

ORIGINAL

IN THE SUPREME COURT OF OHIO

**BANK OF AMERICA, NATIONAL ASSOCIATION,**

**Plaintiff-Appellant,**

**v.**

**GEORGE M. KUCHTA, et al.,**

**Defendants-Appellee.**

\* **13-0304**  
\*  
\* **On Appeal from the Medina County**  
\* **Court of Appeals, Ninth Appellate**  
\* **District**  
\*  
\* **Court of Appeals**  
\* **Case No. 12CA0025-M**  
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**NOTICE OF CERTIFIED CONFLICT OF APPELLANT  
BANK OF AMERICA, N.A.**

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*Attorney for Defendant-Appellees  
George and Bridget Kuchta*

**FILED**  
**FEB 19 2013**  
**CLERK OF COURT**  
**SUPREME COURT OF OHIO**

**Notice of Certified Conflict of Appellant, Bank of America, N.A.**

Appellant Bank of America, N.A. ("Bank of America") gives notice that on January 22, 2013, the Medina County Court of Appeals, Ninth Appellate District, entered in Case No. 12CA0025-M a Journal Entry (attached as "Exhibit A") certifying the following question pursuant to App.R. 25:

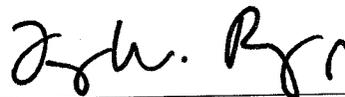
When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?

A copy of the Ninth Appellate District's Decision and Journal Entry dated December 3, 2012 is attached as "Exhibit B".

The Ninth District certified the conflict based on the Tenth District Court of Appeals' decision in *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383 (attached as "Exhibit C").

Pursuant to S.Ct. Prac. R. 8.01, a copy of the Entry certifying the conflict, the underlying decision, and the conflict case are all attached.

Respectfully submitted,



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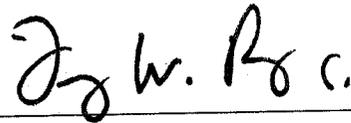
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*Attorneys for Plaintiff-Appellant  
Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 18, 2013, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

Grace Doberdruk  
Dann, Doberdruk & Wellen LLC  
4600 Prospect Avenue  
Cleveland, Ohio 44103



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Terry W. Posey

727619v1

STATE OF OHIO )  
COUNTY OF MEDINA ) COURT OF APPEALS

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

13 JAN 22 AM 11:50

BANK OF AMERICA, N.A.

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY  
CLERK OF COURTS

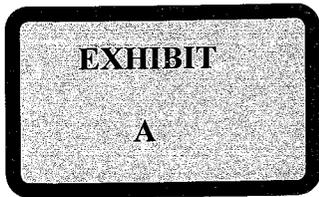
C.A. No. 12CA0025-M

Appellee

v.

GEORGE M. KUCHTA, et al,

Appellants



JOURNAL ENTRY

Appellee has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on December 3, 2012, and the judgment of the Tenth District Court of Appeals in *PNC Bank, N.A. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383. Appellants have opposed to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment \* \* \* is in conflict with the judgment pronounced upon the same question by any other court of appeals of the state \* \* \*." "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Appellee has proposed that a conflict exists between the districts on the following issue:

When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for a relief from judgment?

We find that a conflict of law exists; therefore, the motion to certify is granted.

*Bert Whitlock*  
\_\_\_\_\_  
Judge

Concur:  
Moore, J.  
Carr, J.

STATE OF OHIO )  
COUNTY OF MEDINA )  
BANK OF AMERICA

Appellee

v.

GEORGE M. KUCHTA, et al.

Appellants

COURT OF APPEALS  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
ss: 12 DEC -5 PM 12:07

FILED  
DAVID B. WAGSWORTH  
MEDINA COUNTY C.A. No. 12CA0025-M  
CLERK OF COURTS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No. 10CIV1003

DECISION AND JOURNAL ENTRY

Dated: December 3, 2012

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellants, George and Bridget Kuchta, appeal from the judgment of the Medina County Court of Common Pleas, denying their motion for relief from judgment. This Court reverses.

I

{¶2} In 2002, Appellants financed a purchase of property in Hinckley, Ohio. Appellants executed a promissory note for \$650,000 in favor of Wells Fargo and secured the note by a mortgage granting a security interest in the property to Wells Fargo.

{¶3} On June 1, 2010, Bank of America filed a complaint in foreclosure, in which it claimed to be the holder of the promissory note executed by Appellants in 2002. The note did not contain any indorsements. Bank of America attached a copy of the mortgage and promissory note. On June 10, 2010, Wells Fargo executed an Assignment of Mortgage. The Assignment states that Wells Fargo "does hereby sell, assign, transfer and set over unto Bank of America \* \*

EXHIBIT  
B

\*, a certain mortgage from [Appellants] \* \* \*, 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 \* \* \*.” This assignment was recorded on June 23, 2010.<sup>1</sup>

{¶4} On July 2, 2010, Appellants filed an answer pro se, in which they argued that the complaint failed to show that Bank of America owned or was assigned their mortgage.

{¶5} Subsequently, Bank of America filed a motion for summary judgment and an affidavit of Herman John Kennerty in support. Kennerty, the Vice President of Loan Documentation for Wells Fargo, the servicing agent for Bank of America, stated that Bank of America is the holder of Appellants’ promissory note and mortgage and attached a copy of the Assignment of Mortgage. Appellants did not oppose the motion for summary judgment.

{¶6} Throughout the following year, “the [c]ourt conducted numerous settlement conferences in an attempt to avoid foreclosure and secure a loan modification for [Appellants].” In June 2011, Bank of America determined that Appellants did not qualify for a loan modification. Shortly thereafter, the court granted Bank of America’s motion for summary judgment and scheduled the property for a Sheriff’s sale on September 29, 2011. No appeal was filed.

{¶7} On September 23, 2011, Appellants filed a motion to vacate judgment pursuant to Civ.R. 60(B). The court denied their motion on September 29, 2011. That same day, Appellants filed for bankruptcy, and the case was stayed until the bankruptcy action was

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<sup>1</sup> Attached, as exhibit C, to its affidavit in support of its motion for summary judgment is a copy of the Assignment of Mortgage. The cover page from the Medina County Recorder’s office notes the filing date as June 23, 2010, the document type as an assignment, and the number of pages as five. We note, however, that the following pages are not incorporated into that cover page or date stamped. Appellants do not challenge the filing of the Assignment.

terminated in March 2012. Appellants now appeal from the court's denial of their motion to vacate judgment and raise one assignment of error for our review.

## II

Assignment of Error

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANTS' 60(B) MOTION TO VACATE WITHOUT HOLDING A HEARING[.]

{¶8} In their sole assignment of error, Appellants argue the court erred by denying their motion for relief from judgment without holding a hearing. We agree.

{¶9} Civ.R. 60(B) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶10} To prevail on a motion for relief from judgment the moving party must demonstrate that:

(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

*GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. A moving party is not automatically entitled to a hearing on a motion for relief

from judgment. *FirstMerit Bank, N.A. v. Reliable Auto Body Co.*, 169 Ohio App.3d 50, 2006-Ohio-5056, ¶ 10 (9th Dist.). “[I]f the Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion.” *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996).

{¶11} A trial court’s decision to deny a motion for relief from judgment without holding a hearing is reviewed for an abuse of discretion. *Id.* at 152. *Accord Somani v. Dillon*, 9th Dist. No. 2839, 1994 WL 189773, \*1 (May 18, 1994). An abuse of discretion implies that the court’s decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶12} One of Appellants’ arguments is that Bank of America did not have a valid assignment of the mortgage at the time the complaint was filed, and therefore, lacked standing to bring the foreclosure suit. The Ohio Supreme Court has addressed this issue in a recent decision, *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.

{¶13} “The Ohio Constitution provides in Article IV, Section 4(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.’” (Emphasis sic.) *Schwartzwald* at ¶ 20.

Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged \* \* \* a personal stake in the outcome of the controversy.

(Internal quotations omitted) *Id.* at ¶ 21, quoting *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51 (1987). Standing is a jurisdictional matter and, therefore, must be established at the time the complaint is filed. *Schwartzwald* at ¶ 24.

{¶14} If, at the commencement of the action, a plaintiff does not have standing to invoke the court's jurisdiction, the plaintiff cannot "cure the lack of standing \* \* \* by [subsequently] obtaining an interest in the subject of the litigation and substituting itself as the real party in interest [pursuant to Civ.R. 17(A)]." *Id.* at ¶ 39. "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 ¶ 40.

{¶15} In light of the Ohio Supreme Court's recent decision, we conclude Appellants' "Civ.R. 60(B) motion contain[ed] allegations of operative facts which would warrant relief from judgment." *See Seidner*, 76 Ohio St.3d at 151. We reverse and remand the case so that the trial court may apply *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.

### III

{¶16} Appellants' assignment of error is sustained. The judgment of the Medina County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,  
and cause remanded.

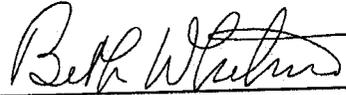
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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.



BETH WHITMORE  
FOR THE COURT

MOORE, J.  
CONCURS.

CARR, J.  
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

MARC E. DANN and GRACE DOBERDRUK, Attorneys at Law, for Appellants.

SCOTT A. KING and TERRY W. POSEY, JR., Attorney at Law, for Appellee.



\$195,200. Also on that date, Botts and his wife executed a mortgage that secured the note and encumbered the property located at 1329 Pannelly Place, Westerville, Ohio 43081. The mortgage indicated that the lender was First Franklin. On September 15, 2009, First Franklin assigned the mortgage to Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1.

{¶ 3} On January 21, 2011, PNC Bank, National Association c/o Select Portfolio Servicing, Inc. ("PNC"), plaintiff-appellee, filed the present foreclosure action against Botts, his wife, and other entities with interests in the real property, alleging that the mortgage conveys PNC an interest in the property, PNC is an entity entitled to enforce the note, Botts and his wife had defaulted on the note, PNC had declared the debt due, and all conditions precedent to PNC's ability to enforce the mortgage had been satisfied.

{¶ 4} On October 3, 2011, PNC filed a motion for default judgment against Botts, his wife, and several other entities that had failed to file an answer or otherwise defend. On October 4, 2011, the trial court granted PNC's motion for default judgment and entered a judgment entry and decree of foreclosure. A sheriff's sale was ordered to take place on January 13, 2012.

{¶ 5} On January 11, 2012, Botts filed a motion to stay the sheriff's sale. Also on January 11, 2012, Botts filed a motion to vacate the judgment pursuant to Civ.R. 60(B) and motion to dismiss the complaint pursuant to Civ.R. 12(B)(1). The property was sold on January 13, 2012. On January 25, 2012, PNC filed separate memoranda in opposition to Botts's motion to vacate judgment and motion to dismiss.

{¶ 6} On February 21, 2012, the trial court issued a decision denying Botts's motion to vacate judgment pursuant to Civ.R. 60(B) and motion to dismiss the complaint pursuant to Civ.R. 12(B)(1) and found moot Botts's motion to stay the sheriff's sale. The trial court denied the motion to vacate judgment on the ground that Botts failed to sufficiently allege fraud under Civ.R. 60(B)(3). The court denied the motion to dismiss on the ground that standing is not jurisdictional in the present matter. The trial court found moot Botts's motion to stay the sheriff's sale because the sheriff's sale had already taken place and the Civ.R. 60(B)(3) motion upon which it was predicated was denied. Botts appeals the judgment of the trial court, asserting the following assignments of error:

[I.] IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANTS' 60(B) MOTION TO VACATE WITHOUT HOLDING A HEARING.

[II.] THE TRIAL COURT ERRED WHEN DETERMINING THAT THE JUDGMENT WAS NOT PROCURED BY FRAUD.

[III.] APPELLANTS DID NOT WAIVE THEIR LACK OF STANDING DEFENSE BECAUSE STANDING IS JURISDICTIONAL AND CAN NEVER BE WAIVED.

(Sic passim.)

{¶ 7} We will address Botts's first and second assignments of error together, as they are related. Botts argues in his first assignment of error that the trial court abused its discretion when it denied the motion to vacate pursuant to Civ.R. 60(B) without holding a hearing. Botts argues in his second assignment of error that the trial court erred when it determined that the judgment was not procured by fraud. In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate three prongs of the *GTE* test, which are: (1) a meritorious claim or defense; (2) entitlement to relief under one of the five grounds listed in the rule; and (3) the timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-51 (1976). This court will not disturb a trial court's decision concerning motions filed under Civ.R. 60(B) absent an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988). An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶ 8} The grounds for relief under Civ.R. 60(B) are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The rule further provides that the motion for relief must be made within a reasonable time and that for

reasons (1), (2), and (3) it cannot be made more than one year after the judgment, order or proceeding was entered or taken. Civ.R. 60(B).

{¶ 9} There is no requirement that a moving party submit evidentiary materials, such as an affidavit, to support his or her motion for relief. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103 (8th Dist.1974). But good legal practice dictates that the moving party submit relevant evidence to demonstrate operative facts, as sufficient factual information is necessary to warrant a hearing on the motion. *Id.* at 104.

{¶ 10} However, a party who files a Civ.R. 60(B) motion for relief from judgment is not automatically entitled to a hearing on the motion. *Id.* at 105. "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Id.* Moreover, "[i]t is an abuse of discretion for the trial court to overrule a Civ.R. 60(B) motion for relief from judgment without first holding an evidentiary hearing where the motion and affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *Twinsburg Banking Co. v. RHEA Constr. Co., Inc.*, 9 Ohio App.3d 39 (9th Dist.1983), syllabus.

{¶ 11} In the present case, Botts's motion to vacate was based upon fraud under Civ.R. 60(B)(3). Botts argues that, because he alleged a meritorious defense, it was an abuse of discretion to deny him relief from judgment without a hearing. Botts's meritorious defense to the foreclosure was that PNC was not the owner and holder of his note and mortgage and, thus, had no right to foreclose. Botts claims a hearing would have provided him the opportunity to challenge the authenticity of the documents submitted by PNC, subpoena witnesses, address the "new" version of his note and allonges, and confront PNC. Specifically, Botts argues that PNC never submitted the proper evidence of ownership of the note and mortgage at the time the complaint was filed. Botts contends the note was never endorsed in blank or directly to PNC by the original lender, First Franklin, so PNC was not a proper holder of the note. Botts also argues the assignment of mortgage was to a securitized trust not registered with the Securities and Exchange Commission ("SEC"), and included no indication that PNC was entitled to enforce it. Botts also asserts that the mortgage attached to the complaint was granted to First Franklin, and PNC was not mentioned in the mortgage. The assignment of mortgage attached to the

complaint, Botts contends, was incapable of assigning the note because notes cannot be assigned in Ohio; rather, they must be negotiated.

{¶ 12} Although in his brief Botts argues at length that he presented a meritorious defense under the first prong of the *GTE* test, the trial court agreed that Botts had presented a meritorious defense. The court found there was a meritorious defense that PNC lacked standing to prosecute the underlying foreclosure action because the documents attached to the complaint did not demonstrate that PNC was the holder of the note, and the mortgage attached to the complaint indicated that it was assigned to Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1. The court also indicated it did not consider the documents attached as exhibits A and B to PNC's memoranda contra because they were unauthenticated and not relevant to the state of the documentation at the time of default judgment.

{¶ 13} The trial court also agreed that Botts's motion to vacate was timely under the third prong of the *GTE* test. The court concluded that three months was not an unreasonable amount of time, especially in light of the fact that the motion was filed prior to the sheriff's sale.

{¶ 14} However, as explained above, to warrant a hearing on a Civ.R. 60(B) motion, Botts was also required to allege operative facts justifying relief under any of the grounds set forth in Civ.R. 60(B)(1) through (5). *See Thompson v. Dodson-Thompson*, 8th Dist. No. 90814, 2008-Ohio-4710, ¶ 22 (trial court did not abuse discretion in denying motion for relief from judgment without a hearing where appellant failed to allege operative facts justifying relief under any of the grounds set forth in Civ.R. 60(B)(1) through (5), thereby failing the second prong of the *GTE* test). In the present case, the trial court found that Botts failed to allege sufficient facts to show he satisfied the second prong from the *GTE* test; that is, Botts did not demonstrate he was entitled to relief under Civ.R. 60(B)(3). Botts's arguments, as summarized by the court, were that the note was never negotiated to PNC, and the assignment of mortgage attached to the complaint indicates it was assigned to Wells Fargo Bank as trustee for a securitized trust that is not registered with the SEC. The court concluded that, while this information presented cause for concern about the quality of PNC's recordkeeping, the issues raised did not constitute

fraud or misconduct in obtaining the judgment but were, at best, claims or defenses related to the underlying action, which Civ.R. 60(B)(3) does not encompass. The court found that, at the very least, Botts could not establish PNC's intent to mislead either him or the court into believing that the mortgage was actually assigned to Wells Fargo as trustee, because PNC could not have foreclosed on the mortgage if the court had believed such. Moreover, the court stated that whether the securitized trust is or was registered with the SEC was not a matter upon which the court relied in granting default judgment to PNC; rather, an affidavit in support indicated that PNC was the holder of the note and mortgage.

{¶ 15} In seeking vacation of the judgment, Botts relied on Civ.R. 60(B)(3), which authorizes a court to vacate its prior final judgment or order for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." The fraud or misconduct contemplated by Civ.R. 60(B)(3) is fraud or misconduct on the part of the adverse party in obtaining the judgment by preventing the losing party from fully and fairly presenting his defense, not fraud or misconduct which in itself would have amounted to a claim or defense in the case. *State Alarm, Inc. v. Riley Indus. Servs.*, 8th Dist. No. 92760, 2010-Ohio-900, ¶ 21; *First Merit Bank, N.A. v. Crouse*, 9th Dist. No. 06CA008946, 2007-Ohio-2440, ¶ 32; and *LaSalle Natl. Bank v. Mesas*, 9th Dist. No. 02CA008028, 2002-Ohio-6117, ¶ 15. Fraud on an adverse party may exist when, for example, a party presents material false testimony at trial, and the falsity is not discovered until after the trial. *Seibert v. Murphy*, 4th Dist. No. 02CA2825, 2002-Ohio-6454.

{¶ 16} Botts's contention that PNC committed fraud under Civ.R. 60(B)(3) when it commenced the foreclosure action even though it did not own his note and mortgage is a matter that should have been presented as a claim or defense by Botts in the underlying foreclosure action. The same issue was presented in *Wells Fargo Bank, N.A. v. Brandle*, 2d Dist. No. 2012CA0002, 2012-Ohio-3492, and *Brandle* has identical facts to those in the present case. In that case, the court concluded that the homeowners failed to allege the type of fraud encompassed by Civ.R. 60(B)(3), finding:

There is no basis to find that Wells Fargo's alleged fraud or misrepresentation that it owned the note or mortgage in any

way prevented the Brandles from fully and fairly presenting that defense in a pleading responsive to Wells Fargo's complaint. Instead of presenting that defense, the Brandles failed to plead or appear in the action, and they offer no reason for their failure to do that. The Brandles may not now rely on their failure to appear as a basis to convert a defensive claim they didn't plead to a claim of fraud or misconduct on which to vacate the judgment that was granted Wells Fargo pursuant to Civ.R. 60(B)(3).

*Id.* at ¶ 14.

{¶ 17} Similarly, in *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650 (2d Dist.), the homeowners, who did not file a responsive pleading until after default judgment had been rendered, asserted that the mortgage company engaged in fraud against them under Civ.R. 60(B)(3) by falsely maintaining that it was the owner and holder of the mortgage when the foreclosure complaint was filed and by manufacturing an assignment of mortgage so that it would appear that the mortgage company held the mortgage at the time the complaint was filed when, in fact, it did not. The homeowners also asserted that the mortgage company engaged in fraud by recording an assignment of mortgage that was so filled with flagrant and fraudulent irregularities that one could only believe the mortgage company did not become a holder of the mortgage until after the complaint was filed. The homeowners argued that, because the mortgage company was not the owner and holder of the note when the complaint was filed, it was not the real party in interest and could not institute the foreclosure action against them. However, the appellate court in *Herring* concluded that the homeowners did not demonstrate that they had a basis for relief from the judgment under Civ.R. 60(B)(3), as the homeowners did not claim that their failure to respond to the foreclosure complaint or the trial court's judgment was the product of any fraud. The court also found that any irregularities in the assignment of mortgage could have been identified and raised in the trial court in a responsive pleading, and the homeowners cannot blame the mortgage company for their inaction in failing to challenge the mortgage company's status as a real party in interest sooner.

{¶ 18} As these cases make clear, the fraud alleged by Botts in the present case is not the type of fraud contemplated by Civ.R. 60(B)(3). Botts could have presented his

claims that PNC was not the holder of the note and mortgage before the trial court but chose to not appear in the action. It is clear Botts was not prevented from fully and fairly presenting his defense due to any fraud by PNC. *See, e.g., US Bank Natl. Assn. v. Marino*, 5th Dist. No. 2011CAE11 0108, 2012-Ohio-1487, ¶ 16 (appellant's argument that bank had no standing because it was not the holder of the note at the time the foreclosure complaint was filed was not viable under Civ.R. 60(B)(3), as the adverse party must have prevented the complaining party from fully and fairly presenting its case or defense, and the appellant had the opportunity to participate in the litigation, to file an answer, and to participate in discovery, but chose to not file an answer or any other response).

{¶ 19} In essence, what Botts seeks to do in the present case is contest the underlying default judgment and decree in foreclosure based upon his claim that PNC committed fraud by asserting they were the real party in interest. A decree and judgment of foreclosure is a final appealable order. *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶ 16, citing *Third Natl. Bank of Circleville v. Speakman*, 18 Ohio St.3d 119, 120 (1985), citing *Oberlin Sav. Bank v. Fairchild*, 175 Ohio St. 311 (1963); and *Ohio Dept. of Taxation v. Plickert*, 128 Ohio App.3d 445 (11th Dist.1998). It is well-settled law in Ohio that a motion for relief from judgment cannot be a substitute for an appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128 (1986), paragraph two of the syllabus. *See also BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413, ¶ 12 (argument raised under Civ.R. 60(B)(3) that mortgage company misrepresented it had standing should have been addressed in prior pleadings and raised in a timely filed appeal from the trial court's order granting judgment and entering foreclosure). Thus, Botts could have filed an appeal from the decree of foreclosure contesting PNC's standing instead of raising it in a belated Civ.R. 60(B) motion. For all of the foregoing reasons, we find the trial court did not err when it denied the motion to vacate pursuant to Civ.R. 60(B) without holding a hearing and determined that the judgment was not procured by fraud. Therefore, Botts's first and second assignments of error are overruled.

{¶ 20} Botts argues in his third assignment of error that he did not waive his lack-of-standing defense because standing is jurisdictional and can never be waived. The real issue Botts raises in this assignment of error is that the trial court erred when it denied his

motion to dismiss pursuant to Civ.R. 12(B)(1) when an assignment of mortgage to PNC was never filed with the trial court prior to judgment. In his motion to dismiss, Botts argued that the trial court lacked subject-matter jurisdiction because PNC did not have standing to bring the action as a non-holder of the note and mortgage at the time of the filing of the complaint. In denying Botts's motion to dismiss, the trial court found that lack of standing can be cured after the complaint is filed, and PNC asserted in its complaint that it was entitled to enforce the note and mortgage and submitted an affidavit in support of default judgment that it was the holder of the note and mortgage.

{¶ 21} Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. E. Local School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, ¶ 10 (4th Dist.); *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). We review an appeal of a dismissal for lack of subject-matter jurisdiction under Civ.R. 12(B)(1) de novo. *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶ 15. A trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus.

{¶ 22} This court has before found that the plaintiff's lack of standing is not a matter subject to dismissal pursuant to Civ.R. 12(B)(1). In *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, this court addressed a defendant's motion to dismiss pursuant to Civ.R. 12(B)(1) on the basis of the plaintiff's lack of standing in the context of a foreclosure action and found:

The trial court's dismissal pursuant to Civ.R. 12(B)(1) appears to be based on appellant's lack of standing or lack of capacity to sue. However, neither standing nor capacity to sue challenges the subject matter jurisdiction of a court in this context. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), Summit App. No. 17299 ("Capacity to sue or be sued does not equate with the

jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance."); see, also, *Benefit Mtg. Consultants, Inc. v. Gencorp, Inc.* (May 22, 1996), Summit App. No. 17488 ("Capacity to sue is not jurisdictional."). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12[B][6]); *Bourke v. Carnahan*, Franklin App. No. 05AP-194, 2005-Ohio-5422, at ¶ 10 ("Elements of standing are an indispensable part of a plaintiff's case."); *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), Summit App. No. 18250 (affirming Civ.R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue).

Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). Dismissal pursuant to this rule focuses on a court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims. Cf. *Moore*, quoting *Vedder v. Warrensville Hts.*, Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶ 15 ("The issue of subject-matter jurisdiction involves 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties' "). Our review of the record reveals no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action.

*Id.* at ¶ 10-11. See also *Bank of New York v. Baird*, 2d Dist. No. 2012-CA-28, 2012-Ohio-4975, ¶ 20-22 (in foreclosure action challenging bank's standing, denial of Civ.R. 12(B)(1) motion to dismiss was proper because lack of standing does not challenge the subject-matter jurisdiction of the court). Thus, Botts could not rely upon lack of standing as the basis for his Civ.R. 12(B)(1) motion, and the trial court could have denied it on this ground.

{¶ 23} Nevertheless, we note that Botts argues under this assignment of error that the trial court erred when it found that PNC's lack of standing could be cured after the complaint was filed. The Supreme Court of Ohio very recently decided *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, \_\_\_ Ohio St.3d \_\_\_, 2012-Ohio-5017, and determined

that lack of standing may not be cured after the complaint is filed. Thus, the trial court's statement here, in this respect, was erroneous. Nevertheless, because we have found that lack of standing may not be challenged in a Civ.R. 12(B)(1) motion to dismiss, we need not delve further into the trial court's findings with respect to this issue. Therefore, we find the trial court did not err when it denied Botts's motion to dismiss, pursuant to Civ.R. 12(B)(1), although we find denial was proper on a different basis than that relied upon by the trial court. For all of these reasons, Botts's third assignment of error is overruled.

{¶ 24} Accordingly, Botts's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

CONNOR and DORRIAN, JJ., concur.

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