ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0791

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4,	*	**On Appeal from the Summit County Court of Appeals, Ninth Appellate District**
Plaintiff-Appellant,	*	**Court of Appeals Case No. CA-26970**
v.	*	
GLENN E. HOLDEN, *et al.*,	*	
Defendants-Appellees.	*	

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4

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EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL INTEREST

This case again presents issues arising from *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In *Schwartzwald*, this Court held that a foreclosure plaintiff could not cure a lack of standing with a post-complaint assignment of mortgage. *Schwartzwald* did not specifically address what elements of proof a foreclosure plaintiff was required to possess to demonstrate standing.

In this particular case, Plaintiff-Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 ("DBNTC"), filed a complaint attaching a copy of the promissory note in favor of the original lender, but also included the mortgage and the assignment of mortgage to DBNTC. As part of its summary judgment submission, DBNTC demonstrated that it had possessed the original promissory note, indorsed in blank, for years prior to filing the complaint. In *Deutsche Bank Natl. Trust Co. v. Holden*, 9th Dist. No. 26970, 2014-Ohio-1333 (the "Opinion"), the Ninth District reversed the entry of summary judgment in favor of DBNTC, holding that there was a genuine issue of material fact created by the differences between the copy of the promissory note attached to the complaint and the original promissory note submitted as part of summary judgment. Opinion, ¶ 15.

In *SRMOF 2009-1 Trust v. Lewis*, Case No. 2014-0485, this Court accepted a certified conflict question on exactly what a plaintiff is required to prove:

> 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?

05/14/2014 Case Announcements, 2014-Ohio-2021. *Lewis* will be resolving a conflict between the Twelfth District Court of Appeals in *SRMOF 2009-1 Trust v. Lewis*, 12th Dist. Nos. CA2012-11-239 and CA2013-05-068, 2014-Ohio-71, and the Ninth District Court of Appeals in *BAC Home Loan Servicing v. McFerren*, 9th Dist. No. 26384, 2013-Ohio-3228.

In *Lewis*, the Twelfth District held that the recorded mortgagee at the time of filing suit possessed standing, even if it could not affirmatively demonstrate an interest in the note at the time of filing. 2014-Ohio-71, ¶ 17. *McFerren*, from the Ninth District, is the opposite. Although the plaintiff in that case was the recorded mortgagee at the time of filing, the failure to introduce summary judgment evidence of possession of the promissory note at the time of filing mandated reversal. 2013-Ohio-3228, ¶ 11.

This case presents issues squarely between the Court's certified conflict – and consequently presents an issue of great general interest.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

On August 12, 2011, DBNTC filed a Complaint seeking to recover the balance due on a Note and to foreclose on the Mortgage executed by Defendants-Appellees Glenn and Ann Holden. On March 6, 2012, the Holdens filed a Counterclaim.

On November 16, 2012, the Holdens filed a Motion for Summary Judgment. DBNTC filed its own summary judgment motion on November 20, 2012.

After briefing, on April 3, 2013, the trial court issued an order granting DBNTC's Motion and denying the Holdens' Motion. On April 30, 2013, the trial court issued its order of judgment and decree of foreclosure.

The Holdens appealed. After briefing, on March 31, 2014, the Ninth District issued the Opinion.

Statement of the Facts

On September 1, 2005, Glenn Holden executed the Note in favor of Novastar Mortgage, Inc. ("Novastar") in the amount of $69,300.00. To secure the Note, the Holdens executed the Mortgage, encumbering the property located at 1050 Shadybrook Drive, Akron, Ohio (the "Property"). The Mortgage identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee on behalf of Novastar and its assigns, and was recorded on September 15, 2005.

The Note was indorsed in blank and delivered to JPMorgan Chase Bank, N.A. ("Chase") as servicer for DBNTC in December 2005. Chase is in possession of the original Note and has had it since that date.

The Holdens admitted they had not made a payment on the account after July 2009.

MERS executed an Assignment of Mortgage in favor of DBNTC on September 17, 2010, which was recorded on September 28, 2010.

On August 12, 2011, DBNTC filed the Complaint, stating two claims: Count One sought to recover the balance due on the Note, and Count Two sought to foreclose the Mortgage. As Glenn Holden had discharged all liability in bankruptcy, and Ann Holden had no personal liability on the Note, the action only sought to foreclose the Mortgage and recover the amounts due.

The copy of the Note attached to the Complaint was from the date of execution and did not contain an indorsement. The copy of the Note attached to the Complaint contained a stamp on its face stating that it was a "true and accurate copy of the original." The Mortgage and the Assignment of Mortgage were attached to the Complaint.

In support of its summary judgment motion, DBNTC submitted an affidavit detailing the process by which Chase came to possess the Note as servicer for DBNTC in 2005, and authenticated a copy of the Note with the blank indorsement. The copy authenticated in the affidavit did not contain the "true and accurate copy of the original" stamp (because it was the original). Furthermore, in the depositions of the Holdens and Chase employee Frank Dean, the original Note containing the blank indorsement was introduced to the deponents and an identical copy was introduced as an exhibit.

The Holdens had filed counterclaims relating to the assertion that DBNTC was not the holder of the Note at the time the Complaint was filed and that the Assignment of Mortgage was invalid. They stated claims for violations of the Fair Debt Collection Practices Act, invasion of privacy, Ohio's Consumer Sales Practices Act, and fraud.

The trial court entered summary judgment in favor of DBNTC on its direct claims and on the Holdens' counterclaims.

The Holdens appealed. In the Opinion, the Ninth District held that DBNTC "failed to explain why Chase would have an unindorsed copy of the note in its possession . . . " and that "this creates a genuine issue of material fact . . . ." Opinion, ¶ 13. The Court also noted that it could not "disregard the copy of the note attached to the complaint when it is inconsistent with another copy of the note produced in support of summary judgment." *Id.* As a consequence, the Ninth District concluded that "there is a genuine issue of material fact as to whether Deutsche Bank was the holder of the note at the time the complaint was filed." *Id.*, ¶ 15. The Court did not address the impact of DBNTC's status as the recorded mortgagee on the standing analysis as that issue was not challenged by the Holdens on appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1 If standing is challenged, a party seeking to foreclose a mortgage based on a defaulted promissory note is only required to demonstrate an interest in either the note or mortgage.

In *Schwartzwald,* Federal Home Loan Mortgage Corporation ("Freddie Mac") filed a foreclosure complaint to which the defendants timely filed an answer, raising lack of standing as a defense. *Schwartzwald*, 2012-Ohio-5017, at ¶¶ 11, 13. The defendants then moved for summary judgment on the grounds that Freddie Mac lacked standing. *Id.* The trial court denied the defendants' motion and instead entered summary judgment in favor of Freddie Mac. *Id.*, ¶ 14. The defendants timely appealed. *Id.*, ¶ 15.

The Second District affirmed, holding that even though the evidence did not show that Freddie Mac had standing when it filed its complaint, the defect was cured "by the assignment of the mortgage and transfer of the note prior to entry of judgment." *Id.*, ¶ 15. The defendants timely filed a direct appeal to this Court, and asked the Court to resolve a conflict on whether a defect in standing could be cured by a post-complaint assignment. *Id.*

This Court reversed, holding that to invoke the jurisdiction of a common pleas court, Freddie Mac had to show standing as of the filing of the complaint. *Id.*, ¶ 24. The Court reasoned that "standing is to be determined as of the commencement of suit" (*Id.*, ¶ 24, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351, fn. 5 (1992)), and "invoking the jurisdiction of the court 'depends on the state of things at the time of the action brought.'" *Id.*, ¶ 25, quoting *Mollan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824). "[P]ost-filing events that supply standing that did not exist on filing'" must be disregarded. *Id.*, ¶ 26, citing 13A Wright, Miller & Cooper, *Federal Practice and Procedure* 9, § 3531 (2008).

In *Schwartzwald*, Freddie Mac failed to attach an enforceable promissory note or mortgage to the complaint. During the proceedings, its primary evidence of standing was a post-complaint assignment of mortgage. *Schwartzwald*, 2012-Ohio-5017, at ¶ 29. Because Freddie Mac could not show in response to the borrowers' summary judgment motion that it had standing as of the time of filing the complaint, the Court held the case should be dismissed. *Id.*

Nothing in *Schwartzwald* addressed what documents would be necessary to show standing. The Ninth District plainly believes that both an interest in the **note** and **mortgage** must be demonstrated. The other appellate courts disagree.

The First, Second, Fifth, Eighth, Eleventh, and Twelfth Districts all held that standing in a foreclosure action could be established by showing the right to enforce **either** the note **or** mortgage. *HSBC Bank USA, Natl. Assocs. v. Sherman*, 1st Dist. No. C-120302, 2013-Ohio-4220 (appeal pending as case number 2013-2003); *PHH Mortg. Corp. v. Unknown Heirs*, 2d Dist. No. 25617, 2013-Ohio-4614 (jurisdiction declined in case number 2013-1890); *Wells Fargo Bank, N.A. v. Dawson*, 5th Dist. No. 2013CA00095, 2014-Ohio-269; *CitiMortgage, Inc. v. Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894, 984 N.E.2d 392; *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist No. 2013-T-0048, 2013-Ohio-5848; *Lewis*, 2014-Ohio-71.

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

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

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

Conversely, with just an enforceable note attached to the complaint, the Second, Eighth, and Eleventh Districts have held standing is present even if there are defects in the mortgage or assignment. *PHH Mortg.*, 2013-Ohio-4614, ¶ 7; *Patterson*, 2012-Ohio-5894, ¶ 22; *Santisi*, 2013-Ohio-5848, ¶¶ 24-26. In those cases, the courts found that the copy of the note attached to the complaint was either indorsed in blank, making it "bearer" paper, or had been indorsed to the plaintiff. *PHH Mortg.*, 2013-Ohio-4614, ¶ 7, fn. 1; *Patterson*, 2012-Ohio-5894, ¶ 22; *Santisi*, 2013-Ohio-5848 at ¶ 24, citing R.C. 1303.25. As a person entitled to enforce a note, the plaintiffs had standing. *Id.*

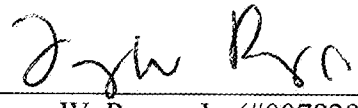
All of these courts are in conflict with the Ninth District's holding in the Opinion, and in *McFerren*. *McFerren* held that *Schwartzwald* mandated that a foreclosing plaintiff "had to be the holder of the Note *and* the mortgage at the time it initiated" the action in order to possess standing. 2013-Ohio-3228, ¶ 13 (italics in original). The Opinion appears to be following the same rationale, as there was simply no discussion of the undisputed evidence of DBNTC's status as the recorded mortgagee.

In this case, DBNTC is facing counterclaims on the sole basis that it lacks standing enforce the Note and Mortgage. In the First, Second, Fifth, Eleventh, and Twelfth Districts, the DBNTC's sole status as the recorded mortgagee would plainly establish such standing, entitle it to judgment, and eviscerate those counterclaims. Only in the Ninth District is there any issue. This Court should accept jurisdiction, and hold the matter for decision in *Lewis*.

CONCLUSION

The Ninth District has read *Schwartzwald* to require a foreclosing plaintiff to demonstrate standing through evidence of a right to enforce both the note and the mortgage. This requirement is not contained within the language of *Schwartzwald*, nor has it been adopted by six other appellate districts considering the identical issue. This case should be accepted and held for decision in *Lewis*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

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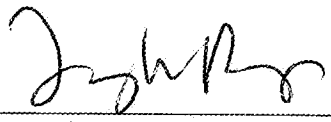

Counsel

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STATE OF OHIO)ss:	IN THE COURT OF APPEALS
COUNTY OF SUMMIT)	NINTH JUDICIAL DISTRICT
DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE	C.A. No. 26970
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2011 08 4500
GLENN E. HOLDEN, et al.	
Appellants	

DECISION AND JOURNAL ENTRY

Dated: March 31, 2014

HENSAL, Judge.

{¶1} Appellants, Glenn E. Holden and Ann M. Holden, appeal from the judgment of the Summit County Court of Common Pleas. For the following reasons, this Court affirms in part and reverses in part.

I.

{¶2} On September 1, 2005, Mr. Holden executed a promissory note for $69,300 in favor of Novastar Mortgage, Inc. for the property located at 1050 Shadybrook Drive in Akron, Ohio. The note was secured by a mortgage on the property executed by both Mr. and Mrs. Holden in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Novastar. On September 17, 2010, MERS assigned the mortgage to Deutsche Bank National Trust Company as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 ("Deutsche Bank").

{¶3} On August 12, 2011, Deutsche Bank filed a complaint for foreclosure against the Holdens, CitiFinancial, Inc. and JP Morgan Chase Bank, N.A. Attached to its complaint, Deutsche Bank included copies of the promissory note executed in favor of Novastar, the mortgage executed in favor of MERS, the assignment of the mortgage from MERS to Deutsche Bank and the preliminary judicial report. The promissory note attached to the complaint contained no indorsements and bore a stamp indicating that it was a "true and accurate copy of the original."

{¶4} In response to the complaint, the Holdens filed an answer and counterclaim, which alleged that Deutsche Bank violated the Fair Debt Collection Practices Act, the Consumer Sales Practices Act, committed fraud and an invasion of privacy. After completion of discovery, the parties filed cross-motions for summary judgment. The trial court denied the Holdens' motion for summary judgment, but granted Deutsche Bank's motion on both its claims and the counterclaims. The Holdens now appeal and raise four assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN A MATERIAL ISSUE OF FACT REMAINED FOR TRIAL AS TO WHETHER APPELLEE HAD POSSESSION OF APPELLANT[ ] GLENN HOLDEN'S NOTE WHEN THE COMPLAINT WAS FILED SINCE THE NOTE ATTACHED TO THE COMPLAINT WAS NOT INDORSED BY THE ORIGINAL LENDER.

{¶5} The Holdens argue that the trial court erred in granting summary judgment to Deutsche Bank as a genuine issue of material fact remained for trial as to whether Deutsche Bank was in possession of Mr. Holden's note at the time it filed the lawsuit. This Court agrees in part.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8. Pursuant to Civil Rule 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). The movant must specifically identify the portions of the record that demonstrate an absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the movant satisfies this initial burden, the nonmoving party has a reciprocal burden to point to specific facts that show a genuine issue of material fact for trial. *Id.* The nonmoving party must identify some evidence that establishes a genuine issue of material fact, and may not rely upon the allegations and denials in the pleadings. *Sheperd v. City of Akron*, 9th Dist. Summit No. 26266, 2012–Ohio–4695, ¶ 10.

{¶7} Civil Rule 17(A) provides that "[e]very action shall be prosecuted in the name of the real party in interest." "[A] party lacks standing to invoke the jurisdiction of the court unless he has * * * some real interest in the subject matter of the action." (Emphasis deleted.) *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012–Ohio–5017, ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179 (1973). "The real party in interest in a foreclosure action 'is the current holder of the note and mortgage.'" *Quantum Servicing Corp. v. Haugabrook*, 9th Dist. Summit No. 26542, 2013-Ohio-3516, ¶ 8, quoting *Wells Fargo Bank N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013–

Ohio–2374, ¶ 10. Whether the plaintiff has standing to bring the action is a jurisdictional matter that is determined at the time of the filing of the complaint. *Schwartzwald* at ¶ 25.

{¶8} Revised Code Section 1303.31(A)(1) provides that the holder of a negotiable instrument is one of the persons entitled to enforce the instrument. "When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." R.C. 1303.25(B).

{¶9} In support of its motion for summary judgment, Deutsche Bank attached an affidavit from Megan L. Theodoro, an assistant secretary for JPMorgan Chase Bank, National Association ("Chase"). She averred that Chase serviced the Holdens' loan on behalf of Deutsche Bank. Ms. Theodoro testified that Deutsche Bank purchased the note from Novastar on November 1, 2005, as part of a pooling and servicing agreement, which named Chase as the loan's servicer. According to her, Chase acquired physical possession of the original note in December of 2005 and stored it at its Monroe, Louisiana facility until it was forwarded to Deutsche Bank's attorney in connection with the filing of the foreclosure complaint. Ms. Theodoro further testified that, when Chase received the note, it was endorsed in blank. Attached to her affidavit was what she stated was a copy of the "original Note," which contained an undated blank indorsement from Novastar.

{¶10} Thus, Deutsche Bank has filed two different copies of the same note–one with and one without an indorsement. Both copies purport to be true and accurate copies of the original note. Ms. Theodoro's affidavit fails to explain why the copy of the note attached to her affidavit differs from the one attached to the complaint when, from her averments, the note, while in Chase's possession, had always contained a blank indorsement from Novastar to Deutsche Bank.

{¶11} In support of its motion for summary judgment, Deutsche Bank also offered into the record the deposition testimony of Chase employee, Frank Dean. When asked at his deposition to view what Deutsche Bank's counsel represented to him was the original note, Mr. Dean testified that it contained an indorsement to Deutsche Bank. He compared the original note to the copy attached to the foreclosure complaint and agreed that the copy attached to the complaint did not have the indorsement. He further testified as follows:

> Q: If this case was referred to foreclosure by Chase, then why does the note attached to the complaint not contain an [i]ndorsement?
>
> * * *
>
> A: It's my opinion that we were in receipt not only of the original note, but a certified true copy of the note. And * * * whoever went into the image vault and extracted a copy of the mortgage for foreclosure counsel extracted the unendorsed copy rather than the endorsed copy.

This Court notes that Mr. Dean's explanation does not appear to be based on personal knowledge of what actually occurred, but rather his opinion of what may have occurred.

{¶12} The Sixth District encountered a similar situation in *U.S. Bank, N.A. v. McGinn*, 6th Dist. No. S-12-004, 2013-Ohio-8. In *McGinn*, the foreclosing lender attached a copy of the note to its complaint that contained two indorsements. When the lender filed a summary judgment motion, however, it submitted a copy of the note that had three indorsements. The homeowners argued that the inconsistent copies of the note created a genuine issue of material fact as to whether the lender was in possession of the note at the time the complaint was filed. In response to the homeowners' argument, the lender submitted an affidavit from a representative of the loan servicer. He averred that, because multiple copies of the note are maintained in the servicer's custody, he "believe[d]" that someone must have inadvertently attached an earlier copy of the note to the complaint that differed from the actual note with all the indorsements. *Id.*

at ¶ 23. The Sixth District concluded that the representative failed to offer a definitive explanation for the additional indorsements and that his belief fell short of the Civil Rule 56(E) affidavit standard, which requires personal knowledge of the matters contained therein. *Id.* at ¶ 25.

{¶13} In this case, Deutsche Bank has failed to explain why Chase would have an unindorsed copy of the note in its possession since it was only the servicer for Deutsche Bank and not for MERS or Novastar. This creates a genuine issue of material fact since Ms. Theodoro averred that the note in Chase's possession had always contained a blank indorsement from Novastar to Deutsche Bank. Deutsche Bank further argues that this Court should disregard the copy of the note attached to the complaint since a document is not attached to a pleading under Civil Rule 10 for the purposes of presenting evidence to prove a claim, but rather to assert a claim or defense. We are not persuaded, however, that, under these circumstances, we can disregard the copy of the note attached to the complaint when it is inconsistent with another copy of the note produced in support of summary judgment.

{¶14} In the recent case of *Fannie Mae v. Trahey*, 9th Dist. Lorain No. 12CA010209, 2013-Ohio-3071, this Court also faced a similar issue when the foreclosing lender attached a copy of the note to its complaint that contained a blank indorsement from the original lender. In that case, the foreclosing lender filed an amended complaint, which included a different copy of the note. The note attached to the amended complaint demonstrated an indorsement from the original lender to another lender and then a second indorsement from that lender in blank. We concluded that the inconsistencies between the indorsements contained on the submitted notes created a genuine issue of material fact that precluded summary judgment as we could not ascertain which lender possessed the note at the time the foreclosure was filed. *Id.* at ¶ 12. *But*

see Bridge v. Ocwen Fed. Bank FSB, N.D.Ohio No. 1:07 CV 2739, 2013 WL 4784292 (Sept. 6, 2013) (slip opinion) (distinguishing *Trahey* and finding that two different copies of identical promissory note did not create genuine issue of material fact so as to preclude summary judgment from being granted to the foreclosing lender).

{¶15} Due to the inconsistencies between the copies of the note and the lack of an explanation based on personal knowledge as to how Deutsche Bank came to offer two different copies of the note into the record, this Court concludes that there is a genuine issue of material fact as to whether Deutsche Bank was the holder of the note at the time the complaint was filed. Accordingly, the trial court erred in granting Deutsche Bank's motion for summary judgment on its foreclosure complaint.

{¶16} Deutsche Bank advances an additional argument in its appellate brief that, even if it did not establish that it was the holder of the note, it still had the right to enforce the note as a non-holder in possession of the note. Deutsche Bank, however, did not make this argument in its motion for summary judgment, and it may not raise the issue for the first time on appeal. *See Hignett v. Schwarz*, 9th Dist. Lorain No. 10CA009762, 2011-Ohio-3252, ¶ 22.

Holdens' Counterclaims

{¶17} The Holdens set forth a limited argument that, because there is a genuine issue of material fact as to whether Deutsche Bank had possession of the note, the trial court erred in granting summary judgment to Deutsche Bank on their counterclaims. The Holdens' first counterclaim attacked the validity of the assignment of mortgage from MERS and alleged that, due to the invalid assignment, Deutsche Bank violated the Fair Debt Collection Practices Act. This particular claim neither asserts any allegations concerning the note nor do the Holdens submit any argument in support of their claim that the trial court erred in granting summary

judgment. This Court has repeatedly held that, "[i]f an argument exists that can support [an] assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998).

{¶18} Likewise, the Holdens failed to offer any support for their contention that the trial court erred in granting summary judgment to Deutsche Bank on their counterclaim for invasion of privacy by intrusion upon seclusion. *See id.* This Court notes that the claim does not concern the note in any way.

{¶19} The Holdens' remaining counterclaims, however, do concern whether Deutsche Bank held the note. They alleged that Deutsche Bank violated the Ohio Consumer Sales Practices Act "by making a false presentation that a legal obligation was owed" and committed fraud by making false representations that they were entitled to enforce the note. Due to our conclusion that there is a genuine issue of material fact on the issue of whether Deutsche Bank was the holder of the note at the initiation of the litigation, we conclude that there was also a genuine issue of material fact on the Holdens' Ohio Consumer Sales Practices Act and fraud counterclaims.

{¶20} Accordingly, the trial court did not err in granting summary judgment to Deutsche Bank on the Holdens' Fair Debt Collection Practices Act and invasion of privacy counterclaims. It did, however, err in granting summary judgment to Deutsche Bank on its foreclosure complaint along with the Holdens' Ohio Consumer Sales Practices Act and fraud counterclaims. Their first assignment of error is sustained on that basis.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY GRANTING APPELLEE DEUTSCHE BANK'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEUTSCHE BANK DID NOT SATISFY ALL CONDITIONS PRECEDENT TO FORECLOSURE SINCE THE ACCELERATION LETTER DID NOT

COMPLY WITH THE LANGUAGE OF PARAGRAPH 22 OF APPELLANTS' MORTGAGE.

{¶21} In their second assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because it failed to establish that it had fulfilled its obligation to send them a satisfactory acceleration letter. In light of our resolution of the Holdens' first assignment of error, this argument is not yet ripe for review and we decline to address it. *See Trahey*, 2013-Ohio-3071 at ¶ 13.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY RELYING ON THE AFFIDAVIT OF MEGAN L. THEODORO FILED IN SUPPORT OF APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE AFFIDAVIT WAS NOT MADE UPON PERSONAL KNOWLEDGE.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT WHEN THE NOTE ATTACHED TO THE COMPLAINT WAS PAYABLE [TO] NOVASTAR MORTGAGE, INC. NOT APPELLEE DEUTSCHE BANK AS TRUSTEE AND THE ASSIGNMENT OF MORTGAGE FROM MERS WAS NOT SUFFICIENT TO INVOKE THE SUBJECT MATTER JURISDICTION OF THE COURT.

{¶22} In their third assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because Ms. Theodoro's affidavit was not made upon her personal knowledge. In their fourth assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because Deutsche Bank was required to possess both the note and mortgage in order to have standing to file its foreclosure complaint. In light of our resolution of the Holdens' first assignment of error, these arguments are moot. This Court, therefore, declines to address them. App.R. 12(A)(1)(c).

III.

{¶23} The Holdens' first assignment of error is sustained in part, their second assignment of error is not ripe for review, and their third and fourth assignments of error are moot. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
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.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J:
CONCURS.

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

MARC E. DANN and GRACE DOBERDRUK, Attorneys at Law, for Appellants.

RICHARD A. FRESHWATER and STEPHEN D. WILLIGER, Attorneys at Law, for Appellee.