

IN THE SUPREME COURT OF OHIO

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR HSI
ASSET SECURITIZATION
CORPORATION TRUST 2007-HE2,

Plaintiff-Appellee,

vs.

RONALD D. GREEN, *et al.*,

Defendant-Appellant.

* CASE NO. 2014-0639
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* **On Appeal from the Licking County**
* **Court of Appeals, Fifth Appellate**
* **District, Case No. 2013 CA 00050**
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**MEMORANDUM OF PLAINTIFF-APPELLEE
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE
FOR HSI ASSET SECURITIZATION CORPORATION
TRUST 2007-HE2, IN RESPONSE
TO MEMORANDUM IN SUPPORT OF JURISDICTION**

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HE2*

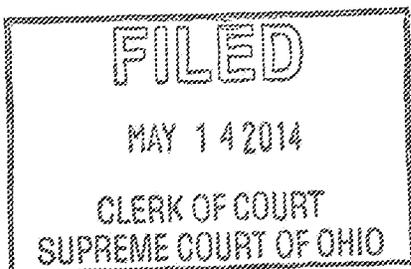


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**RESPONSE TO EXPLANATION OF WHY THIS CASE IS
OF PUBLIC OR GREAT GENERAL INTEREST**

Plaintiff Deutsche Bank National Trust Company (“Deutsche Bank”), as Trustee for HSI Asset Securitization Corporation Trust 2007-HE2 (the “Trust”), filed this foreclosure action five years ago, attaching to the Complaint a copy of the promissory note, indorsed in blank, and an assignment of mortgage. Defendants Ronald and Sharon Green (the “Greens”) did not appear and the trial court entered a default judgment.

The Greens filed a motion for relief from the default judgment, lost, and did not appeal. The Greens filed a second motion for relief from judgment based on their assertion that Deutsche Bank lacked standing. The Trial Court overruled that motion, the Greens appealed to the Fifth District Court of Appeals, lost, and did not appeal to this Court.

Undeterred, years after judgment, the Greens filed a third post judgment motion (packaged as a “common law motion to vacate”), again raising standing. The trial court overruled that motion, and the Fifth District affirmed, reasoning that res judicata barred the perpetual filing of post judgment motions under the same theory.

The Greens’ Memorandum now urges that this Court’s decision in *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214 somehow created an exception to res judicata, and allows borrowers to repeatedly challenge a lender’s standing. Nothing in *Schwartzwald* remotely suggested that rule of law, and nothing in this case presents a matter of great general or public interest. This Court should decline jurisdiction.

STATEMENT OF THE CASE

On July 23, 2009, Deutsche Bank filed this action in the Licking County Common Pleas Court (“Trial Court”) seeking judgment on a defaulted promissory note and to foreclose a mortgage which secured its repayment. The Greens did not answer and, on August 28, 2009, the

Trial Court entered a default judgment. On May 27, 2009, the mortgaged property was sold at a Sheriff's Sale.

On February 9, 2012, the Greens filed a Motion for Relief from Judgment ("First Motion"), seeking relief both from the default judgment and the entry confirming the Sheriff's Sale. The Trial Court held that there was no basis to set aside the default judgment, but because Deutsche Bank had filed a motion to withdraw the Sheriff's Sale prior to sale, the confirmation entry should be vacated and the property be resold. The Greens did not appeal.

On May 9, 2012, the Greens filed a Motion for Relief from Judgment under Civ.R. 60(B) ("Second Motion"), arguing that Deutsche Bank did not have standing when it filed the Complaint. On May 9, 2012, the Trial Court denied the Second Motion, and on March 14, 2013, the Fifth District affirmed, holding that the Second Motion was barred by res judicata because the Greens did not appeal the denial of the First Motion. The Greens did not appeal the Fifth District's decision to this Court.

On April 25, 2013, the Greens filed a Motion to Vacate Judgment ("Third Motion"). On May 23, 2013, the Trial Court denied the Third Motion. On February 5, 2014, the Fifth District affirmed, holding that the Third Motion was barred by res judicata. On February 11, 2014, the Greens filed a Motion for Reconsideration, which the Fifth District denied on March 10, 2014.

STATEMENT OF THE FACTS

On November 24, 2006, the Greens executed a Note in favor of Decision One Mortgage Company, LLC ("Decision One"), and Mortgage in favor of Mortgage Electronic Registration Systems ("MERS"), as nominee for Decision One and its successors and assigns. The Note was subsequently indorsed in blank by Decision One and transferred to Deutsche Bank. On July 8,

2009, MERS, as nominee for Decision One, executed an Assignment of Mortgage to Deutsche Bank.

On July 23, 2009, Deutsche Bank filed the Complaint, seeking the balance due on the Note and to foreclose the Mortgage. Attached to the Complaint was a copy of the Note indorsed in blank by Decision One, the Mortgage, and an Assignment of Mortgage. On August 27, 2009, Deutsche Bank filed a Motion for Default Judgment, and on August 28, 2009, the Trial Court entered a default judgment.

On March 22, 2011, Deutsche Bank issued a Notice of Sheriff's Sale. On May 27, 2011, Deutsche Bank filed a Motion to Withdraw the property from Sheriff's Sale, and the Trial Court granted the Motion. Nonetheless, on May 27, 2011, the Sheriff's Sale proceeded.

On February 9, 2012, the Greens filed the First Motion, arguing that they needed discovery to uncover meritorious defenses, and that the Property should not have been sold because the Motion to Withdraw was granted. On February 13, 2012, the Trial Court denied the First Motion as to the default judgment, but agreed that the Sheriff's Sale should not have proceeded in the face of the Motion to Withdraw, and vacated the sale. The Greens did not appeal.

On May 9, 2012, the Greens filed the Second Motion, arguing, among other things, that Deutsche Bank did not have standing because the Note and Mortgage were not transferred to the Trust in accordance with the pooling and servicing agreement ("PSA") for the Trust. On May 9, 2012, the Trial Court denied the Second Motion, and the Greens appealed, arguing Deutsche Bank lacked standing. On March 14, 2013, the Fifth District affirmed, holding the Second Motion was barred by res judicata because the Greens could have raised standing in the First

Motion, and that the law does not permit serial motions for relief. *Deutsche Bank v. Green*, 5th Dist. App. No. 12 CA 47, 2013-Ohio-977. The Greens did not appeal.

On April 25, 2013, the Greens filed the Third Motion “under the common law,” repeating their arguments that Deutsche Bank lacked standing because the Note and Mortgage were not transferred to the Trust in conformity with the PSA. On May 23, 2013, the Trial Court denied the Third Motion, and on February 5, 2014, the Fifth District affirmed, finding the arguments of the Third Motion barred by res judicata. *Deutsche Bank v. Green*, 5th Dist. App. No. 13 CA 50, 2014-Ohio-408.

RESPONSE TO APPELLANTS’ PROPOSITIONS OF LAW

Appellants’ Proposition of Law No. I

A parties’ [sic] standing is an integral part of the court’s jurisdiction, defined as the court’s original constitutional grant of authority, often referred to as subject matter jurisdiction, the lack of which results in a void judgment.

Appellants’ Proposition of Law No. II

Ohio recognizes the common law right of the trial court to vacate a judgment which is void. *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph three of the syllabus, followed.

Appellants’ Proposition of Law No. III

A mortgagor/debtor has the authority to challenge an assignment by the mortgagee/creditor to the extent that the assignment would be rendered void in order to demonstrate Plaintiff [sic] lack of standing to file the foreclosure complaint.

None of the Greens’ propositions of law affect the outcome of this case. The Greens failed to challenge standing before default or in the First Motion, precluding them from raising the issue in a later motion. The Greens then **did** challenge standing in the Second Motion, lost in

the Trial Court, lost in the Fifth District, and then failed to appeal the Fifth District's decision to this Court, rendering the issue barred by res judicata again.

Even if res judicata did not apply, attaching bearer paper to the Complaint was sufficient to show that Deutsche Bank had standing. Even if the Greens' proposition of law were accepted and adopted, it would not change the outcome of this case. Jurisdiction should be declined.

A. The Third Motion is barred by res judicata.

The Greens' First and Second Propositions of Law argue that a plaintiff's lack of standing precludes the Court from obtaining jurisdiction over a matter, that a judgment rendered by a court when a party lacks standing to invoke it renders any judgment that was issued "void," and that, as a result, a party's standing can be challenged at any time. Even if they had merit (and they do not), as to the Greens, these arguments are irrelevant.

This Court has repeatedly held that res judicata prevents a litigant from re-litigating an issue that was or could have been raised in an earlier proceeding between the same parties. *Vectren Energy Delivery of Ohio, Inc. v. Public Utilities Commission*, 113 Ohio St.3d 180, 186, 2007-Ohio-1386-863 N.E.2d 599. A post-judgment motion is not a substitute for appeal, and does not give parties the ability to extend the time for filing a notice of appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986). When a party elects not to appeal a final judgment, that party may not later challenge the judgment on a motion to vacate using grounds that could have been raised in an appeal from that judgment. *Id.*; see also *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43 and *State ex rel. Henderson v. Maple Heights Civil Service Com.*, 63 Ohio St.2d 39, 41, 406 N.E.2d 1105 (1980) (holding party who failed to pursue appellate remedies could not collaterally attack a jurisdictional determination).

The reason for this rule is obvious: “There must be an end to litigation someday, and free, calculated, deliberate choices” should not be disregarded. *Doe*, 28 Ohio St.3d at 131 (quoting *Ackermann v. United States*, 340 U.S. 193, 198 (1950)).

Res judicata attaches to determinations of subject matter jurisdiction. Restatement (Second) of Judgments, § 12, cmt. c. (“*Subject matter jurisdiction actually litigated in original action*. When the question of the tribunal’s jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion.”); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (“[Res judicata] also applies to jurisdictional questions. After a contest these cannot be relitigated.”); 11 Wright, Miller, & Kane, *Federal Practice and Procedure*, § 2862 (2012) (“A court’s determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated”).

This Court has applied these principles to bar post judgment attacks based on a complainant’s supposed lack of standing. *Mantho v. Board of Liquor Control*, 162 Ohio St. 37, 120 N.E.2d 730 (1954); *Incorporated Consultants v. Todd*, 175 Ohio St. 425, 195 N.E.2d 788 (1964).

This Court has also applied these principles to post-judgment motions. “Res 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.” *Harris*, 2006-Ohio-1934 at ¶8, quoting *Beck-Durell Creative Dept., Inc. v. Imaging Power, Inc.*, 10th Dist. Franklin No. 02 AP-281, 2002-Ohio-5908, ¶16.

Nothing in *Schwartzwald* changed these rules. In that case, the borrowers appeared in the case, defended on the issue of standing, filed a direct appeal from the decision overruling their motion for summary judgment, and then filed a timely appeal to this Court. *Schwartzwald*, 134 Ohio St.3d at 14. *Schwartzwald* said nothing about res judicata, much less sub silentio overruled more than a dozen of this Court’s long-standing precedents.

Here, the Greens did not answer the Complaint, a default judgment was entered, and the Greens did not appeal. Their failure to challenge standing prior to judgment barred them from attempting to raise the issue in a post-judgment motion. *Doe*, 28 Ohio St.3d at 131; *Mantho*, 162 Ohio St. at 41-44; *Todd*, 175 Ohio St. at 427-428.

In any event, the Greens then filed two motions for relief from the default judgment, the latter of which argued standing. The Trial Court overruled the First Motion, and the Greens did not appeal. The Trial Court then overruled the Second Motion, the Fifth District affirmed, and the Greens did not appeal that decision to this Court. The Greens then filed a Third Motion, which the Fifth District again overruled. The Fifth District’s holding that the Third Motion was barred by res judicata was consistent with this Court’s long standing precedent. Opinion, ¶26, citing *Harris*, 2006-Ohio-1934 at ¶8.¹

And that makes the Greens’ First and Second Propositions of Law moot. Even if, as the Greens advocate, borrowers could challenge standing post-judgment, the Greens *did so* in the

¹ The Greens suggest that this case is related to *Bank of America, N.A. v. Kuchta*, Case. No. 2013-0304, pending before the Court on a certified conflict question as to whether a lack of standing can be challenged in a post-judgment motion. In *Kuchta*, the defendants raised standing in their answer, summary judgment was entered, and the defendants did not appeal. *Bank of Am. v. Kuchta*, 9th Dist. Medina No. 12CA0025-M, 2012-Ohio-5562, ¶¶10. The defendants then filed a motion for relief from judgment raising the standing issue. *Id.*, ¶¶15-16. The question in *Kuchta* is whether res judicata bars a defendant who raised standing during the underlying case from again raising the issue as grounds for relief from judgment. The determinative issue in this case is the res judicata effect of losing multiple motions for relief from judgment.

Second Motion, and lost. If the Fifth District erroneously affirmed the Trial Court's dismissal of the Second Motion, the Greens remedy was to appeal to this Court, not to file a Third Motion. Their "deliberate choice" in not appealing precludes further litigation. *Doe*, 28 Ohio St.3d at 131. As to the Greens, the First and Second Propositions of Law are irrelevant, because even if the Court were to adopt them, they would not matter. The Court should not accept jurisdiction over these Propositions.

B. The argument on standing is procedurally irrelevant.

The Greens' Third Proposition of Law contends that a mortgagor should have standing to challenge an assignment of a mortgage so they can show the assignment was invalid between the assignor and assignee. In this case, the Greens argue that the Assignment of Mortgage was executed after the cutoff date in the PSA, and that this supposedly means that Deutsche Bank lacks standing. Memorandum, 7-9. This argument has no merit.

As an initial matter, this argument is unavailable to the Greens for the reasons stated above. A party is not permitted successive post-judgment motions. *Harris*, 2006-Ohio-1934 at ¶8. If the Greens believed they were entitled to challenge the mortgage assignment, their option to do so was before judgment, or if they were capable of satisfying the other requirements of Civ.R. 60(B), in their First Motion. In any event, the Greens *did raise* this issue in the Second Motion, lost, appealed to the Fifth District, lost, and did not appeal to this Court. The Greens do not get perpetual bites at the same apple. *Id.* Because res judicata precludes them from again raising the same issues, as to them, their Third Proposition is moot.

Regardless, even if the Greens were permitted to (again) attack the assignment, the record in this case shows that Deutsche Bank had standing. The right to enforce a negotiable instrument is determined by whether the plaintiff qualifies as a "person entitled to enforce" under R.C.

1303.31(A) (U.C.C. §3-301). A “person entitled to enforce” includes a “holder,” which includes party in possession of an instrument which has been indorsed in blank. R.C. 1301.01(T) (U.C.C. §1-201); R.C. 1303.25(B) (U.C.C. § 3-205).

Here, the Note was originally payable to Decision One, who indorsed the Note in blank. Accordingly, Deutsche Bank was a “holder” of the Note, with standing to enforce. R.C. 1301.01(T); R.C. 1303.31(A); *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶¶47-54 (7th Dist.).

Likewise, the right to enforce a mortgage is based on being the person entitled to enforce the note whose payment which it secures, regardless of whether there is a separate assignment of the mortgage. *Kernohan v. Manss*, 53 Ohio St. 118, 41 N.E. 258 (1895); *see, also, Marcino*, 181 Ohio App.3d at 332, 336; *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶¶ 21-22; *Cent. Mtge. Co. v. Webster*, 2012-Ohio-4478, 978 N.E.2d 963 (5th Dist.); *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. Licking No. 08CA60, 2009-Ohio-1855, ¶¶32-36; *Bank of N.Y. v. Dobbs*, 5th Dist. Knox No. 2009-CA-000002, 2009-Ohio-4742, ¶¶29-30; *Deutsche Bank Natl. Trust Co. v. Hansen*, 5th Dist. Fairfield No. 2010 CA 00001, 2011-Ohio-1223, ¶¶46-47 and Official Comment 9 to R.C. 1309.203. Here, as a holder of the Note, Deutsche Bank was also the party entitled to foreclose the Mortgage, regardless of the Assignment of Mortgage or the terms of the PSA.

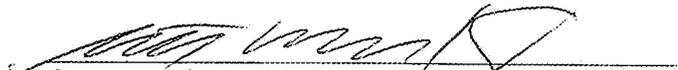
Accordingly, the Greens’ Third Proposition of Law—that they should have the ability to challenge the Assignment of Mortgage because it did not comply with the PSA—would have no impact on the outcome of this case. Even if, as the Greens would have it, and the Assignment of Mortgage were invalid, it would not matter, because Deutsche Bank had standing to enforce both

the Note and Mortgage as the holder of bearer paper. There is no issue of great general or public interest. The Court should decline jurisdiction.

CONCLUSION

The Fifth District did not err in following this Court's long-standing precedents that res judicata precluded the Greens from filing repeated post-judgment motions. In any event, their theories of standing are without merit. There was no error. There is no reason for this Court to accept jurisdiction.

Respectfully submitted,



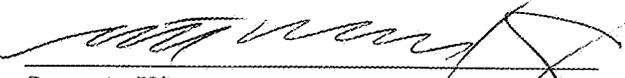
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S. ordinary mail, postage prepaid, this 13th day of May, 2014.

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