ORIGINAL

IN THE SUPREME COURT OF OHIO

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4,	*	**Supreme Court Case No. 2014-0791**
Plaintiff-Appellant,	*	**On appeal from the Summit County Court of Appeals, 9th Appellate District**
vs.	*	
GLENN E. HOLDEN, *et al.*,	*	**Appeals Case CA-26970**
Defendants-Appellees.	*	

APPELLEES GLENN AND ANN HOLDEN'S MEMORANDUM IN OPPOSITION TO JURISDICTION

MARC DANN (0039425)
GRACE DOBERDRUK (0085547) (COUNSEL OF RECORD)
THE DANN LAW FIRM
4600 Prospect Avenue
Cleveland, Ohio 44103
(216) 373-0539 Office
(216) 373-0536 Facsimile
mdann@dannlaw.com
grace@dannlaw.com
Counsel for Defendants-Appellees Glenn and Ann Holden

FILED
JUN 13 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TERRY W. POSEY JR. (0078292)
(COUNSEL OF RECORD)
THOMPSON HINE LLP
10050 Innovation Drive, Suite 400
Miamisburg, OH 45342-4934
Telephone: (937) 443-6857
Facsimile: (937) 443-6635
Terry.Posey@ThompsonHine.com

RICHARD A. FRESHWATER (0080762)
STEPHEN D. WILLIGER (0014342)
THOMPSON HINE LLP
3900 Key Center, 127 Public Square
Cleveland, OH 44114
Telephone: (216) 566-5500
Facsimile: (216) 566-5800
Richard.Freshwater@ThompsonHine.com
Stephen.Williger@ThompsonHine.com

Counsel for Plaintiff-Appellant Deutsche Bank National Trust Company

RECEIVED
JUN 13 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT OF GREAT GENERAL INTEREST..... .1

COUNTER-STATEMENT OF THE CASE AND FACTS 2

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW.....3

Proposition of Law 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

CONCLUSION 10

CERTIFICATE OF SERVICE 11

EXPLANATION OF WHY THIS CASE IS NOT OF GREAT GENERAL INTEREST

This case does not present an issue of great general interest because the issues presented in this appeal were resolved by this Court's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017. It is uncontroverted that Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 (hereinafter "Deutsche Bank as Trustee") was not the original lender and filed a complaint for foreclosure attempting to enforce a note payable to Novastar Mortgage, Inc. The Ninth District Court of Appeals correctly reversed the judgment of foreclosure because a material issue of fact remained for trial when the affidavit filed in support of Appellant's motion for summary judgment contained a note with an indorsement inconsistent with the note attached to the complaint.

> 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.
>
> *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶15.

Appellant Deutsche Bank as Trustee did not have a valid interest in the note and mortgage when the complaint in foreclosure was filed and lacked standing to file a foreclosure complaint. This Court held in *Schwartzwald*:

"It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest. *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 41.

Appellant Deutsche Bank as Trustee mentions the certified conflict case *SRMOF 2009-1 Trust v Lewis,* Case No 2014-0485 recently accepted by this Court on the issue of what needs to be attached to a complaint to demonstrate standing, but the issue in a summary judgment decision is not about standing to file a complaint - it's about whether a factual issue remains for trial on whether or not the plaintiff is entitled to enforce the note and mortgage. The case *SRMOF 2009-1 Trust v Lewis, 2014-Ohio-71* involved an appeal from a motion to vacate a judgment and is not of a similar procedural posture to Appellees Glenn and Ann Holden's case. In the conflict case *BAC Home Loan Servicing v. McFerren*, 2013-Ohio-3228 the 9th District Court of Appeals correctly determined that being a mortgagee without having possession of the note would not permit foreclosure because the mortgage is merely security for the note obligation.

Appellees Glenn and Ann Holden's case involved a summary judgment decision and the Ninth District Court of Appeals correctly held that a material issue of fact remained for trial. This appeal is not of great general interest, it is just another case where Appellee Deutsche Bank as Trustee filed for foreclosure without the legal right to do so.

COUNTER-STATEMENT OF THE CASE AND FACTS

Appellees Glenn and Ann Holden supplement Appellant Deutsche Bank as Trustee's Statement of the Case and Facts as follows:

On August 12, 2011 Appellant Deutsche Bank as Trustee filed a complaint for foreclosure against Appellants Glenn and Ann Holden. [T.d. 1]. The note attached as Exhibit A to the complaint is payable to NovaStar Mortgage, Inc. not Appellee. There is no indorsement on

the note and the note contains a stamp certifying it to be "a true and accurate copy of the original." *See Complaint, Exhibit A.*

As the case developed a second promissory note ("Note 2") surfaced. Note 2 differed materially from the note that was attached to the complaint ("Note 1").

Note 2 is different in several important respects. Note 2 does not contain a certification that it is a "true and accurate copy of the original" and it has an indorsement in blank from Novastar Mortgage, Inc. that is not on Note 1. Note 2 was an exhibit to the Affidavit of Megan L. Theodoro, an employee of JPMorgan Chase Bank and not an employee of Appellee Deutsche Bank as Trustee. *See Affidavit of Megan L. Theodoro.*

When Appellee Glenn Holden had previously filed bankruptcy a motion for relief from stay was filed by Appellant Deutsche Bank as Trustee in his bankruptcy case on September 29, 2010 where the note attached as an exhibit to that motion was certified as a "true and accurate copy of the original and the note did not have an indorsement (it is the same as Note 1). *See Appellee's Opposition to Summary Judgment.*

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

<u>Proposition of Law 1:</u> 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 order to enforce a promissory note under Ohio's version of the Uniform Commercial Code requires possession of the promissory note except in cases where the original note has been lost. See R.C. 1303.31. Since the mortgage is considered security for the promissory note it would not make sense for a plaintiff in a foreclosure case who only had a mortgage assignment to have standing to foreclose. This principle was conceptualized in the conflict case cited by

Appellant where the Ninth District Court of Appeals reversed summary judgment in *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228 when BAC Home Loan Services filed a complaint for foreclosure with an exhibit of a note payable to Quicken Loans, Inc. and an assignment of mortgage from MERS to BAC Home Loan Services because a material issue of fact remained for trial as to whether or not the foreclosing Plaintiff had possession of the original note when the complaint was filed. In *McFerren* the Court specifically rejected the analysis in *CitiMortgage, Inc. Patterson*, 2012-Ohio-5894 that a foreclosing plaintiff needed only the note or mortgage:

> 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.
>
> *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, ¶ 11.

The Court in *McFerren* continued its analysis and concluded that it was necessary for a plaintiff in a foreclosure case to be the holder of both the note and mortgage in order to have standing:

> 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.
>
> 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.
>
> *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, ¶¶ 12-13.

The promissory note attached to the complaint filed against Appellees Glenn and Ann Holden is payable to Novastar Mortgage, Inc. *See Complaint, Exhibit A*. There is no indorsement on the note. "If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." R.C. 1303.21(B).

Appellees Glenn and Ann Holden's note is payable to an identified person, namely Novastar Mortgage, Inc. Therefore, the only way that Appellant Deutsche Bank as Trustee could have become a "holder" would be for Novastar Mortgage, Inc. to transfer possession of the note to Deutsche Bank as Trustee and either indorse the note directly to Deutsche Bank as Trustee or indorse the note in blank. Appellees Glenn and Ann Holden's note has no indorsement at all. *See Complaint, Exhibit A*.

Appellees Glenn and Ann Holden raised the issue of Appellant Deutsche Bank as Trustee's lack of standing to foreclose in their answer to the complaint, but even if they had not standing is jurisdictional and can never be waived. See *Wells Fargo Bank, N.A. v. Washington*,

2013-Ohio-773, ¶ 9 (vacated a judgment of foreclosure and confirmation of sale when there was a lack of standing because "[a] jurisdictional defect cannot be waived. *Painesville v. Lake Cty. Budget Comm.*, 56 Ohio St.2d 282 (1978). This means that the lack of jurisdiction can be raised at any time, even for the first time on appeal. See *In re Byard*, 74 Ohio St.3d 294, 296 (1996). This is because jurisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void. *Patton v. Diemer*, 35 Ohio St.3d 68 (1988)." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998).))

Decisions granting a motion for summary judgment are reviewed de novo. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. "[T]he 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.*" (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264.

In Appellees Glenn and Ann Holden's opposition to summary judgment Appellees quoted from the Deposition of Appellant Deutsche Bank as Trustee's 30(B) corporate representative Frank Dean when he described how he came to view the original note.

BY MS. DOBERDRUK:

Q. Did you bring this document – this file with you when you came today?

A. No.

Q. Do you know -- have you ever viewed this manila file before coming here today?

A. No.

Q. If you've never viewed this file here before, how do you know that the piece of paper you're holding in your hand is the official note?

A. For a couple reasons. First, it contains the borrower, Glenn E. Holden's original signature. Secondly, the manila file indicates that it was sent to our attorney from our Monroe, Louisiana custodial facility.

Q. When you say it was sent from the Monroe, Louisiana custodial facility, whose facility are you talking about?

A. JPMorgan Chase.

Q. All right. Have you ever heard in securitized mortgages that when the notes are sold to the trust, that there's a custodian for the trust?

A. Yes, I've heard that.

Q. And the custodian maintains records for the trust?

A. I'll assume that that's correct. I, again, don't know much detail about . . .

Q. Is Chase the custodian of records for the Soundview Home Loan Trust 2005-4?

MR. FRESHWATER: Objection.

THE WITNESS: Yeah, I don't know.

BY MS. DOBERDRUK:

Q. If we go back to Exhibit B, the pooling and servicing agreement, I'm going to show you the definition section of the pooling and servicing agreement. Could you identify who the custodian of the trust is?

A. Wells Fargo Bank, NA.

Q. So if Wells Fargo Bank, NA, is the custodian of the trust, isn't it fair to say that Wells Fargo would have a copy of Glenn Holden's original note if this note was part of the trust?

A. I don't know.

Q. And I asked you previously if you had ever spoken to anybody at Wells Fargo about Glenn Holden's note. And have you ever talked to anybody at Wells Fargo?

A. No.

Q. So in preparing for the deposition, was your review of the records a review of Chase's records?

A. Oh, I'm sorry. Was that a question?

Q. Yes.

A. I apologize.

Q. That's all right. Did you review any records other than Chase's records?

A. No.

Deposition of Frank Dean, pages 34-39.

The Court of Appeals correctly reversed summary judgment for Appellant Deutsche Bank as Trustee because a material issue of fact remained for trial since the note that was different from the note attached to the complaint came from Chase's records and Chase was not the custodian of records for the Soundview Home Loan Trust 2005-4. A material issue of fact existed for trial because the note attached to the complaint did not contain an indorsement and it was certified to be a true and accurate copy of the original. *See Complaint, Exhibit A*. In addition, when Appellee Glenn Holden filed bankruptcy a motion for relief from stay was filed in his bankruptcy case on September 29, 2010 where the note attached as an exhibit to that motion was certified as a "true and accurate copy of the original and the note did not have an indorsement. *See Appellee's Opposition to Summary Judgment.*

Since a certified copy of Appellant Glenn Holden's note was filed in both state and federal court and neither note had an indorsement in blank form Novastar Mortgage, Inc. a material issue of fact existed for trial when Appellee produced a note with an indorsement in blank from non-custodian Chase's records.

At the time that Appellant Deutsche Bank as Trustee filed a complaint for foreclosure the Appellant misrepresented its legal status by falsely alleging it was entitled to enforce the note

when the note was payable to Novastar Mortgage, Inc. *See Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 25 ("demonstration that the original allegations were false will defeat jurisdiction.")

The assignment of Appellees Glenn and Ann Holden's mortgage was deficient to provide standing to foreclose and contained false representations. The assignment did not and could not transfer the note.

A mortgage assignment does not transfer a negotiable instrument such as a promissory note – it follows the negotiable instrument as an incident to the debt. *See Washer v. Tontar*, 128 Ohio St. 111, 190 N.E. 231 (1934); *Edgar v. Haines*, 109 Ohio St. 159, 164, 141 N.E. 837 (1923).

In *BAC Home Loans Servicing, L.P. v. Blythe*, 2013-Ohio-5775 the Seventh District Court of Appeals reasoned that in a foreclosure case where the note attached to the complaint was payable to a different entity from the plaintiff then the plaintiff would not be a nonholder in possession under R.C. 1303.31 and would not be entitled to enforce the note and mortgage:

> Appellee's assertion that it is a nonholder in possession and entitled to enforce is similarly mistaken. As the official comment to R.C. 1303.31/UCC 3-301 indicates, a nonholder in possession must establish that it has "acquired rights of a holder by subrogation," by transfer, is a successor to a holder, or "otherwise acquires the holder's rights." (UCC 3-301, official comment 1990, R.C. 1303.31.) To demonstrate status as a nonholder in possession of specially indorsed commercial paper, Appellee would have to demonstrate the transfer or acquisition of the paper. Nothing in this record establishes the transfer or acquisition of Countrywide Bank FSB's right to the note by any means.

BAC Home Loans Servicing, L.P. v. Blythe, 2013-Ohio-5775, ¶17.

The court below properly determined that there is a factual issue ripe for determination at trial as to whether or not Appellee Glenn Holden's note was payable to Novastar Mortgage, Inc. at the time the complaint for foreclosure was filed. *See Complaint, Exhibit A*. If the court were to find that that it was so payable at that time, Appellant Deutsche Bank as Trustee had no dispute with Appellees Glenn and Ann Holden at the time the complaint was filed and no actual controversy existed between Appellant Deutsche Bank as Trustee and Appellees Glenn and Ann Holden.

CONCLUSION

The Ninth District Court of Appeals determination that there was a sufficient factual issue for trial as to whether or not Appellant Deutsche Bank as Trustee possessed a valid interest in Appellees Glenn and Ann Holden's note and mortgage at the time the complaint was filed was driven by the narrow constraints of the evidence (or lack thereof) that was presented in support of and in opposition to Plaintiff's motion for Summary Judgment.. See *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 3 ("receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.").

Based on the standard that applies for a summary judgment motion the Ninth District Court of Appeals correctly reversed the judgment of foreclosure on the basis that factual issues remained for trial.

Appellants Glenn and Ann Holden respectfully request that the Supreme Court of Ohio decline jurisdiction over this case.

Respectfully submitted,

Grace Doberdruk

Marc E. Dann (0039425)
Grace Doberdruk (0085547) (COUNSEL OF RECORD)
The Dann Law Firm
4600 Prospect Avenue
Cleveland, Ohio 44103
(216) 373-0539 Phone
(216) 373-0536 Fax
mdann@dannlaw.com
grace@dannlaw.com
Counsel for Appellants Glenn and Ann Holden

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2014 a copy of the foregoing document as served by ordinary U.S. mail upon the following:

Terry W. Posey Jr.
THOMPSON HINE LLP
10050 Innovation Drive
Suite 400
Miamisburg, OH 45342-4934

Richard A. Freshwater
Stephen Williger
THOMPSON HINE, LLP
3900 Key Center, 127 Public Square
Cleveland, OH 44114

Grace Doberdruk
GRACE DOBERDRUK (0085547)