

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,

Plaintiff-Appellant,

v.

BRIAN HORN, *et al.*,

Defendants-Appellees.

* Case No. 2013-1534
*
* On Appeal from the Lorain County
* Court of Appeals, Ninth Appellate
* District
*
* Court of Appeals
* Case No. 12CA010230
*
*
*

MOTION FOR RECONSIDERATION OF PLAINTIFF-APPELLANT
WELLS FARGO BANK, N.A.

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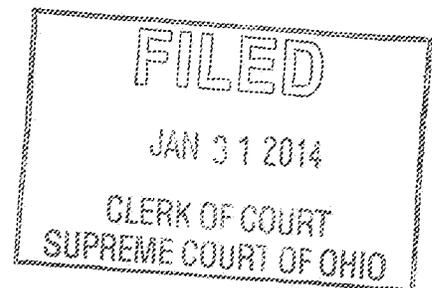
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I. INTRODUCTION

This case addresses an important split of authority arising from the mortgage foreclosure standing decision in *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In this foreclosure case, the Ninth District Court of Appeals held that evidence of standing to enforce both the note and the mortgage must be attached to the complaint, and that a failure to do so requires dismissal of the action. This is not only contrary to any dictates of *Schwartzwald*, it is in conflict with decisions from the First, Second, Fifth, Seventh, Eighth, Tenth, Eleventh, and Twelfth Districts, including decisions rendered after the filing of the Memorandum in Support of Jurisdiction.

In this case, Wells Fargo Bank, N.A. (“Wells Fargo”) attached to the Complaint a copy of the promissory note indorsed in blank, therefore rendering it bearer paper. As part of summary judgment, it also submitted undisputed evidence to demonstrate that it was the successor by merger to the original mortgagee (and had been since 2004). The Ninth District held that because the merger documents were not attached to the Complaint, *Schwartzwald* required the case to be dismissed.

Wells Fargo appealed to this Court, raising two propositions of law: first, that the documents upon which the plaintiff intends to rely on to prove standing need not be attached to the complaint; and second, a copy of a properly indorsed promissory note attached to the complaint is sufficient. On January 22, 2014, this Court declined to accept jurisdiction, with three justices voting to accept the first proposition of law, and two justices voting to accept the second proposition.

After the decision in this case (as discussed in the Memorandum in Support of Jurisdiction), the Ninth District refined its analysis, even going so far as to state that the recorded

mortgagee lacks standing if there is no enforceable promissory note attached to the complaint. At the time of the Memorandum in Support of Jurisdiction, the Seventh, Eighth, and Tenth Districts had all rejected the Ninth District's interpretation of *Schwartzwald*, and held that the documents attached to the complaint are not dispositive of the issue of standing, and that in any event, evidence of a right to enforce either the note or the mortgage was sufficient to provide standing.

Since the filing of the Memorandum in Support of Jurisdiction, the First, Second, Fifth, Eleventh, and Twelfth Districts have all adopted the rule that documentary evidence of the right to enforce both the note and mortgage is not required to be attached to the complaint. Far from being resolved, the dispute between the Ninth District and the remaining districts is widening. Wells Fargo respectfully requests that the Court reconsider the Decision declining jurisdiction.

II. DISCUSSION

Despite attaching bearer paper to the Complaint, and despite providing evidence at the time of filing a summary judgment motion that Wells Fargo was the successor by merger to the recorded mortgagee, the Ninth District held *sua sponte* that Wells Fargo lacked standing under *Schwartzwald*. *Wells Fargo Bank NA v. Horn*, 9th Dist. No. 12CA010230, 2013-Ohio-2374, ¶¶ 12-13. A month and a half later, the Ninth District went further – holding that a recorded mortgagee who does not attach an enforceable promissory note to the complaint similarly lacks standing under *Schwartzwald*. *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. No. 26384, 2013-Ohio-3228, ¶ 11.

Wells Fargo appealed to this Court on September 27, 2013, raising two propositions of law:

Proposition of Law No. I: A plaintiff is not required to attach to the complaint all of the evidence upon which it will rely to show standing.

Proposition of Law No. II: A copy of a note indorsed in blank attached to a complaint is sufficient to demonstrate the plaintiff's standing to enforce the note and a mortgage which secures the note's repayment.

In support of the first proposition, Wells Fargo cited the decisions of the Eighth and the Tenth Districts, both of which held that the documents attached to the Complaint are not dispositive of the standing analysis. *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657, ¶ 57; *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340.

In support of the second proposition, Wells Fargo cited the decisions of the Seventh and Eighth Districts which held that an enforceable promissory note attached to the complaint was sufficient to provide standing under *Schwartzwald. CitiMortgage, Inc. v. Loncar*, 7th Dist. No. 11-MA-174, 2013-Ohio-2959, ¶ 15; *CitiMortgage, Inc. v. Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894, ¶ 22. This Court has since declined jurisdiction over appeals of both cases. *Loncar*, 137 Ohio St. 3d 1413, 2013-Ohio-5096, 998 N.E.2d 511; *Patterson*, 135 Ohio St.3d 1414, 2013-Ohio-1622, 986 N.E.2d 30.

On January 22, 2014, this Court declined jurisdiction over this case. Justices Kennedy and French voted to accept the entire case, and Chief Justice O'Connor voted to accept the first proposition of law. *1/22/2014 Case Announcements*, 2014-Ohio-176.

In between the filing of the Memorandum in Support of Jurisdiction and this Court's ruling, the First, Second, Fifth, Eleventh, and Twelfth Districts have all adopted positions consistent with Wells Fargo's propositions of law and in conflict with the Ninth District's decision in this case. *HSBC Bank USA, Natl. Assocs. v. Sherman*, 1st Dist. No. C-120302, 2013-Ohio-4220 (appeal pending as case number 2013-2003); *PHH Mortg. Corp. v. Unknown Heirs*, 2d Dist. No. 25617, 2013-Ohio-4614 (appeal pending as case number 2013-1890); *Wells Fargo*

Bank, N.A. v. Dawson, 5th Dist. No. 2013CA00095, 2014-Ohio-269; *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist No. 2013-T-0048, 2013-Ohio-5848; *SRMOF 2009-1 Trust v. Lewis*, 12th Dist. Nos. CA2012-11-239, CA2013-05-068, 2014-Ohio-71.

In *Sherman*, the First District found that a party who attached to the complaint a recorded assignment of mortgage but a non-enforceable copy of the promissory note still had standing. 2013-Ohio-4220, ¶ 15.

In *PHH Mortg.* and *Santisi*, the Second and Eleventh Districts held that a plaintiff who attached an enforceable promissory note to the complaint had standing to enforce the note and mortgage, regardless of any issues with the assignment of mortgage. 2013-Ohio-4614, ¶ 7, 2013-Ohio-5848, ¶¶ 24-26.

In *Dawson*, the Fifth District (like the First District) held that a party who attached to the complaint an assignment of mortgage but an unendorsed copy of the promissory note still had standing. 2014-Ohio-269, ¶ 23.

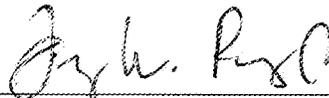
In *Lewis*, the Twelfth District found that the recorded assignment of mortgage attached to the complaint was sufficient to demonstrate standing to enforce the note and mortgage, even when the complaint referenced the note as being lost. 2014-Ohio-71, ¶¶ 15-17.

The division on the standing issue is widening. If Wells Fargo's case had been brought in the First, Second, Fifth, Seventh, Eighth, Tenth, Eleventh, or Twelfth Districts, it would not have been dismissed on the basis of standing. The Ninth District's erroneous decisions in *Horn* and *McFerren* are the basis for the current appeals to this Court in *Sherman* and *PHH*. This case presents a clear opportunity to address these conflicts from a case originating in the district that created them.

III. CONCLUSION

This case affords the Court the opportunity resolve the disharmony in the District Courts as to how *Schwartzwald* should be applied. The Court should reconsider its decision and accept jurisdiction over these important questions.

Respectfully submitted,



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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 30th day of January, 2014.

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