

ORIGINAL

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST

14-0485

Appellee,

-vs-

SHARI LEWIS, ET AL.

Appellant.

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On Appeal from the Butler
County Court of Appeals, Twelfth
Court of Appeals
Case Nos. CA2012-11-239
CA2013-05-068

NOTICE OF CERTIFICATION OF CONFLICT

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Attorney for Appellee SMROF 2009-1 Trust

Attorney for Appellant
Shari Lewis

RECEIVED
MAR 31 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 31 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant Shari Lewis hereby gives notice that, on March 12, 2014, the Twelfth District Court of Appeals issued an Entry Granting Motion to Certify Conflict, attached hereto as Exhibit A, certifying its decision in this case to be in conflict with decisions of other districts on two distinct issues. A copy of the Court of Appeals's decision is attached hereto as Exhibit B.

First, the Court certified its decision to be in conflict with that of the Ninth District Court of Appeals in *BAC Home Loan Servicing v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3229, attached hereto as Exhibit C, on the following issue:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must the plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and the mortgage, or is it sufficient if the Plaintiff demonstrates an interest in either the note or the mortgage?

Second, the Court certified its decision to be in conflict with both the Fifth District Court of Appeals in *CitiMortgage, Inc. v. Roznowski*, 5th Dist. Stark No. 2012-CA-00093, 2012-Ohio-4901, attached hereto as Exhibit D, and *NovStar Mtge. v. Akins*, 11th Dist. Trumbull No. 2007-T-0111, 2008-Ohio-6055, attached hereto as Exhibit E, on the following issue.

Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance, but does not include a specific itemization of those amounts in the judgment.

Appellant respectfully suggests that the Court of Appeals properly identified its decision as being in conflict with those of other Courts of Appeals and asks that the Court exercise its jurisdiction to resolve the conflicts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail this ^{26th} ~~24th~~ day of March 2014 upon Rebecca Algenio, Esq., Reisenfeld & Associates, 3962 Redbank Rd., Cincinnati, OH 45227.



Andrew M. Engel

Engel

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

SRMOF 2009-1 TRUST,

Appellee,

vs.

SHARI LEWIS, et al.,

Appellants.

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MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS
FILED BUTLER CO.
COURT OF APPEALS

CASE NOS. CA2012-11-239
CA2013-05-068

REGULAR CALENDAR

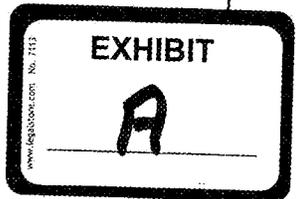
ENTRY GRANTING MOTION
TO CERTIFY CONFLICT

MAR 12 2014

MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Shari Lewis, on January 23, 2014, and a memorandum in opposition filed by counsel for appellee, SRMOF 2009-1 Trust, on February 5, 2014. Ohio Courts of Appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

First, Lewis contends that this court's decision conflicts with other decisions with respect to whether standing in a foreclosure case can be established by demonstrating an interest in the note or mortgage, or whether the plaintiff must demonstrate an interest in both the note and the mortgage. As noted by both the majority and the dissent, there is a conflict among districts regarding the necessary requirements to demonstrate standing in a foreclosure action. This court's decision is in conflict with a decision by the Ninth District Court of Appeals, *BAC Home Loans*



Servicing v. McFerren, 9th Dist. Summit No. 26384, 2013-Ohio-3228. Accordingly, the motion to certify is GRANTED with respect to this issue. The question for certification is as follows: In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must the plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and the mortgage, or is it sufficient if the Plaintiff demonstrates an interest in either the note or the mortgage?

Second, Lewis contends that this court's decision is in conflict with respect to whether a decree in foreclosure judgment entry which awards advances for property inspections, appraisals, maintenance and other similar expenses is a final appealable order even if the entry does not include the specific itemization of those amounts.

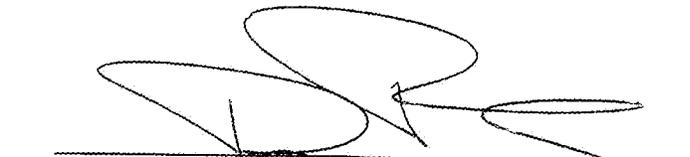
Again, when affirming the trial court's decision this court expressly recognized another split among the districts with the respect to this issue. In the present case, this court found that although certain amounts were not specifically set forth in the decree of foreclosure, the decree nonetheless is a final appealable order because these amounts can be specifically determined at a later date. The Fifth District Court of Appeals has addressed this same issue and reached the opposite result.

CitiMortgage, Inc. v. Roznowski, 5th Dist. Stark No. 2012-CA-00093, 2012-Ohio-4901. The Eleventh District Court of Appeals also reached an opposite result in *NovaStar Mtge., Inc. v. Akins*, 11th Dist. Trumbull No. 2007-T-0111, 2008-Ohio-6055.

Based upon the foregoing, the motion for certification is GRANTED with

respect to this question as well. The question for certification is whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance, but does not include specific itemization of those amounts in the judgment.

IT IS SO ORDERED.



Robert P. Ringland, Presiding Judge



Robin N. Piper, Judge



Mike Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

SRMOF 2009-1 TRUST,

Plaintiff-Appellee,

- vs -

SHARI LEWIS, et al.,

Defendants-Appellant.

CASE NOS. CA2012-11-239
CA2013-05-068

OPINION
1/13/2014

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-08-3073

Reisenfeld & Associates, Rebecca N. Algenio, 3962 Red Bank Road, Cincinnati, Ohio 45227,
for plaintiff-appellee

Andrew M. Engel, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, for defendant-
appellant, Shari Lewis

Michael T. Gmoser, Butler County Prosecuting Attorney, Government Services Center, 315
High Street, 11th Floor, Hamilton, Ohio 45011, for defendant, Butler County Treasurer

M. POWELL, J.

{¶ 1} Defendant-appellant, Shari Lewis, appeals two decisions of the Butler County Court of Common Pleas in favor of plaintiff-appellee, SRMOF 2009-1 Trust (Trust). Lewis appeals the trial court's decision (1) granting summary judgment and a decree of foreclosure

EXHIBIT

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in favor of the Trust, and (2) denying Lewis' motion to vacate that judgment. For the reasons discussed below, we affirm the decisions of the trial court.

{¶ 2} On November 21, 2001, Lewis executed a promissory note in favor of First Union Mortgage Corporation (First Union) in the principal amount of \$141,600.00, with interest of 7.00 percent per annum to purchase a home in Trenton, Ohio. The note was secured by a mortgage on the property. The mortgage was assigned multiple times, and ultimately it was assigned to the Trust on August 24, 2011.

{¶ 3} The Trust filed a complaint in foreclosure against Lewis on August 31, 2011. In the complaint, the Trust alleged that it was the holder of the note and mortgage on the subject property. Attached to the complaint was a copy of the originally executed note between Lewis and First Union. The note was endorsed in blank by First Union. Also attached to the complaint were copies of the recorded mortgage and several recorded assignments of the mortgage. The mortgage and subsequent assignments indicate that the mortgage was originally granted to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for First Union. On June 9, 2011, MERS, as nominee for First Union, assigned its interest in the mortgage to Wells Fargo Bank, N.A. (Wells Fargo), as successor by merger to Wachovia Bank, N.A. (Wachovia). On August 8, 2011, Wells Fargo assigned its interest in the mortgage to Selene Finance LP (Selene Finance). Selene Finance in turn assigned the mortgage to the Trust on August 24, 2011.

{¶ 4} On October 12, 2011, the Trust filed a motion for summary judgment. Before Lewis responded to the motion and during the course of discovery, she requested to inspect the original note. On July 19, 2012, the trial court ordered the Trust to present the original note "on the record as soon as Plaintiff has physical possession of it." According to the record, the original note could not be located, and therefore, on July 27, 2012, the Trust filed

a "Notice of Filing Lost Note Affidavit." The Lost Note Affidavit and Indemnification Agreement (Lost Note Affidavit) was executed by Wells Fargo and indicated that the originally executed note had been lost, destroyed, or was missing and as a result, Wells Fargo transferred to Selene Finance a certified copy of the note in lieu of the original. The certified copy of the note contained an allonge endorsed in blank by Wells Fargo. The Trust then filed an "amended motion for summary judgment" based on the Lost Note Affidavit. In this motion, the Trust asserted that "Plaintiff is the holder of the Note via the Lost Note Affidavit and blank indorsement from Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A., formerly known as First Union National Bank, and is thus entitled to enforce the Note."

{¶ 5} On August 28, 2012, the Trust withdrew its amended motion for summary judgment "on the grounds that the original Note has been located and Plaintiff wants to stand on its original Motion for Summary Judgment." Ultimately, the trial court granted the Trust's motion for summary judgment. In its decision granting the motion for summary judgment, the trial court noted that the original note and mortgage were presented in court for inspection by Lewis where she admitted the signatures on the documents were hers. The trial court "took judicial notice of the original Note and Mortgage and further noted that the Note contained a blank endorsement and that Plaintiff was the holder of this bearer paper by virtue of its possession of that Note."

{¶ 6} Thereafter, on October 31, 2012, the trial court filed the In rem Judgment Entry and Decree of Foreclosure ordering the sale of the property. In the judgment entry, the trial court ordered the Trust to be paid "the sum of \$125,683.50 plus interest at the rate of 7.00000 percent per annum from April 1, 2010, together with all expenses and costs" from the

proceeds of the sale of the property. Lewis appealed the trial court's October 31, 2012 judgment entry and the decision to grant summary judgment in favor of the Trust.

{¶ 7} On February 1, 2013, Lewis filed two motions. In the trial court, Lewis filed a motion to vacate judgment requesting the trial court vacate its In Rem Judgment Entry and Decree of Foreclosure entered on October 31, 2012, as well as the court's decision granting the Trust's motion for summary judgment entered on October 19, 2012. In her motion to vacate judgment, Lewis asserted the Trust did not have standing to prosecute this claim based on the Supreme Court's October 31, 2012 decision in *Fed. Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. Also on February 1, Lewis filed a motion in this court requesting the appeal to be remanded to the trial court for consideration of her motion to vacate judgment. This court granted Lewis' motion. Ultimately, however, the trial court denied Lewis' motion to vacate judgment. Lewis also appealed this decision by the trial court.

{¶ 8} There are two decisions on appeal before this court: (1) the trial court's decision to grant summary judgment and a decree of foreclosure, and (2) the trial court's decision to deny Lewis' motion to vacate. This court consolidated the two cases sua sponte. Lewis asserts two assignments of error for our review.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO SRMOF [2009-1 TRUST].

{¶ 11} In her first assignment of error, Lewis argues the trial court erred in granting summary judgment to the Trust because the Trust did not have standing under the note at the time the complaint was filed. Lewis also contends that the trial court's judgment entry and decree of foreclosure was not a final appealable order.

{¶ 12} In challenging the Trust's standing, Lewis first contends that the Trust only received an interest in the note after the complaint was filed when the original note was located and endorsed over to the Trust. Lewis further argues that the Trust may not rely on the Lost Note Affidavit as the basis for an interest in the note at the time the complaint was filed as the Lost Note Affidavit failed to meet the requirements of R.C. 1303.38. Finally, Lewis contends that the assignment of the mortgage alone was insufficient to confer standing to the Trust.

{¶ 13} "Standing is a preliminary inquiry that must be made before a trial court may consider the merits of a legal claim." *Bank of New York Mellon v. Blouse*, 12th Dist. Fayette No. CA2013-02-002, 2013-Ohio-4537, ¶ 5, quoting *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶ 9. Whether standing exists is a question of law that an appellate court reviews de novo. *Fifth Third Mtge. Co. v. Bell*, 12th Dist. Madison No. CA2013-02-003, 2013-Ohio-3678, ¶ 13.

{¶ 14} Recently, the Supreme Court of Ohio addressed the issue of standing in a foreclosure action. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. In *Schwartzwald*, the Court determined the plaintiff lacked 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." *Blouse* at ¶ 8, quoting *Schwartzwald* at ¶ 28. "It is an elementary concept of law that a party lacks standing to *invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Emphasis sic.) *Schwartzwald* at ¶ 22. Accordingly, the court found that a plaintiff must have standing at the time the complaint is filed and the lack of standing cannot be cured by "receipt of an assignment of the claim or by substitution of the real party in interest" pursuant to Civ.R. 17(A). *Id.* at ¶ 26, ¶ 41.

{¶ 15} Based on the decision in *Schwartzwald*, this court has determined: "[A] party may establish that it is the real party in interest with standing to invoke the jurisdiction of the common pleas 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.'" (Emphasis sic.) *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 13, *appeal not accepted, 11/20/2013 Case Announcements, 2013-Ohio-5096*; *BAC Home Loans, LP v. Mapp*, 12th Dist. Butler No. CA2013-01-001, 2013-Ohio-2968, ¶ 14; *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, ¶ 15. See also *Schwartzwald* at ¶ 28; *Self Help Ventures Fund v. Jones*, 11th Dist. Ashtabula No. 2012-A-0014, 2013-Ohio-868, ¶ 17. In reaching this decision, we noted, the Ohio Supreme Court's "deliberate decision to use the disjunctive word 'or' as opposed to the conjunctive word 'and' when discussing the interest [plaintiff] was required to establish at the time it filed the complaint" is significant. *Burke* at ¶ 13, quoting *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 21.

{¶ 16} While we note that the dissent raises legitimate concerns regarding the necessary requirements to establish standing, this Court, along with the Eighth, Eleventh, Tenth, Seventh, and Sixth Districts have all found that the plain language of *Schwartzwald* only requires a plaintiff to establish an interest in the note or mortgage at the time the suit is filed. *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 13; *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 21; *Fed. Home Loan Mtg. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶ 24; *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶ 27; *CitiMortgage, Inc. v. Loncar*, 7th Dist. Mahoning No. 11 MA 174, 2013-Ohio-2959, ¶ 15; *Bank of New York Mellon v. Matthews*, 6th Dist. Fulton No. F-12-008, 2013-Ohio-

1707, ¶ 11. Until the Supreme Court overrules these cases, we will continue to apply the interpretation of *Schwartzwald* that this court announced in *Burke*. Moreover, although a plaintiff may establish standing by showing an interest in the note or the mortgage, this is not to say that a plaintiff never has to show an interest in both the note and the mortgage. As mentioned above, standing is only a preliminary inquiry that must be made before a trial court may consider the merits of the claim. *Blouse* at ¶ 5. Once a plaintiff has demonstrated standing and therefore invoked the jurisdiction of the common pleas court, in order to be entitled to judgment in a foreclosure action, the plaintiff must indeed prove it is the current holder of the note and mortgage, as well as, default, the amount owed, execution and delivery of the note and mortgage, and valid recording of the mortgage. See *BAC Home Loans Serv., L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.).

{¶ 17} In the present case, even assuming Lewis' arguments with regard to the note and her challenges to the Lost Note Affidavit are true, we find the Trust established it had standing at the time the complaint was filed by way of the assignment of the mortgage. The mortgage and subsequent assignments attached to the complaint indicate that the Trust had the mortgage assigned to it on August 24, 2011. The mortgage was originally granted to MERS as nominee for First Union. On June 9, 2011, MERS, as nominee for First Union, assigned its interest in the mortgage to Wells Fargo, as successor by merger to Wachovia. On August 8, 2011, Wells Fargo assigned its interest in the mortgage to Selene Finance. Selene Finance in turn assigned the mortgage to the Trust on August 24, 2011. Accordingly, the Trust held the mortgage as it was assigned to the Trust seven days before the complaint was filed in this case. Contrary to Lewis' assertions, the mortgage alone was sufficient to establish the Trust had standing to prosecute this foreclosure action.

{¶ 18} Lewis also asserts within her first assignment of error that the trial court's failure to specify the dollar amount owed in late charges, advancements, maintenance, and costs rendered the judgment indefinite and therefore not a final appealable order. Lewis further contends that the trial court's failure to completely determine the amount owed to the Trust in the judgment entry prevented her from exercising her right of redemption. The judgment entry by the trial court ordered, "\$125,683.50 plus interest at the rate of 7.00000 percent per annum from April 1, 2010 together with late charges, advances for the protection and maintenance of the property and costs" to be paid to the Trust from the proceeds of the Sheriff's sale.

{¶ 19} This court has previously considered similar judgment entries which failed to include the specific amount awarded for advancements related to real estate taxes, insurance premiums, and property protection and has concluded that the failure to include such expenses within a judgment entry does not prevent the judgment from being final and appealable. *Washington Mut. Bank, F.A. v. Wallace*, 194 Ohio App.3d 549, 2011-Ohio-4174, ¶ 49 (12th Dist.), *rev'd on other grounds*, 134 Ohio St.3d 359, 2012-Ohio-5495.¹ Moreover, the failure to include specific amounts for these types of advancements does not interfere with the mortgagor's right of redemption. *Id.* at ¶ 45, 49. These additional amounts for late charges, maintenance, and advancements made on behalf of the mortgagor are continuously accruing through the date of the sheriff's sale. *Third Fed. S. & L. Assn. of Cleveland v. Farno*, 12th Dist. Warren No. CA2012-04-028, 2012-Ohio-5245, ¶ 14; *First Horizon Loans v. Sims*, 12th Dist. Warren No. CA2009-08-117, 2010-Ohio-847, ¶ 25. As a result, "[i]t would

1. The Supreme Court recently determined that a conflict exists on the following issue: "Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment." *CitiMortgage, Inc. v. Roznowski*, 02/06/2013 Case Announcements, 2013-Ohio-347. Until the Supreme Court announces its decision in *Roznowski*, we will follow our prior precedent established in *Wallace*.

be beyond reason to hold a trial court or magistrate to a standard that insists they state a definite sum of redemption,' and that '[a]s long as the redemption value of a foreclosed property is ascertainable through normal diligence, the value, as stated by a finder of fact, will be upheld.'" *Wallace* at ¶ 48, quoting *Huntington Natl. Bank v. Shanker*, 8th Dist. Cuyahoga No. 72707, 1998 WL 269091, * 2 (May 21, 1998).

{¶ 20} Accordingly, based on this court's previous decisions in *Wallace* and *Sims*, we find no merit to the arguments advanced by Lewis.

{¶ 21} Based on the foregoing, Lewis' first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO VACATE JUDGMENT.

{¶ 24} In her second assignment of error, Lewis challenges the trial court's decision to overrule her motion to vacate judgment again arguing that the Trust lacked standing at the time of the filing of the complaint. Lewis asserts the trial court did not have jurisdiction over the foreclosure proceeding as the Trust did not have standing. As discussed above, the Trust had standing by way of the assignment of the mortgage. See *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 13. The trial court therefore had jurisdiction over the foreclosure proceeding and properly denied Lewis' motion to vacate the judgment. See *Schwartzwald* at ¶ 22.

{¶ 25} Lewis' second assignment of error is overruled.

{¶ 26} Judgment affirmed.

PIPER, J., concurs.

RINGLAND, P.J., dissents.

RINGLAND, P.J., dissenting.

{¶ 27} I respectfully dissent from the majority's decision as the evidence in the record failed to establish that the Trust had an interest in both the note and the mortgage at the time it filed the complaint. Accordingly, I would hold that the Trust failed to demonstrate standing at the commencement of this foreclosure action and remand the matter to the trial court with instructions to dismiss the complaint pursuant to the Supreme Court of Ohio's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 40.

{¶ 28} Although the majority cites *Schwartzwald* for the proposition that a plaintiff may establish standing in a foreclosure action by demonstrating that it has had the mortgage assigned *or* is the holder of the note, I find that this is an incorrect interpretation of law and the Supreme Court's decision *Schwartzwald*. Furthermore, I note there is a conflict among the districts regarding the interpretation of the necessary requirements to establish standing pursuant to *Schwartzwald*. Compare *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 13 (finding that standing may be established by evidence that the plaintiff is the holder of the note *or* the mortgage) with *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶ 13 (holding a plaintiff must be the holder of the note *and* mortgage at the time it initiates the action in order to have standing); see also *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 21 (holding that a plaintiff may establish standing by evidence that it has had a mortgage assigned *or* is the holder of the note); *Fed. Home Loan Mtg. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶ 24 (holding that in order to establish standing a plaintiff must demonstrate an interest in the note *or* mortgage); *HSBC Bank USA v. Sherman*, 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220, ¶ 16, 18 (rejecting the interpretation that a party may establish standing by showing either it is the assignee of the

mortgage or that it is the holder of the note). Therefore, I urge the Supreme Court to provide courts of this state with the necessary guidance on this issue.

{¶ 29} As noted by the majority, the Supreme Court of Ohio in *Schwartzwald* determined that a plaintiff in a foreclosure action must have standing at the time the complaint is filed in order to invoke the jurisdiction of the common pleas court. *Id.* at ¶ 24-25. "It is an elementary concept of law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Emphasis sic.) *Id.* at ¶ 22. Moreover, the Court found that a lack of standing cannot be cured by "post-filing events" that supply standing. *Id.* at ¶ 26. The lack of standing "cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest." *Id.* at ¶ 41. In *Schwartzwald*, the record did not establish that the plaintiff/bank was the holder of the note or mortgage when it filed the complaint. *Id.* at ¶ 28. As such, the bank "concede[d] that there was no evidence it suffered any injury at the time it commenced th[e] foreclosure action." *Id.* at ¶ 28. Thus, because the bank "failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court." *Id.* Where I diverge with the majority is its reliance on this statement to support the proposition that a party may establish standing by showing either that it is an assignee of the mortgage or the holder of the note. *See Burke* at ¶ 13.

{¶ 30} As an initial matter, from a review of the facts of *Schwartzwald* and the issue presented before the court, it is apparent that the court did not intend to determine whether standing in a foreclosure action may be demonstrated by either the note or the mortgage alone. This specific question was not considered or even before the court. Rather, the precise issue before the court was whether: "In a mortgage foreclosure action, the lack of

standing or real party in interest defect can be cured by the assignment of the mortgage prior to judgment." In addition, the trial court's reference to "or" resulted merely from the facts of the case and was not intended to be a statement of law. See *Schwartzwald* at ¶ 28. As mentioned above, the bank conceded that it did not have an interest in the note or the mortgage when the complaint was filed. Rather, it was a month after the complaint was filed that the note and mortgage were assigned to the bank. *Schwartzwald* at ¶ 10. Accordingly, the court's statement that the bank "failed to establish an interest in the note or the mortgage" must be read in the context of the entire opinion and facts of the case.

{¶ 31} Furthermore, this court's holding that the mortgage alone is sufficient to evidence an injury, and therefore demonstrate standing, is contrary to the fundamental requirement of standing and long-standing foreclosure precedent. As explained in *Schwartzwald*, the fundamental requirement of standing is that the party bringing the action is actually the party who has suffered the injury. See *Schwartzwald* at ¶ 24. In addition, a long-standing foreclosure principle is that "the note and mortgage are inseparable; the former as essential, the latter as an incident." *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1873). "An assignment of the note carries the mortgage with it, while an assignment of the [mortgage] alone is a nullity." *Id.* Accordingly, a party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note. *McFerren* at ¶ 12; see also Restatement of the Law 3d, Property, Mortgages, Section 5.4(e), at 385 (1996) ("[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation"). While it is possible for an entity to assign a mortgage but not transfer the note, the practical effect of such a transaction is that it would be "impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor * * *."

Restatement, Section 5.4(c), at 384; see also Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration Systems' Land Title Theory*, 53 Wm. & Mary L.Rev. 111, 119 (2011), fn. 34 (referencing cases from multiple jurisdictions finding that the note and mortgage are inseparable and that the assignment of a mortgage alone is a nullity). Given that a note and mortgage are inseparable and that a party who merely holds the mortgage suffers no injury, I do not believe the Supreme Court intended to imply that possession of the mortgage alone is sufficient to establish standing. See *McFerren* at ¶ 12.

{¶ 32} Based on the foregoing, I would conclude that *Schwartzwald* did not overturn long-standing precedent. In order to establish standing in a foreclosure action, a plaintiff must demonstrate, through evidence in the record, that it had an interest in both the note *and* the mortgage at the time it filed the complaint.

{¶ 33} In the present case, as noted by the majority, the Trust demonstrated it had an interest in the mortgage prior to the filing of the complaint by attaching the mortgage and the subsequent assignments of the mortgage to the complaint. These documents demonstrated the chain of title from the originating entity, MERS, as nominee for First Union, and finally ending with the assignment to the Trust. The note, however, is more problematic.

{¶ 34} From my review of the record, there is a lack of evidence which demonstrates that the Trust obtained an interest in the note prior to the filing of the complaint in this case. First, the Trust was not a holder of the note when the complaint was filed as it was not in possession of the note. See R.C. 1301.01(T)(1)(a) and R.C. 1303.25(B) (A holder includes a person in possession of an instrument payable to bearer). The Trust obtained possession of the original note, endorsed in blank, almost a year after the filing of the complaint when Wells Fargo located the original note and endorsed it over to the Trust. Therefore, at this time, the Trust became a holder as it was in possession of bearer paper. However, this constitutes a

post-filing event which cannot be the basis for the Trust's standing in this case. See *Schwartzwald* at ¶ 26. Accordingly, in order to demonstrate standing, the Trust was required to demonstrate that it had an interest in the note and was entitled to enforce the note by way of the Lost Note Affidavit.

{¶ 35} R.C. 1303.38 indeed permits a person who is not in possession of an instrument to still enforce a note that has been lost, destroyed, or stolen.² Although the Trust is not the entity which lost the note, I find that an assignee of a promissory note that was not in possession of the note at the time it was misplaced, lost, or destroyed may still enforce the note pursuant to R.C. 1303.38 if, before the assignment, the assignor was entitled to enforce the note. See *Atlantic National Trust, LLC v. McNamee*, 984 So.2d 375 (Ala. 2007). Consequently, the Trust's ability to enforce the note at the time the complaint was filed, turns on whether the Lost Note Affidavit met the requirements under R.C. 1303.38.

{¶ 36} As noted by Lewis, the Lost Note Affidavit executed by Wells Fargo failed to aver that it was in possession and entitled to enforce the note at the time it was lost. See R.C. 1303.38(A)(1). However, the failure to include this specific averment was not necessarily fatal to the affidavit. If the combined allegations in the affidavit along with the certified copy of the originally executed note would have indicated that Wells Fargo was indeed the holder,

2. Under R.C. 1303.38:

- (A) A person who is not in possession of an instrument is entitled to enforce the instrument if all of the following apply:
- (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
 - (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
 - (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service.

this would have been sufficient to establish the requirements under R.C. 1303.38 (A)(1). See *EquiCredit Corp. of Am. v. Provo*, 6th Dist. Lucas No. L-03-1217, 2006-Ohio-3981 (finding that the combined allegations in the affidavits by the plaintiff bank met the requirements of R.C. 1303.38 (A)(1) as the allegations demonstrated it was the holder, and therefore by definition, in possession and entitled to enforce the instrument). In the present case, although Wells Fargo attached a certified copy of a note endorsed in blank, this was insufficient to demonstrate its holder status as one must be also be in possession of a note endorsed in blank to be the holder. There is some indication that First Union may have merged into Wells Fargo and therefore Wells Fargo essentially stood in the shoes of First Union and would arguably be entitled to enforce the note. See *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, ¶ 7 ("[T]he absorbed company becomes a part of the resulting company following merger [and] the merged company has the ability to enforce * * * agreements as if the resulting company had stepped in the shoes of the absorbed company"). However, the Trust failed to provide merger documents or other properly authenticated evidence of the merger of these entities. As a result, there is simply a lack of evidence to indicate that Wells Fargo effectively transferred its interest in the lost note to Selene Finance as the affidavit failed to meet the requirements under R.C. 1303.38.

{¶ 37} Moreover, even if the affidavit was sufficient under R.C. 1303.38, the Lost Note Affidavit executed by Wells Fargo was in favor of Selene Finance. There is nothing in the record which indicates when or if Selene Finance transferred this Lost Note Affidavit and therefore the ability to enforce the note, over to the Trust. The trial court found that the same day the Lost Note Affidavit was executed in favor of Selene Finance, it was placed in the Trust. Beyond the fact that the Lost Note Affidavit was found in the business records of the Trust, there is simply no evidence in the record to support this conclusion.

{¶ 38} Based on the foregoing, the evidence in the record failed to establish that the Trust had an interest in the note at the time it filed the complaint. As the Trust did not have an interest in both the note and mortgage, it did not have standing to invoke the jurisdiction of the common pleas court. Therefore, as indicated above, I would have remanded the matter to the trial court with instructions to dismiss the complaint pursuant to the Supreme Court of Ohio's decision in *Schwartzwald*.

[Cite as *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BAC HOME LOANS SERVICING, LP fka
COUNTRYWIDE HOME LOANS
SERVICING, LP

C.A. No. 26384

Appellee

v.

GARRICK P. MCFERREN, aka
GARRICK MCFERREN, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2011-06-3570

Appellant

DECISION AND JOURNAL ENTRY

Dated: July 24, 2013

BELFANCE, Presiding Judge.

{¶1} Garrick McFerren appeals the decision of the Summit County Court of Common Pleas awarding summary judgment to Bank of America, N.A. For the reasons set forth below, we reverse.

I.

{¶2} On February 19, 2008, Mr. McFerren signed a promissory note (“the Note”) for \$211,500.00 with Quicken Loans, Inc. That same day, he also signed a mortgage (“the Mortgage”) purporting to secure the Note, which named Mortgage Electronic Registration Systems, Inc. (“MERS”) as “the mortgagee under this Security Instrument.” Quicken Loans later transferred the Note to Countrywide Bank, FSB, which subsequently endorsed the Note in blank, thus leaving the space for “payable to” empty. On March 16, 2011, MERS assigned the mortgage to BAC Home Loan Servicing, LP,



and the assignment was recorded on April 19, 2011. BAC initiated foreclosure proceedings on June 30, 2011.

{¶3} On July 1, 2011, BAC merged with Bank of America, N.A., and Bank of America was substituted as party plaintiff on August 30, 2011. Bank of America moved for summary judgment, and Mr. McFerren filed a motion in opposition, albeit untimely. The trial court never ruled on Mr. McFerren's motion for leave to file his motion in opposition, and it awarded summary judgment to Bank of America on March 12, 2012, in a judgment entry prepared by Bank of America.

{¶4} Mr. McFerren has appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

REVIEWING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT DE NOVO, THE RECORD IS CLEAR AND CONVINCING THAT THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN FAVOR OF APPELLEE ON THE FORECLOSURE COMPLAINT AND AGAINST APPELLANT ON THE QUIET TITLE COUNTERCLAIMS AND THIRD PARTY COMPLAINT.

{¶5} Mr. McFerren argues that the trial court erred in awarding summary judgment to Bank of America because BAC lacked standing to initiate the action. We agree that, given the record before us, we cannot conclude that BAC had standing to initiate the action.

{¶6} Bank of America argues that we should not reach the question of standing because Mr. McFerren failed to properly raise it in the trial court; however, it is well-established that "the issue of standing, inasmuch as it is jurisdictional in nature, may be

raised at any time during the pendency of the proceedings.” *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216 (1987), paragraph two of the syllabus. *See also Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 22 (citing *Tyler* with approval).

{¶7} In *Schwartzwald*, the Ohio Supreme Court determined that a plaintiff in a foreclosure action must have standing at the time it files the complaint in order to invoke the jurisdiction of the court. *Schwartzwald* at ¶ 41-42. “It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Internal quotations and citations omitted.) *Id.* at ¶ 22. Standing to sue is jurisdictional in nature as it concerns a party’s capacity to invoke the jurisdiction of the court, and, therefore, whether a party has standing is evaluated at the time of the filing of the complaint. *Id.* at ¶ 24. Moreover, the lack of standing cannot be cured by a subsequent assignment of the note and mortgage subsequent to filing the complaint. *Id.* at ¶38 (“Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a 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.”). In *Schwartzwald*, the record did not establish that the plaintiff/bank was the holder of the note or mortgage when it filed the complaint. As such, it “concede[d] that there [wa]s no evidence that it had suffered any injury at the time it commenced th[e] foreclosure action.” *Id.* at ¶ 28. “Thus, because it failed to establish an interest in the note or

mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.” *Id.*

{¶8} Prior to *Schwartzwald*, this Court also held that in order to have a real interest in a foreclosure action, a party must be the owner and holder of the note and the mortgage at the time it commences the action. See *U.S. Bank, N.A. v. Richards*, 189 Ohio App.3d 276, 2010-Ohio-3981, ¶ 13 (9th Dist.), quoting *Everhome Mtge. Co. v. Rowland*, 10 Dist. Franklin No. 07AP-615, 2008-Ohio-1282, ¶ 12 (“In foreclosure actions, the real party in interest is the current holder of the note and mortgage.”). BAC filed the complaint at issue in this case. Bank of America was substituted as the plaintiff and then moved for summary judgment. Relative to the mortgage, Bank of America submitted copies of the Mortgage naming MERS as mortgagee and the assignment of the Mortgage from MERS to BAC.¹ With respect to the Note, Bank of America attached a copy of the Note payable to Quicken Loans. The note contained an endorsement from Quicken Loans to Countrywide Bank, FSB, which at some point Countrywide Bank endorsed in blank. Bank of America also submitted the affidavit of Linda Geidel. In her affidavit, Ms. Geidel averred that she is an officer of Bank of America, that Bank of America was successor by merger to BAC, and the Bank of America had possession of the Note. However, Ms. Geidel did not aver that BAC had possession of the Note at the time that it filed the complaint.²

¹ Attached to the complaint was a certificate from the Texas Secretary of State that indicated that BAC had formerly been known as Countrywide Home Loan Services, Inc.

² To illustrate the path both the Note and the Mortgage have taken, we have created the chart that is attached as Appendix A at the end of this opinion.

{¶9} Accordingly, none of the evidence in the record demonstrates that BAC had possession of the Note at the time that it filed the complaint. The copy of the Note attached to the complaint does not show anything beyond the fact that BAC had access to a copy of the Note. The Note itself is payable to bearer by virtue of Countrywide Bank's blank endorsement, meaning that nothing on the Note itself indicates when, or if, BAC became its owner through possession of the note. Further, the fact that Bank of America had possession of the Note at the time it moved for summary judgment does not demonstrate that BAC had obtained possession of the Note when it filed the complaint. See *Rowland* at ¶ 15 (“[Bank of America] does not specify how or when [it] became the holder of the note and mortgage. Without evidence demonstrating the circumstances under which it received an interest in the note and mortgage, [it] cannot establish itself as the holder.”). Nor is there evidence that Countrywide Bank, FSB, ever delivered the endorsed Note to BAC or its predecessors.

{¶10} Nevertheless, Bank of America maintains that the record establishes that BAC had standing because the mortgage assignment was dated and recorded prior to the complaint being filed. It reasons that the assignment of the mortgage alone conferred standing. Specifically, it refers to that portion of *Schwartzwald* where the Supreme Court stated that Federal Home Loans did not have standing 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, at ¶ 28, and points to *Citimortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, to support its interpretation. In *Patterson*, the court noted that *Schwartzwald* had held “that Federal Home Loans did not have standing because * * * ‘it failed to establish an interest in the note *or* mortgage at the time it filed

suit.” (Emphasis sic.) *Id.* at ¶ 21, quoting *Schwartzwald* at ¶ 28. The *Patterson* court concluded that the use of “or” marked a departure from its previous holdings that a party needed “the note *and* mortgage when the complaint was filed[.]” in order to have standing. (Emphasis sic.) *Patterson* at ¶ 21, quoting *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. Cuyahoga No. 91675, 2009-Ohio-1092, ¶ 23. Thus, the court held that, in light of *Schwartzwald*, a party may establish its standing by showing that it is the assignee of the mortgage or is the holder of the note. *Patterson* at ¶ 21.

{¶11} We do not find the Eighth District’s rationale persuasive. It is apparent that the Ohio Supreme Court did not consider this precise issue in *Schwartzwald* given that the bank had conceded that it was not the holder of the note or mortgage. *See, e.g., Schwartzwald* at ¶ 28 (noting that Federal Home Loans conceded there was no evidence that it had either). Thus, the language must be read in the context of the entire opinion. Like the Eighth District, this Court has previously held that a party must have the note *and* the mortgage in order to demonstrate standing. *See, e.g., Richards*, 189 Ohio App.3d 276, 2010-Ohio-3981, at ¶ 13. Other districts have made similar holdings. *See, e.g., Losantiville Holdings L.L.C. v. Kashanian*, 1st Dist. Hamilton No. C-110865, 2012-Ohio-3435, ¶ 17; *Arch Bay Holdings, L.L.C. v. Brown*, 2d Dist. Montgomery No. 25073, 2012-Ohio-4966, ¶ 16; *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, ¶ 32 (7th Dist.); *Rowland*, 2008-Ohio-1282, at ¶ 12. It is unlikely that the Supreme Court intended to overturn the holdings of all of the appellate courts on the issue, especially since the issue was not directly before it.

{¶12} Moreover, as explained in *Schwartzwald*, the fundamental requirement of standing is that the party bringing the action is actually the party who has suffered the

injury. See *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, at ¶ 23, 28. A party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note. See Restatement of the Law 3d, Property, Mortgages, Section 5.4(e), at 385 (1996) (“[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation.”). In other words, possession of the mortgage is of no import unless there is possession of the note. While it is possible to assign a mortgage and retain possession of the note, “[t]he practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor * * *.” Restatement, Section 5.4(c), at 384. See also *id.* (noting that UCC 3-203 likely requires courts to disregard a mortgage assignment when the negotiable note is not also delivered); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, 53 Wm. & Mary L.Rev. 111, 119 (2011), fn. 34 (compiling cases from many jurisdictions finding that the note and the mortgage are inseparable and that the assignment of a mortgage alone is a nullity). This would further support the conclusion that the Supreme Court did not intend to imply that simply possessing the mortgage is sufficient to establish standing given that a party who simply holds the mortgage suffers no injury. See *Schwartzwald*, at ¶ 28.

{¶13} Thus, we conclude that *Schwartzwald* did not overturn long-standing property and foreclosure principles and, therefore, BAC had to be holder of the Note and the Mortgage at the time it initiated this action order to have standing. *Id.* It follows that,

if BAC did not have standing at the time it filed the complaint, then Bank of America likewise did not have standing upon merging with BAC.

{¶14} Mr. McFerren has set forth arguments concerning the legal effect of splitting the Note and Mortgage from the inception of the transaction.³ Bank of America argues that Mr. McFerren has no standing to assert defenses which relate to the legal effect of the prior assignments of the note or mortgage.⁴ However, we need not address

³ As noted above, at the inception of the transaction, the Mortgage named MERS as the mortgagee and contains language that indicates that MERS is the nominee of Quicken Loans. This Court has not squarely addressed the legal effect of splitting a note and mortgage at its inception. *See generally* Peterson, 53 Wm. & Mary L.Rev. 111 (discussing analysis of various jurisdictions relating to legal effect of splitting note and the mortgage and the significant departure by MERS from the traditional land registration system and the public policies undermined by the corporation's methods). *See, e.g.*, Peterson, 53 Wm. & Mary L.Rev. 144 (noting the problematic manner in which MERS transfers its mortgages because "MERS has a web page in which mortgage servicers and law firms can enter names of their own employees to automatically produce a boilerplate corporate resolution that purports to designate the servicers' and law firms' employees as certifying officers of MERS with the job title of assistant secretary, vice president, or both."). In *Deutsche Bank Natl. Trust Co. v. Traxler*, 9th Dist. Lorain No. 09CA009739, 2010-Ohio-3940, this Court discussed in dicta the limited argument that MERS lacked authority as nominee to assign a mortgage to the foreclosing bank. *Id.* at ¶ 19. The argument was premised upon the contention in its status as "nominee" MERS was only permitted to enforce the mortgage, but not to assign it. *Id.* As such, it was argued that the right to assign the mortgage was retained by the original lender who possessed the note. *Id.* However, *Traxler* did not ultimately answer this question but did refer to cases suggesting that MERS had authority to assign a mortgage when designated as both a nominee and mortgagee. *Id.* at ¶ 19-21. However, the cases cited in *Traxler* concerning that issue were decided without evidence in the record as to the method by which MERS operated. *See id.* at ¶ 19 (compiling cases from other districts that "recognized MERS' authority to assign a mortgage when designated as both a nominee and mortgagee").

⁴ We note that it is unclear why a foreclosure defendant would lack "standing" to raise issues concerning the legal effect of prior assignments or other transactions in *defending* the foreclosure action. In that context, the defendant may raise legally relevant defenses as such would relate to the character of the obligation (i.e. secured or not secured) and to whom the obligation is actually owed (in cases of multiple assignments, to avoid the risk that multiple parties claim the right to collect). Bank of America relies upon *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 Fed.Appx. 97 (6th Cir.2010), and *Bridge v. Ames Capital Corp.*, N.D. Ohio No. 1:09 CV 2947, 2010 WL 3834059 (Sept. 29, 2010), in support. However, the procedural posture

those arguments, as the record before us does not allow us to conclude that BAC was the owner of the Note when it initiated the action.

{¶15} Mr. McFerren's assignment of error is sustained.

III.

{¶16} In light of the foregoing, the judgment of the Summit County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, 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.

and substantive issues addressed in those cases are distinct from the instant matter and those cases do not stand for the blanket proposition that in all contexts an obligor may not raise defenses concerning the assignment of the obligation. *Bridge* is readily distinguishable because the mortgagor was a plaintiff seeking a declaratory judgment and the court addressed standing in the context of Ohio's declaratory judgment statute. *Livonia* addressed the question of the meaning of "record chain of title" under Michigan's foreclosure by advertisement statute. *See id.* at 99.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, J.
DISSENTING.

{¶17} I agree with the majority’s conclusion that “none of the evidence in the record demonstrates that BAC had possession of the Note at the time that it filed the complaint,” but I would not remand this matter for further proceedings. Instead, I would hold that BAC’s failure to demonstrate standing at the commencement of this foreclosure action requires dismissal of the complaint pursuant to the Supreme Court of Ohio’s decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 40; *see also Wells Fargo Bank NA v. Horn*, 9th Dist. No. 12CA010230, 2013-Ohio-2374.

APPEARANCES:

DAVID N. PATTERSON, Attorney at Law, for Appellant.

STACY L. HART and CARSON A. ROTHFUSS, Attorneys at Law, for Appellee.

Appendix A

The appendix cannot be displayed.

[Cite as *CitiMortgage, Inc. v. Roznowski*, 2012-Ohio-4901.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2012-CA-93
JAMES A. ROZNOWSKI, ET AL	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of
Common Pleas, Case No. 2008CV00894

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: October 22, 2012

APPEARANCES:

For Plaintiff-Appellee
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[Cite as *CitiMortgage, Inc. v. Roznowski*, 2012-Ohio-4901.]

Gwin, P.J.

{¶1} Defendants-appellants James and Steffanie Roznowski appeal a judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiff-appellees CitiMortgage, Inc., the successor by merger to ABN AMRO Mortgage Group, Inc. For the reasons that follow, we find we have no jurisdiction over the matter.

{¶2} This case came before us on an earlier appeal, in which we determined there was no final appealable order. *CitiMortgage Inc v. Roznowski*, 5th Dist. No. 2011CA00124, 2012-Ohio-74. We found the earlier judgment did not set forth the dollar amount of the balance due on the mortgage and did not reference any documents in the record that did.

{¶3} In response, the trial court entered a judgment on February 1, 2012. The court set forth the principal sum due plus the interest. In addition, it awarded “costs of this action, those sums advanced by plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for property inspections, appraisal, preservation and maintenance.” The court did not enter a dollar amount for any of those damages.

{¶4} Before addressing the merits of any appeal, we must first determine whether we have jurisdiction over the matter. If the parties to the appeal do not raise this jurisdictional issue, we may raise it sua sponte. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64, (1989), syllabus by the court. With few exceptions, the order under review must be a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *General Accident Insurance Co. v. Insurance Co. of North America*, 44 Ohio

St.3d 17, 20, 540 N.E.2d 266, (1989). An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. Ohio Constitution, Article IV, Section 3(B)(2) ; R.C. § 2505.02 .

{¶15} Ohio law recognizes an absolute right of redemption that is dual in nature, arising both from equity and statute. *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190. In *Hausman*, the Ohio Supreme Court explained that the mortgagor's equitable right of redemption is cut off by a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property. *Id.* After the decree of foreclosure has been entered, a mortgagor retains a statutory right of redemption under R.C. 2329.33 that may be exercised at any time prior to the confirmation of sale by depositing the "amount of the judgment" with all costs in the common pleas court.

{¶16} To redeem the property under R.C. 2329.33, "the mortgagor-debtor must deposit the amount of the judgment with all costs specified." *Women's Federal Savings Bank v. Pappadakes* 38 Ohio St.3d 143, 527 N.E.2d 792 (1988), paragraph one of the syllabus. The funds deposited must be available for use and division immediately. *Id.* at 146.

{¶17} In *Huntington National Bank v. Shanker*, Cuyahoga App. No. 72707, 1998 WL 269091, (May 21, 1998) , the court stated "It would be beyond reason to hold a trial court or magistrate to a standard that insists they state a definite sum of redemption," and that "[a]s long as the redemption value of a foreclosed property is ascertainable through normal diligence, the value, as stated by a finder of fact, will be upheld."

Likewise, courts have held it could be impractical to require the mortgagee to state with specificity the total amount due for additional charges because some of the damages would be accruing continuously through the date of the sheriff's sale. *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847 ¶ 25.

{¶8} In *Roznowski I*, we said:

“Generally, an order that determines liability but not damages is not a final, appealable order. *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863, at ¶ 31. There is an exception to this general rule, however, ‘where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.’ *State ex rel. White v. Cuyahoga Metro.Housing Auth.* (1997), 79 Ohio St.3d 543, 546, 684 N.E.2d 72. Thus, if ‘only a ministerial task similar to executing a judgment or assessing costs remains’ and there is a low possibility of disputes concerning the parties’ claims, the order can be appealed without waiting for performance of that ministerial task. *Id.*

Roznowski I at ¶25, citations sic.

{¶9} The valuation of the damages “for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums” may be mechanical and ministerial, and ascertainable by normal diligence, and thus the court was not required to list them in the judgment entry of foreclosure. However, we find the computation of the dollar amount for “expenses incurred in property inspections, appraisal, preservation and maintenance” are not easily ascertainable. This matter has been pending for nearly

five years, and the accrued expenses appellee claims could represent a substantial sum. In order to exercise their right of redemption, appellants must know the amount of money they must produce. Nothing in the record gives appellants or this court notice of the amount.

{¶10} Appellants may dispute the necessity, frequency, and/or reasonableness of the expenses, and any challenges to these expenses may be likely to produce a second appeal before the sale. Further, these damages are not accruing continuously until the sheriff's sale. The final appraisals will be ordered by the sheriff, and appellee may or may not be required to expend funds for further inspections or maintenance. If there is a delay, occasioned, for example, by another appeal, the court can award subsequent damages.

{¶11} Appellee represented at oral argument all of the above can be challenged at the confirmation hearing. We do not agree. The proper time to challenge the existence and the extent of mortgage liens is in the foreclosure action, not upon confirmation of a judicial sale. *National Mortgage Association v. Day*, 158 Ohio App. 3d 349, 2004-Ohio-4514, 815 N.E. 2d 730. Confirmation involves only a determination of whether a sale has been conducted in accord with law, such as whether the public notice requirements were followed and whether the sale price was at least two-thirds of lands appraised value. *Ohio Savings Bank v. Ambrose*, 56 Ohio St. 3d 53, 55, 563 N.E. 2d 1318 (1990). It is for this reason that only damages whose computation are "mechanical and ministerial" can be addressed at a hearing on confirmation of the sheriff's sale.

{¶12} We find the judgment entry appealed from is not a final appealable order, and the appeal is dismissed for lack of jurisdiction.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 1010

[Cite as *CitiMortgage, Inc. v. Roznowski*, 2012-Ohio-4901.]

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

CITIMORTGAGE, INC.

Plaintiff-Appellee

-vs-

JAMES A. ROZNOWSKI, ET AL

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2012-CA-93

For the reasons stated in our accompanying Memorandum-Opinion, the appeal is dismissed for lack jurisdiction. Costs to appellees.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

[Cite as *NovaStar Mtge., Inc. v. Akins*, 2008-Ohio-6055.]

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

NOVASTAR MORTGAGE, INC.,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2007-T-0111
	:	and 2007-T-0117
MARJORIE E. AKINS, et al.,	:	
Defendants,	:	
CAROL A. VILLIO,	:	
Defendant-Appellant.	:	

Civil Appeals from the Court of Common Pleas, Case No. 2006 CV 00632.

Judgment: Case No. 2007-T-0111 is affirmed; case No. 2007-T-0117 is dismissed.

Rachel A. Leier, Manley, Deas, Kochalski, L.L.C., 1400 Goodale Boulevard, Suite 200, Columbus, OH 43212 (For Plaintiff-Appellee).

Robert L. York, 138 East Market Street, Warren, OH 44481 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Carol A. Villio, appeals the judgment entered by the Trumbull County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, NovaStar Mortgage, Inc. ("NovaStar").

{¶2} Marjorie E. Akins is Villio's mother. Prior to May 18, 2005, Akins owned the residential property located at 1907 Parkwood Drive ("Parkwood Drive property") in



Warren, Ohio. On May 18, 2005, Akins conveyed the property to herself and Villio creating a survivorship tenancy. At that time, there were two prior mortgages on the Parkwood Drive property.

{¶3} Also on May 18, 2005, Akins and Villio entered into a mortgage loan agreement with NovaStar. Pursuant to the mortgage agreement, NovaStar was granted a priority lien on the Parkwood Drive property.¹ The amount of the loan was \$80,750.

{¶4} On May 18, 2005, Villio approved a "settlement statement." This document instructed the title agency how to distribute the proceeds from the loan. According to Villio's affidavit, on May 19, 2005, a second "settlement statement" was approved.² This second settlement statement revised the distribution of the loan proceeds.

{¶5} On May 18, 2005, NovaStar provided Villio and Akins a notice of right to rescind the loan agreement. This document notified Villio and Akins of their right to rescind the loan agreement until midnight on May 21, 2005. A new notice of right of rescission was not given to Akins and Villio when the distribution of the proceeds was revised by the second settlement statement.

{¶6} Pursuant to the mortgage note, Akins and Villio were to make monthly payments of \$655.55. Akins and Villio did not make the monthly payment due October 1, 2005. After collection efforts by NovaStar to allow Villio to make her obligations

1. The mortgage document designated Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as NovaStar's nominee, as the mortgagee. However, MERS later assigned its interest in the mortgage to NovaStar.

2. This second settlement statement is also dated May 18, 2005. However, since this matter is at the summary judgment stage, we will accept Villio's assertion that this document was executed on May 19, 2005.

under the note current were unsuccessful, NovaStar invoked the acceleration clause in the loan.

{¶7} In March 2006, NovaStar filed a complaint for foreclosure of the Parkwood Drive property.

{¶8} In May 2006, Villio sent a notice of rescission to NovaStar. This document indicated that Villio “elected to rescind” the mortgage loan transaction.

{¶9} In July 2006, with leave of court, Villio filed an answer to the complaint.³ In that same pleading, she filed counterclaims against NovaStar and a motion to dismiss the foreclosure complaint.

{¶10} NovaStar and Villio filed motions for summary judgment. In addition, both Villio and NovaStar filed briefs in opposition to the other party’s motion for summary judgment. NovaStar attached several documents to its motion for summary judgment, including: an affidavit from one of its employees, Matthew Montes; a copy of the note; a copy of the mortgage; a copy of the assignment from MERS to NovaStar; a copy of the correspondence sent to Akins and Villio indicating NovaStar’s intent to foreclose on the mortgage; a copy of the notice of right to cancel; and a copy of the rescission notice that Villio sent to NovaStar. Villio also attached several documents to her motion for summary judgment, including: her affidavit; a copy of the note; a copy of the mortgage; a copy of the first and second settlement statements; a copy of the notice of right to cancel; a copy of the rescission notice she sent to NovaStar; a copy of Akins’ responses to Villio’s request for admissions; and a copy of a \$50 check written by Akins to the title agency.

3. Akins was also named as a defendant. However, Akins separately defended the matter at the trial court level and is not a party on appeal.

{¶11} On September 14, 2007, the trial court issued a judgment entry, which, among other matters, (1) granted NovaStar's motion for summary judgment, (2) denied Villio's motion for summary judgment, and (3) denied Villio's motion to dismiss. The trial court included language in this judgment entry, pursuant to Civ.R. 54(B), that there was no just reason for delay. Villio timely appealed the trial court's September 14, 2007 judgment entry to this court, and that appeal was assigned case No. 2007-T-0111.

{¶12} On October 22, 2007, the trial court issued an "agreed judgment entry and decree of foreclosure."⁴ Therein, the trial court entered judgment in favor of NovaStar and against Villio "in the amount of \$80,619.43, plus interest thereon at the rate of 9.10% per annum from September 1, 2005, plus late charges, costs and advances, all as provided in the Note and Mortgage." Villio has also appealed the trial court's October 22, 2007 judgment entry to this court, and that appeal was assigned case No. 2007-T-0117. On appeal, this court has consolidated case No. 2007-T-0111 and case No. 2007-T-0117 for all purposes.

{¶13} Villio raises four assignments of error. Her first and third assignments of error are:

{¶14} "[1.] The court below erred in granting the motion for summary judgment [filed] by Appellee NovaStar upon the issue of the enforceability of the Promissory Note and the Mortgage.

4. While this judgment entry was captioned as an agreed judgment entry, Villio's counsel did not sign the judgment entry and specifically responded to the proposed judgment entry with a memo to NovaStar's counsel, which stated, in part, "the judgment entry you propose is wholly inappropriate and you do not have permission to sign my consent." (Emphasis sic.) However, since this judgment entry was signed by the trial court, we will proceed as though it is a valid entry.

{¶15} “[3.] The court below erred in denying the motion for summary judgment by Appellant Villio upon the issue of the enforceability of the Promissory Note and the Mortgage.”

{¶16} Due to the similar nature of these assigned errors, they will be addressed in a consolidated analysis.

{¶17} Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. Civ.R. 56(C). The standard of review for the granting of a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶18} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R.

56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶19} ****

{¶20} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' [*Dresher v. Burt*, 75 Ohio St.3d at 276.]" *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40-42. (Emphasis sic.)

{¶21} Villio does not challenge the trial court's finding that she was in default on the mortgage note. Instead, she argues that the trial court erred by finding that her notice of rescission was not valid. Thus, we will focus our analysis on this issue.

{¶22} Since this transaction conveyed a security interest in a residential property, which was the borrowers' primary residence, it was subject to the provisions of the Federal Truth in Lending Act ("TILA"). See Section 1601, Title 15, U.S.Code, et

seq. Specifically relevant to the instant matter is Section 1635, Title 15, U.S.Code, which provides, in pertinent part:

{¶23} "(a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section."

{¶24} A lender's failure to give notice as required by TILA will extend the time period for a borrower's right to rescind "up to three years." *ContiMortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28, 2001 Ohio App. LEXIS 3410, at *7. (Citations omitted.)

{¶25} The trial court noted that Section 1635, Title 15, U.S.Code permits the borrower three days to rescind the agreement from the date the rescission materials are

provided to the borrower or the date the transaction is consummated. In this matter, the trial court concluded that both of these events occurred on May 18, 2005, thereby providing Villio until midnight on May 21, 2005 to rescind the agreement.

{¶26} It is undisputed that NovaStar properly provided Villio with notice of her right to rescind the transaction on May 18, 2005. Villio argues that the second draft of the settlement statement amounted to a novation of the agreement and, as a result, she was entitled to a new notice of right to rescind. We disagree.

{¶27} “A novation is generally understood as a mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation ***.” *Huntington Natl. Bank v. Martin* (Mar. 12, 1999), 11th Dist. No. 98-L-082, 1999 Ohio App. LEXIS 936, at *6, citing 18 Ohio Jurisprudence 3d (1997) 204-205, Contracts, Section 283.

{¶28} “In order to effect a valid novation, all parties to the original contract must clearly and definitely intend the second agreement to be a novation and intend to completely disregard the original contract obligation.” *Kruppa v. All Souls Cemetery of the Diocese of Youngstown* (Feb. 22, 2002), 11th Dist. No. 2001-T-0029, 2002 Ohio App. LEXIS 773, at *14, quoting *Moneywatch Cos. v. Wilbers* (1995), 106 Ohio App.3d 122, 125.

{¶29} The settlement statement was drafted on a form provided by the United States Department of Housing and Urban Development (“HUD”). See, e.g., *Podany v. Real Estate Mtge. Corp. Escrow Co.* (Dec. 16, 1999), 8th Dist. No. 75307, 1999 Ohio App. LEXIS 6083, *4, fn. 3. “A HUD-1 Settlement Statement is a form that lenders must provide to borrowers to identify all settlement (or closing) costs on a federally related

mortgage loan.” *Schuetz v. Banc One Mtge. Corp.* (C.A.9, 2002), 292 F.3d 1004, 1008, fn. 2, citing Section 2603, Title 12, U.S.Code. See, also, *Vega v. First Fed. S. & L. Assoc. of Detroit* (C.A.6, 1980), 622 F.2d 918, 923. The HUD settlement Statement must also “inform the borrowers of the fees that they are paying in the loan transaction.” *Mills v. Equicredit Corp.* (E.D.Mich.2003), 294 F.Supp.2d 903, 908.

{¶30} We note the settlement statement was an agreement with the title agency regarding how to distribute the proceeds of the loan. The revised settlement statement did not change the fees charged; instead, it merely changed the designated recipients of some of the proceeds. Specifically, the payoff amounts of two accounts at First Place Bank were collectively reduced by \$56.76 in the revised settlement statement. Also, an “additional disbursement exhibit” was attached to both of the settlement statements. The total distribution amount increased by \$3,380 in the revised settlement statement. In the initial settlement statement, Villio and Akins were to receive a cash distribution of \$3,089.35. However, in the revised settlement statement, they owed \$50. The revised settlement statement shows a “broker credit” in the amount of \$183.89. Accordingly, when the amount Villio and Akins were to receive in the initial settlement statement (\$3,089.35) is added to the amount they owed in the revised settlement statement (\$50), the broker credit (\$183.89), and the difference between the payoff amount for the First Place accounts (\$56.76), the total comes to \$3,380 – the exact amount of the increase of the additional distributions. In sum, Villio and Akins decided they wanted more money of the loan proceeds to go toward paying off existing debt. It appears Novastar made efforts to accommodate Villio and Akins’ wishes.

{¶31} We emphasize that none of the terms of the underlying note or mortgage changed as a result of the revised settlement statement. Specifically, the same amount of money was borrowed from NovaStar, and the same repayment conditions remained in effect.

{¶32} Moreover, while the settlement statement was related to this transaction, it was a separate contract with its own terms. The settlement statement itself did not convey any interest in real property; therefore, it was not necessary to comply with TILA by issuing a new notice of right to rescind due to the revisions of the settlement statement.

{¶33} Finally, even if there were technical mistakes in NovaStar's compliance with TILA, we do not believe those mistakes permit Villio to rescind the mortgage nearly one year after she executed the documents. NovaStar cites the following language from the Fourth Appellate District:

{¶34} "In sum, we agree with the trial court's conclusion that any TILA mistakes in the instant case constitute technical (if not hyper-technical) mistakes and do not violate the spirit of the law. We therefore find no error in the court's judgment that appellant could not rescind the mortgage loan. Our holding is supported by several other factors as well. First, whatever mistakes that may have occurred in the loan closing, neither appellant nor her mother suffered any apparent prejudice. We find no evidence to show that appellant was damaged or that appellant wanted to rescind the loan. Only after appellant was in default and foreclosure proceedings had begun (approximately eighteen months after the loan closing) did appellant express her desire

to rescind the loan." *ContiMortgage Corp. v. Delawder*, 2001 Ohio App. LEXIS 3410, at *16.

{¶35} In this matter, Villio did not seek to rescind the loan agreement within three days of May 18th or 19th of 2005. Instead, she provided NovaStar with her notice of rescission in *May 2006*. This was nearly one year after the mortgage loan was executed and after NovaStar had initiated foreclosure proceedings.

{¶36} The trial court did not err by granting NovaStar's motion for summary judgment and denying Villio's motion for summary judgment.

{¶37} Villio's first and third assignments of error are without merit.

{¶38} Villio's second assignment of error is:

{¶39} "The court below erred in granting judgment on September 14, 2007 in favor of Appellee NovaStar and against Appellant Villio for money judgment on the Promissory Note and Mortgage that is so vague and uncertain that Appellant cannot ascertain the amount of the judgment."

{¶40} In its September 14, 2007 judgment entry, the trial court granted NovaStar's motion for summary judgment. The trial court included language in the judgment entry that "[t]his is a final and appealable order and there is no just reason for delay." The inclusion of this language rendered the legal issues contained in the judgment entry immediately appealable, even though other issues remained pending before the trial court. See Civ.R. 54(B). Further, we note the trial court included the following language in its September 14, 2007 judgment entry: "Plaintiff NovaStar shall submit a proposed entry in foreclosure upon receipt of this Judgment Entry."

{¶41} The language of the trial court's September 14, 2007 judgment entry clearly indicates the trial court's intention that the judgment entry was not to serve as a final judgment entry outlining all of Villio's obligations. Instead, the language of the judgment entry provided Villio a means to immediately appeal the legal issues – addressed in our analysis of her first and third assignments of error – to this court.

{¶42} Since the trial court's September 14, 2007 judgment entry was not intended to be the final judgment of the case, the judgment was not vague or uncertain due to its failure to detail the parties' rights and obligations.

{¶43} Villio's second assignment of error is without merit.

{¶44} Villio's fourth assignment of error is:

{¶45} "The court below erred in entering judgment on October 22, 2007 in favor of Appellee NovaStar and against Appellant Villio for money judgment on the Promissory Note and Mortgage that is so vague and uncertain that Appellant cannot ascertain the amount of the judgment or amount that she must pay to exercise her right of redemption with reasonable certainty."

{¶46} The Fourth District has held:

{¶47} ""[T]he trial court must *** enter its own independent judgment disposing of the matters at issue between the parties, such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined. In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court."" *Burns v. Morgan*, 165 Ohio App.3d 694, 2006-Ohio-1213, at ¶10, quoting *Yahraus v. Circleville* (Dec. 15, 2000), 4th Dist. No. 00CA04, 2000 Ohio App. LEXIS

6315, at *9, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist. No. 90-T-4396, 1991 Ohio App. LEXIS 1063, at *7 (Ford, J., concurring).

{¶48} In this matter, the trial court's October 22, 2007 judgment entry entered judgment "in the amount of \$80,619.43, plus interest thereon at the rate of 9.10% per annum from September 1, 2005, plus late charges, costs and advances, all as provided in the Note and Mortgage." Further, the court stated that Villio owed NovaStar "the sums found to be owing to it as set forth above, together with interest due thereon, and the advances made on behalf of the Property for real estate taxes, insurance premiums and property protection and maintenance by [NovaStar.]"

{¶49} Regarding the interest and late fees, these matters are set forth in the note. While the better practice would be for the trial court to specify the exact interest rate and late charges in the judgment entry itself, the fact that these terms are unambiguously stated in the note does not render the judgment entry deficient in regard to these items. This is because it is possible for Villio to ascertain the amount of the interest and late fees by referencing the note and performing her own computations.

{¶50} The judgment entry also provides that Villio pay to NovaStar for its advance on real estate taxes and insurance premiums. The judgment entry does not provide a cost of these purported advancements. Further, the record does not contain any evidence that NovaStar made any advancements for real estate taxes or insurance premiums.

{¶51} We are also troubled by the trial court's assessment of "costs." In Paragraph 7(E), the note is entitled "Payment of Note Holder's Costs and Expenses" and provides:

{¶52} "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees."

{¶53} There is nothing in the record to demonstrate NovaStar's costs and expenses or whether those costs and expenses were reasonable.

{¶54} In addition, the trial court's judgment entry requires Villio to reimburse NovaStar for funds it advanced for "property protection." Paragraph 9 of the mortgage provides, in part:

{¶55} "[If certain preconditions occur,] Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the property."

{¶56} Again, there is nothing in the record to indicate what, if any, funds NovaStar expended relating to property protection. Further, if NovaStar did advance such funds, there is nothing in the record to show that those expenditures were "reasonable" and "appropriate."

{¶57} The trial court's October 22, 2007 judgment entry is vague and uncertain, because it does not permit Villio to determine her obligations as they existed at the time of the decree with reasonable certainty. Accordingly, the trial court's October 22, 2007 judgment entry is "void for uncertainty." *Short v. Short*, 6th Dist. No. F-02-005, 2002-Ohio-2290, at ¶10. (Citations omitted.) Further, since an appeal cannot arise from a

void judgment, the trial court's October 22, 2007 judgment entry is not a final, appealable order. *Id.*

{¶58} We recognize, as NovaStar contends, there will be costs incurred by the lender that will not be known until the time of confirmation of sale. However, to the extent specific costs of the lender have been incurred and are known at the time of the decree of foreclosure, those specific costs should be included in the decree. Otherwise, the debtor is being asked to review and approve a judgment without knowing the amount. This could result in an improperly-motivated lender submitting exorbitant statements for lawn care, insurance, maintenance, etc. Foreclosure proceedings can be time- and resource-intensive matters. However, at the time the final judgment is entered, the mortgage company has most likely expended the majority of the costs associated with the foreclosure case. Thus, the mortgage company should submit an amount certain that is owed by the borrower for the principal, interest, and fees at the time of the final judgment. If the specific costs are submitted, the borrower has an opportunity to object before it becomes a judgment. Further, this "owed to date" approach permits the trial court to review the charges and make sure that they are accurate and reasonable. This method would continue to protect the lender's interests, because the final decree could provide for an allowance of any additional costs incurred between the date of the decree and the date of the confirmation of sale. The confirmation of sale would then reflect reimbursement of those additional costs.

{¶59} Villio's fourth assignment of error has merit to the extent indicated.

{¶60} The judgment of the trial court in case No. 2007-T-0111 is affirmed. The appeal in case No. 2007-T-0117 is dismissed due to lack of a final, appealable order.

{¶61} As a result of our decision, this matter will return to the trial court's docket.

A review of the trial court's docket indicates that the confirmation of sale has not occurred. Thus, the trial court is to issue a new judgment and decree of foreclosure, to replace the October 22, 2007 judgment entry, which is void. Consistent with this opinion, the new judgment entry and decree shall adequately and specifically state the rights and obligations of the parties. Thereafter, this matter shall proceed according to law.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.