

ORIGINAL

IN THE SUPREME COURT OF OHIO

HSBC BANK USA, NATIONAL ASSOCIATES, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-15,

Plaintiff-Appellee,

v.

MATTHEW SHERMAN, A/K/A MATT SHERMAN, et al.,

Defendant-Appellant.

Supreme Court Case No. 2013-2003

On Appeal from the Hamilton County Court of Appeals, First Appellate District

Appeals Case No. C 120302

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE HSBC BANK USA, N.A.

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**THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST
AND DOES NOT INVOLVE A CONSTITUTIONAL QUESTION**

This is a garden variety foreclosure. Plaintiff HSBC Bank USA, N.A. ("HSBC"), as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-15 ("Trust") filed suit against Defendant-Appellant Matthew Sherman to obtain judgment on a note ("Note") and to foreclose on a mortgage ("Mortgage"). Attached to the Complaint was an assignment of the Mortgage from the original creditor to HSBC.

Sherman argues that this case presents a standing issue under *Fed. Home Loan Mort. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, because the copy of the Note attached to the Complaint was indorsed to Wells Fargo Bank, N.A. ("Wells Fargo"). It does not. The assignment of the Mortgage was sufficient to confer standing. Moreover, Wells Fargo indorsed the note in blank, and HSBC included the copy of the Note with the blank indorsement as part of its motion for summary judgment. The First District Court of Appeals correctly concluded that HSBC possessed standing at the time of filing the Complaint. This case simply does not present any question of great general or public interest to address.

STATEMENT OF THE CASE AND FACTS

On July 5, 2006, Sherman executed the Note in the amount of \$405,000.00 in favor of American Broker's Conduit ("ABC"). On the same day, to secure payment of the Note, Sherman executed the Mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for ABC and its successors, securing the residence located at 3661 Heekin Avenue, Cincinnati, Ohio. On July 17, 2006, the Mortgage was recorded.

Beginning more than three years ago, Sherman had failed to make the payments on the Note and owes \$401,433.00 plus interest from April 1, 2010.

On January 26, 2011, MERS assigned the Mortgage to HSBC. On February 7, 2011, HSBC filed this action. Attached to the Complaint as Exhibits were a copy of the Note, indorsed from ABC to Wells Fargo, a copy of the Mortgage, and a copy of the Assignment of Mortgage from MERS to HSBC.

HSBC filed a Motion for Summary Judgment, supported by the affidavit of a Wells Fargo employee, the servicer of the Note and Mortgage. The affidavit testified that HSBC was the “holder” of the note. Included as part of the summary judgment materials was an authenticated copy of the Note, indorsed by Wells Fargo in blank, rendering it bearer paper.

In his Memorandum Contra, Sherman did not contend that he was current on the Note, or that the balance owed had been misstated, but only that HSBC lacked standing to prosecute the action. On February 13, 2012, the Magistrate issued a Decision recommending that the Trial Court enter summary judgment in favor of HSBC. On February 24, 2012, Sherman filed Objections to the Decision. On April 17, 2012, the Trial Court entered an order adopting the Decision and a final decree in foreclosure.

On April 24, 2012, Sherman filed a notice of appeal. On September 27, 2013, the First District Court of Appeals issued *HSBC Bank USA, Nat’l Assocs. v. Sherman*, 1st Dist. No. C-120302, 2013-Ohio-4220 (the “Opinion”), noting that: (1) HSBC alleged it was “entitled to enforce the note” in the complaint and that the mortgage was given to secure the note; (2) the mortgage specifically referenced the note in conjunction with the note; and (3) the note specifically referenced the mortgage, and that the “properly assigned mortgage was sufficient to demonstrate HSBC’s standing under *Schwartzwald*.” Opinion, ¶¶ 13-14, citing *Fifth Third Mtge. Co. v. Bell*, 12th Dist. No. CA2013-02-003, 2013-Ohio-3678, ¶ 16. The Court further noted that

the assignment “established HSBC’s interest in the suit and was filed with the Complaint.” *Id.*, citing *Schwartzwald*, 2012-Ohio-5017, ¶ 24.

The Opinion also discussed that some courts would have permitted the Assignment alone to satisfy the standing principles announced in *Schwartzwald*. *Id.*, ¶ 16, citing *CitiMortgage, Inc. v. Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21. The First District then affirmed the finding of standing. Opinion, ¶ 18.

Sherman filed an Application for Reconsideration, which the First District denied.

ARGUMENT OPPOSING APPELLANT’S PROPOSITIONS OF LAW

Appellant’s Proposition of Law No. 1: The real party in interest in a foreclosure action is the party entitled to enforce the note. In order to have standing to prosecute a foreclosure claim, the foreclosing party must be entitled to enforce the note when the complaint is filed.

Appellant’s Proposition of Law No. 2: Evidence of a properly assigned mortgage at filing, but without evidence of ownership or possession of the Note at filing, is insufficient to confer standing in a foreclosure action.

Both of Sherman’s propositions of law request that *Schwartzwald* be modified to add language that is not in the decision, is not supported by Ohio case law or secondary authority, and would complicate and confuse Ohio courts. Sherman’s two propositions are really one: standing to enforce a promissory note can only be measured by having an indorsed promissory note attached to the complaint. The First District correctly held that this is not the law; jurisdiction should not be accepted.

- A. Absent evidence to the contrary, standing to enforce a mortgage gives the plaintiff standing to enforce the note whose payment which it secures.

The Third Restatement of Property § 5.4(b) adopts the common law rule that absent evidence to the contrary, an assignment of mortgage is presumptively accompanied by an assignment of the note whose payment the mortgage secures (“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.”). This is because the “Restatement asserts as its essential premise is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party...because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured.” *Bank of N.Y. v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, ¶ 28. Most of the District Courts of Appeal have had no difficulty applying this rule. *Bank of N.Y. Mellon v. Matthews*, 6th Dist. No. F-12-008, 2013-Ohio-1707, ¶ 15; *Fed. Home Loan Mortg. Corp. v. Koch*, 11th Dist. No. 2012-G-3084, 2013-Ohio-4423, ¶ 36.; *Everbank v. Vanarnhem*, 3rd Dist. No. 14-13-02, 2013-Ohio-3872, ¶ 33. *See also Wells Fargo Bank, N.A. v. Elliott*, 5th Dist. No. 13-CA-03-0012, 2013-Ohio-3690, ¶ 20.

Here, it was undisputed that HSBC was the assignee of the Mortgage prior to the filing of the Complaint. That assignment was presumptively accompanied by the assignment of the Note. *Dobbs*, 2009-Ohio-4742 at ¶ 28. Sherman failed to introduce any evidence to rebut that presumption. For this reason alone, HSBC possessed standing to enforce the Note and Mortgage. The First District’s decision was correct.

B. *Schwartzwald* held that standing must be proven at the time the complaint is filed, but did not change the substantive requirements for standing.

Sherman nonetheless suggests that this court’s holding in *Schwartzwald* somehow changed the substantive requirements for what it takes to prove standing in a mortgage foreclosure action. It did not.

Schwartzwald resolved a long-brewing conflict between the appellate districts on whether a defect in standing could be *cured* prior to judgment. In that case, the plaintiff did not attach the note to the complaint and did not have an assignment of mortgage until weeks after the complaint have been filed. 2012-Ohio-5017, ¶¶ 7, 10. The plaintiff never provided an authenticated indorsed note, and relied solely on the post-complaint assignment of mortgage. The Second District held that any defect in standing could be cured prior to judgment, and that a post-complaint assignment was therefore sufficient. 2012-Ohio-5017 at ¶ 11.

This Court rejected that logic, and held that because the plaintiff “failed to establish an interest in the note *or* mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.” *Id.*, ¶ 28 (emphasis added).

Nothing in *Schwartzwald* changed the substantive requirements of what it takes to show standing, much less suggested that an interest in both the note **and** mortgage is required to establish standing. To the contrary, as noted above, the Court stated that the complaint in that case should be dismissed because the plaintiff could not show an interest in either the note *or* mortgage at the time of the filing of the complaint. 2012-Ohio-5017 at ¶ 28.

Here, because it was undisputed that HSBC attached to the complaint an assignment of the mortgage, because that assignment of the mortgage was presumptively by a transfer of the note, and because Sherman failed to introduce anything contrary, *Schwartzwald* simply has no application.

C. The single Ninth District case upon which Sherman relies is irrelevant.

In the fifteen months since *Schwartzwald*'s release, with one exception, every District Court of Appeals has continued to apply the law enunciated in the Third Restatement of Property. The First District (in this case), the Fifth District (in *Wells Fargo Bank, N.A. v. Elliott*,

5th Dist. No. 13-CAE-03-0012, 2013-Ohio-3690, ¶ 25), the Eighth District (in *Patterson*, 2012-Ohio-5894 at ¶ 21) the Eleventh District (*Self Help Ventures Fund v. Jones*, 11th Dist. Ashtabula No. 2012-A-0014, 2013-Ohio-868, ¶ 17), and the Twelfth District (in *Bell*, 2013-Ohio-3678 at ¶ 16), have all held that an assignment of mortgage attached to the complaint is sufficient to establish standing under *Schwartzwald* even if the copy of the note is absent or not sufficiently indorsed.

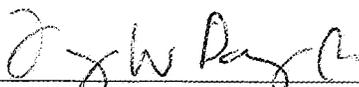
Sherman cites the one decision that has gone the other way: *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. No. 26384, 2013-Ohio-3228, ¶ 8. Without citation to any controlling authority, the decisions of other appellate districts, the Third Restatement, and without acknowledging the relationship between an assignment of a note and the right to enforce the mortgage discussed above, the Ninth District held that under *Schwartzwald*, a mortgagee had to show independent evidence of its right to enforce both the note *and* the mortgage, and that proof of standing to enforce the note or the mortgage does not give the mortgagee the right to enforce the other. *Id.*, ¶ 12. Since its issuance, not even the Ninth District has cited *McFerren*.

As to Sherman, the existence of *McFerren* does not make this case involve a question of general or public interest. An un-appealed decision from another appellate district cannot impact Sherman, much less serve as an excuse to prolong a foreclosure in which he is admittedly in default. There is no reason for this Court to take jurisdiction over this case.

CONCLUSION

This is a garden variety foreclosure action. HSBC was the recorded mortgagee at the time of filing the complaint, and introduced an enforceable copy of the promissory note prior to judgment. Whatever the Ninth District held in a single case cannot impact Sherman. Jurisdiction should be declined.

Respectfully submitted,



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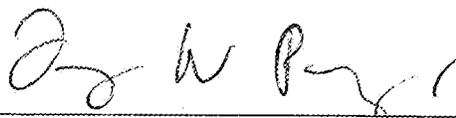
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CERTIFICATE OF SERVICE

A copy of the foregoing was served by United States mail, first class postage prepaid, on the following this 17th day of January, 2014:

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