ORIGINAL

IN THE SUPREME COURT OF OHIO

ORIX CAPITAL MARKETS, LLC, AS SPECIAL SERVICER FOR U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF PRUDENTIAL SECURITIES SECURED FINANCING CORPORATION, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2001-C1,	)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District 13-1512 Court of Appeals Case No. CA-13-100211
Plaintiff-Appellee,	)	
v.	)	
STERLING TELECOM OFFICE BUILDING, LLC, *et al.*,	)	
Defendants-Appellants.	)	

FILED
SEP 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

Robert R. Kracht (#0025574)
rrk@mccarthylebit.com
John E. Moran (#0087272)
jem@mccarthylebit.com
McCARTHY, LEBIT, CRYSTAL
& LIFFMAN CO., L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, Ohio 44115
(216) 696-1422
(216) 696-1210 (facsimile)
Attorneys for Defendants-Appellants

Michael P. Shuster (#0064518)
mshuster@porterwright.com
PORTER WRIGHT MORRIS
& ARTHUR, LLP
925 Euclid Avenue
1700 Huntington Building
Cleveland, Ohio 44115-1483
(216) 443-9000
(216) 443-9011 (facsimile)
Attorney for Plaintiff-Appellee

RECEIVED
SEP 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST	1
II. STATEMENT OF THE CASE AND FACTS	6
III. LAW AND ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	8
Proposition of Law 1: A trial court's ruling denying a Motion to Dismiss premised on Civ.R. 12(H)(3), Ohio Rules of Civil Procedure, affects a substantial right of a defendant in a mortgage foreclosure proceeding, warranting the filing of an interlocutory appeal	8
Proposition of Law 2: A REMIC trust, not the certificateholders, would be the owner and holder of legal title to the mortgage assets in a securitized mortgage pool and would be the real party in interest entitled to maintain a foreclosure action on a defaulted mortgage	11
IV. CONCLUSION	13
Certificate of Service	15

Appendix:

Magistrate's Decision	Appx. 1
Trial Court Decision	Appx. 2
Court of Appeals' Journal Entry	Appx. 3
Beneficial Ownership and the REMIC Classification Rules, November, 2012, *Bloomberg Real Estate Journal*	Appx. 4

TABLE OF AUTHORITIES

Page

Cases:

Federal Home Mortgage Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017 .... *passim*

N. Cent. Loc. Educ. Ass'n v. N. Cent. Loc. School District Board of Education, No. 96CA0011, 1996 Ohio App. LEXIS 4349, at *3 (Ohio Court Appeal October 2, 1996) 10

Patton v. Diemer, 35 Ohio St.3d 68, 70 (1988) 9

State ex rel. Nestle United States v. Indus. Comm'n of Ohio, 10th District No. 01AP-1214, 2003-Ohio-413, at paragraph 86 10

The Lincoln Tavern, Inc. v. Snader, 165 Ohio St. 61 (1956) at syllabus 3 3

Statutes and Other Authorities:

Ohio Revised Code §1746.04(A) 13-14

Ohio Revised Code §2505.02 ..... 2, 8

Ohio Revised Code §2505.02(A)(1) 9

Ohio Revised Code §2505.02(B)(1) 8

Ohio Rule of Civil Procedure 12(B)(6) 10, 13

Ohio Rule of Civil Procedure 12(H)(3) ..... *passim*

IN THE SUPREME COURT OF OHIO

ORIX CAPITAL MARKETS, LLC, AS SPECIAL SERVICER FOR U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF PRUDENTIAL SECURITIES SECURED FINANCING CORPORATION, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2001-C1,	)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
Plaintiff-Appellee,	)	Court of Appeals Case No. CA-13-100211
v.	)	
STERLING TELECOM OFFICE BUILDING, LLC, *et al.*,	)	
Defendants-Appellants.	)	

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Substantial rights are affected when a court acts without jurisdiction over the subject matter of an action. The rights that are affected are no more pronounced than they are in foreclosure proceedings. This is exemplified by this Court's recent decision in the case of ***Federal Home Mortgage Corp. v. Schwartzwald***, 134 Ohio St.3d 13, 2012-Ohio-5017, where the Schwartzwalds ultimately prevailed in their challenge regarding the trial court's lack of

subject matter jurisdiction. But, unfortunately, for the Schwartzwalds, they prevailed well after their home was sold at sheriff's sale. They effectively won the battle, but lost the war.

While the ***Schwartzwald*** decision does not speak to the remedy, if any, that may be available to the Schwartzwalds, when you consider the many ramifications that a defective foreclosure proceeding can and will cause, it is evident that new rules and procedures must be developed in connection with commercial and residential foreclosure proceedings in order to protect the interests of all parties concerned. As an interim measure, however, Appellants submit that a ruling denying a motion to dismiss based on the trial court's lack of jurisdiction over the subject matter in a foreclosure proceeding should be subject to immediate review as a final order or an interlocutory appeal should be allowed as that order, as will be demonstrated below, affects substantial rights within the meaning of R.C. §2505.02. Thus, the consideration of whether new rules and/or procedures or clarification of the procedures involving appeals from trial court orders denying motions to dismiss premised on the trial court's lack of jurisdiction over the subject matter in a foreclosure proceeding, is of public and great general interest, warranting review by this Court.

Using the ***Schwartzwald*** case as an example, had the Schwartzwalds been permitted to pursue an interlocutory appeal from the trial court's denial of their motion to dismiss, together with a corresponding stay of the underlying foreclosure proceeding, even if the Court of Appeals still affirmed the trial court's ruling in the context of an interlocutory appeal, the issue of the trial court's subject matter jurisdiction would have been brought before the appellate court and, ultimately, to this Court for review <u>before</u> the plaintiff recovered final judgment in the foreclosure action and before the property went to sheriff's sale.

In any foreclosure action where the purported plaintiff lacks standing to maintain the action, if appropriate safeguards are not implemented to address the issue before final judgment and sale, a whole host of irreparable problems will arise. In this regard:

(1) The property owners' equity of redemption would not have been foreclosed;

(2) The entire foreclosure proceeding, including, but not limited to, the final decree in foreclosure would be a legal nullity. *See,* ***The Lincoln Tavern, Inc. v. Snader***, 165 Ohio St. 61 (1956) at syllabus 3;

(3) The order of sale issued by the trial court directing the sheriff to appraise, advertise and then sell the subject property at sheriff's sale would likewise be void *ab initio*;

(4) Any deed issued by the sheriff to the successful bidder at the foreclosure sale would likewise be void and of no affect. *See,* ***Lincoln Tavern, supra***;

(5) The purchaser of the property at the foreclosure sale will not receive clear title or any title for that matter to the property and there will be a cloud on the title to the subject property that will stay with the property and will adversely affect the rights and interest of all subsequent purchasers and other third parties going forward. *See,* ***Lincoln Tavern, supra***;

(6) To the extent that the purchaser or any subsequent purchasers of the subject property were to obtain a purchase money loan from a lender in order to purchase the property, the mortgage of the lender will not attach to the property in light of the fact that the purported owner would not have legal title; and

(7) The lack of clear title to the subject property may also prevent any purchaser from having an insurable interest in the property such that, in the event of a casualty loss due to fire or other damage to the property, the purported owner's insurance carrier may decline coverage on grounds that the purported owner does not have an insurable interest in the property.

While some may believe that the property owner whose property was sold via a defective foreclosure proceeding would have recourse back against the plaintiff in the form of monetary

damages for any loss they may sustain, the prospect of monetary recourse for the property owner does not, however, change or correct the defect in title to the real estate. The title defect will remain with the property forever unless and until it is reversed back to the source of the problem. Moreover, given the unique nature of real property, money damages will not compensate the property owner for their loss and there is no guaranty that the purported plaintiff would be subject to process in the State of Ohio so that the property owner could readily seek recourse against it. Since the foreclosure action would, under those circumstances, be considered a legal nullity, there would be no proceeding in which the property owner could legitimately seek recourse against the purported plaintiff. Therefore, if the property owner sought to seek recourse against the purported plaintiff, they would be required to file a new action naming the purported plaintiff.

Further, if judicial economy is one of the goals of the Civil Rules, the absence of an effective process to promptly address the validity of a party's standing in a foreclosure proceeding has and will cause a needless multiplicity of litigation. Again, using the ***Schwartzwald*** situation as an example, the plaintiff in that action commenced the foreclosure proceeding by filing its complaint on April 15, 2009. Thereafter, the trial court entered summary judgment in favor of the plaintiff and against the Schwartzwalds, ordered their equity of redemption foreclosed and the property sold. The property was appraised, advertised for sale and sold to the plaintiff at sheriff's sale. Thereafter, the Schwartzwalds timely perfected an appeal to the Court of Appeals and the Court of Appeals ultimately entered its order affirming the ruling of the trial court. Thereafter, the Court of Appeals certified that its decision conflicted with the decisions of several other courts of appeals and this Court accepted the conflict and the Schwartzwalds' appeal regarding the issue of standing. That whole process involved the efforts

of three (3) courts over a period of three and one-half (3-½) years, when this Court determined on October 31, 2012, that the entire proceeding was void *ab initio.*

The lack of an effective remedy for the property owner may not be more apparent than the situation presented in this action. While the originating lender for the mortgage loan that is the subject of this action was Prudential Mortgage Capital Company, LLC ("PMCC" or "Original Lender"), there were several subsequent transfers and/or attempts to transfer the note and mortgage. The original lender, PMCC, purported to assign the note and mortgage to Prudential Mortgage Capital Funding, Inc. ("PMCF" or "Second Lender"). Thereafter, the Second Lender, PMCF, purportedly assigned the note and mortgage to LaSalle Bank, N.A., as Trustee for the Registered Holders of Prudential Securities Secured Financing Corporation, Commercial Mortgage Pass-Through Certificates, Series 2001-C1. This transfer purportedly was done for the purpose of spinning off the subject note and mortgage into an investment vehicle known as a REMIC or Real Estate Mortgage Investment Conduit, whereby a pool of commercial or residential mortgages are held in trust and interest in the profits realized from the trust assets are sold to investors who purchase certificates evidencing the nature and extent of their investment.

At the heart of every REMIC transaction is a trust. The trust in this case was created by a Pooling and Servicing Agreement dated May 1, 2001 (the "PSA") (*see*, Plaintiff's Notice confirming that the Pooling and Servicing Agreement was previously submitted pursuant to an Affidavit filed in the trial court, the Plaintiff's Notice, Exhibit 1). The PSA is actually the trust document which not only creates the trust and identifies and appoints a trustee, but also provides for all terms and conditions regarding how the trust and trust assets and the interests of the beneficiaries of that trust are governed. Section 2.01(a) of the PSA states, in relevant part, that:

> It is the intention of the parties hereto that a common law trust be established pursuant to this agreement and, further, that such trust be designated as **"Rock 2001-C1 Commercial Mortgage Trust"**. LaSalle Bank is hereby appointed, and does hereby agree, to act as Trustee hereunder and, in such capacity, to hold the Trust Fund in trust for the exclusive use and benefit of all present and future Certificateholders. (Emphasis supplied).

Section 2.01(a) creates a trust and provides for the appointment of a trustee to administer the Rock 2001-C1 Commercial Mortgage Trust (the "Rock 2001 Trust"). Section 2.01(b) of the PSA then sets forth that the creator/settlor of the Rock 2001 Trust will transfer ownership of various mortgage loans and related property to the Rock 2001 Trust. Pursuant to Section 2.02(a) of the PSA, the Rock 2001 Trust accepted the ownership of various mortgage assets, purportedly also including the note and mortgage that are the subject of this foreclosure proceeding.

As a result, a significant question arises regarding what person, or what entity or entities, would the Defendants have recourse against as a result of damages flowing from this lawsuit.

Thus, the irreparable injury that may result when a court lacks subject matter jurisdiction over a foreclosure procedure warrants prompt review and is of public and great general interest.

II. STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Orix filed its Complaint on December 14, 2011. On December 16, 2011, Defendants filed a Motion to Dismiss based on, *inter alia*, Plaintiff's lack of standing to prosecute this action and the trial court's lack of subject matter jurisdiction. Defendants have contended from the inception of this foreclosure action that standing was a jurisdictional threshold issue that must be determined at the outset of the action.

On January 23, 2012, over a month after the Complaint was filed, Plaintiff-Appellee Orix filed an Assignment of Open-End Mortgage and Security Agreement and Assignment of Leases and Rents (the "Assignment") with the Cuyahoga County Fiscal Officer. The Assignment is

dated January 18, 2012 and purports to transfer an interest in the mortgage from Bank of America, as Trustee for an undisclosed group of certificateholders, to U.S. Bank, National Association, as Trustee for an undisclosed group of certificateholders. Shortly thereafter, on February 3, 2012, Plaintiff sought leave to file Plaintiff's Supplement to its Response in Opposition to Defendant's Motion to Dismiss Complaint, in which Plaintiff claimed that it filed the mortgage Assignment "out of an abundance of caution." The trial court ultimately denied Defendants' initial Motion to Dismiss, pursuant to a Journal Entry dated July 26, 2012. The trial court's Journal Entry did not articulate the basis upon which the court denied the initial Motion to Dismiss.

Subsequent to the rendition of this Court's decision in the case of ***Federal Home Mortgage Corp. v. Schwartzwald***, dated October 31, 2012, the Defendants filed a renewed Motion to Dismiss based on this Court's decision in the ***Schwartzwald*** case. Said Renewed Motion to Dismiss was filed on January 3, 2013. Thereafter, Plaintiff Orix filed a Notice, on January 18, 2013, confirming that the PSA had been previously submitted pursuant to an Affidavit filed in connection with this action. On that same date, Plaintiff Orix filed a Response in Opposition to Defendants' Renewed Motion to Dismiss. On January 25, 2013, Defendants filed a Reply to Plaintiff's Response in Opposition to Defendants' Renewed Motion to Dismiss. On February 5, 2013, Plaintiff Orix filed a Motion for Leave to file a Sur-Reply, *instanter*, in further opposition to Defendants' Renewed Motion to Dismiss.

On February 21, 2013, the Magistrate rendered his decision, denying the Defendants' Renewed Motion to Dismiss. (*See*, copy of Magistrate's Decision, Appx. 1). On March 5, 2013, Defendants filed their Objections to the Magistrate's Decision Denying Defendants' Renewed Motion to Dismiss. On March 15, 2013, Plaintiff Orix filed its Response in Opposition to

Defendants' Objections to the Magistrate's Decision. On March 27, 2013, Defendants filed a Reply in response to Plaintiff's Response in Opposition to Defendants' Objections to the Magistrate's Decision.

On July 26, 2013, the trial court entered its Order overruling Defendants' Objections to the Magistrate's Decision. (*See*, Trial Court Decision, Appx. 2). On August 5, 2013, Defendants timely filed a Notice of Appeal from the trial court's July 26, 2013 Order overruling Defendants' Objections to the Magistrate's Decision. On August 9, 2013, the Eighth District Court of Appeals, *sua sponte*, entered an Order dismissing the Defendants' appeal on grounds that the Order appealed from was not a final, appealable order. (*See*, Court of Appeals Decision, Appx. 3).

The Defendants appealed to this Court from the Order issued by the Court of Appeals dismissing the appeal on grounds that the Order of the trial court appealed from was not a final, appealable order. Defendants seek review of the decision of the Court of Appeals and the trial court's denial of the Renewed Motion to Dismiss on the basis that the denial of a motion to dismiss regarding the trial court's lack of subject matter jurisdiction in a foreclosure proceeding affects a substantial right and/or warrants review on an interlocutory basis.

III. LAW AND ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law 1: A trial court's ruling denying a Motion to Dismiss premised on Civ.R. 12(H)(3), Ohio Rules of Civil Procedure, affects a substantial right of a defendant in a mortgage foreclosure proceeding, warranting the filing of an interlocutory appeal.

The Court of Appeals' Order dismissing the Defendants' appeal, *sua sponte*, was premised on Ohio Revised Code §2505.02. Defendants submit, however, that an order denying a motion to dismiss based on Civil Rule 12(H)(3) of the Ohio Rules of Civil Procedure is an order that affects a substantial right within the meaning of O.R.C. §2505.02(B)(1) and/or should fall

within the purview of an interlocutory appeal. As defined at R.C. §2505.02(A)(1), a "substantial right" means "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." If a court acts without jurisdiction over the subject matter, the entire underlying proceeding is void *ab initio*. ***Patton v. Diemer***, 35 Ohio St.3d 68, 70 (1988). However, the rights of the defendant-property owner in a foreclosure proceeding can, during the pendency of the foreclosure action, be divested of possession and control of their property by way of the appointment of a receiver and ultimately lose their property at foreclosure sale where the defendant would not be afforded a meaningful or effective remedy on appeal from a final decree in foreclosure after the real property is sold. For the myriad of reasons referenced in Section I of this Memorandum, highlighted by the net result of this Court's decision in the ***Schwartzwald*** case, a review of court procedures regarding residential and commercial foreclosure cases must be made with adequate safeguards to timely address jurisdictional defects before irreparable injury occurs.

In the present case, although the original Complaint was filed in this action by Plaintiff Orix, as Special Servicer for U.S. Bank, Trustee on behalf of an unidentified group of certificateholders, none of the exhibits attached to the Complaint established that the note or mortgage were held by Orix or U.S. Bank at the commencement of this action. In fact, the Amended Complaint filed by the Plaintiff on February 10, 2012, demonstrates that there was a document executed on January 18, 2012 (over a month after the original Complaint was filed) that was filed of record in Cuyahoga County on January 26, 2012, purportedly assigning the mortgage to U.S. Bank, as Trustee, for this unidentified group of certificateholders.

Despite the existence of this evidence, together with the evidence submitted by Plaintiff when it filed its Amended Complaint, the Magistrate found that the Motion to Dismiss

impermissibly referred to matters outside the pleadings. (Magistrate's Decision, pp. 2-3). The Magistrate, applying a Civ.R. 12(B)(6) standard, found that, "the Court has ruled only that standing has been sufficiently pleaded." (*See*, Magistrate's Decision at p. 2).

Defendants, however, did not file their renewed Motion to Dismiss based on Civil Rule 12(B)(6); rather, it was premised on Civil Rule 12(H)(3). In ruling upon a Civil Rule 12(H)(3) Motion to Dismiss, "the court is not confined to the allegations of the complaint, but may consider relevant extraneous material without converting the motion into a motion for summary judgment." ***State ex rel. Nestle United States v. Indus. Comm'n of Ohio***, 10th District No. 01AP-1214, 2003-Ohio-413, at paragraph 86. In this way, the Civil Rule 12(H)(3) standard is the same as the Civil Rule 12(B)(1) standard. ***N. Cent. Loc. Educ. Ass'n v. N. Cent. Loc. School District Board of Education***, No. 96CA0011, 1996 Ohio App. LEXIS 4349, at *3 (Ohio Court Appeal October 2, 1996). Under this standard, "the court is not required to take all allegations in the complaint at face value. Instead, no presumptive truthfulness attaches to plaintiff's allegations." ***Id.***

A determination of the proper subject matter jurisdiction in a foreclosure action is dependent upon whether the plaintiff had standing. *Citing,* ***Schwartzwald***, 2012-Ohio-5017, at paragraph 22. Standing exists in such an action if the plaintiff holds the note or mortgage. ***Id.*** at paragraph 28. Whether standing exists is determined as of the commencement of the lawsuit. ***Id.*** at paragraph 24. Therefore, under Civil Rule 12(H)(3), if it appears that the plaintiff did not hold the note or mortgage as of the commencement of the suit, the trial court was without subject matter jurisdiction and was required by Civil Rule 12(H)(3) to dismiss the action. Thus, applying the Civil Rule 12(H)(3) standard, it is irrelevant whether standing has been sufficiently pleaded within the meaning of Civil Rule 12(B)(6).

Had the Magistrate looked beyond the four corners of the original Complaint and properly considered the question of its jurisdiction over the subject matter by reviewing documentation and information that was provided not by the Defendants in this action, but by the Plaintiff, itself, the Magistrate, as well as the trial judge, would have been compelled to grant the Motion to Dismiss and enter an Order dismissing the foreclosure proceeding. The purported Plaintiff would then be faced with the task of correcting whatever deficiencies existed in the chain of title to the note and mortgage and related loan documents and then re-file the foreclosure complaint. Thereafter, with the true owner and holder of the note and mortgage before the court, the court's subject matter jurisdiction would then be properly invoked and the Defendants would be able to properly defend against the foreclosure action and assert any claims or defenses against the actual party in interest.

Proposition of Law 2: A REMIC trust, not the certificateholders, would be the owner and holder of legal title to the mortgage assets in a securitized mortgage pool and would be the real party in interest entitled to maintain a foreclosure action on a defaulted mortgage.

Plaintiff Orix, as Special Servicer, introduced into evidence in the trial court the Pooling and Servicing Agreement. The PSA is the document which actually created the trust and is itself the actual trust agreement that governs the identity of the entity that is the true and correct owner and holder of all of the notes and mortgages that were transferred into the securitized pool of mortgage assets. As noted earlier, the trust created by the PSA is the Rock 2001-C1 Trust. Section 2.01(a) of the PSA states that the Rock 2001-C1 Trust will hold these mortgages "in trust for the exclusive use and benefit of all present and future certificateholders." (*See*, PSA at p. 60). A review of the caption of the Complaint demonstrates that it was filed by Plaintiff, Orix Capital Markets, LLC, as Special Servicer for U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Trustee for the Registered Holders of

Prudential Securities Secured Financing Corporation, Commercial Mortgage Pass-Through Certificates, Series 2001-C1". Plaintiff contends that the certificateholders, the holders of the purported beneficial interest in the trust assets, not the trust itself, are the owners and holders of the notes and mortgages that are in the securitized mortgage pool. Plaintiff Orix further argued that, although the trustee for the certificateholders has changed over the years, the named certificateholders with the beneficial interest in the loan documents, have always remained the same.

A review of the underlying trust document submitted by Plaintiff Orix for the court's review in this proceeding, clearly demonstrates that the certificateholders are simply not the owners and holders of the notes and mortgages in the investment pool. The PSA demonstrates that the trust at the heart of the investment pool is the Rock 2001-C1 Trust and that it would be this trust, not the certificateholders, who at best would be beneficiaries under the trust, is or would be the true owner and holder of the subject note and mortgage. Had the Magistrate and the trial court considered the implications of the PSA, they would have noted the distinct difference between "beneficial" versus "legal" ownership interest. Although the certificateholders, who have invested in the REMIC trust, are considered (for tax purposes) to hold beneficial ownership, they do not hold legal title. Legal title is held by the underlying REMIC trust. (*See*, Beneficial Ownership and the REMIC Classification Rules, November, 2012, *Bloomberg Real Estate Journal*, at pp. 5-6, and 8, attached hereto at Appendix 4. Thus, the Rock 2001-C1 Trust, is the actual owner and holder of the notes and mortgages that are pooled within the REMIC trust, not the beneficiaries, *i.e.*, the certificateholders.

Finally, it should be noted, and it was argued in the trial court below, that even had the subject note and mortgage been assigned from the Original Lender to the Second Lender and

then to the Rock 2001-C1 Trust, or a trustee for the Rock 2001-C1 Trust, the trust itself would have been barred from having access to Ohio courts unless it had registered as a real estate business trust with the Ohio Secretary of State pursuant to Ohio Revised Code §1746.04(A). A Certificate of No Record was obtained from the Ohio Secretary of State demonstrating that the Rock 2001-C1 Trust was not registered with the Secretary of State.

IV. CONCLUSION

In view of the foregoing, it is evident that the Magistrate and trial court improperly applied the 12(B)(6) standard to their review of Defendants' Renewed Motion to Dismiss that was premised upon Civil Rule 12(H)(3). The Magistrate and trial court were authorized to look beyond the allegations in the Complaint and consider the various documents introduced into evidence by the purported Plaintiff, Orix, which conclusively established that, if U.S. Bank, as Trustee for the Registered Certificateholders, was in fact an owner and holder of the note and mortgage, it was not the owner and holder of the note and mortgage when the Complaint was filed on December 14, 2011. Rather, the evidence established that an assignment of the mortgage was made by Bank of America, as Trustee, to U.S. Bank, as Trustee, over a month after the original Complaint was filed. Further, had the trial court considered the PSA at all, following its introduction by Plaintiff Orix, it would have determined that the Rock 2001-C1 Trust was the only party or entity that could have been the owner and holder of the subject note and mortgage. The registered certificateholders, whomever they may be, are merely beneficial owners, but not legal owners, of the mortgages and notes that are held in the securitized pool of mortgage assets.

In addition, Defendants presented to the trial court a Certificate of No Record received from the Ohio Secretary of State, showing that the Rock 2001-C1 Trust was not registered in

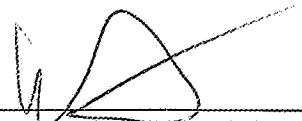
accordance with §1746.04(A) of the Ohio Revised Code and, as a result, it did not have access to Ohio courts. Accordingly, the Magistrate and the trial court had more than sufficient evidence provided by Plaintiff Orix, itself, that clearly demonstrated that the purported Plaintiff, Orix, as Special Servicer, and/or U.S. Bank, as Successor Trustee on behalf of the Registered Certificateholders, did not own and hold the note and mortgage when the Complaint was filed. Further, the true owner and holder of the note and mortgage, the Rock 2001-C1 Trust, was not the named Plaintiff and was not registered with the Ohio Secretary of State, as required by law in order to have access to Ohio courts. Accordingly, pursuant to the provisions of Civil Rule 12(H)(3), the trial court should have granted Defendants' Renewed Motion to Dismiss.

For the reasons advanced above, the denial of the Motion to Dismiss in the context of a residential or, as in this case, a commercial foreclosure proceeding, clearly affects a substantial right that warrants immediate appellate review at the outset of an action. In view of the many significant problems caused to owners of residential and commercial properties, the significant waste of judicial resources, and the significant impact defective residential and commercial foreclosure proceedings have on real estate title and the interests of purchasers acquiring properties through foreclosure sales and mortgage lenders providing funds for those purchasers to acquire properties at foreclosure sales, a review by this Court of the policies, practices and procedures currently in effect in Ohio regarding the foreclosure of residential and commercial mortgages is necessary.

These issues clearly present matters that are of public and great general interest, justifying this Court's exercise of its discretionary review of the proceedings below. The Defendants respectfully request that this Court accept this appeal, review the proceeding below, and enter an Order reversing the Court of Appeals and the trial court and enter an Order

dismissing the foreclosure action on grounds that the trial court's subject matter jurisdiction was not invoked by the real party in interest.

Respectfully submitted,



Robert R. Kracht (#0025574)
rrk@mccarthylebit.com
John E. Moran (#0087272)
jem@mccarthylebit.com
McCARTHY, LEBIT, CRYSTAL
& LIFFMAN CO., L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, Ohio 44115
(216) 696-1422
(216) 696-1210 (facsimile)

Attorney for Defendants-Appellants, Sterling Telecom Office Building, LLC and Mark Munsell

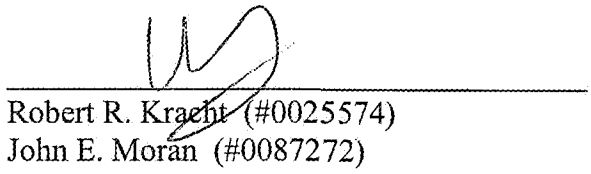
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Appellants' Memorandum in Support of Jurisdiction has been served upon the following; via regular U.S. Mail, postage prepaid; this 20th day of September, 2013:

Michael P. Shuster, Esq.
Porter Wright Morris & Arthur LLP
925 Euclid Avenue
1700 Huntington Building
Cleveland, Ohio 44115-1483
Attorneys for Plaintiff-Appellee

Mr. Frank L. Pschirer, Senior Director REMS
Colliers International
200 Public Square
2005 BP America Building
Cleveland, Ohio 44114
Court-Appointed Receiver

Michael A. Kenney, Jr., Esq.
Cuyahoga County Prosecutor's Office
1200 Ontario Street, Ninth Floor
Cleveland, Ohio 44113
Attorney for Defendant, Richard W. Sensenbrenner, Treasurer of Cuyahoga County, Ohio



Robert R. Kracht (#0025574)
John E. Moran (#0087272)

O:\WDox\Client\11704\00006\00510014.DOCX

APPENDIX

APPENDIX 1

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2013 FEB 21 P 3:11

CLERK OF COURTS
CUYAHOGA COUNTY

Orix Capital Markets, LLC, as Special Servicer for U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, N.A., as Trustee for the Registered Holders of Prudential Securities Secured Financing Corporation, Commercial Mortgage Pass-Through Certificates, Series 2001-C1	CASE NO. CV 11 771372
	JUDGE DANIEL GAUL
	MAGISTRATE THOMAS J. VOZAR
Plaintiff	
v.	
	MAGISTRATE'S DECISION
Sterling Telecom Office Building, LLC, et al.	
Defendants	

Defendant Sterling Telecom Office Building, LLC's motion to dismiss filed January 3, 2013 is denied.

Defendant reiterates its argument, made in a prior motion to dismiss,[1] that plaintiff lacks standing to invoke this court's subject matter jurisdiction. The current motion relies on the recent holding in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 ¶22 and ¶24, that standing is a jurisdictional requirement to be determined as of the commencement of suit.

Defendant appears to argue for an extension of this holding to mean that a foreclosure plaintiff must submit proof of standing with the filing of the complaint. However, there is

[1] Defendant inexplicably states, at n.1 of its motion brief, that the court's ruling on the prior motion "did not articulate the basis upon which the Court decided to deny the motion." In fact, the court entered a four page decision denying the prior motion. The decision may be viewed on the on-line appearance docket by going to the July 26, 2012 entry, then clicking on "View Img," then repeatedly clicking on the white arrow at the top of the page to scroll through the full decision.

FEB 25 2013

nothing in the *Schwartzwald* decision that supports such an extension. To the contrary, in a recent case from the Eighth District Court of Appeals following *Schwartzwald*, *U.S. Bank v. Downey,* 2013-Ohio-494 (8th Dist.) ¶24, the foreclosure plaintiff "filed valid affidavits with its summary judgment motion to prove that it was the holder of the note."

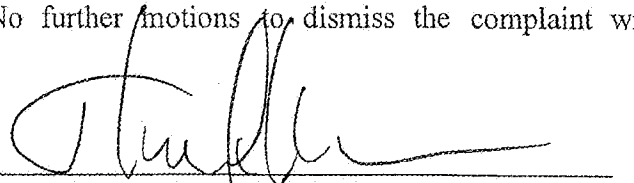
Therefore, although a plaintiff's standing is determined as of the date of filing the case, proof of such standing may be, and properly is, made at an evidentiary phase of the action, typically by way of a summary judgment motion or at trial.

Further, nothing in the *Schwartzwald* decision alters the civil procedure rules. In order to grant a Civ.R. 12(B)(6) motion to dismiss, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would entitle it to relief. *Maitland v. Ford Motor Co.*, 2004-Ohio-5717, 103 Ohio St.3d 463 ¶11. Defendant refers to evidentiary matters outside the scope of the complaint, such as an assignment instrument purportedly filed with the county recorder's office and the alleged failure of the ROCK 2001 Trust to register as a real estate investment trust pursuant to Ohio Rev. Code §1747.01. Such matters may not be considered in ruling on the motion to dismiss.

Similarly, although plaintiff filed an affidavit with its amended complaint, such affidavit is not considered by the magistrate as evidence in determining the instant motion. Any written instrument attached to a pleading becomes part of the pleading. Civ.R. 10(C). Therefore, the statements contained in the affidavit are considered to be allegations only for purposes of defendant's Civ.R. 12(B)(6 motion.

Contrary to the assertion of plaintiff, the court has not made a final determination as to standing in this case; the court has ruled only that standing has been sufficiently pleaded. Standing remains a fact issue to be resolved at an evidentiary stage in this litigation.

This is the second Civ.R. 12(B)(6) motion to dismiss the complaint that defendant has filed. In both instances the defendant has impermissibly referred to evidentiary matters outside the four corners of the complaint. No further motions to dismiss the complaint will be considered.



MAGISTRATE THOMAS J. VOZAR
CUYAHOGA COUNTY COURT OF COMMON PLEAS

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on all parties and/or counsel of record by regular U.S. mail, postage prepaid, this ____ day of February, 2013.

Michael P. Shuster
Porter Wright Morris & Arthur LLP
925 Euclid Avenue
1700 Huntington Building
Cleveland, Ohio 44115-1483

Attorney for Plaintiff

Robert R. Kracht
McCarthy, Lebit, Crystal & Liffman Co., L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, Ohio 44115

Attorney for Defendant Sterling Telecom Office Building, LLC

Michael A. Kenny, Jr.
Cuyahoga County Prosecutor
1200 Ontario Avenue, Ninth Floor
Cleveland, Ohio 44113

Attorney for Defendant Treasurer Of Cuyahoga County, Ohio

Frank Pschirer
Ostendorf-Morris Company
1100 Superior Avenue, Suite 800
Cleveland, Ohio 44114

Receiver

COPIES MAILED BY CLERK:

_____
(Date)

_____
Clerk of Courts

APPENDIX 2

80409901

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP

ORIX CAPITAL MARKETS LLC
Plaintiff

STERLING TELECOM OFFICE BUILDING LLC ET AL
Defendant

Case No: CV-11-771372

Judge: DANIEL GAUL

JOURNAL ENTRY

ORDER OVERRULING DEFENDANTS' OBJECTION TO MAGISTRATE'S DECISION. OSJ.

OSJ

Judge Signature Date

07/26/2013

EXHIBIT
A

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ORIX CAPITAL MARKETS, LLC AS, SPECIAL SERVICER FOR U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF PRUDENTIAL SECURITIES SECURED FINANCING CORPORATION, COMMERCIAL MORTGAGE PASS-THROUG CERTIFICATES, SERIES 2001-C1,	)	CASE NO. CV-11-771372
Plaintiff	)	JUDGE DANIEL GAUL
vs.	)	**JOURNAL ENTRY**
STERLING TELECOM OFFICE BUILDING, LLC, *et al.*,	)	
Defendants	)	

Upon Objection of Defendants, and after review, the Court Hereby denies Defendants' Objections to Magistrate's Decision Denying Defendants' Motion to Dismiss Based on Recent Decision of the Ohio Supreme Court.

Plaintiff filed this foreclosure action on December 14, 2011. On January 3, 2013, Defendants filed a motion to dismiss, and on February 21, 2013, the motion to dismiss was denied by the Court's Magistrate. Defendants subsequently objected to the Magistrate's Decision.

Under Ohio Civil Rule 53(D)(4),

> [i]f one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Defendants object on the bases that 1. the Magistrate applied the wrong standard of review in ruling on the motion to dismiss and 2. the Magistrate overlooked evidence that the Court was without subject matter jurisdiction.

I. Motion to Dismiss Standard

Defendant argues that the Magistrate applied the standard of review under Civ. R. 12(B)(6) and instead should have reviewed Defendants' motion under the Civ. R. 12(H)(3) standard. Plaintiff counters that the Magistrate correctly applied Civ. R. 12(B)(6).

"A motion to dismiss for lack of standing is treated as a motion to dismiss pursuant to Civ. R. 12. Specifically, a lack of standing may properly be raised in a motion to dismiss premised on Civ. R. 12(B)(6)." *Revocable Living Trust of Mandel v. Lake Erie Utils. Co.*, 2012 Ohio 5718, P11 (8th Dist. 2012) (Internal citations omitted).

Defendants' argument throughout their motions to dismiss and their objections is that Plaintiff lacked standing to bring this action. Defendants state in their objection that "[a] determination of proper subject matter jurisdiction in a foreclosure action is dependent upon whether the plaintiff has standing." As standing was the main issue in Defendant's motion to dismiss, the Court finds that the Magistrate appropriately applied the law as set forth by the Eight District Court of Appeals in applying Civ. R. 12(B)(6).

II. Plaintiff's Standing

Defendants argue that Plaintiff's complaint must fail as a matter of law because Plaintiff lacks standing to bring this action. Plaintiff lacks standing, according to Defendants, because U.S. Bank, as the trustee, held neither the Note nor Mortgage on the date the Complaint was filed. Plaintiff argues that its standing has been sufficiently pleaded.

In ruling on a motion raising the defense of failure to state a claim upon which relief can be granted, the Court inquires whether the allegations constitute a statement of claim for relief under Civil Rule 12(B). For the purposes of the motion, the complaint is to be liberally construed in a light most favorable to the plaintiff, and material allegations are to be taken as admitted. *State ex rel. Woods v. Oak Hill Community Med. Ctr.*, 91 Ohio St. 3d 459 (2001). The court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416 (2002).

Plaintiff has alleged in both its complaint and amended complaint that, "[p]laintiff holds the Note, Mortgage, Guaranty, and related loan documents. ... ORIX Capital Markets, LLC ("ORIX") has been appointed Special Servicer by the controlling class certificate holder of the Noteholder." The complaint therefore contains allegations that describe the relationship of the loan servicer that of the Noteholder. These allegations, construed in a light most favorable to the plaintiff, and taken as admitted, are sufficient to satisfy the purpose of the complaint, which is to "give the defendant fair notice of the claim and an opportunity to respond." *EverStaff, LLC v. Sansai Environmental Technologies, LLC*, 2011-Ohio-4824 (8th Dist.).

After taking an independent review as to the application of Civ. R. 12(B)(6) and the evidence that the Court was without subject matter jurisdiction, the Court hereby finds that the Magistrate has properly determined the factual issues and appropriately applied the law.

As such, the Court hereby overrules Defendants' objection to the Magistrate's Decision.

DATED: 7/25/13

JUDGE DANIEL GAUL

RECEIVED FOR FILING

JUL 26 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By Deputy

APPENDIX 3

AUG X 8 2013

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

ORIX CAPITAL MARKETS, LLC.

Appellee

COA NO. 100211 | LOWER COURT NO. CV-11-771372

COMMON PLEAS COURT

-vs-

STERLING TELECOM OFFICE BLDG., ET AL

Appellant

MOTION NO. 467253

Date 08/08/13

Journal Entry

Sua sponte, the appeal is dismissed per R.C. 2505.02. See Matteo v. Principe, 8th Dist. No. 92894, 2010-Ohio-1204.

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

AUG X 8 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

CA13100211
80600837

COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS TAXED

Judge MARY J. BOYLE, Concurs

MELODY J. STEWART
Administrative Judge