

IN THE SUPREME COURT OF OHIO

**BANK OF AMERICA, NATIONAL
ASSOCIATION,**

Plaintiff-Appellant,

v.

GEORGE M. KUCHTA, et al.,

Defendants-Appellee.

* **Case No. 2013-0304**
*
* **On Appeal from the Medina County**
* **Court of Appeals, Ninth Appellate**
* **District**
*
* **Court of Appeals**
* **Case No. 12CA0025-M**
*
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**BRIEF OF APPELLANT
BANK OF AMERICA, N.A.**

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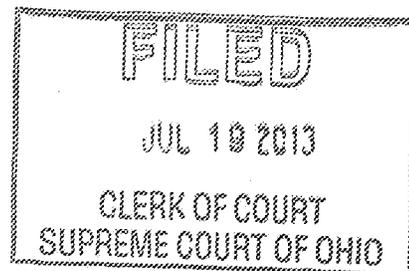


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I. INTRODUCTION

This Court has accepted jurisdiction to resolve a question which the Ninth District Court of Appeals certified as arising from *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214: “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?”

In *Schwartzwald*, the Court held that a plaintiff in a mortgage foreclosure action could not cure a defect in standing by filing a post-complaint assignment of the note and mortgage. In that case, the defendants raised the standing issue in their opposition to the plaintiff’s summary judgment motion and in their own summary judgment motion, and then directly appealed the lower courts’ adverse rulings to this Court.

In this case, the defendants raised the standing issue in their answer, but failed to raise it in opposition to the plaintiff’s motion for summary judgment, and did not appeal the trial court’s adverse ruling. After the time for appeal had expired, the defendants raised standing in a motion for relief from judgment. The Ninth District reversed the trial court’s denial of that motion, reasoning that because a lack of standing affects subject matter jurisdiction, the issue can be raised at any time. *Bank of Am. v. Kuchta*, 9th Dist. No. 12CA0025-M, 2012-Ohio-5562 (the “Opinion”). The Tenth District came to the opposite conclusion. *PNC Bank, Nat’l Ass’n v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383.

As set forth below, when a defendant raises a defense but does not appeal an adverse ruling, res judicata precludes a defendant from then basing a post-judgment motion on that defense. This rule applies even if the defense was based on standing. The Court should answer the certified question with a direct response: “No.”

II. STATEMENT OF FACTS

This case has some similarities to *Schwartzwald*. On December 19, 2002, the Defendants George and Bridget Kuchta (the “Kuchtas”) executed a promissory note (“Note”) in favor of Wells Fargo Home Mortgage, Inc. for the principal amount of \$650,000. Complaint, ¶ 1; Ex. A; Affidavit of Herman John Kennerty (“Affidavit”), ¶ 2 and Ex. A. To secure repayment of the Note, the Kuchtas executed a mortgage (“Mortgage”) against 422 Eastwood Road, Hinckley, OH (the “Property”). Complaint, ¶ 2; Ex. B; Affidavit, ¶ 2; Ex. B. On December 24, 2002, the Mortgage was recorded. *Id.*

On June 1, 2010, Plaintiff Bank of America filed the Complaint in this case, which included as exhibits the Note and Mortgage. Complaint, Ex. A and B. On June 10, 2010 (following the Complaint), Wells Fargo Bank, N.A. (as successor by merger to Wells Fargo Home Mortgage, Inc.) executed an Assignment of Mortgage (“Assignment”) assigning the Note and Mortgage to Bank of America. Notice of Filing Assignment of Mortgage, filed August 10, 2010. On June 23, 2010, the Assignment was recorded. *Id.*

On July 2, 2010, the Kuchtas, acting pro se, filed an Answer asserting that “[t]here is no proof in the Foreclosure Complaint that the Plaintiff owns or was assigned my mortgage.” Answer, 1.

On August 10, 2010, Bank of America filed a Motion for Summary Judgment and Affidavit seeking judgment for the balance due on the Note and to foreclose the Mortgage. Motion for Summary Judgment, 2-4. And that is where the similarities to *Schwartzwald* end.

The Kuchtas did not respond to the Motion for Summary Judgment. On June 27, 2011, the Trial Court granted the Motion and entered a final Judgment and Decree in Foreclosure (“Final Judgment”). Judgment and Decree of Foreclosure. The Kuchtas did not appeal.

On September 7, 2011, the Trial Court set a Sheriff's Sale for the Property for September 29, 2011. On September 23, 2011, the Kuchtas filed a "60(B) Motion to Vacate the Judgment of Foreclosure" (the "60(B) Motion"). The 60(B) Motion argued that because the copy of the Note attached to the Complaint did not contain an indorsement to Bank of America, the Note was never negotiated to Bank of America and the Final Judgment should be vacated. *Id.* at 4.

On September 29, 2011 (before *Schwartzwald*), the Trial Court denied the 60(B) Motion. Judgment Entry. The Trial Court found that the Kuchtas had not presented a meritorious defense or evidence of fraud under Civ.R. 60(B) (3). *Id.* at 10. The Trial Court reasoned that the Assignment also assigned the Note, and that this was sufficient. *Id.* at 8-10.

The Kuchtas' appeal was delayed because they filed for bankruptcy. Notice of Bankruptcy Filing, filed September 29, 2011. On March 23, 2013, after the bankruptcy was dismissed for failure to make payments, Bank of America filed a Motion to Reactivate. On March 26, 2012, the Trial Court reactivated the case. Entry Reactivating Case for Postjudgment Proceedings Only.

On April 12, 2012, the Kuchtas filed a notice of appeal from the Trial Court's denial of the 60(B) Motion. On December 3, 2012, the Ninth District reversed the Trial Court, holding that the 60(B) Motion "contained operative facts warranting relief from judgment" under *Schwartzwald*. Opinion, ¶¶ 15-16. Recognizing that this holding was contrary to the decision of the Tenth District in *Botts*, the Ninth District certified the question at issue here: "When a defendant fails to appeal from a trial court's judgment, can a lack of standing be raised as a part of a motion for relief from judgment?"

III. ARGUMENT

The Certified Question

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?

Appellant's Propositions of Law in Response to the Certified Question

1. Res judicata bars a defendant who participated in litigation from using a post-judgment motion to contest standing.
2. When a party who participated in litigation could have raised an issue as part of a direct appeal but did not do so, that party cannot extend the time for filing an appeal by using that issue as a basis for a motion for relief from judgment.

A. *Schwartzwald*.

In *Schwartzwald*, Federal Home Loan Mortgage Corporation ("Freddie Mac") filed a foreclosure complaint to which the defendants timely filed an answer, raising lack of standing as a defense. *Schwartzwald*, 2012-Ohio-5017, at ¶¶ 11, 13. The defendants then moved for summary judgment on the grounds that Freddie Mac lacked standing. *Id.* The trial court denied the defendants' motion and instead entered summary judgment in favor of Freddie Mac. *Id.*, ¶ 14. The defendants timely appealed. *Id.*, ¶ 15.

The Second District affirmed, holding that even though the evidence did not show that Freddie Mac had standing when it filed its complaint, the defect was cured "by the assignment of the mortgage and transfer of the note prior to entry of judgment." *Id.*, ¶ 15. The defendants timely filed a direct appeal to this Court, and asked the Court to resolve a conflict on whether a defect in standing could be cured by a post-complaint assignment. *Id.* This Court reversed the Second District, and held that to invoke the jurisdiction of a common pleas court, Freddie Mac had to show standing as of the filing of the complaint. *Id.*, ¶ 4.

In *Schwartzwald*, the Court was not faced with the two issues which this certified question presents: (a) can a defendant participate in litigation and contest the plaintiff's standing, lose on the merits, fail to appeal, and then collaterally attack the judgment based on a lack of standing; and (b) can a defendant fail to timely appeal a trial court's adverse ruling, but then essentially extend the time for appeal by filing a post-judgment motion based on an issue which could have been raised during an appeal? The answer to both questions is "no."

B. Res judicata bars a defendant who participated in litigation from using a post-judgment motion to contest standing.

"Res judicata is applicable to Civ.R. 60(B) motions." *Coulson v. Coulson*, 5 Ohio St.3d 12, 17, 448 N.E.2d 809 (1983). Res judicata precludes a defendant from using a post-judgment motion to re-litigate an issue that was in controversy during the case. *State ex rel. Dewine v. Helms*, 9th Dist. App. No. 26472, 2013-Ohio-359; *Nkurunziza v. Nyamusevya*, 10th Dist. No. 11AP-222, 2011-Ohio-6133, ¶ 12; *Boardman Canfield Ctr., Inc. v. Baer*, 7th Dist. App. No. 06-MA-80, 2007-Ohio-2609.

These principles do not change because the issue is one affecting subject matter jurisdiction:

The "bootstrap" doctrine normally operates to foreclose a collateral attack upon the jurisdiction of a court that has rendered a final judgment. Its premise is that every court has jurisdiction to decide its own jurisdiction, unless the legislature has decided otherwise. When a court has jurisdiction to decide an issue, it has the power to decide wrongly as well as rightly. Even if its decision in favor of its jurisdiction is erroneous, it is valid. It may be reversed on appeal, but if an appeal is not taken, the decision stands, and is binding. The second half of the bootstrap doctrine premises that any unappealed decision is res judicata in subsequent litigation. Since the trial court has jurisdiction to decide its own jurisdiction, its decision is not void but is, on the contrary, res judicata, unless policies of res judicata indicate otherwise. If the same reasoning is followed in motions after final judgment under Civ.R. 60(B), it could be said that when the trial court has jurisdiction to decide its own jurisdiction, any judgment it renders is not void at all, but is at most erroneous and reversible upon appeal only.

Sturgill v. Sturgill, 61 Ohio App. 3d 94, 100-101, 572 N.E.2d 178 (2nd Dist. 1989).

The American Law Institute also adopts the approach that if a question of subject matter jurisdiction is raised, the court's judgment is binding and cannot be collaterally attacked. Restatement of the Law 2d, Judgments, § 12, cmt. c (1982) ("*Subject matter jurisdiction actually litigated in original action.* When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion."). *See also Stoll v. Gottlieb*, 305 U.S. 165 (1938), *rehrg. denied*, 305 U.S. 675 (1938), Restatement of the Law 2d, Judgments, § 12, Illustration 2 and *Rindfleisch v. AFT, Inc.*, 8th Dist. App. Nos. 84551, 84897, 84917, 2005-Ohio-191, ¶ 8 ("The jurisdictional determination becomes binding in collateral actions between the same parties or their privies even if the determination is erroneous on the facts and the law.").

Ohio courts have applied these principles. In *Sturgill*, the husband admitted in his answer that his wife had been an Ohio resident for six months prior to the filing of an action for divorce, the trial court granted the divorce and the husband did not appeal. After the time for appeal expired, the husband filed a motion to vacate the judgment because the wife was in fact a Virginia resident, with the result that the trial court lacked subject matter jurisdiction. The Second District affirmed the trial court's denial of that motion: "Appellant does not contest that the trial court had subject matter jurisdiction to grant divorces generally. The pleadings and the testimony demonstrate 'apparent' residency compliance." *Sturgill*, 61 Ohio App. 3d at 104. "The court in its final judgment determined plaintiff had met her jurisdictional requirement of residency. Appellant did not appeal the final judgment of divorce. As such the court's judgment is now final and subject to the principles of res judicata." *Id.* at 103.

Res judicata not only attaches when issues of subject matter jurisdiction are directly raised by the participants in the litigation, it also applies if the defendant participates in the litigation but does not contest subject matter jurisdiction and then does not appeal:

Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect. The principle to be applied in this situation is essentially that of claim preclusion, particularly the proposition that a judgment should be treated as resolving not only all issues actually litigated but all issues that might have been litigated.

Restatement of the Law 2d, Judgments, § 12, cmt. d.

The only time that res judicata does not bar subsequent attacks on subject matter jurisdiction by those who participated in the litigation is when the court rendering judgment plainly lacked subject matter jurisdiction over the type of dispute at hand. As the American Law Institute puts it: “The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority.” Restatement of the Law 2d, Judgments, § 12(1).

Unless a court **never** had the ability to adjudicate the type of dispute at all, society’s interest in finality of judgments outweighs a party’s erroneous invocation of a court’s jurisdiction in a particular instance. Again, the American Law Institute explains:

[W]hen the issue of subject matter jurisdiction has been only implicitly resolved through a judgment on the merits, and then is raised through an attack on the judgment, it signifies that the adversary system failed to bring forward a highly relevant issue in the original proceeding. If the belated contention about lack of jurisdiction could be rejected out of hand on its merits, the question of its being res judicata would not have much practical significance. It is when the belated contention about subject matter jurisdiction indeed has some substantial merit, rather, that the application of the rules of res judicata has real effect and hence poses a genuine dilemma. The question is whether to permit, in the interest of securing conformity to the rules of jurisdiction, the revival of a question that attentive counsel should have raised in the first instance. The situation is therefore not simply one of relitigation; to the contrary, it partakes of some

aspects of a challenge to subject matter jurisdiction following a default judgment.¹ See Comment *e*.

The interests primarily at stake in resolving this question are governmental and societal, not those of the parties. By hypothesis the parties had earlier opportunity to litigate the question of jurisdiction and thereby to protect their interest in the observance of the rules governing competency. They also had their day on the merits, even if before a body whose authority is now in doubt. To allow one of them to raise the question of subject matter jurisdiction after judgment is in the effect to make him a public agent for enforcing the rules of jurisdiction. But the public interest, though substantial, also has its protectors in other litigants on other occasions, who will have opportunity and incentive to object to the excess of authority if it is repeated.

The question therefore is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superfluous vindication of the rule by a litigant who is undeserving of the accompanying benefit that will redound to him. The public interest is of that strength only if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection.

Restatement of the Law 2d, Judgments, § 12, cmt d.

Ohio courts have been faced with these circumstances too. In *Mantho v. Board of Liquor Control*, 162 Ohio St. 37, 120 N.E.2d 730 (1954), the Board of Liquor Control denied the applicants' petitions for a liquor license, and they appealed to the common pleas court, which granted the licenses. The Board appealed to the Tenth District, which reversed. During the appeal, the applicants did not raise any issue about the Board's standing to appeal.

However, after they lost, the applicants filed common law motions in the Tenth District to vacate the judgments, arguing that they were void because the Board had no right to invoke the Tenth District's appellate jurisdiction. The Tenth District granted both motions. This Court reversed,

¹ The Restatement of the Law 2d, Judgments, does not present a firm rule on how to address a collateral attack on subject matter jurisdiction defects when the defendant did not appear, a default judgment is entered, but the defendant did not timely appeal. Restatement of Law 2d, Judgments, § 12, cmt. f. As the American Law Institute notes, most cases where these issues have been raised were resolved on other grounds. *Id.* Since the Kuchtas appeared and defended this case, whether *res judicata* attaches to a default judgment which is served on the defendant and from which the defendant did not appeal is **not** before the Court today.

reasoning that the Tenth District had subject matter jurisdiction over the type of dispute—an appeal from an adverse ruling by a court of common pleas—and that any defect in the invocation of that jurisdiction could not be raised in a post-judgment motion. *Mantho*, 162 Ohio St. at 41-44, citing 39 American Jurisprudence 979, Section 106.

In *Vitale v. Connor*, 5th Dist. App. No. CA-671, 1985 Ohio App. LEXIS 8004 (June 10, 1985), the Bureau of Worker’s Compensation (“BWC”) tried to vacate a common pleas court judgment because the employee did not file the notice of appeal within fifteen days of the State Personnel Board’s order, claiming that this deprived the common pleas court of subject matter jurisdiction. Citing the principles in the Restatement of the Law 2d, Judgments, the Fifth District held that because the BWC had the opportunity to raise the issues before judgment or on a direct appeal from the judgment, it was precluded from doing so in a post-judgment motion.

Lower courts have applied these principles to foreclosure actions. In *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. App. No 23927, 2010-Ohio-5285, the borrower attacked a foreclosure judgment on the grounds that the trial court did not have subject matter jurisdiction because the plaintiff did not have standing. The Second District rejected that attack; in a concurring opinion, Judge Froelich summarized the issue nicely:

But this is not a situation where a municipal court grants a real estate foreclosure. Rather, the foreclosure was rendered by the General Division of the Common Pleas Court which has the power and authority (*i.e.*, the subject matter jurisdiction) to grant foreclosure judgments.

It is a totally different matter to assert, as do the Appellants, that the Common Pleas Court should have been aware that one of the parties to the litigation—over which the court had subject matter jurisdiction—was not a real party in interest and lacked standing to participate in the litigation. If that were the situation, such contention should have been brought to the attention of the trial court and [it] would have been addressed.

Murphy, 2010-Ohio-5285, ¶¶ 23-24 (Froelich, J., concurring). See also *State ex rel. Henderson v. Maple Heights Civil Service Com.*, 63 Ohio St.2d 39, 41, 406 N.E.2d 1105 (1980) (holding party who failed to pursue appellate remedies could not collaterally attack a jurisdictional determination); *Dwyer v. Thompson Township Volunteer Fire Dep't*, 11th Dist. App. No. 1397, 1988 Ohio App. LEXIS 3643, *4-5 (Sept. 9, 1998) (A party is “barred from collaterally attacking the judgments of the lower courts on the grounds of an apparent lack of subject matter jurisdiction when he had failed to pursue his right to appeal on that issue.”).

Ohio courts have also applied these rules when the trial court never had jurisdiction over the type of dispute. *State ex rel. Mayfield Heights v. Bartunek*, 12 Ohio App.2d 141, 231 N.E.2d 326 (8th Dist. 1967). In that case, a probate court entered a consent judgment in a declaratory judgment action holding that a municipal zoning classification was invalid. Because the probate court never had jurisdiction over that type of dispute in the first instance, a collateral attack on the consent judgment was permitted. *Bartunek*, 12 Ohio App.2d at 149.

Here, the Kuchtas raised the issue of standing in their Answer. Answer, p. 1. The Trial Court expressly found that the Kuchtas owed Bank of America the balance due under the Note, and that Bank of America was entitled to enforce the Mortgage. Final Judgment, pp. 2-3. Having directly raised the issue of standing during the case, res judicata precluded the Kuchtas from again raising standing in a post-judgment motion. Restatement of the Law 2d, Judgments, § 12, cmt. c; *Sturgill*, 61 Ohio App. 3d at 100-101. This is true even if the lack of standing would have affected the Trial Court’s subject matter jurisdiction. *Id.*

This would have also been true even if the Kuchtas had never raised the issue of standing as a defense. A common pleas court had subject matter jurisdiction over foreclosure actions (R.C. 2323.07), and a court’s implicit finding of jurisdiction is subject to res judicata.

Restatement of Law 2d, Judgments, § 12, cmt d. Having participated in the litigation prior to the entry of Final Judgment, res judicata precludes the Kuchtas from raising a “*Schwartzwald*” issue in a post judgment motion, even if they had not previously raised the issue at all.

The practical consequences of a contrary rule would be significant. If the law were otherwise, a defendant could enter an appearance in a case, raise standing as a defense, and then “test the waters” to see if there are other viable defenses. Having lost, the defendant could then try to get a second attack by filing a post-judgment motion.

Even worse, the defendant could deliberately keep the defense in their “back pocket,” and never raise the issue at all. If the defendant loses on those other theories, they could always come back later and claim that the plaintiff lacked standing in a post-judgment motion. Every court action would be followed by a second court action to see whether the court in the first action had jurisdiction. No judgment would ever be final. That is not and should never be the law.

In this case, the Kuchtas affirmatively raised the issue of Bank of America’s standing, and the Trial Court determined that Bank of America was the appropriate plaintiff, and had standing. If, as the Kuchtas contend, the Trial Court erred in entering the Final Judgment because Bank of America lacked standing, their remedy was to appeal the Final Judgment. They did not do so, and res judicata precludes the Kuchtas from now raising the issue in a post-judgment motion. The Court should answer the certified question in the negative.

C. When a party who participated in litigation could have raised an issue as part of a direct appeal but did not do so, that party cannot extend the time for filing an appeal by using that issue as a basis for a motion for relief from judgment.

The Ninth District’s question should be answered “no” for a second, but related reason: the relationship between post-judgment motions and a timely filed appeal. For two reasons,

motions for relief from judgment were never intended to displace the filing of an appeal, or to be a substitute for an appeal.

First, it is the “function of the appellate courts to correct legal errors committed by the trial court.” *Wells Fargo Bank, N.A. v. Smith*, 10th Dist. App. No. 09AP-559, 2009-Ohio-6576, ¶ 11, citing *Elliott v. Smead Mfg. Co.*, 4th Dist. App. No. 08CA13/08AP13, 2009-Ohio-3754. A movant must base a motion for relief from judgment on new grounds “rather than use the arguments it lost under the judgment as the basis for relief.” *Smith*, 2009-Ohio-6576, ¶ 11; *see also Tokar v. Tokar*, 8th Dist. App. No. 93506, 2010-Ohio-524, ¶ 10; *Zerinsky v. Fisher*, 11th Dist. App. No. 2004-L-133, 2005-Ohio-5761, ¶ 17.

In *Elyria Township Bd. of Trustees v. Kerstetter*, 91 Ohio App. 3d 599, 632 N.E.2d 1376 (9th Dist. 1993), the defendant filed a motion for relief from judgment based on the same issues litigated during the action. The trial court granted the motion. The Ninth District reversed, holding “[i]f the township was dissatisfied with the trial court’s evaluation of those arguments, it should have appealed. Therefore, since the township alleged no new grounds to justify relief, it failed to demonstrate the second [*GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976)] factor, that it is entitled to relief under one of the grounds stated in Civ.R. 60(B).” *Kerstetter*, 91 Ohio App. 3d at 602.

This rule also applies to errors that were in the record and from which an appeal could have been taken, even if they were not raised during the case. *DaimlerChrysler Fin. Servs. N. Am., LLC v. Hursell Unlimited, Inc.*, 9th Dist. App. No. 24815, 2011-Ohio-571, ¶ 17 (quoting *Murphy-Kesling v. Kesling*, 9th Dist. App. No. 24176, 2009-Ohio-2560, ¶ 15) (“This Court has repeatedly held that ‘[e]rrors that could have been corrected by a timely appeal cannot be the predicate for a motion for relief from judgment.’”). “A party may not use a Civ. R. 60(B) motion

as a substitute for a timely appeal.” *Doe v. Trumbull County Children Services Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605, paragraph 2 of the syllabus (1986). Where a party elects not to appeal a final judgment, it may not later challenge the judgment under Civ.R. 60(B) using grounds that could have been raised in an appeal from that judgment. *Doe*, 28 Ohio St.3d at 131.

And that leads to the second reason for the rule: if a party could use Civ.R. 60(B) to re-argue matters that were raised, or to correct errors already in the record, a post-judgment motion would effectively extend the time for appeal. The Fifth District put it this way:

Civ.R. 60(B) was intended to provide relief from a final judgment in specific, enumerated situations and cannot be used as a substitute for a direct, timely appeal. [Citation to *Doe* omitted]. “If a party raises the same question in a Civ.R. 60(B) motion as [it] could have raised on a direct appeal, [that party] could get an indirect extension of time for appeal by appealing the denial of the Civ.R. 60(B) motion.”

LSF6 Mercury Reo Invs. v. Garrabrant, 5th Dist. App. No. 11CAE040037, 2012-Ohio-4883, ¶ 15, citing *Newell v. White*, 4th Dist. App. No. 05CA27, 2006-Ohio-637, ¶ 15 and *Parke--Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 915 (7th Cir. 1989).

The fact that there has been a subsequent change in the law is not an exception to these principles. *Doe* is a good illustration. In that case, in April 1983, the trial court had dismissed a complaint on the grounds that it was barred by sovereign immunity. *Doe*, 28 Ohio St.3d at 128. The plaintiff did not appeal. *Id.* In July 1983, this Court decided *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.*, 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983), and held that sovereign immunity was not a bar to certain claims. *Doe*, 28 Ohio St.3d at 136. In November 1983, the plaintiff filed a Rule 60(B) Motion, arguing that this Court’s decision in *Enghauser* was grounds for relief from judgment dismissing the complaint. This Court made plain it was not:

The rationale which compels the rejection of appellee’s argument is clear—that being the strong interest in the finality of judgments. To hold otherwise would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse

final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being “no change in the law.” Moreover, acceptance of appellee’s attempted employment of a motion under Rule 60(B) would do violence to the well-settled principle that “* * * [t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.”

Doe, 28 Ohio St.3d at 131, quoting *Parks v. U. S. Life & Credit Corp.*, 677 F.2d 838, 841 (11th Cir. 1982) and *Ackermann v. United States*, 340 U.S. 193 (1950). *See also* *Manthos*, 162 Ohio St. at 45-46 (“There must be an end to litigation. Stability of the law requires finality of decisions of the courts. These fundamental principles can not be questioned. The position taken by the appellees in the present proceedings is inconsistent with such fundamental conceptions.”).

In this case, the Kuchtas raised the issue of standing as a defense, and could have appealed from the Trial Court’s adverse ruling. They simply did not do so, and cannot use a post-judgment motion as a substitute for appeal. *Kerstetter*, 91 Ohio App. 3d at 602; *Smith*, 2009-Ohio-6576, ¶ 11; *Tokar*, 2010-Ohio-524 at ¶ 10; *Zerinsky*, 2005-Ohio-5761 at ¶ 17.

Similarly, the 60(B) Motion was based on evidence that was in the record; in fact, the 60(B) Motion is based on the assertion that the evidence in the record did not support standing. 60(B) Motion, 2-4. While that is a perfectly appropriate assignment of error on an appeal (*Schwartzwald*, 134 Ohio St.3d at ¶ 38), it is not a basis for a post-judgment motion. *LSF6 Mercury Reo Invests.*, 2012-Ohio-4883 at ¶ 15.

The fact that the law enunciated in *Schwartzwald* differed from the law in the Final Judgment does not change this result. The Trial Court entered the Final Judgment in June 2011. At that time, the law in the Ninth District was that a defect in standing could be redressed by a post-filing assignment of mortgage. *Bank of N.Y. v. Stuart*, 9th

Dist. App. No. 06CA008953, 2007-Ohio-1483, ¶ 9; *IndyMac Fed. Bank, FSB v. OTM Invs., Inc.*, 9th Dist. App. No. 10CA0056-M, 2011-Ohio-3742; *Cent. Mortg. Co. v. Elia*, 9th Dist. App. No. 25505, 2011-Ohio-3188; *Deutsche Bank Nat'l Trust Co. v. Traxler*, 9th Dist. App. No. 09CA009739, 2010-Ohio-3940, ¶ 11; *Argent Mortg. Co., LLC v. Phillips*, 9th Dist. App. No. 24979, 2010-Ohio-5826. *Schwartzwald* made clear that the rule that was followed in the Ninth District was incorrect. 134 Ohio St.3d at ¶ 38.

But this Court's post-judgment decision in *Schwartzwald* was not a basis for a post-judgment motion. *Doe*, 28 Ohio St.3d at 131. To the contrary, the 60(B) Motion was premised on the assertion that the documents in the record prior to the entry of the Final Judgment did not show standing as of the date the Complaint was filed. 60(B) Motion, 2-4. The remedy for **that** supposed error was a direct appeal from the Final Judgment, not a post-judgment motion. The Kuchtas did not file that appeal, and cannot use Civ.R. 60(B) to stretch into eternity their time for appeal. *Doe*, 28 Ohio St.3d at 131.

The Ninth District turned these principles on their head. Parties cannot use a post-judgment motion as a substitute for appeal, or to stretch out their time for appeal. This is true even if this Court later adopts a different rule of law than was previously followed in that district court of appeals. The Court should answer the certified question in the negative.

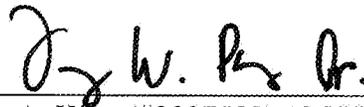
IV. CONCLUSION

While *Schwartzwald* clarified the dispute among the appellate districts as to whether standing could be cured by a post-complaint assignment, it did not address the questions that this case presents. The law has a strong interest in protecting the finality of judgments; all things, particularly litigation, must come to an end. In this case, any challenge to defects in standing

was barred by res judicata, and the Kuchtas could not use the 60(B) Motion to extend their time for appeal.

“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?” In cases like this one, where the defendant appeared and participated in the litigation, this Court should hold that the answer to the certified question is “no.”

Respectfully submitted,



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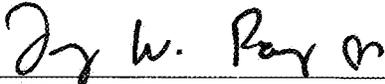
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*Attorneys for Plaintiff-Appellant, Bank of America,
N.A.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 18th day of July, 2013.

Marc E. Dann
Grace M. Doberdruk
Doberdruk & Harshman LLC
4600 Prospect Avenue
Cleveland, Ohio 44103



Terry W. Posey, Jr.

744652.2

IN THE SUPREME COURT OF OHIO

ORIGINAL

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
*
*
*

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:

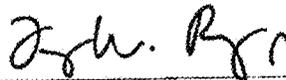
When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?

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,



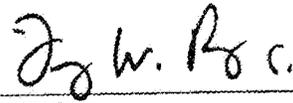
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*Attorneys for Plaintiff-Appellant
Bank of America, N.A.*

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



Terry W. Posey

727619v1

STATE OF OHIO)

COUNTY OF MEDINA)

BANK OF AMERICA, N.A.

Appellee

v.

GEORGE M. KUCHTA, et al.

Appellants

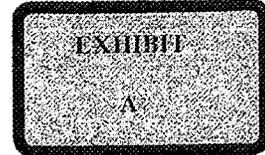
COURT OF APPEALS

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FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C.A. No. 12CA0025-M



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.

Judge

Concur:
Moore, J.
Carr, J.

COURT OF APPEALS
 IN THE COURT OF APPEALS
 NINTH JUDICIAL DISTRICT
)
)ss: 12 DEC -5 PM 12:10
)
 STATE OF OHIO)
 COUNTY OF MEDINA)
 BANK OF AMERICA)
 Appellee)
 v.)
 GEORGE M. KUCHTA, et al.)
 Appellants)

FILED
 DAVID B. WAGSWORTH
 MEDINA COUNTY 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

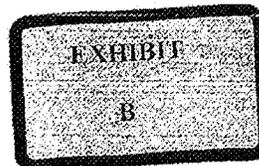
WHITMORE, Presiding Judge.

{¶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 * *



* , 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, 2010.¹

{¶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

¹ 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.

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.

[Cite as *PNC Bank, Natl. Assn. v. Botts*, 2012-Ohio-5383.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

PNC Bank, National Association
c/o Select Portfolio Servicing, Inc.,

Plaintiff-Appellee,

v.

Thomas N. Botts, Jr.,

Defendant-Appellant,

Beth J. Botts et al.,

Defendants-Appellees.

12AP-256

(C.P.C. No. 11CV-1-970)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 20, 2012

McGlinchey Stafford PLLC, Monica Levine Lacks, and James S. Wertheim, for appellee PNC Bank.

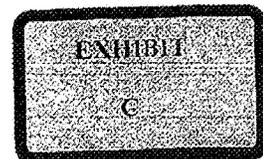
Dann, Doberdruk & Wellen LLC, Marc E. Dann, and Grace Doberdruk, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Thomas N. Botts, Jr., defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion to vacate judgment pursuant to Civ.R. 60(B) and motion to dismiss pursuant to Civ.R. 12(B)(1), and found moot his motion to stay the sheriff's sale.

{¶ 2} On December 27, 2004, Botts and his wife, Beth J. Botts, executed a promissory note in favor of First Franklin Financial Corporation ("First Franklin") for



\$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.

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.



Judge

Concur:
Moore, J.
Carr, J.

STATE OF OHIO	)	COURT OF APPEALS	
	)	IN THE COURT OF APPEALS	
COUNTY OF MEDINA	)	12 DEC -5 PM 2:10	NINTH JUDICIAL DISTRICT
BANK OF AMERICA	)	FILED	
	)	DAVID B. WADSWORTH	A. No. 12CA0025-M
	)	MEDINA COUNTY	
	)	CLERK OF COURTS	
Appellee			
v.			
GEORGE M. KUCHTA, et al.			APPEAL FROM JUDGMENT
			ENTERED IN THE
			COURT OF COMMON PLEAS
Appellants			COUNTY OF MEDINA, OHIO
			CASE No. 10CTV1003

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 * *

*, 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, 2010.¹

{¶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

¹ 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.

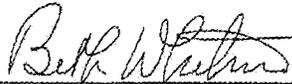
Judgment reversed,
and cause remanded.

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.

COMMON PLEAS
2011 SEP 29 PM 3:33

DANIEL J. WRIGHT
MEDINA COUNTY
CLERK OF COURTS

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

Bank of America	)	CASE NO. 10CIV1003
)	
Plaintiff)	
vs.	)	JUDGE JAMES L. KIMBLER
)	
George M. Kuchta, et al.)	
	)	Judgment Entry with Instructions
Defendant	)	to the Clerk

This case is before the Court on the Motion to Vacate the Judgment of Foreclosure and the Motion to Stay Sheriff's Sale Pending Decision on the 60(B) Motion to Vacate filed by Defendants George and Bridget Kuchta on September 23, 2011. The property owned by the Kuchtas is scheduled for sheriff's sale on September 29, 2011. Upon due consideration, the Court finds that the motions are not well taken.

In making this decision, the court has reviewed the pleadings and documents filed with the court and has considered the law and arguments as set forth in the Defendants' Motion to Vacate. The Court finds that Plaintiff, Bank of America, is the real party in interest in this case and that it had the right to enforce the mortgage on the property owned by George and Bridget Kuchta.

The court takes judicial notice of the Merger Decisions published on the website of the Federal Deposit Insurance Corporation showing that Wells Fargo Home Mortgage, Inc. merged with Wells Fargo Bank, National Association on May 14, 2003. See Attached.

On June 1, 2010, Bank of America filed a Complaint in Foreclosure against George and Bridget Kuchta, alleging that the borrowers defaulted on a loan secured by a mortgage on their home at 422 Eastwood Road in Hinckley, Ohio. Attached to the complaint is a copy of a Note dated December 19, 2002, in which the Kuchtas promised to pay Wells Fargo Home Mortgage, Inc. the principal amount of \$650,000.00, plus interest. A copy of the Mortgage securing the promissory note was also attached to the complaint.

On June 11, 2010, Plaintiff filed a preliminary judicial report indicating that title to the property at issue is vested in George and Bridget Kuchta.

On July 2, 2010, the Kuchtas filed a pro se Answer which alleges that their mortgage was with Wells Fargo Home Mortgage, not the Plaintiff, US Bank. "There is no proof in the Foreclosure Complaint that Plaintiff owns or was assigned my mortgage."

On August 10, 2010, Bank of America filed a motion for summary judgment as well as an affidavit in support of the motion. The affidavit was signed by Herman John Kennerty, a vice president of loan documentation of Wells Fargo Bank, N.A. as servicing agent for Bank of America, National Association. The affiant stated that he has custody of the accounts of Wells Fargo Bank, that Plaintiff is the holder of the note and mortgage which are the subject of the foreclosure case and that there has been a default in payment under the terms of the note and mortgage. Copies of the note, mortgage and assignment are attached to Kennerty's affidavit.

On August 10, 2010, Bank of America also filed a "Notice of Filing Assignment of Mortgage" which had been recorded with the Medina County

Recorder's office on June 23, 2010, approximately three weeks after the foreclosure case was filed. The assignment states: "****Wells Fargo Bank N.A. sbmt [successor by merger to] Wells Fargo Home Mortgage, Inc., *** does hereby sell, assign, transfer and set over unto Bank of America, National Association *** a certain mortgage from George M. Kuchta and Bridget M. Kuchta, husband and wife, to Wells Fargo Home Mortgage, Inc. dated December 19, 2002, recorded December 24, 2002, in Instrument No. 2002OR052200, in the office of the Medina County Recorder, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon."

The Kuchtas did not oppose Plaintiff's Motion for Summary Judgment.

Over the next year, the Court conducted numerous settlement conferences in an attempt to avoid foreclosure and secure a loan modification for the borrowers. On June 9, 2011, plaintiff informed the borrowers that they did not qualify for a loan modification because their income was not sufficient to make monthly payments which would amortize the amount owed on the note, (approximately \$648,000) plus escrow for real estate taxes (\$395/ month) and homeowners insurance (\$142/month).

On June 27, 2011, the court issued a Judgment Entry and Decree in Foreclosure. The property is scheduled for Sheriff's sale on September 29, 2011.

Discussion

The Kuchtas have filed a Motion to Vacate the foreclosure decree. In the motion they argue that Bank of America is not entitled to judgment because it did not establish that it was the holder of the note and mortgage they had signed with Wells Fargo Home Mortgage.

The Kuchtas contend that Bank of America lacked standing to bring the foreclosure action. They maintain that Plaintiff did not have standing because there was no proof to show that the promissory note which the Kuchtas signed in 2002 was properly negotiated to the Bank in accordance with the mandates of the UCC. The Kuchtas argue that Plaintiff did not prove that it was the holder of the promissory note because the original lender, Wells Fargo Home Mortgage, had not negotiated the note, by either endorsing the note itself or by executing an allonge and affixing it to the note. "There is no endorsement on the note to negotiate the note to Bank of America. There is no allonge permanently affixed to the note to negotiate the note to Bank of America". The Kuchtas claim that even though the Assignment of the Mortgage recorded on June 23, 2010 stated that the **note** was being assigned to Bank of America along with the mortgage, the Assignment did not transfer ownership of the promissory note to the Bank.

Under Ohio law, the right to enforce a note cannot be assigned but instead, the note must be negotiated in accord with Ohio's version of the Uniform Commercial Code. See R. C. 1301.01 et seq.; see also U.C.C. Article 3. An attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note.

The real party in interest in a foreclosure action is the current holder of the note and mortgage. *Deutsche Bank Natl. Trust Co. v. Ingle*, Cuyahoga App. No. 92487, 2009 Ohio 3886. To foreclose on the Kuchtas' property, Plaintiff had to demonstrate it was a person entitled to enforce the note.

R.C. 1303.31 states:

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

"(1) The holder of the instrument;

"(2) A non-holder in possession of the instrument who has the rights of a holder;

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

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

The Kuchtas argue the chain of title is was broken because plaintiff did not show proof the Wells Fargo Home Mortgage properly transferred ownership of the note to Bank of America.

Courts have recognized that a promissory note represents the debt incurred and a mortgage serves as security for the payment of the obligations contained in the promissory note. *In re: Perrysburg Marketplace Co.* (1997) 208 B.R. 148, 159, 34 UCC Rep. Serv. 2d 732, citations deleted.

In *Bank of New York v. Dobbs*, Knox App. No. 2009-CA-2, 2009 Ohio 4742, the Fifth District Court of Appeals held that the assignment of a mortgage may be sufficient to establish the transfer of the note, and vice versa, stating:

"In Ohio it has been held that transfer of the note implies transfer of the mortgage. In *LaSalle Bank National Association v. Street*, Licking App. No. 08CA60, 2009 Ohio 1855, . . ."

"Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers* (1950), 59 Ohio Law Abs. 400, 100 N.E.2d 68, 75."

Section 5.4 of the Restatement III, Property (Mortgages) discusses transfers of the obligations secured by a mortgage and transfers of the mortgage itself by the original mortgagee to a successor, or a chain of successors. Such transfers occur in what is commonly termed the "secondary mortgage market", as distinct from the "primary mortgage market" in which the mortgage loans are originated by lenders and executed by borrowers. *Bank of New York v. Dobbs*, ¶27.

The Restatement asserts that lenders nearly always keep the mortgage and the note it secures in the hands of the same party. This is because separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed to separate the note and mortgage. More commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly. *Dobbs*, ¶28.

The Restatement suggests that frequently mortgagees fail to document their transfers carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4 (b) suggests "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree

otherwise." Thus, the obligation follows the mortgage if the record indicates the parties so intended. *Dobbs*, ¶28

"Given the present state of banking and financing it makes little sense not to apply this reasoning to transfers of mortgages without express transfer of the note, where the record indicates it was the intention of the parties to transfer both."

Dobbs, ¶31.

In instant case, the Kuchtas did not expressly contradict the evidence of ownership by Plaintiff; they merely allege that Plaintiff has not shown that it is entitled to enforce the promissory note and foreclosure on its mortgage.

The mortgage signed by the Kuchtas states in paragraph 20, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument and Applicable law."

The promissory note states in paragraph one, "I understand that the Lender may transfer this note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is the called the "Note Holder." Section 10, entitled "Uniform Secured Note" states "In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the Security Instrument), dated the same day as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what

conditions I may be required to make immediate payment in full of all amounts I owe under the Note. ***"

Given that the note refers to the mortgage and the mortgage likewise refers to the note, the Court finds a clear intent by the parties to keep the note and mortgage together, rather than transferring the mortgage alone. The Court therefore concludes that the chain of title between Wells Fargo Home Mortgage and Bank of America was not broken.

The Motion for Summary Judgment is supported by an affidavit from a vice president loan documentation of Wells Fargo Bank. He stated that Plaintiff is the holder of the note and mortgage which were the subject of the foreclosure action. "True and accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto as Exhibits "A" and "B".

This affidavit established that the original instruments were in the possession of Wells Fargo, and that the affiant had access to the original note and mortgage. The Court finds the affidavit provided authentication of the documents and established that Bank of America is the holder of the promissory note. The borrowers did not come forward with any evidence to show that any of the Plaintiff's documents were inaccurate or that the affiant's statements about the promissory note were false.

The Court finds that plaintiff had legal standing to bring the foreclosure action because the **mortgage** was properly assigned to Bank of America by the original lender. Under the facts of this case, Plaintiff had the right to enforce the promissory note even though it had not been negotiated by an endorsement or an allonge. *Bank of New York v. Dobbs*, 2009 Ohio 4742, 5th Dist. No. 2009-CA-

000002; *Deutsche Bank v. Gardner*, 8th Dist. No. 92916, 2010 Ohio 663; *Deutsche Bank v. Douce*, 10th Dist. No. 07AP-453, 2008 Ohio 589.

The Kuchtas rely on *In re Wells*, 407 B.R. 873 (N.D. Ohio 2009) for the proposition that the assignment of a mortgage is insufficient under Ohio law to transfer ownership of the note. *Wells* is a bankruptcy case where the issue before the court was whether the mortgagee filed sufficient documentation with its proof of claim to establish that it was a secured creditor so that it could receive payment from the Chapter 13 trustee for pre-petition arrears due under the promissory note. The court finds that *Wells* deals primarily with the sufficiency of a proof of claim in a bankruptcy proceeding and it is not on point for issues before the court in the foreclosure case.

In *Deutsche Bank Nat. Trust Co. v. Gardner*, 8th Dist. No. 92916, 2010-Ohio-663, the court upheld the trial court decision finding that the Plaintiff had the right to enforce the mortgage even though only an unendorsed copy of the promissory note was offered into evidence. The court noted:

“We recognize that a promissory note, as a negotiable instrument, is freely transferable and provides the holder with the right to demand money or bring suit to recover money on the note. See R.C. 1303.22(A) and 1303.31. ‘Under Ohio law, the right to enforce a note cannot be assigned- instead, the note must be negotiated in accord with Ohio’s version of the Uniform Commercial Code. See Ohio Rev. Code §1301.01 et seq. and §1303.01 et seq.; see also U.C.C. Article 3. An attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note’.” ¶21.

In foreclosure cases where there is insufficient proof to show whether the plaintiff is the holder of the promissory note, courts should consider extrinsic evidence to determine whether the note was transferred to the plaintiff when the mortgage was assigned. *Deutsche Bank Natl. Trust Co. v. Gardner*, 2010 Ohio 663.

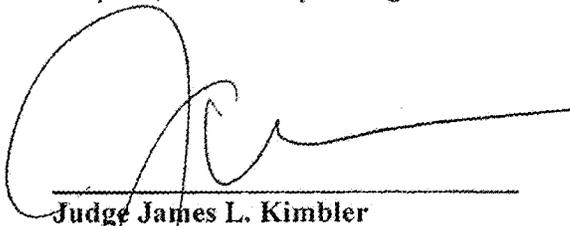
The Court finds there was sufficient extrinsic evidence in the instant case to substantiate that Plaintiff had standing to prosecute the foreclosure case. The evidence consisted of the affidavit testimony of Herman John Kennerty, the note, the mortgage and the Mortgage Assignment. This evidence established that Bank of America is the holder of the Note and Mortgage and that it had standing to seek remedy for its alleged financial injury. *Homecomings Financial, LLC v. McNerney*, Case No. 1:09 CV 2383, U.S. District Court for the Northern District of Ohio, Eastern Division. 2010.

Conversely, there was no evidence supporting the Kuchtas protestations that Bank of America is not the real party in interest in this case. The borrowers did not conduct any discovery before the case went to decree, even though they had raised the issue of standing in their Answer. They did not file a brief or submit any evidentiary materials in opposition to Plaintiff's Motion for Summary Judgment. Nor did they file an affidavit in support of the Motion to Vacate. They have not produced *any* evidence that refutes Bank of America's position that it is the holder of the Note. The Kuchtas provided no *actual* evidence that the explanation for the chain of ownership set forth by Bank of America is somehow incorrect or has been fabricated. *Deutsche Bank National Trust Company v. Doucet*, 10th Dist. No. 07AP-453, 2008 Ohio 589.

The court finds that the Kuchtas' Motion to Vacate is not warranted by the facts of this case, or by appellate case law regarding a lender's right to enforce a note and mortgage acquired by assignment. The court further finds that the Notice of Assignment of Mortgage filed in this case on August 10, 2010 is sufficient proof to establish that Plaintiff, Bank of America is the holder of the note and mortgage executed by the Kuchtas.

IT IS THEREFORE ORDERED that the Motion to Vacate the Judgment of Foreclosure and the Motion to Stay Sherriff's Sale filed by Defendants George and Bridget Kuchta are DENIED.

IT IS FURTHER ORDERED that the Sherriff's Sale to be held on September 29, 2011 shall go forward as scheduled. The Medina County Clerk of Court shall return Defendants' \$500.00 deposit, minus 2% poundage.



Handwritten signature of Judge James L. Kimbler, consisting of a large, stylized 'J' and 'K' followed by a horizontal line.

Judge James L. Kimbler

INSTRUCTIONS TO THE CLERK

Pursuant to Civil Rule 58, the Clerk is hereby directed to serve upon the following parties, notice of this judgment and its date of entry upon the journal:

Jeffrey Tobe
Lerner, Sampson & Rothfuss
P.O. Box 5480
Cincinnati, OH 45201-5480

Marc E. Dann
Law Office of Marc Dann Co. LPA
20521 Chagrin Blvd. Suite D
Shaker Heights, OH 44122

Brian Richter
Medina County Prosecutor's Office
72 Public Square
Medina, OH 44256

Benjamin N. Hoen
Weltman, Weinberg & Reis Co., LPA
323 West Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

John E. Kohler
20325 Center Ridge Road
Suite 612
Rocky River, OH 44116

Wells Fargo Bank
c/o CSC-Lawyers Incorporating Service
50 W. Broad Street
Columbus, OH 43215

John E. Kohler, Trustee
535 Eastwood Road
Hinckley, OH 44233

Notice was mailed by the Clerk of Court on Sept. 29, 2011.

Arinda M. Lucas
DEPUTY CLERK OF COURT

201021461
(kdk)

COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS CLERK

2011 JUN 27 AM 11:44

Bank of America, National
Association

Plaintiff,

-vs-

George M. Kuchta and Bridget M.
Kuchta, et al

Defendants.

Case No. 10CIV1003

Judge James Kimbler

DAVID D. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

ENTRY GRANTING SUMMARY
JUDGMENT AND DECREE IN
FORECLOSURE

This matter is before the Court on the Motion for Summary Judgment of the plaintiff, to obtain judgment upon the Note as described in the Complaint; and to foreclose the lien of the Mortgage securing the obligation of such Note upon the real estate described herein; and to require all parties to set up their claims to the real estate or be barred.

The Court finds that all necessary parties have been properly served, are properly before the Court, and that the defendant, Wells Fargo Bank, N.A. is in default of Motion or Answer.

The Court finds that the defendants, George M. Kuchta, Bridget M. Kuchta and John E. Kohler, Trustee, filed an Answer in response to the plaintiff's Complaint. The Court finds that the plaintiff has filed a motion for Summary Judgment supported by a Memorandum and Affidavit. Upon consideration thereof, the Court finds no genuine issue as to any material fact and the plaintiff



LSR201021461D278P1500C9

is entitled to a Judgment and Decree in Foreclosure as a matter of law.

The Court finds that the allegations contained in the Complaint are true and that there is due and owing to the plaintiff, from the defendants, George M. Kuchta and Bridget M. Kuchta, jointly and severally, upon the subject Note the principal balance of \$887,406.12, for which amount judgment is hereby rendered in favor of the plaintiff, with interest at the rate of 6.3750 percent per annum from December 1, 2009, and as may be adjusted pursuant to the terms of the note, together with advances for taxes, insurance and otherwise expended, plus costs.

The Court finds that the Note is secured by the Mortgage held by the plaintiff, which mortgage constitutes a valid and first lien upon the following described premises:

See Exhibit "A"

The Court finds that the Mortgage was filed for record on December 24, 2002, in Instrument No. 2002OR052200, of this County's Recorder's Office; that the conditions of said Mortgage have been broken and plaintiff is entitled to have the equity of redemption of the defendant-titleholders foreclosed.

The Court finds that the defendant, PNC Bank, National Association successor by merger to National City Bank, has filed an Answer herein asserting an interest in the real estate which

is the subject of this action, which interest is junior in priority to plaintiff's interest as hereinabove set forth.

The Court finds that the defendant, Medina County Treasurer, has filed an Answer herein asserting an interest in the real estate which is the subject of this action, which interest is senior in priority to plaintiff's interest as hereinabove set forth.

IT IS THEREFORE, ORDERED that unless the sums hereinabove found to be due to plaintiff, and the costs of this action, be fully paid within three (3) days from the date of the entry of this decree, the equity of redemption of the defendant-titleholders in said real estate shall be foreclosed and the real estate sold, free of the interests of all parties herein, and an order of sale may issue to the Sheriff of this County, directing him to appraise, advertize and sell said real estate, according to law and the orders of this Court, and report his proceedings to this Court.

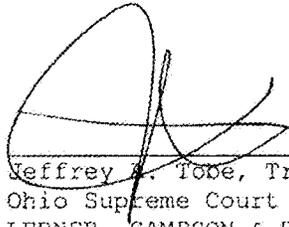
IT IS FURTHER ORDERED that the Sheriff shall send counsel for the party requesting the Order of Sale a copy of the publication notice promptly upon its first publication.

IT IS FURTHER ORDERED that the Sheriff, upon confirmation of said sale, shall pay from the proceeds of said sale, upon the claims herein found, the amounts thereof in the following order of priority:

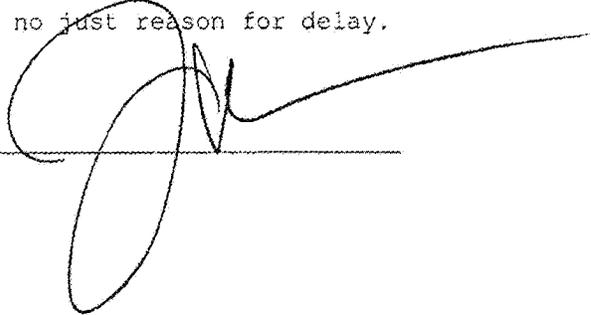
1. To the Clerk of this Court, the costs of this action, including the fees of appraisers.
2. To the Treasurer of Medina County, all unpaid taxes, assessments and penalties due and legally assessed against the real estate including pro-rated taxes through the date of the confirmation of the sheriff's sale on the subject property.
3. To the plaintiff, the sum of \$587,406.12, with interest at the rate of 6.3750 percent per annum from December 1, 2009, and as may be adjusted pursuant to the terms of the note, together with advances for taxes, insurance and otherwise expended, plus costs.
4. The balance of the sale proceeds, if any, shall be paid by the Sheriff to the Clerk of this Court to await further orders of this Court.

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

JUDGE



Jeffrey A. Tobe, Trial Counsel
Ohio Supreme Court Reg. #0081798
LERNER, SAMPSON & ROTHFUSS
Attorneys for Plaintiff
P.O. Box 5480
Cincinnati, OH 45201-5480
(513) 241-3100
attyemail@lsrlaw.com



submitted AUG 06 2010
George M. Kuchta, Pro Se

submitted AUG 06 2010
Bridget M. Kuchta, Pro Se

submitted AUG 06 2010
Steve B. Wagner
Ohio Supreme Ct. #0063276
Attorney for John E. Kohler

submitted AUG 06 2010
Benjamin N. Hoen
Ohio Supreme Ct. #0077704
Attorney for PNC Bank, National Association successor by merger
to National City Bank

senior interest protected
Brian M. Richter
Ohio Supreme Ct. #0040409
Attorney for Medina County Treasurer

INSTRUCTIONS TO THE CLERK

provide notice of the foregoing Judgment and its date of entry upon the journal, per the provisions of Civ. R. 58.

Court Case No.: 10CIV1003
LS&R No.: 201021461
cc

Legal Description

PARCEL NO. 1:

Situated in the Township of Hinckley, County of Medina and State of Ohio, being part of Lot 29 in said Township and also known as being a parcel of land transferred 6-23-86 to George M. and Bridget M. Kuchta recorded in O.R. 310-623 of Medina County Deed Records and more fully described as follows:

Beginning at a 1/2" pipe found at the Northeast corner of Hinckley Township Lot 29 at the centerline of Eastwood Road T.H. 405, 60' wide (unimproved);

Thence, South 03-degrees 00-minutes 26-seconds West, along the East line of Lot 29, a distance of 1781.93' to a 5/8" bar set;

Thence, North 87-degrees 43-minutes 00-seconds West, parallel to the South line of said Lot 29 and along a Northerly line of a parcel of land transferred 6-22-67 to Ronald H. and E. Louise Perkins recorded in D.V. 351-65, a distance of 672.54' to a 5/8" bar set;

Thence, North 00-degrees 13-minutes 57-seconds East, a distance of 1236.88' to a 5/8" bar set;

Thence, South 87-degrees 26-minutes 07-seconds East, a distance of 116.82' to a 5/8" bar set;

Thence North 00-degrees 13-minutes 57-seconds East, a distance of 124.08' to a 5/8" bar set;

Thence, North 87-degrees 26-minutes 07-seconds West, a distance of 116.82' to a 5/8" bar set;

Thence, North 00-degrees 13-minutes 57-seconds East, passing over a 5/8" bar set at 395.70' a distance of 423.70' to a point at the North line of Lot 29 and centerline of Eastwood Road (unimproved);

Thence South 87-degrees 26-minutes 07-seconds East, along the North line of Lot 29 and centerline of Eastwood Road (unimproved), a distance of 759.00' to the place of beginning. Said parcel contains 28.9731 acres of land, more or less, and is subject to all legal highways and easements of records, as surveyed in January 2000 by Susan L. Eichhorn P.S. 7265 of Corner Stone Professional Land Surveyors, Inc.

The basis of bearings is North 87-degrees 43-minutes 00-seconds West along the South line of Hinckley Township Lot 29; the same bearing used in survey L-222 of Medina County Engineers Records. All Bars set bear cap 7265.

P.P.#16-03B-23-019

Constance Gibson 6-17-10
MEDINA COUNTY TAX MAPS DATE

LEGAL DESCRIPTION

APPROVED

NOT APPROVED

PARCEL NO. 2:

Situated in State of Ohio, County of Medina, Township of Hinckley, being part of Lot 29 in said Township, and also known as being a parcel of land transferred 6-23-86 to George M. and Bridget M. Kuchta recorded in O.R. 310-632 of Medina County Deed Records, and more fully described as follows:

Beginning at a railroad spike monument set at the Northwest corner of Hinckley Township Lot 29 at the centerline of Eastwood Road, T.H. 485, 60' wide;

Thence South 87-degrees 19-minutes 39-seconds East, along the centerline of Eastwood Road and North line of Lot 29, a distance of 419.00' to a railroad spike monument set;

Thence South 2-degrees 40-minutes 21-seconds West, along the West line of a parcel of land transferred 5-13-86 to Gordon R. and Betty J. Eastwood recorded in O.R. 303-456, a distance of 308.00' to a 5/8" bar set;

Thence South 87-degrees 19-minutes 39-seconds East along said Eastwood parcel's South line, a distance of 157.10' to a 5/8" bar set;

Thence North 2-degrees 40-minutes 21-seconds East, along Eastwood parcel's East line, a distance of 300.00' to a railroad spike set at the centerline of Eastwood Road and North line of Lot 29;

Thence South 87-degrees 19-minutes 39-seconds East, along said centerline and North line of Lot 29, a distance of 197.13' to a railroad spike set;

Thence South 87-degrees 26-minutes 07-seconds East, along the centerline of Eastwood Road and North line of Lot 29, a distance of 276.80' to a railroad spike set;

Thence South 2-degrees 33-minutes 52-seconds West, along the West line of a 1.2393 acre parcel of land transferred 3-25-96 to George M. Kuchta recorded in O.R. 1150-891, a distance of 350.00' to a 5/8" bar set;
Thence South 87-degrees 26-minutes 07-seconds East, along the South line of said 1.2393 acre parcel, a distance of 171.00' to a 5/8" bar set;
Thence along the following courses and distances of said 1.2393 acre parcel, marked by a 5/8" bar set;
North 2-degrees 33-minutes 52-seconds East, 61.00';
South 87-degrees 26-minutes 07-seconds East, 10.00';
North 2-degrees 33-minutes 52-seconds East, 74.00';
South 87-degrees 26-minutes 07-seconds East 19.00';
Thence North 02-degrees 33-minutes 52-seconds East, along an Easterly line of said 1.2393 acre parcel and the Easterly line 0.32 acre parcel described in said O.R. 1150-891, a distance of 215.00' to a railroad spike set at the centerline of Eastwood Road and North line of Lot 29;
Thence South 87-degrees 26-minutes 07-seconds East along the centerline of Eastwood Road and North line of Lot 29, a distance of 778.40' to a point at the northwest corner of a 29 acre parcel transferred 6-23-86 to George M. and Bridget M. Kuchta recorded in O.R. 310-632;
Thence South 00-degrees 13-minutes 57-seconds West along a Westerly line of said 29 acre parcel, passing over a 5/8" bar set at 30.00' a distance of 425.70' to a 5/8" bar set;
Thence along the following courses and distances of said 29-acre parcel, marked by 5/8" bar set;

South 87-degrees 26-minutes 07-seconds East, 116.82';
South 00-degrees 13-minutes 57-seconds West, 124.08';
North 87-degrees 26-minutes 07-seconds West, 116.82';
Thence South 00-degrees 13-minutes 57-seconds West along a westerly line of said 29 acre parcel, a distance of 1236.88' to a 5/8" bar set at a Northerly line of a parcel of land transferred 6-22-67 to Ronald H. and E. Louke Perkins recorded in D.V. 351-65;
Thence North 87-degrees 43-minutes 00-seconds West, parallel to the South line of Hinckley Township Lot 29 and along said Perkins parcel's Northerly line, a distance of 938.52' to a 5/8" bar set;

Thence North 08-degrees 28-minutes 00-seconds West along a Northeasterly line of aforesaid Perkins parcel, a distance of 452.10' to a 5/8" bar set;
Thence North 86-degrees 53-minutes 00-seconds West, along a Northerly line of Perkins parcel, a distance of 1073.18' to a 5/8" bar set at the West line of Hinckley Township Lot 29;
Thence North 02-degrees 26-minutes 13-seconds East along the West line of Lot 29, passing over a 1" pipe found at 839.33' and passing over a 3/4" pipe found at 1306.98' a distance of 1337.16' to the place of beginning.

copy

From: 3307648797 Page: 6/6 Date: 6/17/2010 11:36:13 AM
From: 513-241-4094 To: 13307648797 Page: 6/7 Date: 6/17/2010 10:32:39 AM

Said parcel contains 70.9440 acres of land, more or less, and is subject to all legal highways and easements of record, as surveyed in January 2000 by Susan L. Ekuborn P.S. 7265 of Corner Stone Professional Land Surveyors, Inc.
The basis of bearing is North 87-degrees 43-minutes 00-Seconds West along the South line of Hinckley Township Lot 29; the same bearing used in survey L-222 of Medina County Engineers Records.

P.P.#16-03B-23-020

Property Address: 422 Eastwood Road, Hinckley, OH 44233
Parcel No: 016-03B-23-019 and 016-03B-23-020
Prior Deed Reference: 2005OR045325 and 2003OR067273

Cornie Gibson 6-17-10
MEDINA COUNTY TAX MAPS DATE

LEGAL DESCRIPTION

APPROVED

NOT APPROVED

This fax was received by GFI FAXmaker fax server. For more information, visit: <http://www.gfi.com>