20/2006, AND ATTACHED COPIES OF THE NOTE AND MORTGAGE UPON WHICH THE CASE WAS BASED. UNFORTUNATELY FOR PLAINTIFF, HOWEVER, THE EVIDENCE PROVIDED INDICATES THAT THE MORTGAGE WAS NOT ASSIGNED TO PLAINTIFF CITIMORTGAGE, INC. UNTIL 10/13/2006, AFTER THE CASE WAS FILED. PLAINTIFF, THEREFORE, HAS NOT PROVIDED SUFFICIENT EVIDENCE OF STANDING AS REQUIRED BY WELLS FARGO V. JORDAN. AS A CONSEQUENCE, THE SHERIFF'S SALE HELD 10/03/2011 IS HEREBY VACATED; THE JUDGMENT RENDERED 09/11/2008 IS ALSO VACATED; AND THE CASE IS DISMISSED, WITHOUT PREJUDICE. FINAL. COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

04/18/2012
CPJLJ

- 87
04/17/2012

RECEIVED FOR FILING

04/19/2012 09:01:54
By: CLPAL
GERALD E. FUERST, CLERK

Page 1 of 1