

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0297

U.S. BANK, N.A.,

Plaintiff-Appellant,

v.

MICHAEL COOPER, et al.,

Defendants-Appellees.

*
*
* On Appeal from the Medina County
* Court of Appeals, Ninth Appellate
* District
*
* Court of Appeals
* Case No. 12CA0084-M
*
*
*

NOTICE OF CERTIFIED CONFLICT OF PLAINTIFF-APPELLANT
U.S. BANK, NATIONAL ASSOCIATION

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FILED
FEB 26 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
FEB 26 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict of Appellant, U.S. Bank, National Association

Appellant U.S. Bank, National Association (“U.S. Bank”) gives notice that on February 25, 2014, the Medina County Court of Appeals, Ninth Appellate District, entered in Case No. 12CA0084-M a Journal Entry (attached as “Exhibit A”) certifying the following questions pursuant to App.R. 25:

- (1) Does a lack of standing deprive the [trial] court of subject matter jurisdiction; and
- (2) May a defendant use a lack of standing as the basis for a common law motion to vacate?

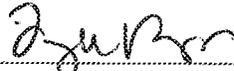
A copy of the Ninth Appellate District’s Decision and Journal Entry dated January 13, 2014 is attached as “Exhibit B”.

The Ninth District certified the conflict based on the following cases:

1. Fifth District Court of Appeals, *Wells Fargo Bank, Natl. Assn. v. Elliott*, 5th Dist. Delaware No. 13 CAE 03 0012, 2013-Ohio-3690 (attached as “Exhibit C”);
2. Tenth District Court of Appeals, *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383 (attached as “Exhibit D”);
3. Tenth District Court of Appeals, *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Nos. 13AP-198, 13AP-373, 2013-Ohio-4884 (attached as “Exhibit E”); and
4. Eleventh District Court of Appeals, *Deutsche Bank Natl. Trust v. Santisi*, 11th Dist. No. 2013-T-0048, 2013-Ohio-5848 (attached as “Exhibit F”).

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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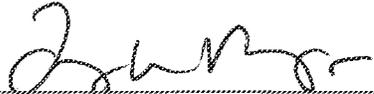
Attorneys for Plaintiff-Appellant

U.S. Bank, National Association

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

John C. Oberholtzer, Esq.
Matthew G. Bruce, Esq.
Oberholtzer, Filous & Perrico, LPA
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Terry W. Posey

770348.1

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS

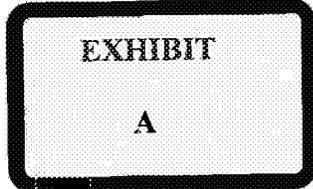
U.S.BANK, N.A.,

16 FEB 25 AM 10: 23

C.A. No. 12CA0084-M

Appellee

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS



v.

MICHAEL A. COOPER, 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 January 13, 2014, and the judgments of: (1) the Fifth District Court of Appeals in *Wells Fargo Bank, Natl. Assn. v. Elliott*, 5th Dist. Delaware No. 13 CAE 03 0012, 2013-Ohio-3690, (2) the Eleventh District Court of Appeals in *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist. Trumbull No. 2013-T-0048, 2013-Ohio-5848, (3) the Tenth District Court of Appeals in *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12AP-256, 2012-Ohio-5383, and (4) the Tenth District Court of Appeals in *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Franklin Nos. 13AP-198, 13AP-373, 2013-Ohio-4884.

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 in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Mdg. Co.*, 66 Ohio St.3d 594, 596 (1993).

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

- (1) Does a lack of standing deprive the [trial] court of subject matter jurisdiction; and

(2) May a defendant use a lack of standing as the basis for a common law motion to vacate?

The same issue is currently pending before the Supreme Court of Ohio, which determined that a conflict of law exists between this Court's decision in *Bank of AM, N.A. v. Kuchta*, 9th Dist. Medina No. 12CA—25-M, 2012-Ohio-5562, and the Tenth District Court of Appeals in *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12AP-256, 2012-Ohio-5383.

Accordingly, we find that a conflict of law exists.

The motion to certify is granted.



Judge

Concur:
Whitmore, J.
Carr, J.

STATE OF OHIO)
)
)ss: COUNTY OF MEDINA)

COURT OF APPEALS
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
14 JAN 13 AM 11:31

U.S. BANK, N.A.
Appellee

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS
Case No. 12CA0084-M

v.

MICHAEL A. COOPER, et al.
Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 07CIV0903

DECISION AND JOURNAL ENTRY

Dated: January 13, 2014

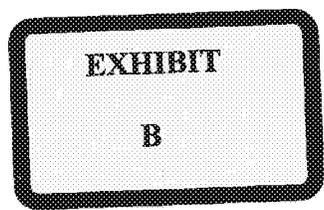
MOORE, Presiding Judge.

{¶1} Appellants, Michael and Tammy Cooper (“the Coopers”), appeal from the judgment of the Medina County Court of Common Pleas. This Court reverses and remands to the trial court for the complaint to be dismissed.

I.

{¶2} On May 27, 2005, Mr. Cooper executed a promissory note for \$224,100 in favor of Manhattan Mortgage Group, LTD for the property located at 8521 Wooster Pike Road, Seville, Ohio 44273. The note was secured by a mortgage on the property in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”).

{¶3} On June 8, 2007, U.S. Bank, National Association as Trustee (“U.S. Bank”) filed a complaint for foreclosure alleging that the Coopers were in default under the terms of their note and mortgage in the amount of \$220,896.21. U.S. Bank attached the following exhibits to its complaint: (1) a copy of the original mortgage initialed and signed by the Coopers, (2) a



property description for 8521 Wooster Pike Road, and (3) a notice of a federal tax lien on the property. U.S. Bank did not attach a copy of the note to its complaint, and indicated that although it is the holder and owner of the note, a copy of the note "is unavailable at this time." In August of 2007, the Coopers filed an answer, and in September of 2007, U.S. Bank filed a motion for summary judgment.

{¶4} In its motion for summary judgment, U.S. Bank alleged that because of the Coopers' default, it "had a right to accelerate and call due the entire balance on the Note." In support, U.S. Bank attached: (1) the affidavit of China Brown, vice president of loan documentation for Wells Fargo Bank, N.A., as servicing agent of U.S. Bank, (2) a copy of the May 27, 2005 note to Manhattan Mortgage Group, LTD, signed by Michael Cooper, (3) an undated note allonge from Manhattan Mortgage Group, LTD, to Mortgage Lenders Network, USA Inc., (4) an undated note allonge from Mortgage Lenders Network, USA Inc., to Emax Financial Group, LLC, (5) an undated note allonge from Emax Financial Group, LLC, to Residential Funding Company, LLC fka Residential Funding Corporation, (6) an undated note allonge from Residential Funding Corporation, to U.S. Bank, with incorrect information as to: (a) the date of the original note, (b) the original amount due, and (c) the name of the borrower, and (7) a copy of the May 27, 2005 mortgage to Manhattan Mortgage Group, LTD.

{¶5} Prior to ruling on U.S. Bank's motion for summary judgment, the trial court referred the matter to mediation. After an unsuccessful attempt to settle the case, the trial court scheduled a non-oral motion hearing in May of 2008. Additionally, U.S. Bank filed: (1) a motion for default judgment against those defendants who failed to answer, and (2) a notice of assignment of the mortgage from MERS to U.S. Bank dated June 11, 2007. The Coopers did not oppose the motion for summary judgment, and a proposed decree of foreclosure circulated

among the represented parties. The record indicates that Attorney A. Michelle Jackson authorized her signature on behalf of the Coopers. While all other signatures are dated for June of 2008, Ms. Jackson's signature is dated for June of 2006, and the consent entry is time-stamped July 7, 2008. The Coopers did not appeal from this order.

{¶6} On November 5, 2010, the Coopers filed a motion for relief from judgment pursuant to Civ.R. 60(B). A magistrate of the trial court denied the Coopers' motion because it failed to meet the requirements in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976). However, the magistrate also indicated that:

In reality, summary judgment was granted because the [Coopers] effectively consented to the decree in foreclosure. The [Coopers] never responded in opposition to [U.S. Bank's] motion for summary judgment despite the fact it was scheduled for non-oral hearing on two different occasions. [U.S. Bank's] motion for summary judgment was *riddled with defects that generally would have precluded the granting of summary judgment* by this [c]ourt unless the parties agreed otherwise.

For example, without even addressing the potential robo-signor issue, the affidavit of China Brown was still defective. None of the allonges first attached to the motion for summary judgment were properly authenticated by the affidavit. The mortgage and note contain acceleration provisions. Compliance with the acceleration provisions was never mentioned in the affidavit. In fact, the acceleration clauses, as conditions precedent, were not even mentioned in the complaint. The assignment of mortgage was not filed until over 30 days [after] the matter for non-oral summary judgment decision.

(Emphasis added.) The Coopers filed objections to the magistrate's decision, stating: (1) the motion for summary judgment was granted in error, (2) the Coopers were not aware of U.S. Bank's fraudulent activity until October 2010, and (3) Wells Fargo, the servicer of the loan, entered into a consent judgment entry in federal court, which should be followed in the instant matter. The trial court overruled the objections and adopted the magistrate's decision.

{¶7} The Coopers filed a timely notice of appeal, setting forth two assignments of error for our consideration.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN AFFIRMING AND ADOPTING THE MAGISTRATE'S DECISION FILED ON JULY 5, 2012, DENYING THE [COOPERS'] MOTION FOR RELIEF [FROM] JUDGMENT, BECAUSE [U.S. BANK] IS NOT A REAL PARTY IN INTEREST AND LACKED STANDING TO INVOKE THE JURISDICTION OF THE COURT.

{¶8} In their first assignment of error, the Coopers argue that, pursuant to *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 (2012), U.S. Bank did not have standing to file its foreclosure complaint. The Coopers further argue that the trial court did not have subject matter jurisdiction over the foreclosure action because U.S. Bank did not have an interest in the mortgage at the time of the commencement of the lawsuit.

{¶9} Because the Coopers allege that U.S. Bank did not have standing to file the foreclosure complaint, and that the trial court lacked jurisdiction over the matter, they present a legal question that this Court reviews de novo. See *Quantum Servicing Corp. v. Haugabrook*, 9th Dist. Summit No. 26542, 2013-Ohio-3516, ¶ 7, citing *Thomas v. Bldg. Dept. of Barberton*, 9th Dist. Summit No. 25628, 2011-Ohio-4493, ¶ 6. See also *FirstMerit Bank v. Wood*, 9th Dist. Lorain No. 09CA009586, 2010-Ohio-1339, ¶ 5, quoting *Eisel v. Austin*, 9th Dist. Lorain No. 09CA009653, 2010-Ohio-816, ¶ 8 (“[A] [c]hallenge[] to a * * * court’s jurisdiction present[s] [a] question[] of law and [is] reviewed by this Court de novo.”)

{¶10} Further, “[a] party should not file a Civ.R. 60(B) motion for relief from judgment in order to have the void judgment vacated or set aside, since Civ.R. 60(B) motions apply only to judgments that are voidable rather than void.” (Internal quotations and citations omitted.) *State ex rel. DeWine v. 9150 Group, L.P.*, 9th Dist. Summit No. 25939, 2012-Ohio-3339, ¶ 7. “This is because the power to vacate a void judgment does not arise from Civ.R. 60(B), but rather, from

an inherent power possessed by the courts in this state.” *Id.*, citing *Patton v. Diemer*, 35 Ohio St.3d 68 (1988), paragraph four of the syllabus. “Therefore, a common law motion to vacate a void judgment need not meet the standards applicable to a Civ.R. 60(B) motion.” *State ex rel. DeWine* at ¶ 7. As such, this Court will treat the motion below as a common law motion to vacate, and our analysis will not include discussion of the *GTE Automatic Elec., Inc.* factors.

{¶11} Pursuant to Civ.R. 17(A), “[e]very action shall be prosecuted in the name of the real party in interest.” “The real party in interest in a foreclosure action ‘is the current holder of the note and mortgage.’” *Haugabrook* at ¶ 8, citing *Wells Fargo Bank N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013-Ohio-2374, ¶ 10, quoting *U.S. Bank, N.A. v. Richards*, 189 Ohio App.3d 276, 2010-Ohio-3981, ¶ 13 (9th Dist.). However, Civ.R. 17(A) does not apply “unless the plaintiff has standing to invoke the jurisdiction of the court in the first place.” (Internal quotations omitted). *Haugabrook* at ¶ 8.

{¶12} In *Schwartzwald*, 134 Ohio St.3d 13, at ¶ 3, the Supreme Court of Ohio stated that “receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.” “The Ohio Constitution provides in Article IV, Section 4(B): ‘[t]he 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.) *Id.* 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.

{¶13} At the commencement of an action, if a plaintiff does not have standing to invoke the court's jurisdiction, the "common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance." *Id.* at ¶ 38. "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.

{¶14} Here, the record indicates that U.S. Bank filed its complaint on *June 8, 2007*. However, the assignment of the mortgage from MERS to U.S. Bank is dated *June 11, 2007*. Further, the note allonge from Residential Funding Corporation to U.S. Bank is undated, and contains incorrect information regarding: (1) the name of the borrower (listing the borrower as Richard Cooper instead of Michael Cooper), (2) the date of the original loan (listing the date of the original loan as June 23, 2005, instead of May 27, 2005), and (3) the amount of the original loan (listing the amount of the original loan as \$21,200, instead of \$224,100). Additionally, although the trial court identified serious defects with the evidence attached to U.S. Bank's motion for summary judgment, including with the assignment, it endorsed and journalized the decree of foreclosure because the parties allegedly consented.

{¶15} Upon careful review of the record, we see no evidence that U.S. Bank had standing to file its foreclosure complaint against the Coopers on June 8, 2007. The assignment of the mortgage itself clearly shows that U.S. Bank came into possession of the mortgage on June 11, 2007, three days after the complaint was filed. Also, there is no indication in the record

as to when U.S. Bank became the holder of the Coopers' note because the allonges are undated and contain inaccurate information. Therefore, in accordance with *Schwartzwald*, this Court sustains the Coopers' first assignment of error and orders the trial court to dismiss the complaint without prejudice.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN DENYING THE [COOPERS'] MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60(B) BECAUSE [] [U.S. BANK] IS NOT A PARTY IN INTEREST.

{¶16} Based upon our resolution of the Coopers' first assignment of error, we conclude that the second assignment of error is moot. *See* App.R. 12(A)(1)(c).

III.

{¶17} In sustaining the Coopers' first assignment of error, and deeming the second assignment of error moot, the judgment of the Medina County Court of Common Pleas is reversed and the cause is remanded for further proceedings consistent with this decision.

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.



CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR.

APPEARANCES:

JOHN C. OBERHOLTZER, Attorney at Law, for Appellants.

SCOTT A. KING and CHRISTINE M. COOPER, Attorneys at Law, for Appellee.

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WELLS FARGO BANK, NATIONAL
ASSOCIATION

Plaintiff-Appellee

-vs-

CHRIS W. ELLIOTT, ET AL

Defendants-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 13 CAE 03 0012

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Delaware County
Court of Common Pleas, Case No. 11CV E
091206

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 27, 2013

APPEARANCES:

For Plaintiff-Appellee

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EXHIBIT

C

Gwin, P.J.

{¶1} Appellant appeals the February 4, 2013 judgment entry of the Delaware County Common Pleas Court denying his motion to dismiss complaint.

Facts & Procedural History

{¶2} On October 27, 2006, appellant Chris W. Elliott executed a promissory note in favor of Ethical Mortgage Lending, LLC ("Ethical Mortgage") for \$162,000. Also on that date, appellant executed a mortgage that secured the note and encumbered the property located at 6207 Charmar Drive, Westerville, Ohio. The mortgage indicated the lender was Ethical Mortgage Lending, LLC, and listed Mortgage Electronic Registration Systems ("MERS") as nominee for lender and lender's successors and assigns. The mortgage provided that "MERS is the mortgagee under this Security Instrument." In a document entitled "Assignment of Mortgage" that was recorded January 12, 2011, MERS, as nominee for Ethical Mortgage, assigned the October 27, 2006 mortgage securing 6207 Charmar Drive, Westerville, Ohio, to appellee Wells Fargo Bank, National Association, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset Backed Certificates, Series 2007-AC2.

{¶3} Appellee filed a complaint for foreclosure on September 30, 2011. Appellee attached to the complaint a copy of the October 27, 2006 note with Ethical Mortgage listed as the lender. The note did not contain any endorsement to indicate the note had been transferred or assigned. Also attached to the complaint was a copy of the October 27, 2006 mortgage. Finally, appellee attached to the complaint a copy of the assignment of mortgage recorded on January 12, 2011 from MERS, as nominee for Ethical Mortgage, to appellee.

{¶4} Appellant was served with the complaint on October 10, 2011, by process server, but did not file an answer to the complaint. On April 13, 2012, appellee filed a motion for default judgment against appellant. Appellee filed an affidavit in support of its motion for default judgment which incorporated a copy of the October 27, 2006 note. However, this copy of the note contained an endorsement by Ethical Mortgage made payable to Huntington National Bank and a second endorsement made by Huntington National Bank payable to blank. The trial court granted appellee's motion for default in a judgment entry and decree of foreclosure on April 19, 2012 and indicated the judgment entry and decree of foreclosure was a final appealable order. Appellant did not appeal the April 19, 2012 judgment entry and decree of foreclosure. The trial court scheduled a sheriff's sale of the home on July 11, 2012. Appellant filed a Chapter 7 bankruptcy petition on July 10, 2012. Appellee was granted relief from the automatic bankruptcy stay on August 21, 2012 and on October 18, 2012, appellee filed with the trial court a notice that the automatic stay was no longer in effect. On November 7, 2012, a sheriff's sale of the home was scheduled for December 12, 2012.

{¶5} On November 9, 2012, appellant filed a motion to dismiss complaint pursuant to Civil Rule 12(B)(1). The trial court denied appellant's motion to dismiss on February 4, 2013. The trial court first determined that Civil Rule 12(B)(1) is not the proper procedural tool for appellant's request because it is only before judgment has been rendered or after the judgment has been vacated that the trial court may consider a motion to dismiss complaint. The trial court further found that the assignment of the mortgage in this case which was completed prior to the filing of appellee's complaint was sufficient to transfer both the mortgage and the note. The trial court concluded

appellee had standing at the time the complaint was filed. Appellant filed an appeal of the trial court's February 4, 2013 decision denying his motion to dismiss and raises the following assignments of error on appeal:

{¶6} "I. THE TRIAL COURT ERRED WHEN IT HELD CHRIS W. ELLIOTT ("MR. ELLIOTT") COULD NOT CHALLENGE ITS SUBJECT MATTER JURISDICTION POST-JUDGMENT WITHOUT FIRST FILING A MOTION FOR RELIEF FROM JUDGMENT.

{¶7} "II. THE TRIAL COURT ERRED WHEN IT HELD WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR STEARNS ASSET BACKED SECURITIES I LLC, ASSET BACKED CERTIFICATES, SERIES 2007-AC2 ("WELLS FARGO") ESTABLISHED ITS STANDING TO INVOKE THE SUBJECT MATTER JURISDICTION OF THE COURT. "

I.

{¶8} Appellant first argues the trial court erred in finding a Civil Rule 12(B)(1) is not the proper procedural method to address appellant's arguments because the issue of subject matter jurisdiction can be raised at anytime during the proceedings and because appellee lacked subject matter jurisdiction at the time the complaint was filed and thus the default judgment is void ab initio. We disagree.

{¶9} Jurisdiction is the trial court's "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003 (1998); *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972). The term jurisdiction "encompasses jurisdiction over the subject matter and over the person." *State v. Parker*, 95 Ohio St.3d 524, 769 N.E.2d 846 (2002). Subject

matter jurisdiction is defined as a court's power to hear and decide cases. *Pratts v. Hurley*, 102 Ohio St.3d 81, 806 N.E.2d 992 (2004). Because subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002); *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998).

{¶10} Separate from the requirement of subject matter jurisdiction in a case is the requirement of standing. Standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 875 N.E.2d 550 (2007), quoting Black’s Law Dictionary (8th Ed. 2004). Standing depends on “whether the party has alleged such a personal stake in the outcome of the controversy” * * * as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *Id.*, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973). In order to establish standing, a plaintiff must show they suffered “(1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 119 L.Ed.3d 351 (1992). “These three factors – injury, causation, and redressability – constitute the irreducible constitutional minimum of standing.” *Id.*

{¶11} There is a clear distinction between the requirements of subject matter jurisdiction and standing. Standing focuses on injury, causation, and redressability between a plaintiff and defendant in a case, while subject matter jurisdiction focuses on

the court's power and ability to hear and decide a case. A lack of standing argument challenges the capacity of a party to bring an action, not the court's statutory or constitutional power to adjudicate the case and thus is distinguishable from a lack of subject matter jurisdiction argument. *PNC Bank, N.A. v. Boffs*, 10th Dist. No. 12AP-256, 2012-Ohio-5383 (stating standing and capacity to sue do not challenge the subject matter jurisdiction of a court); See also *Country Club Townhouses-North Condominimim Unit Assn v. Slates*, 9th Dist. No. 17299, 1996 WL 28003 (stating lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court); *Wells Fargo Bank, N.A. v. Brandle*, 2d Dist. No. 2012-CA-0002, 2012-Ohio-3492 (finding lack of standing does not deprive a court of subject matter jurisdiction).

{¶12} Civil Rule 12(B) provides that, "every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion: (1) lack of jurisdiction of the subject matter * * *. Thus, Civil Rule 12(B)(1) provides for dismissal of a complaint where the trial court lacks jurisdiction over the subject matter of the litigation. There is no provision in Civil Rule 12(B)(1) for dismissal for lack of standing or capacity to sue. Thus, appellant cannot rely on lack of standing as the basis for his Civil Rule 12(B)(1) motion. See *Deutsche Bank Nat'l Trust Co. v. Whiteman*, 10th Dist. No. 12AP-536, 2013-Ohio-1636. Appellant could have challenged appellee's standing through a direct appeal of the default judgment and decree of foreclosure, a final appealable order, that the trial court issued on April 19, 2012.

{¶13} Appellant argues the holding by the Ohio Supreme Court in *Federal Home Loan Mortgage Corporation v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, compels the trial court to grant his Civil Rule 12(B)(1) motion to dismiss. However, in *Schwartzwald*, the court determined that a plaintiff receiving an assignment of a note and mortgage from the real party in interest subsequent to the filing of the action, but before the entry of judgment, does not cure a lack of standing to file the foreclosure action. *Id.* See also *Deutsche Bank Nat'l Trust Co. v. Whiteman*, 10th Dist. No. 12AP-536, 2013-Ohio-1636. As discussed above, lack of standing does not deprive a court of subject matter jurisdiction and thus lack of standing cannot be challenged in a Civil Rule 12(B)(1) motion to dismiss.

{¶14} Further, in *Schwartzwald*, the Supreme Court of Ohio determined the issue of standing may be raised "at any time during the pendency of the proceedings." Subsequent to the issuance of the decision in *Schwartzwald*, the Ohio Supreme Court issued the decision in *Countrywide Home Loans Servicing v. Nichpor*, finding that after a judgment entry and decree of foreclosure were issued subsequent to a motion for default judgment, the matter is no longer pending. 990 N.E.2d 565, 2013-Ohio-2083. In this case, after appellee filed a motion for default judgment, the trial court issued a judgment entry and decree of foreclosure on April 19, 2012. Thus, the matter was not pending when appellant filed his motion to dismiss.

{¶15} Appellant's first assignment of error is overruled.

II.

{¶16} Appellant next argues the trial court erred in finding that even if it considered his Civil Rule 12(B)(1) motion to dismiss, the motion would fail on the merits.

Appellant contends the documents attached to appellee's complaint demonstrate appellee lacked standing at the time the complaint was filed. Appellant further argues there was no intent for the mortgage and note to move together and that MERS could not assign the mortgage. We disagree.

{¶17} When reviewing the trial court's denial of a motion to dismiss for lack of subject matter jurisdiction under Civil Rule 12(B)(1), we review the decision de novo. *Brown v. Levin*, 10th Dist. No. 11AP-349, 2012-Ohio-5768. We must determine whether any cause of action cognizable by the forum has been raised in the complaint. *Prosen v. Dimora*, 79 Ohio App.3d 120, 606 N.E.2d 1050 (8th Dist. 1992); *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 537 N.E.2d 641 (1989). Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).

{¶18} The current holder of the note and mortgage is the real party in interest in foreclosure actions. *U.S. Bank Natl. Assoc. v. Marcino*, 181 Ohio App.3d 328, 908 N.E.2d 1032, 2009-Ohio-1178 (7th Dist.), ¶ 32 citing *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C061069, 2007-Ohio-5874, ¶ 18. R.C. 1303.31 provides:

(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.

Standing in a foreclosure case requires the lender to establish "an interest in the note or mortgage at the time it filed suit." *Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214 (2012).

{¶19} In this case, the affidavit of Michael Brown filed with appellee's motion for default judgment states the records he reviewed contained a note executed by appellant in the amount of \$162,000 secured by a mortgage and states appellee is the servicer of the loan and is authorized to act on behalf of the holder of the note. It is unclear from Michael Brown's affidavit when the note was negotiated to appellee. However, attached to appellee's complaint is an assignment of mortgage recorded on January 12, 2011, in which MERS, as nominee for Ethical Mortgage, assigns appellant's October 27, 2006 mortgage to appellee.

{¶20} In *Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio 4742, we held that the assignment of a mortgage, without an express transfer of the note, is sufficient to transfer both the mortgage and the note if the record indicates the parties intended to transfer both the note and mortgage. *Id.* See also *Federal Home Loan Mtge. Corp. v. Rufo*, 983 N.E.2d 406, 2012-Ohio-5930 (11th Dist. 2012) (holding the assignment of the mortgage also resulted in the transfer of the note on that date);

Self Help Ventures Fund v. Jones, 11th Dist. No. 2012-A-0014, 2013-Ohio-868 (holding that assignment of mortgage is sufficient to transfer a contemporaneous note).

{¶21} This case is analogous to the *Dobbs* case as the record indicates the parties intended to transfer both the note and the mortgage. The note dated October 27, 2006 with lender Ethical Mortgage provides as follows:

In addition to the protections given to the note holder under this note, a mortgage * * * (the "Security Instrument"), dated the same date 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. The Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note.

{¶22} The October 27, 2006 mortgage in which MERS is the mortgagee as nominee for lender Ethical Mortgage, states that "Security Instrument" means "this document, which is dated October 27, 2006." The mortgage further defines the note as "the promissory note signed by Borrower and dated October 27, 2006." The mortgage provides that "[t]his Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note" and that the "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note."

{¶23} The note refers to the mortgage and the mortgage refers to the note. Thus, we find a clear intent by the parties to keep the note and mortgage together rather than transferring the mortgage alone. The assignment of the mortgage was sufficient to

transfer both the mortgage and the note. Since the mortgage assignment was recorded on January 12, 2011, approximately eight (8) months before the complaint was filed, the note was effectively transferred on that date.

{¶24} Further, we disagree with appellant's contention that MERS could not assign the mortgage. The mortgage specifically states that MERS is "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns." Ethical Mortgage is listed in the mortgage as the lender. Thus, MERS had the authority to assign the mortgage and note to appellee as nominee for Ethical Mortgage.

{¶25} Accordingly, we find that even if the trial court could have properly addressed appellant's standing arguments in his Civil Rule 12(B)(1) motion to dismiss, appellee had standing at the time the complaint was filed. Appellant's second assignment of error is overruled.

{¶26} Based on the foregoing, we overrule appellant's first and second assignments of error. The February 4, 2013 judgment entry of the Delaware County Common Pleas Court denying appellant's motion to dismiss complaint pursuant to Civil Rule 12(B)(1) is affirmed.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WELLS FARGO BANK, NATIONAL
ASSOCIATION

Plaintiff-Appellee

-vs-

CHRIS W. ELLIOTT, ET AL

Defendants-Appellant

JUDGMENT ENTRY

CASE NO. 13 CAE 03 0012

For the reasons stated in our accompanying Memorandum-Opinion, the February 4, 2013 judgment entry of the Delaware County Common Pleas Court denying appellant's motion to dismiss complaint pursuant to Civil Rule 12(B)(1) is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

HON. CRAIG R. BALDWIN

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., :

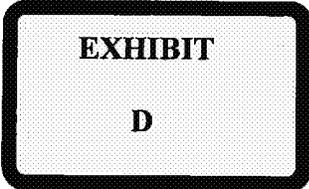
Defendant-Appellant, :

Beth J. Botts et al., :

Defendants-Appellees. :

12AP-256
(C.P.C. No. 11CVE-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 Panelly 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.

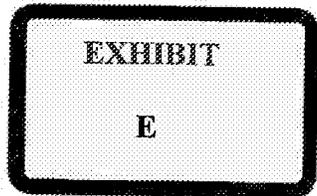
{¶ 24} Accordingly, Botts's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deutsche Bank National Trust Co.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-198
Bradley Finney et al.,	:	(C.P.C. No. 08CVE-09-12623)
Defendants-Appellants.	:	(REGULAR CALENDAR)
Deutsche Bank National Trust Company	:	
in its Capacity as Indenture Trustee for the	:	
Noteholders of Aames Mortgage	:	
Investment Trust 2005-2, a Delaware	:	
Statutory Agent,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-373
Bradley Finney et al.,	:	(C.P.C. No. 08CVE-09-12623)
Defendants-Appellants.	:	(REGULAR CALENDAR)



D E C I S I O N

Rendered on November 5, 2013

Manley Deas Kochalski, LLC, and Matthew J. Richardson,
for appellee.

Doucet & Associates Inc., Troy J. Doucet and Audra Lepi
Tidball, for appellants.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendants-appellants, Bradley Finney and Michele Finney ("appellants"), appeal from a judgment of the Franklin County Court of Common Pleas denying their

motion to vacate a default mortgage foreclosure judgment granted in favor of plaintiff-appellee, Deutsche Bank National Trust Co. in its Capacity as Indenture Trustee for the Noteholders of Aames Mortgage ("Deutsche Bank"). Appellants also appeal an order confirming a sheriff's sale of the mortgaged real property. For the reasons that follow, we affirm.

Facts and Case History

{¶ 2} On September 3, 2008, Deutsche Bank initiated this action by filing a complaint naming appellants as defendants. Deutsche Bank alleged in its complaint that, in February 2005, appellants had executed a promissory note and a mortgage; the appellants had defaulted on making payments as required by the note and mortgage; and the amount of unpaid principal on the note was \$263,546.79, plus interest dating from May 1, 2008. Deutsche Bank further alleged in the complaint that the promissory note was "currently owned or being serviced by Plaintiff," but had been "misplaced and cannot be located at this time." (Complaint, ¶ 2.) It attached to the complaint a copy of a mortgage executed by appellants, which named as mortgagee Aames Funding Corporation, dba Aames Home Loan ("Aames"). Deutsche Bank sought a judgment awarding it monetary damages as well as an order of foreclosure and sale of the property.

{¶ 3} Appellants were served summons and a copy of the complaint on or about September 1, 2008 but did not timely file an answer to the complaint. On October 15, 2008, Deutsche Bank moved for default judgment. It contemporaneously filed an affidavit executed by one of its employees, which included as exhibits copies of what Deutsche Bank represented to be true and accurate copies of the original note and mortgage. The attached mortgage named Aames as the mortgagee and the attached note similarly named Aames as the lender to whom appellants were required to make payments. The affiant further stated that Deutsche Bank had custody of both the note and mortgage and was entitled to enforce the mortgage; appellants had defaulted on their obligations; and Deutsche Bank had given notice of that default to appellants.

{¶ 4} On November 18, 2008, the trial court entered judgment in favor of Deutsche Bank and ordered foreclosure and sale of the real property. Appellants did not timely appeal the foreclosure judgment. Ultimately, the sheriff scheduled sale of the

property for March 13, 2009. However, on March 13, 2009, Deutsche Bank moved the court to vacate the order of sale, and the court granted the motion on the same day.

{¶ 5} Thereafter, Deutsche Bank on multiple occasions, i.e., in September 2009, November 2009, March 2010, and January 2012, took steps to accomplish sale of the property. On each of these occasions, however, scheduled sheriff's sales were stayed either at the bank's request or as the result of action taken by the appellants, including their filing of bankruptcy petitions.

{¶ 6} On November 13, 2012, Deutsche Bank again took steps to procure a sheriff's sale of the property. On December 4, 2012, over four years after the court entered the default judgment of foreclosure, appellants filed a motion requesting the court grant them relief from judgment "pursuant to common law and/or Civ.R. 60(B)(5)." (Dec. 4, 2012 motion, 1.) The motion cited the decision of the Supreme Court of Ohio in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, and asserted that the trial court had lacked subject-matter jurisdiction to enter the default judgment because Deutsche Bank "lacked standing at the time the Complaint was filed." (Dec. 4, 2012 motion, 1.) While the motion was pending, the sheriff scheduled sale of the property for March 1, 2013.

{¶ 7} On February 28, 2013, the trial court denied appellants' motion for relief from judgment and denied a pending motion filed by appellants to stay the March 1 sale. The court cited, inter alia, *PNC Bank, N.A. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383, ¶ 22, for the proposition that lack of standing of a foreclosure plaintiff does not implicate the subject-matter jurisdiction of the court. (Feb. 28, 2013 Decision, 5, 6.)

{¶ 8} On March 1, 2013, the sheriff conducted a public sale of the real estate, and Deutsche Bank submitted the highest and best bid for the property in the amount of \$195,000. On March 8, 2013, appellants moved the court to stay confirmation of the sheriff's sale. They asserted that the Ninth District Court of Appeals had certified to the Supreme Court of Ohio a conflict of one of its decisions, *Bank of America, N.A. v. Kuchta*, 9th Dist. No. 12CA-25-M, 2012-Ohio-5562, with our decision in *Botts*. On April 2, 2013, the court granted appellants' motion to stay confirmation of the sheriff's sale contingent upon appellants posting a supersedeas bond. The record does not reflect the posting of a supersedeas bond and, on April 17, 2013, the trial court confirmed the sheriff's sale.

{¶ 9} Appellants timely appealed the trial court's decision denying its motion to vacate the default judgment of foreclosure.

{¶ 10} In this appeal, appellant asserts the following assignments of error:

[1.] The trial court erred in denying the Finney's common law motion for relief from Judgment because Deutsche lacked standing at the time the complaint was filed, rendering the underlying judgment void for lack of subject matter jurisdiction.

[2.] The trial court erred in confirming the sheriff's sale without notice to the Finneys in violation of Local Rule 25.01.

Standard of Review

{¶ 11} Appellants' original motion for relief from judgment was filed "pursuant to common law and/or Civ.R. 60(B)(5)." Appellants do not argue in this court, however, that the trial court abused its discretion in failing to grant them relief pursuant to Civ.R. 60(B). They argue instead that the trial court should have used its inherent authority under the common law to vacate a void judgment. Accordingly, we address only that argument.

{¶ 12} Appellants contend that the trial court lacked subject-matter jurisdiction to enter the default judgment because Deutsche Bank did not demonstrate that it had standing as the real party in interest at the time it filed the foreclosure action. Appellants argue that the default judgment was, therefore, void ab initio. They further contend that the court has inherent authority to vacate a void judgment irrespective of the three requirements of Civ.R. 60(B) as established in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), i.e., demonstration of one of the grounds for relief described in Civ.R. 60(B)(1) through (5); a meritorious defense; and timeliness.

{¶ 13} We recognize that a "judgment rendered by a court lacking subject-matter jurisdiction is void *ab initio*" and that "authority to vacate a void judgment is not derived from Civ.R. 60(B) but rather constitutes an inherent power possessed by Ohio courts." *Patton v. Diemer*, 35 Ohio St.3d 68 (1988), paragraphs three and four of the syllabus. Moreover, a "judgment" issued by a court that lacks subject-matter jurisdiction is a nullity. *Id.* at 71. *Accord Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶ 19 ("[A] judgment rendered without subject matter jurisdiction is * * * a nullity and void ab initio * * * [;] the authority to vacate such void judgments originates from the

inherent power possessed by Ohio courts, not Civ.R. 60(B)[;] * * * and the trial court's determination of a common-law motion to vacate does not turn on Civ.R. 60(B)'s requirements that the movant file timely and present a meritorious defense." (Citations omitted.)).

{¶ 14} We apply an abuse-of-discretion standard of review when considering a trial court ruling on a Civ.R. 60(B) motion. The question whether a trial court possessed subject-matter jurisdiction to adjudicate any particular case, however, is a question of law subject to de novo review. *Klosterman v. Turnkey-Ohio, L.L.C.*, 182 Ohio App.3d 515, 2009-Ohio-2508, ¶ 19 (10th Dist.) ("We review the issue of subject-matter jurisdiction de novo."). We, therefore, consider de novo the parties' arguments as to whether the trial court had subject-matter jurisdiction to enter default judgment against appellants.

Analysis

{¶ 15} The parties in this case disagree as to the correct interpretation of the decision of the Supreme Court of Ohio in *Schwartzwald*. Appellants argue that *Schwartzwald* stands for the proposition that a common pleas court lacks *subject-matter* jurisdiction over a foreclosure action where the plaintiff lacked standing to bring the action at the time the complaint was filed. Appellants further argue that the trial court, in their case, never possessed subject-matter jurisdiction because Deutsche Bank did not demonstrate that it was the real party in interest with standing to assert rights arising from the note and mortgage that appellants signed. They argue that our prior decision in *Botts* is inconsistent with *Schwartzwald* and, therefore, must be overruled.

{¶ 16} Appellants contend that the word "jurisdiction" refers to either subject-matter jurisdiction or personal jurisdiction. They suggest that the Supreme Court of Ohio in *Schwartzwald* clearly was not referring to personal jurisdiction throughout its analysis and that the court was, instead, necessarily referring to subject-matter jurisdiction. We agree that it appears the Supreme Court was not referring to personal jurisdiction. However, we disagree that the Supreme Court was referring to subject-matter jurisdiction.

{¶ 17} In addition to personal jurisdiction and subject-matter jurisdiction, the Supreme Court has also recognized what it characterized as a "third category of jurisdiction":

The term "jurisdiction" is also used when referring to a court's exercise of its jurisdiction over a particular case. See *State v.*

Parker, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶ 20 (Cook, J., dissenting); *State v. Swiger* (1998), 125 Ohio App.3d 456, 462, 708 N.E.2d 1033. "The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses *the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction*. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.' "

(Emphasis added.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 12.

{¶ 18} Consistent with this third use of the word "jurisdiction," Deutsche Bank argues that a court of common pleas has subject-matter jurisdiction when the matter alleged is within the class of cases in which a particular court has been empowered to act. *State v. Filiaggi*, 86 Ohio St.3d 230, 240 (1999). It cites *Pratts* for the proposition that, once subject-matter jurisdiction exists, any trial court error thereafter is an error in the court's exercise of jurisdiction, resulting in a judgment that is voidable on timely direct appeal, but not void ab initio.

{¶ 19} Deutsche Bank asserts that its foreclosure complaint alleged cognizable cause of action within the subject-matter jurisdiction of the court of common pleas, i.e., foreclosure. It argues that *Schwartzwald's* references to "jurisdiction" contemplate a question of a court's jurisdiction *over a particular case*—not the court's underlying subject-matter jurisdiction—and that an error in exercising jurisdiction over a particular case because the plaintiff lacked standing renders a court's judgment in the case voidable on direct appeal but not void so as to be subject to collateral attack following the expiration of time for appeal. It argues that, in *Pratts*, the Supreme Court observed that the term "jurisdiction" "encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.' " * * * "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *." (Citations omitted.) *Pratts* at ¶ 10-12. Deutsche Bank notes that, in *Schwartzwald*, "the term 'jurisdiction' appears twenty-

two times, but only once does the term 'subject matter jurisdiction' appear, and only in a quotation for a plurality decision from the Court from 1998[.]" (Appellee's Brief, 7.)

{¶ 20} Accordingly, Deutsche Bank defends this court's decisions in *Botts*, as well as a subsequent Tenth District decision in *Deutsche Bank Natl. Trust Co. v. Whiteman*, 10th Dist. No. 12AP-536, 2013-Ohio-1636. Deutsche Bank contends that *Botts* and *Whiteman* are consistent with the law established by the Supreme Court of Ohio in *Pratts* and that the Supreme Court did not change that law in *Schwartzwald*. It further contends that the default judgment is now *res judicata* and that appellants may not raise issues concerning the bank's alleged lack of standing in a post-judgment motion.

{¶ 21} In *Botts* at ¶ 22-23, we relied on *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, for the proposition that lack of standing does not challenge the subject-matter jurisdiction of the court. In *Whiteman*, at ¶ 27-28, citing *Wells Fargo Bank, N.A., v. Brandle*, 2d Dist. No. 2012CA0002, 2012-Ohio-3492, ¶ 20, we followed *Botts* and held that "[a] lack of standing does not deprive a court of subject-matter jurisdiction."

{¶ 22} Appellants encourage us to overrule our holdings in *Botts* and *Whiteman*. They further point to Ohio Constitution, Article IV, Section 4(B), which provides:

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.

{¶ 23} Appellants argue that: (1) this constitutional provision states that a court of common pleas has original jurisdiction over all justiciable matters; (2) a legal action filed by a party who lacks standing is not justiciable; and therefore (3) a court lacks subject-matter jurisdiction over a legal action in which the plaintiff lacks standing. We reject this syllogism which we deem to be misleading and, if accepted, makes the subject-matter jurisdiction of a court dependent upon the existence of standing of a plaintiff. Justiciability does not confer subject-matter jurisdiction.

{¶ 24} Rather, we recognize that subject-matter jurisdiction is not dependent upon the justiciability of any particular case. The fact that a case is justiciable does not necessarily mean that a particular court has subject-matter jurisdiction over it, e.g, a case brought in a municipal court in Ohio that exceeds the monetary jurisdiction limits set by

statute or a case brought in the Court of Claims that does not name the State of Ohio as a defendant. Similarly, a court may have jurisdiction over the subject-matter of a case and yet not be empowered to adjudicate it to final judgment for reasons particular to that case, including the lack of standing of the plaintiff. Where an action is brought by a plaintiff who lacks standing, the action is not justiciable because it fails to present a case or controversy between the parties before it. See *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶ 19 (10th Dist.) (" 'For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.' " (Citations omitted.)). But the court's lack of "jurisdiction," i.e., its ability to properly resolve a particular action due to the lack of a real case or controversy between the parties, does not mean that the court lacked subject-matter jurisdiction over the case.

{¶ 25} The Supreme Court of Ohio has found the decision of the Ninth District Court of Appeals in *Kuchta* to be in conflict with our decision in *Botts* 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 relief from judgment.

Bank of Am., N.A. v. Kuchta, Sup. Ct. of Ohio case No. 2013-0304.

{¶ 26} In resolving that issue, the Supreme Court may provide additional guidance as to the proper interpretation of *Schwartzwald*. In the interim, we follow the precedent this court has established at ¶ 22 of *Botts* and ¶ 27 of *Whiteman* that "a lack of standing does not deprive a court of subject matter jurisdiction." We conclude that a default judgment issued in a case in which the plaintiff lacked standing is, at best, voidable and not void. Accordingly, although possessing inherent authority to vacate a void judgment, the trial court in the case before us correctly refused to exercise that inherent authority because the default judgment was not void. The trial court did not err in overruling appellant's common law motion to vacate the default judgment.

{¶ 27} We therefore overrule appellants' first assignment of error.

{¶ 28} In their second assignment of error, appellants argue that the trial court erred in signing an entry confirming the sheriff's sale that was prepared by counsel for

Deutsche Bank but was not first submitted to appellant's counsel, as prescribed by Franklin County Court of Common Pleas Loc.R. 25.01.

{¶ 29} This court has held that a trial court has discretion in enforcing Loc.R. 25.01, as it is the trial judge who ultimately determines, and is responsible for, the content of the entry. *Sain v. Roo*, 10th Dist. No. 01AP-360 (Oct. 23, 2001), citing *Whitehurst v. Perry Twp.*, 114 Ohio App.3d 729, 736 (10th Dist.1996) and *Jackson Twp. v. Stickles*, 10th Dist. No. 95APC09-1264 (Mar. 21, 1996). R.C. 2329.31 provides that the common pleas court shall confirm a sheriff's sale if it finds that "the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code." Appellants do not argue that the sale failed to comply with any of those statutory provisions. We, therefore, find no abuse of trial court discretion in signing and entering the confirmation of sale prepared by Deutsche Bank's counsel. Appellants have not demonstrated that they were prejudiced thereby.

{¶ 30} Accordingly, we overrule appellants' second assignment of error.

Conclusion

{¶ 31} Having overruled both of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

O'GRADY and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, of the Third Appellate District,
assigned to active duty under the authority of the Ohio
Constitution, Article IV, Section 6(C).

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR FIRST
FRANKLIN MORTGAGE LOAN TRUST
2006-FF11,

Plaintiff-Appellee,

- vs -

ISABELLE SANTISI, et al.,

Defendant-Appellant,

O P I N I O N

CASE NO. 2013-T-0048



Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2006 CV 3433.

Judgment: Affirmed.

Scott A. King and Terry W. Posey, Jr., Thompson Hine, L.L.P., Austin Landing 1, 10050 Innovation Drive, Suite 400, Dayton, OH 45342 and *Steven L. Sacks*, Lerner, Sampson & Rothfuss, 120 East Fourth Street, Suite 800, P.O. Box 5480, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Philip Zuzolo and Patrick B. Duricy, Zuzolo Law Office, LLC, 700 Youngstown Warren Road, Niles, OH 44446 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Isabelle Santisi, appeals from the April 12, 2013 Judgment Entry of the Trumbull County Court of Common Pleas, denying her Motion to Vacate the July 1, 2009 Amended Decree of Foreclosure. The issues before this court are whether plaintiff-appellee, Deutsche Bank National Trust Company's, alleged lack of

standing rendered the Decree of Foreclosure void ab initio and whether the court had subject matter jurisdiction. For the following reasons, we affirm the judgment of the court below.

{¶2} On December 29, 2006, Deutsche Bank filed a Complaint in Foreclosure in the Trumbull County Court of Common Pleas against Isabelle Santisi, the Trumbull County Treasurer, and John Doe, as Santisi's spouse.

{¶3} The plaintiff, captioned as Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust, c/o Wells Fargo Bank, N.A., alleged that it was "the holder and owner of a note, a copy of which is attached hereto." Deutsche Bank further alleged that the note and the mortgage securing the note were in default. A copy of the mortgage, attached to the Complaint and re-recorded (due to spelling errors)¹ on November 27, 2006, identifies "First Franklin, A Division of National City Bank of Indiana," as the lender. The Complaint stated that the mortgage was "subsequently assigned" to Deutsche Bank. A copy of the note was also attached, identifying First Franklin as the lender.

{¶4} On January 11, 2007, the Trumbull Country Treasurer filed his Answer and Consent to Decree in Foreclosure.

{¶5} On February 12, 2007, Deutsche Bank filed an Affidavit of Status of Account, sworn to by Sean Nix, identified in the affidavit as "Vice President [of] Loan Documentation with Wells Fargo Bank, N.A. as servicing agent for Deutsche Bank." Nix attested that, by virtue of his employment, he "has the custody of and has personal knowledge of the accounts of said company, and specifically with the account of

1. The mortgage was originally recorded on June 16, 2006.

Isabelle Santisi.” Nix stated that “the account is in default” and that the principal balance owed by Santisi was \$285,000.00.

{¶6} Also on February 12, 2007, Deutsche Bank filed a Motion for Default Judgment against Santisi.

{¶7} On June 14, 2007, the trial court issued a Judgment and Decree in Foreclosure. The court determined that Santisi was properly served and was “in default of * * * Answer.” The court found that “the allegations contained in the Complaint are true,” Santisi owed the balance of \$285,000.00, and “the conditions of [the] Mortgage have been broken and plaintiff is entitled to have the equity of redemption of the defendant-titleholders foreclosed.”

{¶8} In response to a motion by filed by Deutsche Bank, the trial court issued a July 1, 2009 Entry Amending Decree in Foreclosure Nunc Pro Tunc, making the finding that Deutsche Bank was entitled to recover advances made to Santisi totaling \$10,848.39.

{¶9} On October 18, 2010, Santisi filed a Motion for Stay of Execution of Sheriff’s Sale and requested that the matter be scheduled for mediation.

{¶10} On the same date, the trial court ordered the case stayed and scheduled the matter for mediation.²

{¶11} On January 5, 2012, the stay was lifted following a hearing.

{¶12} On July 24, 2012, Santisi filed a Motion to Vacate Judgment as Void Ab Initio and 60(B) Motion to Vacate Judgment. Santisi asserted that Deutsche Bank did not file its recorded assignment of the mortgage until February 6, 2007, over a month

2. A second motion for a stay was filed on October 19, 2010, and the court issued a second order staying execution of the sale and ordering mediation on October 20, 2010.

after the Complaint was filed. Based on these facts, Deutsche Bank did not have standing at the time of the filing of the Complaint and the judgment of foreclosure was void due to a lack of subject matter jurisdiction.

{¶13} On July 26, 2012, the trial court denied the Motion to Vacate.

{¶14} On February 19, 2013, Santisi filed a Motion to Vacate the July 1, 2009 Amended Decree of Foreclosure. She argued that under the recent Ohio Supreme Court case of *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, Deutsche Bank was required to demonstrate standing as of the date of the Complaint and failed to do so. Deutsche Bank filed a response on April 8, 2013, asserting that Santisi did not establish grounds for granting a 60(B) motion.

{¶15} The trial court denied the Motion to Vacate in an April 12, 2013 Judgment Entry. The court found that since Deutsche Bank attached the note, which contained a blank indorsement, to the Complaint, the jurisdiction of the court was properly invoked at the time of the filing of the Complaint. The court also held that Santisi was unable to satisfy the requirements of Civ.R. 60 on any grounds that would entitle her to relief from judgment.

{¶16} Santisi timely appeals and raises the following assignments of error:

{¶17} “[1.] Plaintiff/Appellee failed to present an affidavit or any other record evidence sufficient to meet its burden to establish it had standing to pursue a foreclosure action and, as such, is unable to properly invoke the jurisdiction of the common pleas court or support its motion for default judgment.

{¶18} “[2.] Plaintiff-Appellee failed to establish standing as there was no admissible evidence to explain material inconsistencies regarding the promissory note.”

{¶19} In her first assignment of error, Santisi argues that Deutsche Bank failed to present an affidavit or other evidence to meet the burden of showing that it had standing to pursue a foreclosure action and, therefore, did not properly invoke the jurisdiction of the court to grant the Motion for Default Judgment and enter a Decree of Foreclosure. She asserts that mere possession of the note did not satisfy the jurisdictional requirements and that the Decree is void ab initio.

{¶20} Deutsche Bank argues that Santisi has waived any arguments related to standing and that it established standing by being the holder of the note, which was indorsed in blank.

{¶21} “An appellate court reviews a judgment entered on a Civ.R. 60(B) motion for an abuse of discretion.” *Am. Express Bank, FSB v. Waller*, 11th Dist. Lake No. 2011-L-047, 2012-Ohio-3117, ¶ 11. A determination as to whether the trial court has subject-matter jurisdiction, however, is a question of law reviewed de novo. *Smith v. Dietelbach*, 11th Dist. Trumbull No. 2011-T-0007, 2011-Ohio-4308, ¶ 14.

{¶22} The issue in this case is whether the trial court had jurisdiction to issue the Decree of Foreclosure, based on Deutsche Bank’s alleged lack of standing. There is no defect in Deutsche Bank’s standing on the face of the record before us. The Complaint alleged that Deutsche Bank was “the holder and owner of a note, a copy of which is attached” to the Complaint and noted that, following the recording of the mortgage, it was “subsequently assigned to the plaintiff herein.” As Santisi did not deny these averments in a responsive pleading, they must be taken as “admitted.” Civ.R. 8(D).

{¶23} Deutsche Bank asserted its standing to foreclose the mortgage by alleging that it was “the holder and owner of a note” in its Complaint. This allegation is legally sufficient to establish Deutsche Bank’s standing to foreclose. The holder of a note has

standing to foreclose. See *Cent. Mtge. Co. v. Webster*, 2012-Ohio-4478, 978 N.E.2d 963, ¶¶ 29-36 (5th Dist.); *U.S. Bank, N.A. v. Turner*, 6th Dist. Erie No. E-11-059, 2012-Ohio-3413, ¶ 12 (“by pleading inter alia that it was the *holder* of a note secured by a mortgage, U.S. Bank satisfied the pleading requirements of Civ.R. 8(A) for its foreclosure claim”).

{¶24} Additionally, as was asserted by Deutsche Bank, it also provided evidence of standing by virtue of holding the note, which contained an indorsement in blank, at the time the Complaint was filed. A blank indorsement is “an indorsement that is made by the holder of the instrument and that is not a special indorsement.” R.C. 1303.25(B). “When an instrument is endorsed in blank, [i.e., it does not identify the payee,] the instrument becomes payable to bearer and may be negotiated by transfer of possession alone.” *Fed. Home Loan Mtge. Corp. v. Rufo*, 11th Dist. Ashtabula No. 2012-A-0011, 2012-Ohio-5930, ¶ 37, citing R.C. 1303.25(B). See *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 22 (“possession of the bearer paper that secured the defendants’ mortgage” made the plaintiff a holder, with standing to enforce the note).

{¶25} While there may be some argument as to whether a copy of the note in Deutsche Bank’s possession, with the indorsement in blank by First Franklin, was satisfactory to meet the standing requirement, we again emphasize that this case involves default judgment, that Deutsche Bank met the pleading requirements, and that any such specific standing arguments should have been raised in a responsive pleading or direct appeal, as will be discussed further.

{¶26} At no point during the course of these proceedings was Deutsche Bank required to establish its standing beyond the allegations of the Complaint. This court

has recognized: "A default judgment is 'based upon admission and * * * therefore obviates the need for proof.'" *Schmidt v. Brower*, 11th Dist. Ashtabula No. 2010-A-0014, 2010-Ohio-4431, ¶ 20, citing *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 122, 502 N.E.2d 599 (1986); *Girard v. Leatherworks Partnership*, 11th Dist. Trumbull No. 2004-T-0010, 2005-Ohio-4779, ¶ 38 ("[w]hen a defendant fails to answer, default judgment is appropriate because liability has been admitted or 'confessed' by the omission of statements in a pleading refuting the plaintiff's claims").

{¶27} Santisi cites *Schwartzwald* as justification for her arguments regarding Deutsche Bank's lack of standing. In that case, the Ohio Supreme Court held that a mortgagee did not have standing to invoke the jurisdiction of the common pleas court "because it failed to establish an interest in the note or mortgage at the time it filed suit." *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 28; *Patterson*, 2012-Ohio-5894, at ¶ 21 ("a party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned or (2) is the holder of the note"). In the present case, Deutsche Bank established its interest in both the note and the mortgage, which was not disputed by Santisi prior to judgment, and, thus, properly invoked the lower court's jurisdiction.

{¶28} Further, *Schwartzwald* is distinguishable from this case, in that it did not involve a default judgment. The court did not have before it the issue of whether standing was deemed admitted by the defendant and, thus, established by the filing of the Complaint, as is the case here.

{¶29} Santisi failed to properly contest Deutsche Bank's standing. The Complaint was filed on December 29, 2006. Santisi failed to answer or appear. On February 12, 2007, Deutsche Bank moved for default judgment. On June 14, 2007, the trial court entered its Judgment and Decree in Foreclosure. The Decree in Foreclosure was a final judgment. Santisi did not file her first Motion to Vacate until July 24, 2012, five years after the initial June 14, 2007 Decree of Foreclosure, and three years after the Amended Decree of Foreclosure. She filed her second Motion to Vacate, which forms the basis of the present appeal, on February 19, 2013.

{¶30} As described above, Santisi failed to file both a response during the proceedings and a direct appeal. Her 60(B) motion was also untimely. She cannot now raise a challenge under Civ.R. 60(B) or additional arguments as to why the indorsement in blank was not sufficient to meet the standing requirements. *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12AP-256, 2012-Ohio-5383, ¶ 19 (the defendant should have contested standing in an appeal from the decree of foreclosure rather than "raising it in a belated Civ.R. 60(B) motion").

{¶31} A default judgment "is a final determination of the rights of the parties." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150, 351 N.E.2d 113 (1976). It is well established that "[a] party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal" from a final judgment. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus.

{¶32} Further, we note that this was Santisi's second Motion to Vacate/Civ.R. 60(B) Motion. "[R]es judicata prevents the successive filings of Civ.R. 60(B) motions [for] relief from a valid, final judgment when based upon the same facts and same

grounds or based upon facts that could have been raised in the prior motion.” (Citation omitted). *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8.

{¶33} While Santisi argues that the alleged lack of standing deprived the court of its subject-matter jurisdiction and that this issue can be raised at any time, we disagree.

{¶34} *Schwartzwald* states that “standing to sue is required to invoke the jurisdiction of the common pleas court,” but did not state that the common pleas court lacked subject-matter jurisdiction where a party lacked standing to sue. 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 24. In fact, there is “a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 10.

{¶35} “Jurisdiction” means “the courts’ statutory or constitutional power to adjudicate the case.” (Emphasis omitted.) *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210. “The term encompasses jurisdiction over the subject matter and over the person. * * * Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.” (Citations omitted.) *Pratts* at ¶ 11. “It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.” (Citations omitted). *Id.* at ¶ 12.

{¶36} In the present case, as in *Schwartzwald*, the trial court had subject matter jurisdiction of the action and the parties. Assuming, arguendo, that Deutsche Bank improperly invoked that jurisdiction by lacking the requisite standing to sue, the court’s judgment is merely voidable, not void ab initio. *State v. Fillaggi*, 86 Ohio St.3d 230, 240,

714 N.E.2d 867 (1999) (“[w]here it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present[;] [a]ny subsequent error in the proceedings is only error in the ‘exercise of jurisdiction,’ as distinguished from the want of jurisdiction in the first instance”) (citation omitted).

{¶37} Thus, Santisi’s argument that the underlying judgment is void is incorrect. *Botts*, 2012-Ohio-5383, at ¶ 22 (“[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court”) (citation omitted). On this issue, *Schwartzwald* stated that “the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings.” 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 22 (citation omitted). The key words are “during the pendency of the proceedings.” In *Countrywide Home Loans Servicing, L.P. v. Nichpor*, the Ohio Supreme Court made it clear that, after a judgment entry grants a decree of foreclosure and order of sale, the matter is no longer pending. 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565, syllabus. As noted above, the challenge to standing in this case was not raised until several years after the Decree of Foreclosure was filed and became final.

{¶38} Further, allowing Santisi to prevail on a standing claim raised over five years after the filing of the Complaint and the Decree of Foreclosure essentially permits her to challenge the issue of standing at any time, potentially in perpetuum. Deutsche Bank properly pled its standing to enforce the note; the foreclosure was not contested; judgment was entered; and no appeal was taken. Santisi argues that she is entitled to vacate that judgment, simply because Deutsche Bank failed to respond to an argument that was never raised during the course of the proceedings. If the present judgment

may be declared void, then virtually every default judgment ever entered in a foreclosure action may be found void, unless the plaintiffs happened to have introduced affirmative evidence of their standing to bring suit beyond the allegations of the complaint.

{¶39} The first assignment of error is without merit.

{¶40} In her second assignment of error, Santisi asserts that Deutsche Bank presented inconsistent evidence to show that standing existed. Specifically, she argues that the recording of the assignment of the note and mortgage did not occur until after the filing of the Complaint.

{¶41} As discussed extensively above, there is no basis to challenge standing through a Civ.R. 60(B) motion in this case. Regardless, the fact that the assignment was not recorded until after the filing of the Complaint is not inconsistent with a prior assignment or transfer of the note, either of which is sufficient to confer standing. Also, as discussed above, the possession of the note with the blank indorsement further establishes that Deutsche Bank had standing, which was not disputed with a responsive pleading. See *U.S. Bank, N.A. v. McGinn*, 6th Dist. Sandusky No. S-12-004, 2013-Ohio-8, ¶ 21 (the fact that the mortgage was assigned after the filing of the complaint was not “fatal” to the foreclosure action when the bank could establish standing through demonstrating the transfer of the note prior to the date the complaint was filed).

{¶42} The second assignment of error is without merit.

{¶43} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, denying Santisi’s Motion to Vacate the July 1, 2009 Amended Decree of Foreclosure, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J., concurs with a Concurring Opinion,
COLLEEN MARY O'TOOLE, J., dissents.

TIMOTHY P. CANNON, P.J., concurring.

{¶44} I concur with most of the majority's judgment in this case. However, I disagree with any suggestion in the majority opinion that a Civ.R. 60(B) motion cannot be utilized to challenge standing in every case.

{¶45} Civ.R. 60(B) is applicable only to final orders of the trial court. There is no reason to carve out an exception for final judgments that are attacked for lack of standing. However, a Civ.R. 60(B) motion for lack of standing must comply with the well-established precedent that it be timely filed and present a meritorious defense. *See GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-151 (1976). In this case, appellant did not comply with either requirement.

{¶46} It is not sufficient to simply allege appellee had no standing. In this case, appellee alleged that it owned the note at the time the complaint was filed. When appellant failed to answer this allegation, it was deemed admitted. If appellant obtained information that this allegation was not true, i.e., establishing appellee did not have authority to invoke the jurisdiction of the trial court at the inception of the case, it would clearly be a meritorious defense. If a meritorious defense was established and timely raised, it should be considered as would any other Civ.R. 60(B) challenge to a final order. However, that did not occur in this case. Therefore, I concur with the judgment.