

ORIGINAL

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST

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CASE NO. 2014-0485

Appellee

*

On Appeal from the Butler County
Court of Appeals, 12th District Case
Nos. CA 2012-11-0239 and
CA 2013-05-0068

-vs-

*

SHARI LEWIS, et al.

*

Appellant.

*

MERIT BRIEF OF APPELLANT SHARI LEWIS

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Table of Contents | i |
| Table of Cases, Statutes and Authorities Cited | iii |
| Introduction | 1 |
| Statement of the Facts and the Case | 3 |
| Argument | 6 |
| Proposition of Law: In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, a plaintiff must possess the right to enforce the debt secured by the mortgage | |
| <u>A. SRMOF Was Not Entitled To Enforce The Note When Suit Was Filed.</u> | 7 |
| <u>B. Assignment of a Mortgage Without Transfer Of The Debt it Secures Is A Legal Nullity.</u> | 9 |
| <u>C. Permitting A Merc Mortgagee To Sue To Collect A Debt It Would Not Be Permitted To Sue On Directly Disturbs The Balance Established Under Of Article 3 Of The Uniform Commercial Code, As Adopted In Ohio By The General Assembly.</u> | 12 |
| <u>D. Permitting a Mortgagee to Foreclose Without the Right to Enforce the Note Exposes Makers of Negotiable Instruments To Double Liability on the Same Debt.</u> | 13 |
| <u>E. Answering The Certified Question.</u> | 14 |
| Conclusion | 14 |
| Certificate of Service | 15 |
| Appendix | |
| Notice of Certification of Conflict | A-1 |
| Court of Appeals Judgment and Opinion | A-2 |
| Trial Court Decision and Entry Granting Plaintiff's Motion for Summary Judgment | A-3 |

| | |
|---|-----|
| Trial Court Decision and Entry Denying Defendant's Motion To Vacate | A-4 |
| R.C. 1303.31 | A-5 |
| R.C. 1303.38 | A-6 |

| Cases Cited | Page |
|---|-------------|
| <i>Arch Bay Holdings, L.L.C. v. Brown</i> , 2nd Dist. Montgomery No. 25073, 2012-Ohio-4966 | 2 |
| <i>BAC Home Loan Serv. v. McFerren</i> , 9th Dist. Summit No. 26384, 2013-Ohio-3228 | 1, 2 |
| <i>Bank of New York Mellon v. Matthews</i> , 6th Dist. Fulton No. F-12-008, 2013- Ohio-1707 | 1 |
| <i>Bank of America, N.A., v. Pasqualone</i> , 10th Dist. Franklin No. 13AP-87, 2013- Ohio-5795 | 13 |
| <i>Carpenter v. Longan</i> , 83 U.S. 271, 21 L.Ed. 313 (1873) | 9, 10 |
| <i>Cervantes v. Countrywide Home Loans, Inc.</i> , 656 F.3d 1034 (9 th Cir. 2011) | 10 |
| <i>Chase Manhattan Mtge. Corp. v. Smith</i> , 1st Dist. Hamilton No. C061069, 2007- Ohio-5874 | 2 |
| <i>CitiMortgage, Inc. v. Loncar</i> , 7th Dist. Mahoning No. 11 MA 174, 2013-Ohio- 2959 | 1 |
| <i>Citimortgage, Inc. v. Patterson</i> , 8th Dist. Cuyahoga No. 98360, 2012- Ohio-5894 | 1 |
| <i>Cleveland v. Shaker Hts.</i> , 30 Ohio St.3d 49, 507 N.E.2d 323 (1987) | 12 |
| <i>Edgar v. Haines</i> , 109 Ohio St. 159, 141 N.E. 837, (1923) | 10 |
| <i>Everhome Mtge. Co. v. Rowland</i> , 10th Dist. Franklin No. 07AP-615, 2008-Ohio- 1282 | 2 |
| <i>Fed. Home Loan Mtg. Corp. v. Koch</i> , 11th Dist. Geauga No. 2012-G-3084, 2013- Ohio-4423 | 1 |
| <i>Fed. Home Loan Mtg. Corp. v. Schwartzwald</i> , 134 Ohio St.3d 13, 2012-Ohio-5017 | passim |
| <i>Fifth Third Mortgage Co. v. Fillmore</i> , 5th Dist. Delaware No. 12 CAE 04 0030, 2013-Ohio-312 | 8 |
| <i>First Knox National Bank v. Peterson</i> , 2009-Ohio-5096, (5th Dist. No. 08CA28) | 9 |

| | |
|---|-----|
| <i>First Union Natl. Bank v. Hufford</i> , 3 rd Dist. Auglaize No. 2-01-07146 Ohio App.3d 673 | 2 |
| <i>George v. Surkamp</i> , 76 S.W.2d 368, 336 Mo. 1 (Mo. 1934) | 10 |
| <i>HSBC Bank USA v. Sherman</i> , 1 st Dist. Hamilton No. C-120302, 2013-Ohio-4220 | 2-3 |
| <i>HSBC Bank USA, NA. v. Thompson</i> , 2nd Dist. Montgomery No. 23761, 2010-Ohio-4158 | 13 |
| <i>In Re Dorsey</i> , 13-8036. (B.A.P. 6 th Cir. 2014)(March 7, 2014) | 10 |
| <i>In re Vargas</i> , 396 B.R. 511 (Bankr.C.D.Cal.2008) | 10 |
| <i>Kernohan v. Manss</i> , 53 Ohio St. 118, 41 N.E. 258 (1895) | 9 |
| <i>Landmark Nat'l Bank v. Kesler</i> , 289 Kan. 528, 216 P.3d 158 (2009) | 10 |
| <i>Losantiville Holdings L.L.C. v. Kashanian</i> , 1st Dist. Hamilton No. C-110865, 2012-Ohio-3435 | 2 |
| <i>McKenna v. Wells Fargo Bank, N.A.</i> , 693 F.3d 207 (1st Cir. 2012) | 13 |
| <i>National City Bank v. Skipper</i> , 2009-Ohio-5940 (9th Dist. No. C.A. 24772) | 9 |
| <i>National Live Stock Bank of Chicago v. First National Bank of Geneseo</i> , 203 U.S. 296, 27 S.Ct. 79, 51 L.Ed. 192 (1906) | 9 |
| <i>Osbourne v. Van Dyk Mtge. Corp.</i> , 12th Dist. No. CA2012-03-020, 2013-Ohio-332 | 12 |
| <i>SRMOF Trust 2009-1 v. Lewis</i> , 12 th District Butler Nos. CA 2012-11-0239 and CA 2013-05-0068, 2014-Ohio-71 | 1 |
| <i>U.S. Bank Natl. Assn. v. Gray</i> , 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340 | 1 |
| <i>U.S. Bank Natl. Assn. v. Marcino</i> , 7 th Dist. Jefferson No. 08 JE 2181181 Ohio App. 3d 328, 2009-Ohio-1178 | 2 |
| <i>Wells Fargo Bank, N.A. v. Stovall</i> , 8th Dist. Cuyahoga No. 91802, 2010-Ohio-236 | 2 |
| <i>Wilborn v. Bank One Corp.</i> , 906 N.E.2d 396, 121 Ohio St.3d 546, 2009-Ohio-306 | 9 |

Statutes, Constitutions, and Treatises

| | |
|--|----------|
| Ohio Constitution, Article 4, Section 3(B)(4) | 1 |
| Ohio Constitution, Article 4, Section 2 (B)(2)(f) | 1 |
| R.C. 1303.31 | 7, 8, 12 |
| R.C. 1303.38 | 8 |
| R.C. 1303.67 | 13 |
| 4 Powell on Real Property Section 37.27 | 11 |
| Restatement of the Law, 3d, Property, Mortgages, Section 5.4 | 11 |

INTRODUCTION

This case is before the Court pursuant to Article 4, Section 3(B)(4) and Article 4, Section 2(B)(2)(f) of the Ohio Constitution to resolve a conflict between the Twelfth District in this case and the Ninth District Court of Appeals in *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, 9th Dist. No. 26384.

The Court accepted the following question certified by the Twelfth District Court of Appeals:

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

More specifically, under the facts of this case, the Court must decide if a mortgage can be enforced, and the right of redemption foreclosed, in the absence of the debt the mortgage secures.

In its majority decision, the Court of Appeals basically conceded that SRMOF was not entitled to enforce the note when suit was commenced. *SRMOF Trust 2009-1 v. Lewis*, 12th District Nos. CA 2012-11-0239 and CA 2013-05-0068, 2014-Ohio-71, ¶17. It nonetheless held that SRMOF possessed standing to sue because it had been assigned the mortgage prior to suit. The majority accepted the reasoning of the Eighth District in *Citimortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894. *Id.* at 15. In *Patterson*, the court read *Schwartzwald* to conclude that any interest in either the note or the mortgage was sufficient to confer standing in a foreclosure case. Several other districts have adopted that reasoning. *See, 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.

In *McFerren*, the Ninth District Court of Appeals held that in order to have standing to bring a foreclosure action, the plaintiff “had to be holder of the Note *and* the Mortgage at the time it initiated th[e] action.” *McFerren* at ¶13. As in this case, the plaintiff in *McFerren* had been assigned the mortgage, but was not entitled to enforce the note when suit was filed. Prior to *Patterson*, courts throughout the state had required a plaintiff to be entitled to enforce the debt in order to pursue a foreclosure case. *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. Hamilton No. C061069, 2007-Ohio-5874; *First Union Natl. Bank v. Hufford*, 3rd Dist. Auglaize No. 2-01-07146 Ohio.App.3d 673, 677, 679-680; *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*, 2nd Dist. Montgomery No. 25073, 2012-Ohio-4966, ¶ 16; *U.S. Bank Natl. Assn. v. Marcino*, 7th Dist. Jefferson No. 08 JE 2181, Ohio App.3d 328, 2009-Ohio-1178, ¶ 32; *Everhome Mtge. Co. v. Rowland*, 10th Dist. Franklin No. 07AP-615, 2008-Ohio-1282, ¶12. In fact, prior to *Patterson*, the Eighth District had followed the same rule. *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. Cuyahoga No. 91802, 2010-Ohio-236, ¶15.

In his dissent in this case, Judge Ringland embraced the reasoning of *McFerren* and concluded that *Schwartzwald* does not stand for the proposition that an interest in the mortgage, by itself, was enough to confer standing to foreclose. He agreed with the analysis of *McFerren* that that issue was not presented in *Schwartzwald* and this Court did not pass on it. The First District Court of Appeals has also questioned the expansive reading of *Schwartzwald*:

We note that in *Schwartzwald*, the mortgagee was neither an assignee of the mortgage nor a holder of the note at the time it filed its complaint. It achieved both positions only after the complaint had been filed. *See Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 7 and 10; *see also Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, at ¶ 2 (also reviewing a scenario where the mortgagee had brought suit but had filed neither an assigned note nor mortgage with its complaint). The "or" statement must be read in the context of the entire opinion. The question of whether standing can be achieved

by the filing of either document with the complaint was not presented by the facts of the case and was not necessary to the resolution of the issue presented.

HSBC Bank USA v. Sherman, 1st Dist. No. C-120302, 2013-Ohio-4220, ¶17.

It is this sharp split among the Courts of Appeals that gives rise to the certified conflict.

STATEMENT OF THE FACTS

The loan at issue in this case was originated by First Union Mortgage Corporation in November 2001.¹ The version of the note attached to SRMOF's complaint appears to have been endorsed in blank by First Union, rendering the note "bearer" paper. The endorsement is undated.

To secure payment of the note, Lewis executed a mortgage which named as mortgagee Mortgage Electronic Registration Systems ("MERS"), "solely as nominee" for the Lender, First Union Mortgage Corporation. The granting clause of the mortgage provides that the mortgage is intended:

TO SECURE to Lender the repayment of the indebtedness evidenced by the Note, with interest thereon; the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and the performance of the covenants and agreements of Borrower herein contained, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property . . .

In the months leading up to the filing of this lawsuit, the mortgage was assigned three times.²

1. From MERS, as nominee for First Union Mortgage Corp. to Wells Fargo Bank on June 9, 2011, several months *after* Wells Fargo purported to transfer the lost note to Selene Finance, LP via the Lost Note Affidavit.
2. From Wells Fargo Bank to Selene Finance, LP on August 8, 2011, nearly a year after Wells Fargo acknowledged that the note was lost.
3. From Selene Finance LP to Appellee, SRMOF 2009-1 Trust, on August 24,

¹ *Complaint*, Ex. A (8/31/11)(Docket 4).

² *Notice of Filing of the Assignment of Mortgage* (10/12/11)(Docket 28)

2011.

SRMOF filed this suit on August 31, 2011, seeking judgment on a promissory note, along with foreclosure of the mortgage.³ In the Complaint, SRMOF claimed to be the "holder" of the promissory note.⁴ Ultimately, SRMOF filed a Motion for Summary Judgment,⁵ together with copies of the note, mortgage, and the three mortgage assignments.⁶ It also filed an affidavit supporting the motion.⁷ The affidavit submitted in support of summary judgment authenticated a copy of the note attached to the affidavit was a "true and exact."⁸

Prior to submission of the motion for summary judgment for decision, the trial court ordered SRMOF to produce the original promissory note in open court for inspection.⁹ Instead of producing the original note as ordered, SRMOF filed a Notice of Filing of Lost Note Affidavit.¹⁰ Only then were Lewis and the Court given notice that, in fact, SRMOF was not, and never had been, in possession of the original note. SRMOF also filed an Amended Motion for Summary Judgment seeking judgment on the newly presented Lost Note Affidavit.¹¹

In December 2010, Wells Fargo Bank executed a document called a Lost Note Affidavit and Indemnification Agreement.¹² The affidavit is "in favor of Selene Finance." In this affidavit, Wells Fargo asserts merely that the note cannot be located. It does not state that it was in possession of the note when the note was lost. Nor does it state that it was entitled to enforce the note when the note was lost. The affidavit goes on to state Wells Fargo will indemnify Selene

³ *Complaint* (8/31/11)(Docket 4)

⁴ *Id.* at ¶1

⁵ *Motion for Summary Judgment* (10/12/11)(Docket 25)

⁶ *Notice of Filing of the Assignment of Mortgage* (10/12/11)(Docket 28)

⁷ *Affidavit of Carter Nicholas* (10/12/11)(Docket 29)

⁸ *Id.* at ¶5

⁹ *Entry Ordering Original Note to be presented to Court* (7/19/12)(Docket 54)

¹⁰ *Notice of Filing of Lost Note Affidavit* (7/27/12)(Docket 55)

¹¹ *Amended Motion for Summary Judgment* (8/14/12)(Docket 58)

¹² *Notice of Filing of Lost Note Affidavit* (7/27/12)(Docket 55)

Finance should Selene Finance suffer any damage because of the lack of the note.

But soon thereafter, in August 2012, SRMOF withdrew its Amended Motion for Summary Judgment claiming that the original note had been located and was now in its possession.¹³ So despite its initial claim of holder status, the first time SRMOF came in possession of the note was a year after it filed this lawsuit. SRMOF also asked the trial court to decide its original Motion for Summary Judgment. Lewis responded *pro se*, asserting several issues including a lack of standing, as well as raising questions about the assignments of the mortgage.

Less than two weeks before this Court decided *Schwartzwald*, the trial court granted summary judgment to SRMOF.¹⁴ Thereafter, the Court entered an *In Rem Judgment and Decree in Foreclosure* that found that SRMOF was entitled to recover \$125,683.50, plus interest and late charges.¹⁵

Lewis both appealed from the judgment and filed a motion in the trial court to vacate the judgment because SRMOF lacked standing when suit was filed. The trial court overruled that motion, finding, *inter alia*, that the Lost Note Affidavit effectively transferred the debt to SRMOF.¹⁶

On appeal, the Court of Appeals held that because SRMOF had been assigned the mortgage prior to the filing of the complaint, it had standing to sue. Lewis appeals from the decision.

ARGUMENT

In *Fed. Home Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017,

¹³ *Notice of Intent to Withdraw Amended Motion for Summary Judgment* (8/28/12)(Docket 63)

¹⁴ *Decision and Entry Granting Plaintiff's Motion for Summary Judgment* (10/19/12)(Docket 76)

¹⁵ *In Rem Judgment and Decree in Foreclosure* (10/31/12)(Docket 77)

¹⁶ *Decision and Entry Denying Defendant's Motion to Vacate*, p.9 (4/5/2013)(Docket 97)

this Court held that if a plaintiff does not possess standing at the commencement of a civil action, it fails to invoke the jurisdiction of a common pleas court. *Id.* ¶¶24-28. The issue presented in *Schwartzwald* was a general one in that it did not rely on any substantive law applicable only to foreclosure cases. And for its resolution, the Court did not have to decide the exact nature or extent of the interest that was needed to support standing in foreclosure cases. It concluded that “because [Federal Home Loan] 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.* ¶28. The Court of Appeals relied on this language to conclude that an interest in either the note or the mortgage was sufficient to confer standing to file a foreclosure case. *Lewis, supra*, at ¶15.

The question certified by the Court of Appeals seeks clarification about the substantive rights a plaintiff must possess to have standing in a foreclosure case. The Court of Appeals held that any right in the mortgage was sufficient to support standing. *Lewis* asserts that a foreclosing plaintiff does not have standing unless it is also entitled to enforce the debt that the mortgage secures. Unless it is entitled to recover money on the debt, a mortgagee cannot suffer any injury to support common law standing. And in cases involving negotiable instruments, standing is premised on the statutory entitlement to enforce the debt. These principles are well-founded in Ohio law.

The holding of the Court of Appeals rejects century-old precedent, both in Ohio and from around the country; disturbs the balance established under of Article 3 of the Uniform Commercial Code, as adopted in Ohio by the General Assembly; and, most importantly, places those obligated on negotiable instruments at risk of duplicate liability on the same debt.

A. SRMOF was not entitled to enforce the note when suit was filed.

The Court of Appeals did not directly address SRMOF’s status as a “person entitled to

enforce” the note under R.C. 1303.31. It instead accepted Lewis’s argument that SRMOF failed to meet the requirements under R.C. 1303.38, which relate to enforcement of a lost note. *Lewis*, ¶17. Nonetheless, a brief review of these provisions is helpful to understand the statutory backdrop against which the certified question must be considered.

The concept of “person entitled to enforce” the note is central to the Court’s consideration of all of the issues presented in this case. A “person entitled to enforce” a negotiable instrument is defined by statute:

(A) “Person entitled to enforce” an instrument means any of the following persons:

- (1) The holder of the instrument;
- (2) A nonholder in possession of the instrument who has the rights of a holder;
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

R.C. 1303.31(A).

In this case, the record is clear that SRMOF was not in possession of original note when it filed suit. Despite its assertion in the Complaint that it was the “holder” of the note, it did not obtain possession of the note until a year after suit was filed. Thus, it could not be classified as either a “holder” or “a non-holder in possession . . . who has the rights of a holder.” Both of those statuses require possession of the original note. Instead, it based its entitlement to enforce the note on the third category – person not in possession of the instrument who is entitled to enforce under R.C. 1303.38. That statute permits a person to enforce a lost or destroyed note if that person proves, *inter alia*, that it was in possession of the instrument and entitled to enforce it when the loss of possession occurred. R.C. 1303.38(A).

In this case, the Lost Note Affidavit was executed by Wells Fargo, not SRMOF. It was not even issued to SRMOF; it was issued “in favor of Selene.” Those facts alone make the affidavit ineffective to transfer any right to enforce the note. The language of R.C. 1303.38(A) provides that only the person who both lost the note and was entitled to enforce the note may seek relief under that statute.

Moreover, the Lost Note Affidavit is not even sufficient to provide Wells Fargo the right to enforce the lost note. Nowhere in the affidavit does it state that Wells Fargo was either in possession of, or entitled to enforce, the note when it was lost. This deficiency is fatal to any reliance on R.C. 1303.38(A).

In *Fifth Third Mortgage Co. v. Fillmore*, 5th Dist. Delaware No. 12 CAE 04 0030, 2013-Ohio-312, the court addressed this very issue. In that case, Fillmore attempted to enforce a promissory note, and the mortgage securing it, using the mechanism set forth in R.C. 1303.38. But the affidavit Fillmore presented to the court contained the same deficiencies found in the Lost Note Affidavit offered in this case: it failed to state both that Fillmore was in possession of the note when it was lost and that he was entitled to enforce the note when it was lost. *Id.* ¶43. The court found these two omissions fatal to Fillmore’s attempt to enforce the lost note and foreclose on the accompanying mortgage. *Id.*

Thus, although the Court of Appeals did not directly rule on the issue, the record firmly establishes that SRMOF did not qualify as a “person entitled to enforce” the note under R.C. 1303.31. The issue, then, is whether a mortgagee has standing to file a foreclosure case if it is not a “person entitled to enforce” the note secured by the mortgage.

B. Assignment of a Mortgage Without Transfer Of The Debt it Secures Is A Legal Nullity.

As this Court has held, a “foreclosure proceeding is the enforcement of a debt obligation .

...” *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 906 N.E.2d 396, 2009-Ohio-306, ¶ 17. As a result, foreclosure in Ohio is a two-step process. *First Knox National Bank v. Peterson*, 2009-Ohio-5096, ¶18 (5th Dist. No. 08CA28). Only after the court determines liability on the underlying obligation can it move to the foreclosure under the mortgage. *Id.* See also, *National City Bank v. Skipper*, 2009-Ohio-5940, ¶25 (9th Dist. No. C.A. 24772). Thus, determination of liability under the note is a prerequisite to enforcement of the mortgage itself.

And a mortgage cannot be enforced in the absence of the debt it secures. This is because the mortgage is but an incident to the debt. *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (1895). It does not have a life of its own. *Id.* Therefore, a transfer of the mortgage without a corresponding transfer of the debt is a legal nullity.

The United States Supreme Court has held that: "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1873). Moreover, once the decured debt is paid in full, the mortgage ceases to have any effectiveness at all. *National Live Stock Bank of Chicago v. First National Bank of Geneseo*, 203 U.S. 296, 306, 27 S.Ct. 79, 51 L.Ed. 192 (1906) ("Such a mortgage has no separate existence, and when the note is paid, the mortgage expires, as it cannot survive the debt which the note represents").

This Court has embraced this rule: "Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action. Where given to secure notes, it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment." *Kernohan, supra* at p. 133; see also, *Edgar v. Haines*, 109 Ohio St. 159, 164, 141 N.E. 837, (1923) ("It is well settled by the former adjudications of this court that a

mortgage is not property separate and distinct from the note which it secures, but that, on the other hand, the mortgage security is an incident of the debt which it is given to secure, . . .”).

Indeed, this general principle is widely accepted in American courts. *See In Re Dorsey*, 13-8036. (B.A.P. 6th Cir. 2014)(March 7, 2014) (holding that “without evidence of debt, there is no valid, enforceable mortgage. A mortgage may be enforced only by a person who is entitled to enforce the obligation the mortgage secures.”); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011)(“The [mortgage] deed and note must be held together because the holder of the note is only entitled to repayment . . . , the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.”); *George v. Surkamp*, 76 S.W.2d 368, 336 Mo. 1 (Mo. 1934) (stating that there is no “force to an assignment of the deed of trust itself separate and apart from the note.”); *Landmark Nat’l Bank v. Kesler*, 289 Kan. 528,216 P.3d 158, 167 (2009).

In *Landmark Nat’l Bank v. Kesler*, the Kansas Supreme Court grappled with the issue now presented to this Court – can a mortgagee who has no right to enforce the note be permitted to sue the borrower in foreclosure. Interestingly, the court examined in detail the role of Mortgage Electronic Registration Systems, Inc. (“MERS”) in the secondary mortgage market and the nature of the rights granted to MERS under the standard uniform mortgage, like the one at issue in this case. The Court concluded that “[i]f MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right.” *Id.* at p. 167 (citing *In re Vargas*, 396 B.R. 511, 517 (Bankr.C.D.Cal.2008).

The principle can be considered hornbook law. “Where the mortgagee has “transferred” only the mortgage, the transaction is a nullity and his “assignee,” having received no interest in the underlying debt or obligation, has a worthless piece of paper.” 4 *Powell on Real Property*, §

37.27 [2] (Matthew Bender & Co.2012). “A person holding only a note lacks the power to foreclose because it lacks the security, and *a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it.*” Restatement of the Law 3d, Property, Mortgages, Section 5.4, Comment e (1997) (emphasis added).

Even in *Schwartzwald*, this Court acknowledged that standing to foreclose was premised on entitlement to enforce the debt secured by the mortgage.

This principle accords with decisions from other states holding that standing is determined as of the filing of the complaint. *See, e.g., Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 (“If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder *after the foreclosure action was filed*, then the case may be dismissed without prejudice * * *” [emphasis added]); *U.S. Bank Natl. Assn. v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 (“U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank” [emphasis added]); *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, ¶ 15 (“Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts” [emphasis added]); *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 307 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) (explaining that “ ‘[s]tanding is the legal right to set judicial machinery in motion’ ” and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action) . . .

Schwartzwald, ¶27. All of these cases premised standing to foreclose on the entitlement to enforce the note. This is because the injury complained of is failure to pay the debt. And a person who is not owed any money suffers no injury if the debt isn’t paid.

In this case, because SRMOF did not possess the right to enforce the underlying debt on the date it filed suit, it lacked the requisite injury, and therefore standing, and the jurisdiction of the trial court was not invoked.

C. Permitting A Mere Mortgagee To Sue To Collect A Debt It Would Not Be Permitted To Sue On Directly Disturbs The Balance Established Under Of Article 3 Of The Uniform Commercial Code, As Adopted In Ohio By The General Assembly.

In *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 507 N.E.2d 323 (1987), This Court stated:

“ Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. *Where the party does not rely on any specific statute authorizing invocation of the judicial process*, the question of standing depends on whether the party has alleged * * * a “personal stake in the outcome of the controversy.” ’ ’ ”

Id. , at p.51 (emphasis added) (quoting *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986)); *see also*, *Osbourne v. Van Dyk Mtge. Corp.*, 12th Dist. No. CA2012-03-020, 2013-Ohio-332, ¶16 (stating that, for a claim authorized by statute, standing is defined by the statute itself).

The case decisions cited above all look at common law standing, i.e. whether a mere mortgagee can suffer injury if it is not the party to whom the debt is owed. As set forth above, R.C. 1303.31 limits the right to enforce a negotiable instrument to a limited few. In other words, R.C. 1303.31 is a standing statute. The General Assembly has decided that only a narrowly defined set of persons is permitted to seek payment on negotiable instruments. Yet, the Court of Appeals’s holding expands the right to enforce the debt owed on a negotiable instrument to persons who do not satisfy the statutory definition. It grants to naked mortgagees a right which the General Assembly expressly denied them.

D. Permitting a Mortgagee to Foreclose Without the Right to Enforce the Note Exposes Makers of Negotiable Instruments To Double Liability on the Same Debt.

Pursuant to R.C. 1303.67(A), only payment to a person entitled to enforce a negotiable instrument discharges the maker’s liability on the note. “Subject to division (B) of this section, an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the

instrument and to a person entitled to enforce the instrument.” *Id.* Should the Court permit bare mortgagees to pursue foreclosure cases, borrowers will be exposed to double liability on the same debt.

[I]f a maker pays a “person entitled to enforce” the note, the maker’s obligations are discharged to the extent of the amount paid. UCC § 3–602(a) [R.C. 1303.67(A)]. Put another way, if a maker makes a payment to a “person entitled to enforce,” the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id.* See also UCC § 3–602(c) [R.C. 1303.67(A)].

If, however, the maker pays someone other than a “person entitled to enforce”—even if that person physically possesses the note the maker signed—the payment generally has *no* effect on the obligations under the note. The maker still owes the money to the “person entitled to enforce,” Miller & Harrell, *supra*, ¶ 6.03[6][b][ii], and, at best, has only an action in restitution to recover the mistaken payment. See UCC § 3–418(b) [R.C. 1303.58(B)].

Bank of America, N.A., v. Pasqualone, 10th Dist. Franklin No. 13AP–87, 2013-Ohio-5795, ¶26 (quoting *In re Veal*, 450 B.R. 897, 910 (9th Cir.BAP 2011)). See also *HSBC Bank USA, N.A. v. Thompson*, 2nd Dist. Montgomery No. 23761, 2010–Ohio–4158, ¶ 71–72, (quoting *Adams v. Madison Realty & Development, Inc.*, 853 F.2d 163, 168 (3d Cir.1988) (“[F]rom the maker’s standpoint: ‘it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument.’ ”)); *McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 215 (1st Cir. 2012) (“Allowing a mortgagee who is not also a note holder to foreclose creates a risk that the borrower might remain liable to the true note holder even after the mortgagee had seized and sold the property.”).

E. Answering The Certified Question.

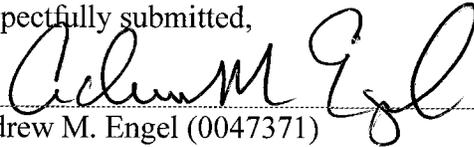
Standing is limited to those who have suffered a legally cognizable injury. In the absence

of the debt, a mortgagee has no injury to complain of. Without the right to enforce the debt obligation itself, a person holding only a mortgage has suffered no injury. And without an injury, a court cannot grant a remedy. A plaintiff without an injury and a court without the power to grant relief equate to a lack of standing. Lewis asks the Court to hold that a foreclosing plaintiff must possess both the right to enforce the debt and the mortgage in order to have standing to sue.

CONCLUSION

For the foregoing reasons, Appellants Shari Lewis requests that the Court reverse the decision of the Butler County Court of Appeals, and dismiss the action without prejudice.

Respectfully submitted,



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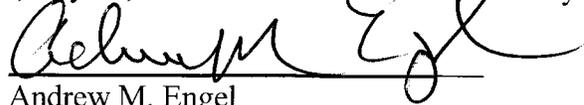
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Counsel for Appellant Shari Lewis

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon John B. Kopf, III, Esq. **THOMPSON HINE LLP**, 41 South High Street, Suite 1700, Columbus, Ohio 43215 and Scott A. King, Esq. and Terry W. Posey, Esq., **THOMPSON HINE LLP, THOMPSON HINE LLP**, Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio 45342-4934 on this 28th day of July, 2014.



Andrew M. Engel

Appendix

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| Notice of Certification of Conflict | A-1 |
| Court of Appeals Judgment and Opinion | A-2 |
| Trial Court Decision and Entry Granting Plaintiff's Motion for Summary Judgment | A-3 |
| Trial Court Decision and Entry Denying Defendant's Motion To Vacate | A-4 |
| R.C. 1303.31 | A-5 |
| R.C. 1303.38 | A-6 |

ORIGINAL

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST

14-0485

Appellee,

-vs-

SHARI LEWIS, ET AL.

Appellant.

*
*
*
*
*

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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Rebecca Algenio.
Reisenfeld & Associates
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Attorney for Appellee SMROF 2009-1 Trust

Attorney for Appellant
Shari Lewis

RECEIVED
MAR 9 1 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 9 1 2014
CLERK OF COURT
SUPREME COURT OF OHIO

A-1

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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Attorney for Appellant

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

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

Engel

SRMOF 2009-1 TRUST,
Appellee,

vs.

SHARI LEWIS, et al.,
Appellants.

2014 MAR 12 PM 2:11

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

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

REGULAR CALENDAR

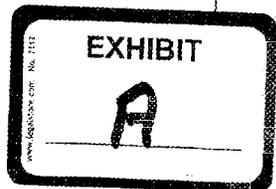
ENTRY GRANTING MOTION
TO CERTIFY CONFLICT

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.

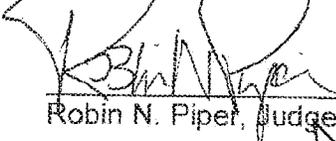
Based upon the foregoing, the motion for certification is GRANTED with

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.

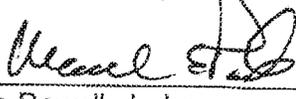
IT IS SO ORDERED.



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

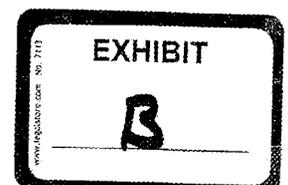
Reisenfeld & Associates, Rebecca N. Algenio, 3962 Red Bank Road, Cincinnati, Ohio 45227,
for plaintiff-appellee

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



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. Schwartwald*, 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 Mtg. 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

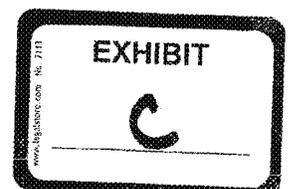
Dated: July 24, 2013

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. Aames 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

[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.

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

SRMOF 2009-1 TRUST,

Plaintiff-Appellee,

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

- vs -

JUDGMENT ENTRY

SHARI LEWIS, et al.,

Defendants-Appellant.

FILED BUTLER CO.
COURT OF APPEALS
JAN 13 2014
MARY L. SWAIN
CLERK OF COURTS

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

(Dissents)

Robert P. Ringland, Presiding Judge

Robin N. Pipet, Judge

Mike Powell, Judge

A-2

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*.

FILED
2012 OCT 19 PM 1:45

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

| | | |
|--------------------------------|---|--------------------------|
| SRMOF 2009-1 TRUST, | : | CASE NO. CV 2011 08 3073 |
| Plaintiff, | : | JUDGE PATRICIA S. ONEY |
| v. | : | DECISION AND ENTRY |
| SHARI LEWIS, aka Shari Frances | : | GRANTING PLAINTIFF'S |
| Lewis, et al., | : | MOTION FOR SUMMARY |
| Defendants, | : | JUDGMENT |
| | : | |

This matter is before this Court on Plaintiff, SRMOF 2009-1 Trust's (referred to hereinafter as "Plaintiff") Motion for Summary Judgment. Plaintiff argues that summary judgment is appropriate as there are no genuine issues of material fact. Plaintiff states that it is the holder of a Note and Mortgage executed by Defendant, Shari Lewis (referred to hereinafter as "Defendant"), that Defendant is in default on payment on the Note, and that, under the terms of the Note and Mortgage, Plaintiff may accelerate the debt and sue for foreclosure on the property used to secure the loan given to Defendant.

On September 14, 2012, Defendant filed a pro se Response to Summary Judgment.¹ Defendant makes essentially two legal arguments relative to Plaintiff's Motion for Summary

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

¹ Defendant filed her Pre-Trial Statement on October 1, 2012. It contains several additional cases to support the arguments made in the Response. However, it also presents a few new arguments. The Defendant did not seek leave to file a Sur Reply. Furthermore, the purpose of the Pre-Trial Statement is not to engage in new arguments on the merit or to supplement a Response to a Motion for Summary Judgment, but to summarize the case. For these reasons, all additional arguments and case law are not being considered as relative to the Motion for Summary Judgment.

Judgment. Defendant's first argument is that Plaintiff did not have standing at the time of the filing of this Complaint. Defendant bases this conclusion on the fact that, at one time, Plaintiff's attorney indicated the Note was missing. Defendant reasons that there is no certainty that Plaintiff held the Note at the time of the filing of the Complaint.

The second argument presented by Defendant is that the assignment of her Note and Mortgage to Plaintiff is not valid. Defendant supports this argument by stating that (1) she never signed an agreement for a re-assignment of her Note and Mortgage, (2) the Assignments were not executed at the same time as the transfer of the Note, and (3) the Assignments were not properly recorded, as they were not recorded until the day before Plaintiff filed this action.

In addition to the two primary legal arguments, Defendant makes three additional arguments: (1) Defendant complains about her dissatisfaction with her prior attorney, (2) Defendant claims that she is the victim of the banking industry's poor business practices, including those of Mortgage Electronic Registration System (MERS), and (3) Defendant states that the Plaintiff illegally held insurance proceeds issued to the Plaintiff and Defendant for damage to the subject property. As these are ancillary issues, the Court will address these briefly at the outset of this decision.

Firstly, Defendant's dissatisfaction with her attorney is irrelevant for the purposes of addressing summary judgment regarding her Note and Mortgage. It is not a material fact that would create a genuine issue to preclude summary judgment on the Note and Mortgage under Civil Rule 56. Secondly, Defendant alleges that legal challenges brought against the banks and MERS are indicative of the industry's victimization of borrowers. Although this Court notes

that there may be business practices which are being challenged in other courts, that fact is also not relevant in this case. Defendant has not demonstrated that a fraud was perpetrated upon her by the Plaintiff or that her default on the Note was caused by the business practices of the Plaintiff. Thirdly, Defendant's Mortgage indicates that any proceeds from insurance that are for damages to the property shall be assigned to the Lender and the Lender shall hold those proceeds until an inspection of the property is conducted to ensure the repairs have been made to the Lender's satisfaction. Defendant's Mortgage, P. 9. Therefore, this argument is also not relevant to this Motion for Summary Judgment. Without the threshold demonstration that a fact is material to the case, there can be no subsequent showing that the material fact creates a genuine issue precluding summary judgment. Therefore, no further consideration shall be given in this Entry to such arguments.

On October 1, 2012, Plaintiff filed a Reply. Plaintiff argues that it has provided appropriate documentation to support its Motion for Summary Judgment pursuant to Civil Rule 56. In contrast, Plaintiff states, Defendant has failed to provide an affidavit or other evidence that comports with Civil Rule 56(E). Plaintiff further disputes Defendant's allegation that it was not the holder of the Note at the time of the filing of the Complaint. Plaintiff states that the documentation demonstrates that Plaintiff had obtained the loan on December 7, 2010, when it was transferred from Wells Fargo Bank to Selene Finance, as servicer for the SRMOF Trust. Thereafter, it was delivered by Selene Finance to Plaintiff. Plaintiff argues that the transfer from Wells Fargo Bank to Selene Finance occurred before the Complaint was filed and Plaintiff became, at that time, the owner of the Note with the right to foreclose on Defendant's residence.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

Civil Rule 56 Standard

Under Civ.R. 56, summary judgment is proper when: (1) No genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to a judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and (4) viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344. In order to prevail on a motion for summary judgment pursuant to Civ.R. 56, the moving party has a heavy burden of showing the absence of issues of material fact. *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 153; *Celotex Corp v. Catrett* (1986), 477 U.S. 317, 322. See also, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. The moving party must show that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317. The evidence to properly support a Motion for Summary Judgment shall be in the form of "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact...No evidence or stipulation may be considered except as stated in this rule." Civ. R. 56(C).

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

The non-moving party then has a reciprocal burden of specificity. Civil Rule 56(E) provides in part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provide in this rule, must set

forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.” Civ. R. 56(E).

History of the Parties

On November 21, 2001, Defendant executed a Note and Mortgage, in the amount of \$141,600, with First Union Mortgage Corporation for the purchase of property located at 103 S. First Street, Trenton, Butler County, Ohio. Defendant made her last payment on August 20, 2010 and thereafter went into default on the Note. At some point, Defendant filed for bankruptcy and was personally discharged from her obligation to pay under the Note. On December 7, 2010, the Note was placed in a trust held by Plaintiff. There were three assignments submitted by Plaintiff showing that the Mortgage was assigned (1) from First Union Mortgage Corporation to Wells Fargo Bank (executed June 9, 2011), (2) from Wells Fargo Bank to Selene Finance (executed on August 8, 2011), and (3) from Selene Finance to SRMOF 2009-1 Trust (executed August 24, 2011). On August 30, 2011 the three assignments were recorded at the Butler County Recorder’s Office. On August 31, 2011, Plaintiff filed a Complaint for foreclosure in rem, seeking only possession of the property due to the Defendant being personally discharged in bankruptcy. Documentation in the file indicates that Selene Finance was a servicer of the loan for Plaintiff and that a Lost Note Indemnification Agreement was executed between Wells Fargo Bank and Selene Finance indicating that the Note could not be located at the time that the Note was to have been placed into the trust.

Before explaining the applicable case law and the decision in this matter, it is noted that

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

Defendant is a pro se litigant, as she had discharged on two separate occasions different attorneys. Secured transactions and the law regarding Notes and Mortgages are complex and difficult for laymen to understand. Therefore, for the benefit of the Defendant, this Court will first engage in a brief explanation of the basics of secured transactions law.

Notes, Mortgages and The Uniform Commercial Code

Negotiable instruments are transferable documents that order payment from one party to another, such as a check or a promissory note. Negotiable instruments are governed by Article 3 of the Uniform Commercial Code.² There are two types of negotiable instruments: (1) order instruments, which contain terms identifying a specific person to be paid, and (2) bearer instruments, which are payable to the bearer (i.e. the person in physical possession of the instrument). Understanding the type of instrument is relevant to determine the appropriate method of negotiating that instrument. Negotiation is a transfer of possession in a form that constitutes the transferee a holder.³ “A bearer instrument⁴ is negotiated by delivery alone...”⁵

An instrument can contain an indorsement on it which can be either a special indorsement or a blank indorsement. A blank indorsement contains only the signature of the person negotiating the instrument and makes the instrument bearer paper for the transferee. As

Judge

PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

² In Ohio, the Revised Code contains several provisions governing negotiable instruments, many of which are similar to The Uniform Commercial Code. See, Oh. Rev. Code §1303.01 et seq. It should be noted, though, that Mortgages are not governed by the UCC and are transferred by a recorded assignment.

³ Miller & Harrell, *The Law of Modern Payment Systems and Notes* (2002) 98-99, Section 3.02[1].

⁴ The Note in this case is a bearer instrument and, therefore, the discussion shall be limited to bearer instruments.

⁵ 2 Hart & Willier, *Negotiable Instruments Under the Uniform Commercial Code* (2010) 3-8, Section 3.01[2]; Oh. Rev. Code §1303.21.

stated above, a bearer instrument is negotiated by delivering it to another party. The Note executed by Defendant contained a blank indorsement, making it bearer paper that could be negotiated by the physical transfer of the document. "Negotiation is not, however, the only kind of transfer that can occur under Article 3; a draft or note can be assigned if the transferor wants to assign rather than negotiate" and clearly indicates that intention.⁶

Standing

In Ohio, Civil Rule 17 provides that every civil action "be prosecuted in the name of the real party in interest." A "real party in interest" is "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is *directly* benefitted or injured by the outcome of the case." In a foreclosure action, "the real party in interest is the entity that is the current holder of the note and mortgage." *Deutsche Bank National Trust Company v. Sexton*, 12th Dist. No. CA2009-11-288, 2010-Ohio-4802, at ¶9.

A holder is a specific legal term which is defined in UCC §1-201 as "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession."⁷ A holder of an instrument has the right to transfer, negotiate, discharge, or enforce the instrument.⁸ A person or entity becomes a holder with the proper negotiation of an instrument, which would be by transfer of possession

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

⁶ 2 Hart & Willier, *Negotiable Instruments Under the Uniform Commercial Code* (2010) 3-4, Section 3.01[1].

⁷ 2A Hart, Gerding & Willier, *Negotiable Instruments Under the Uniform Commercial Code* (2010) 11-19, Section 11.02; 2 Hart & Willier, *Negotiable Instruments Under the Uniform Commercial Code* (2010) 3-14 to 3-15, Section 3.02. See also, Oh. Rev. Code §1301.01(T)(1).

⁸ Miller & Harrell, *The Law of Modern Payment Systems and Notes* (2002) 96, Section 3.01[4(a)].

for a bearer instrument. Furthermore, the holder of an instrument and the owner of that instrument can be two separate entities or persons. Although the holder is a person in possession of an instrument, it should be noted that an owner may not necessarily be in possession of the instrument.⁹

It should be noted that the UCC, and the Ohio version found in the Ohio Revised Code §1301 et seq., specifically provide that others, besides the holder, may enforce an instrument.¹⁰ In fact, the purpose of “special rules for negotiable instruments codified in Article 3 is to promote the free transferability of such paper.”¹¹ Ohio law provides that:

- (A) “Person entitled to enforce” an instrument means any of the following persons:
- (1) The holder of the instrument;
 - (2) A nonholder in possession of the instrument who has the rights of a holder;
 - (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.

Oh. Rev. Code §1303.31. Section 1303.31(A)(3) includes situations where a note is missing or destroyed. Section 1303.38 states that:

- (A) A person 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.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

⁹ 5A Anderson, *Anderson on the Uniform Commercial Code* (1994) 568, Section 3-301:5.

¹⁰ U.C.C. §3-301; Oh. Rev. Code §1303.31; Gardner, *Your Client's Securitized Mortgage: A Basic Roadmap* (Spring 2010) 22:3 NACTT Quarterly 25-31, at 30.

¹¹ Miller & Harrell, *The Law of Modern Payment Systems and Notes* (2002) 98, Section 3.02[1].

(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 of process.

Oh. Rev. Code §1303.38; See, also U.C.C. 3-309.

It should be further noted that “[w]here a promissory note is secured by mortgage, *the note*, not the mortgage, represents the debt.” *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258, 260 (Ohio 1895) (emphasis added); *Bank of N.Y. v. Dobbs*, 5th Dist. Case No. 2009-CA-000002, 2009-Ohio-4742, ¶30 (Ohio Ct. App. 2009). The mortgage is a “mere incident” of the debt, and the assignment of the mortgage will not, in law, transfer the debt. *Id.* This has been the law in Ohio “[f]or nearly a century.” See, *Edgar v. Haines* (1923), 109 Ohio St. 159, 164, 142 N.E. 837. Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers* (1950), 100 N.E.2d 68, 59 Ohio Abs. 400.” See also, *Central Mortgage Company v. Webster*, 5th Dist. No. 2011CA00242, 2012-Ohio-4478, at ¶33, citing to *U.S. Bank National Association v. Marcino*, 181 Ohio App.3d 328, 908 N.E.2d 1032, 2009-Ohio-1178 (7th Dist.).

To further complicate the issue as to which entity has the right to foreclose on Defendant, it appears that the Note and Mortgage were pooled with other such assets and placed into a securitized trust. Therefore, any rights Plaintiff may have relative to Defendant’s Note and Mortgage would be further defined by the operative Trust Agreement. Under general trust law, when a piece of real estate enters into a trust, it becomes part of the trust corpus and is to

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

be managed in accordance with the transactional documents that created the trust, such as the Trust Agreement. In fact, “no rule of law is more clearly established” than that the intention of the creator of the trust controls. *In re Estate of Sells Volkema v. Hanover* (1968), 15 Ohio App.2d 23, 29, 238 N.E.2d 803, 808. Furthermore, the trustee has “legal title to the trust property and has the power to sue to protect” the trust. *In Re Estate of Herrick v. Herrick*, 8th Dist. No. 82057, 2003-Ohio-3025.

A securitized trust differs from a traditional trust, though. A securitized trust is “a complex series of financial transactions designed to maximize the cash flow and cash out options for loan originators.”¹² Many securitized trusts involve a (1) Trustee, who is the owner of the loans on behalf of the certificate holders, (2) a Custodian, who maintains physical possession of the original mortgage loan documents, (3) a Master Servicer, who has an administrative role in assuring the other servicers follow the terms of the servicing agreements, and (4) a Sub-Servicer, who manages the loans by billing, collecting, and remitting payments and foreclosing on the property of loans in default. The Master Servicer and Custodian are typically responsible by contract to the Trustee, while the Sub-Servicer is typically responsible by contract to the Master Servicer.¹³ Although there are considerably more entities involved in a securitized trust, the Trust Agreement still controls the rights and responsibilities of all the involved parties.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

¹² Gardner, Mortgage Securitization, Servicing, and consumer Bankruptcy (Sept. 2005), 2:1 ABA GP/Solo Law Trends & News 1-9, at 1.

¹³ Gardner, Your Client’s Securitized Mortgage: A Basic Roadmap (Spring 2010) 22:3 NACTT Quarterly 25-31, at 25-26.

In the matter before this Court, the trust documents are not admitted into evidence and, therefore, the Defendant has no knowledge as to whether those documents set forth a specific relationship between Plaintiff and Selene Finance which governs the transferability of the Note and/or Mortgage. Therefore, Defendant's challenge regarding when Plaintiff had received the rights under the Note and Mortgage from Selene Finance are not supported by any evidence. Any allegations relating to the trust is, thus, mere speculation.

Defendant also argues that the fact Plaintiff had a lost or missing Note, at the time of the filing of the Complaint, indicates that the Plaintiff was not a holder and did not have the right to enforce the Note. However, Defendant does not provide any evidence to support the allegation that Plaintiff was not entitled to enforce the Note. Defendant fails to understand that, pursuant to Ohio law, Plaintiff need not have physical possession of a Note in order to enforce it. Ownership of the Note occurred for Plaintiff on December 7, 2010. In August 2012, Plaintiff located the original Note. On September 14, 2012, Plaintiff appeared in Court with the original Note and Mortgage and presented it for inspection by the Defendant on the record. Defendant admitted that it was the original Note and Mortgage and that the signatures on those documents were hers. The 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.

In addition to the fact that Plaintiff presented the original Note and Mortgage and had documentation evidencing that it had an interest in the Note since December 7, 2010, Ohio statutes, as stated above, provide that Plaintiff was the entity entitled to enforce the Note

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

against Defendant. As such, Defendant's argument regarding standing based on possession of the original Note fails and the Court now turns to Defendant's arguments regarding the validity of the three assignments.

Assignments

An assignment is "an act of the owner of a right...purporting to transfer it, sometimes to the resulting change in legal relations, sometimes to a document evidencing the act or change."¹⁴ All contractual rights can be assigned, unless:

- (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
- (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
- (c) assignment is validly precluded by contract.¹⁵

"The rights of an assignee against the obligor are often summarized by the rule that the assignee takes, all but, only the rights of the assignor."¹⁶ An assignee "stands in the shoes of the assignor. He has the same title that the assignor had, no better, no worse..." *Carius v. Ohio Contract Purchase Co.* (1928), 30 Ohio App. 57, 62, 164 N.E. 234, 236. Furthermore, it is well established that an assignee, by operation of law, is entitled to enforce a note as a real party in interest. Federal Courts have agreed with this principle.

With regards to Defendant's three arguments on the validity of the assignments, Ohio

¹⁴ Restatement of the Law 2d, Contracts (1981-2010) 15, Assignments and Delegation, Section 317(2), at Comment.

¹⁵ Restatement of the Law 2d, Contracts (1981-2010) 15, Assignments and Delegation, Section 317(2).

and federal courts have consistently ruled that a borrower in a foreclosure action does not have standing to challenge the assignments or any of the other agreements between financial entities relating to the borrower's note and mortgage. One example of another agreement not subject to a borrower's challenge is the Pooling and Servicing Agreement (PSA), which governs the transfer of a Note and Mortgage into a securitized trust and sets forth the servicing rights and obligations between the trust and its servicers.

In Ohio and elsewhere, mortgage borrowers' attempts to invalidate an assignment of mortgage have repeatedly – and consistently – been unsuccessful as both a means to challenge standing, and to avoid their mortgage debt. It has been well-decided in Ohio courts that a person who is not a party to an assignment lacks standing to challenge the validity of that assignment. *Chase Home Finance v. Heft*, 3rd Dist. Nos. 8-10-14, 8-11-16, 2012 –Ohio-876, at ¶37. The reasoning for this is based upon the contract principle that only parties to a contract can assert their rights under that contract. *Bank of New York Mellon v. Unger*, 8th Dist. No. 97315, 2012-Ohio-1950, at ¶21; see also, *Liu v. T&H Mach., Inc.* 191 F.3d 790, 797 (7th Cir.1999) (party to underlying contract lacks standing to “attack any problems with the reassignment” of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir.1900) (“As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so”). For the Defendant, this law would translate to the reality that only MERS and Wells Fargo can challenge the validity of the first assignment, only Wells Fargo and Selene Finance can challenge the validity of the second assignment, and only Selene Finance and Plaintiff can

¹⁶ 2 Hart & Willier, *Negotiable Instruments Under the Uniform Commercial Code* (2010) 3-6, Section 3.01[2].

challenge the validity of the third assignment.

Furthermore, the *Unger* court also recognized that even if an assignment “were declared invalid, there would be no reason to declare the underlying note and mortgage invalid and unenforceable.” *Id.* Ohio courts have consistently found that a borrower’s role in the business relationship of two financial entities “and how it affects [the borrower’s] contractual obligations was uninvolved and unaffected.” *LSF6 Mercury REO Investments Trust Series 2008-1 c/o Vericrest Financial v. Locke*, 10th Dist. No. 11-AP-757, 2012-Ohio-4499, at ¶28, citing to *Bridge v. Aames Capital Corporation*, Case No. 1:09 CV 2947 (N.D. Ohio 2010). The party foreclosing is “legally immaterial” as to the borrower’s obligations. The borrower is exposed to foreclosure through his/her default, not through the defects in the assignments. *Id.* The assignment of a mortgage does not alter the borrower’s obligations under the mortgage or underlying note. Ohio courts have reasoned that a “borrower certainly has an interest in avoiding foreclosure, but the validity of the assignments does not affect whether borrower owes its obligations, but only to whom borrower is obligated.”

In order for the Defendant in this matter to have standing to challenge the assignments, she would have to demonstrate an “injury in fact.” See, *Bank of New York Mellon v. Unger*, 8th Dist. No. 97315, 2012-Ohio-1950, at ¶27, citing to *Wilmington City School Dist. Bd. of Ed. v. Bd. of Commrs. of Clinton Co.*, 141 Ohio App.3d 232, 238, 750 N.E.2d 1141 (12th Dist.2000). “An injury in fact requires a showing that the party suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision.” *Id.* Defendant does not dispute the

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

execution of the Note and Mortgage or that she is in default. Defendant can not demonstrate that she will suffer a specific injury except the injury of losing her home. That injury is traceable to the Defendant's own default, and not to the circumstances surrounding the execution or recording of the assignments. Defendant can not demonstrate that she would not lose her home if the assignments were invalidated, as the original lender would simply proceed with its right to foreclose. In other words, Defendant can not demonstrate that she would suffer an injury in fact and she also has no standing to challenge the assignments based upon this aspect of Ohio law.

In addition to the law regarding challenges to assignments, courts in Ohio have acknowledged that it is speculation for a borrower to argue that their note and mortgage must be invalid because the banking industry has instances of robo-signing or other inappropriate conduct that have been reported in the news. Courts have consistently found that unless the borrower can demonstrate with "evidentiary quality materials" that their own loan documents, affidavits, and/or assignments were fraudulently executed, the borrower's argument remains mere speculation. *Residential Funding Company v. Thorne*, 2012-Ohio-2552, 973 N.E.2d 294 (6th Dist.), at ¶¶24-25. The *Thorne* court went on to decide that even if news items were authenticated, they would be inadmissible hearsay not within any exception. *Id.*, at ¶¶31-33. Defendant, in this matter, has submitted several news items to be considered as evidence regarding the foreclosure crisis in this country. Under Ohio law, these are inadmissible, as stated above, and irrelevant, as Defendant can not demonstrate that her loan documents and/or assignments were fraudulently executed.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

Even if the Defendant were allowed to challenge the assignments, this Court does not find her three arguments regarding the validity of the assignments credible. First, Defendant argues that she did not sign an agreement for her mortgage to be assigned from the original lender, First Union Mortgage Corporation to another entity. However, this is not entirely accurate. Defendant executed a Note and Mortgage with First Union Mortgage Corporation on November 21, 2001. The Mortgage contained language which allowed for its assignment. The Mortgage states that Defendant (1) allows MERS to act as the nominee of First Union Mortgage Corporation, (2) "grants and conveys to MERS" the subject property, and (3) that Defendant "understands and agrees" for MERS to "exercise any and all of those interests" given by Defendant under the Mortgage. Defendant's Mortgage, P.2 & 3. Therefore, it was wholly within First Union Mortgage Corporation and/or MERS' rights to assign the Defendant's Mortgage.

Second, Defendant argues that the three Assignments are not valid due to them being executed after the stated date of the transfer of the Mortgage and Note. Defendant believes that Plaintiff did not have actual possession of the Note at the time of the filing of the Complaint for foreclosure and, therefore, assumes that Plaintiff had no legal right to initiate suit thereon. However, under the Uniform Commercial Code, "[a]n assignment does not [require delivery], so a note may be assigned without delivery of the note to the transferee."¹⁷ Furthermore, if

¹⁷ 5A Anderson, *Anderson on the Uniform Commercial Code* (1994) 453, Section 3-201:13; See also, *Bank of New York v. Dobbs* (September 8, 2009), Knox App. No. 2009-CA-000002, unreported at 2009 WL 2894601, ¶130, where the court found that "where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered."

Defendant's limited understanding of assignments was accurate, then such restriction would nullify the purpose of assignments, which is the ability to freely transfer legal rights among parties.

Third, Defendant argues that the assignments are not valid as they were not recorded until the day before the filing of the Complaint. In Ohio the recording statute "is meant to protect innocent, subsequent bona fide purchasers of land who have no knowledge of any encumbrances." *Whittiker v. Deutsche National Bank*, 605 F.Supp.2d 914, 943, citing to *Wead v. Lutz*, 161 Ohio App.3d 580, 586. It is "intended to govern priorities between lenders, not the validity of liens." *Martin v. Select Portfolio Serving Holding Corporation*, S.D. Ohio No. 1:05-cv-273, 2008 WL 618788 (Mar. 3, 2008). Therefore, the fact that the assignments were not filed immediately upon their execution does not mean that the assignments are not valid. In fact, Ohio courts have further found the failure to record the assignment does not invalidate the assignment. *Id.*, citing to *Wead v. Lutz*, 161 Ohio App.3d 580, 586. Therefore, under the three prior Assignments, Plaintiff would have all the rights that the prior assignors, including the original lender, First Union Mortgage Corp., possessed to bring a foreclosure action against Defendant were Defendant to default under the terms of the Note.

Not only did the three Assignments provide Plaintiff the right to bring the foreclosure action, but the placing of the Note in a securitized trust may have given additional rights to the Plaintiff. Those rights would be in the Trust Agreement, a PSA, and/or a Servicing Agreement, all of which Defendant is not privy to. Regardless, the operative fact is that Plaintiff's status of

holder, assignee, and trust continued to provide Plaintiff with standing to sue for foreclosure in August 2011.

Furthermore, there may have been more than one entity at the time of the filing of the Complaint that had the right to enforce the Note and Mortgage. Under the Bankruptcy Code and Rule 17 of the Federal Rules of Civil Procedure, a loan servicer is a "real party in interest" with standing to conduct...the affairs of the investor relating to the debt that it services" as a party may appear if it has a "direct stake in the litigation." *Greer v. O'Dell* (9/23/2002), U.S Ct. of Appeal, 11th Circuit, 305 F.3d 1297, 1302. Therefore, Selene Finance, as a servicer, may have had standing to foreclose if such agreement between the business entities exists. As stated above, though, the business relationship and the agreements that arise from the relationship between Selene Finance and Plaintiff are not subject to challenges by Defendant as she was not a party to that relationship, nor does she suffer an injury directly caused by the agreements arising from that relationship. Again, Defendant is subjected to foreclosure due to her own default regardless of the entity pursuing that default.

Conclusion

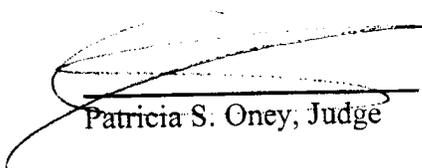
There is no dispute as to the Defendant's default on the Note, that the Defendant was personally discharged in bankruptcy and has expressed an unwillingness to enter into a loan modification to maintain her home, and that she is subject to foreclosure on the home only under the Note and Mortgage. It is also clear by Defendant's Response that she has incorrectly focused upon whether Plaintiff was a holder and has misunderstood the legal term of art as it

applies to commercial paper. Plaintiff was the holder by virtue of its possession of the Note. The Note and Mortgage were assigned to Plaintiff and were included in a group of assets which were pooled together for the specific purpose of being part of a securitized trust. As an asset in a securitized trust, the Defendant's Note and Mortgage are subject to many agreements, all of which are not an issue for Defendant to challenge. The three Assignments are also not subject to challenges by Defendant. Defendant has failed to provide any evidence that Plaintiff had no standing to foreclose on her home.

Based upon the law and in viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can only conclude that Plaintiff was the owner and/or holder of the Defendant's Note and Mortgage, which provided the right to sue for foreclosure in the event of a default by the Defendant. The entity seeking the foreclosure must ultimately show "execution and delivery of the note and mortgage; valid recording of the mortgage; it is the current holder of the note and mortgage; default; and the amount owed." *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, 958 N.E.2d 194 (12th Dist.). Plaintiff has met all of these requirements. Plaintiff has thirty (30) days from the date of this Entry to submit a final Judgment Entry for Foreclosure In Rem and may thereafter proceed to take the residence described therein to sheriff's sale.

Judge
TRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

ENTER


Patricia S. Oney, Judge

cc:

Matthew Taulbee
Reisenfeld & Associates
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Shari Lewis
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FILED

2013 APR -5 PM 2:25

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS
COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

| | | |
|----------------------|---|--------------------------------------|
| SRMOF 2009-1 TRUST, | : | CASE NO: CV 2011 08 3073 |
| Plaintiff, | : | JUDGE PATRICIA S. ONEY |
| vs. | : | DECISION AND ENTRY |
| SHARI LEWIS, et al., | : | DENYING DEFENDANT'S |
| Defendants. | : | MOTION TO VACATE |
| | : | <u>FINAL APPEALABLE ORDER</u> |

On February 1, 2012, Defendant, Shari Lewis (referred to hereinafter as "Defendant"), filed a Motion to Vacate moving this Court to vacate the Decision and Entry Granting Plaintiff's Motion for Summary Judgment entered on October 19, 2012 and the In Rem Judgment Entry and Decree in Foreclosure filed on October 31, 2012. Defendant's Motion was prompted by the issuance of a Supreme Court of Ohio decision in a matter entitled *Federal Home Loan Mortgage Corporation v. Schwartzwald*, (Oct. 31, 2012), 134 Ohio St.3d 13, 979 N.E.2d 1214, which was decided on October 31, 2012.

The Court in *Schwartzwald* ruled that if a plaintiff did not have standing regarding the note prior to the filing of a Complaint for foreclosure, the lack of standing could not be corrected with a later transfer/assignment of the note to plaintiff. *Id.*, ¶27. In *Schwartzwald*, the homeowners purchased a home in 2006 which was financed by Legacy Mortgage. *Id.*, at ¶5. Legacy Mortgage endorsed the note to Wells Fargo Bank and assigned it the mortgage. *Id.* In January 2009, the homeowners went into default. *Id.*, at ¶6. On April 15, 2009, Federal Home Loan Mortgage Corporation (referred to hereinafter as "Federal Home Loan") commenced a foreclosure action against the homeowners. *Id.*, at ¶7. One month later, Wells

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

A-4

Fargo Bank assigned the note and mortgage to Federal Home Loan. *Id.*, at 10. The trial court granted summary judgment to Federal Home Loan and the Second District Court of Appeals affirmed, holding that “Federal Home Loan had established its right to enforce the promissory note as a non-holder in possession, because assignment of the mortgage effected a transfer of the note it secured.” *Id.*, at ¶14 & 15. The issue for the Ohio Supreme Court was “whether a lack of standing at the commencement of a foreclosure action may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment.” *Id.*, at ¶19. The Supreme Court of Ohio stated that standing is determined at the commencement of a suit. In *Schwartzwald*, Federal Home Loan had not suffered an injury at the time the suit was filed as it did not own the debt on April 15, 2009 when the suit commenced. The Supreme Court of Ohio concluded that “a litigant cannot pursuant to Civil Rule 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.” *Id.*, at ¶39.

Civil Rule 60(B) Motions

Defendant’s Motion to Vacate argues that, in accordance with *Schwartzwald*, Plaintiff, SRMOF 2009-1 Trust (referred to hereinafter as “Plaintiff”), did not have standing to bring the foreclosure action and could not correct the standing issue during the pendency of the case. Although Defendant does not argue or caption this motion as a Motion to Vacate Judgment Pursuant to Civil Rule 60(B), the only remedy to challenge a final order with the Court that issued said order is through a 60(B) Motion. Therefore, if the Court is to consider Defendant’s

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

Motion as a 60(B) Motion, it must examine whether Defendant meets the standard required for such motions.

Civ.R. 60(B), which governs motions for relief from judgment, provides in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud * * * (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken * * *.

Civ.R. 60(B) represents a balance between "the legal principle that there should be finality in every case, so that once a judgment is entered it should not be disturbed, and the requirements of fairness and justice, that given the proper circumstances, some final judgments should be reopened." *Advance Mortgage Corp. v. Novak* (1977), 53 Ohio App.3d 289, 291.

To prevail on a motion brought under Civ.R. 60(B), the moving party must demonstrate

that:

- (1) the party has a meritorious defense or claim to present if relief is granted;
- (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and
- (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The moving party must establish all three requirements for the motion to be granted.

Rose Chevrolet, Inc. v. Adams (1988), 36 Ohio St.3d 17. The decision whether to grant relief from judgment is within the discretion of the trial court. *Id.*

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

In the matter before this Court, Defendant has satisfied the second and third prongs of *GTE* by bringing the Motion to Vacate within a reasonable time and for another reason justifying relief from judgment, i.e. Civ. R. 60(B)(5). Defendant, however, does not satisfy the first prong of *GTE*, that requiring a meritorious defense to be presented if relief was granted. Defendant was in default on her Note for approximately 2 ½ years by the time judgment was granted. Defendant acknowledged her default on the record at the report where the original Note and Mortgage was presented for her inspection. At that report, Defendant also acknowledged her original signature on the Note and Mortgage. Defendant had not escrowed any mortgage payments during the time she was in default so that she could reinstate the loan or make a lump sum payment to enter into a loan modification. In fact, Defendant, having been discharged personally from the debt under the Note, through a bankruptcy, refused to even apply for a loan modification, stating to the court that she did not want to become obligated again to a bank for her home. Defendant also did not reaffirm the loan after discharge. Instead, Defendant indicated to the Court that, based on Plaintiff's perceived lack of standing, she believed she was entitled to own her home free and clear from any Note or Mortgage.

Ohio courts have consistently found that a borrower's role in the business relationship of two financial entities "and how it affects [the borrower's] contractual obligations was uninvolved and unaffected." *LSF6 Mercury REO Investments Trust Series 2008-1 c/o Vericrest Financial v. Locke*, 10th Dist. No. 11-AP-757, 2012-Ohio-4499, at ¶28, citing to *Bridge v. Ames Capital Corporation*, Case No. 1:09 CV 2947 (N.D. Ohio 2010). The party foreclosing is "legally immaterial" as to the borrower's obligations. The borrower is exposed to foreclosure through

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

his/her default, not through the defects in the assignments. *Id.* Defendant is subjected to foreclosure due to her own default regardless of the entity pursuing that default.

Defendant simply does not have a meritorious defense to the default and foreclosure action. Therefore, if the court views the Defendant's motion under Civil Rule 60(B), Defendant's motion should be denied.

Retroactive Application of *Schwartzwald*

If the court were to decide Defendant's Motion based on the argument that *Schwartzwald* should be applied to Defendant's circumstances, this Court notes that summary judgment was granted on October 19, 2012, approximately twelve days before *Schwartzwald* was decided. The Plaintiff's Judgment Entry was filed October 31, 2012, the same day *Schwartzwald* was decided. There is no language in *Schwartzwald* that provides that its ruling should be applied to foreclosure cases retroactively. Regardless, even prior to *Schwartzwald*, this Court carefully reviewed all foreclosures to make certain that standing existed at the time the Complaint was filed. This careful review also occurred relative to this matter.

Facts of the Case

The original Note was executed between Defendant and First Union Mortgage Corporation (referred to hereinafter as "First Union") on November 21, 2001. The Note contained a blank endorsement. Prior to the filing of the Complaint in this matter, there was a series of mergers which involved the transfer of the Note. The loan originator, First Union merged with Wachovia Bank on September 1, 2001 and Wachovia Bank merged with Wells

Fargo Bank in 2008. *Plaintiff's Reply in Support of Motion for Summary Judgment, Exhibit A.* The merger of business entities includes the transfer of assets, such as Defendant's Note. Therefore, Wells Fargo had assumed the assets of the loan originator in 2008, even though it later was unable to locate the Note. On December 7, 2010, Wells Fargo executed a Lost Note Affidavit and Indemnification Agreement (referred to hereinafter as "Lost Note Agreement"). The Lost Note Agreement provides that:

- (1) The certified copy, attached to the Lost Note Agreement as Exhibit A, is a true and accurate copy of the original Note executed by Shari Lewis;
- (2) The original Note was lost, missing or destroyed and has not been paid, satisfied, transferred, assigned, pledged, or hypothecated in any way;
- (3) In consideration of Selene Finance accepting the certified copy of the Note in lieu of the original Note, Wells Fargo will defend, indemnify, and hold harmless Selene Finance from and against any and all loss;
- (4) If the original Note is found, Wells Fargo shall endorse it immediately to Selene Finance; and
- (5) Upon endorsement of the found original Note, the Lost Note Agreement shall become null and void.

Plaintiff's Affidavit in Support of Amended Motion for Summary Judgment ("Plaintiff's Affidavit"), Exhibit B. There are two aspects of the financial industry that should be noted: (1) businesses are free to transfer assets by contract, and (2) the transferring of the interest in an asset does not necessarily occur simultaneously with the physical transfer of that asset. Wells Fargo effectively transferred its interest in Defendant's Note to Selene Finance. On the same

day, Selene Finance, placed the Lost Note Agreement with Plaintiff, SRMOF 2009-1 Trust (referred to hereinafter as "Plaintiff"), a securitized trust.

The Mortgage originated with First Union and contained MERS language. Plaintiff's Affidavit, Exhibit C. MERS, as nominee for First Union, assigned the Mortgage to Wells Fargo on June 9, 2011. Plaintiff's Affidavit, Exhibit D. Wells Fargo Bank assigned the Mortgage to Selene Finance on August 8, 2011. Plaintiff's Exhibit E. Selene Finance assigned the mortgage to Plaintiff on August 24, 2011. Plaintiff's Affidavit, Exhibit F. All three Assignments were recorded on August 30, 2011, one day prior to the filing of the foreclosure action.

Defendant went into default on May 1, 2010 and Plaintiff commenced a foreclosure action against Defendant on August 31, 2011. Defendant argues that at the time the foreclosure was commenced, Plaintiff did not have standing to sue for default on the Note.

Standing

In Ohio, Civil Rule 17 provides that every civil action "be prosecuted in the name of the real party in interest." A "real party in interest" is "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is *directly* benefitted or injured by the outcome of the case."¹

"Standing to sue is part of the common sense understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Standing involves a determination of whether a party has alleged a personal stake in the outcome

¹ *Countrywide Home Loans, Inc. v. Swayne*, 2nd Dist. No. 2009 CA 65, 2010-Ohio-3903, at *4, citing to *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24 (emphasis in original); See, e.g., *Countrywide Home Loans Servicing, L.P. v. Shifflet*, Marion App. No. 9-09-31, 2010-Ohio-1266, ¶12; and Civ. R. 17.

of the controversy to ensure the dispute will be presented in an adversarial context. *Mortgage Elec. Registration Sys. v. Petry*, 11th Dist. No. 2008-P-0016, 2008-Ohio-5323, 2008 WL 4561151, ¶ 18. A personal stake requires an injury to the plaintiff. *Id.* The Supreme Court of Ohio has held that standing is jurisdictional in nature. *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973).

Federal Home Loan Mortgage Corporation v. Rufo, 11th Dist. No. 2012-A-0011, 2012-Ohio-5930, at ¶17. “In the context of a mortgage foreclosure action, the mortgage holder must establish an interest in the mortgage or promissory note in order to have standing to invoke the jurisdiction of the common pleas court.” *Id.*, at ¶18, citing to *Schwartzwald*, supra, at ¶ 28. The real party in interest is “one who is *directly* benefitted or injured by the outcome of the case.” *Id.*, at ¶20, citing to *Midwest Business Capital v. RFS Pyramid Management, LLC*, 11th Dist. No. 2011-T-0030, 2011-Ohio-6214, 2011 WL 6016975, ¶19.

In the matter before this Court, Plaintiff sufficiently held the interest in Defendant’s Note under Civil Rule 17. According to the language of the Lost Note Agreement, Wells Fargo did not have any intention of keeping an interest in Defendant’s Note. Quite the opposite. Wells Fargo specifically relinquished its right to that asset and, as the Note was lost at the time, the only option to effectuate a transfer was through contractual means with the provision that physical transfer would occur when the Note was located. In reading the Lost Note Agreement, it is clear that its purpose was to transfer that asset completely to Selene Finance, a servicer of Plaintiff. That transfer occurred approximately one year prior to the filing of the Complaint. Plaintiff effectively met its burden of demonstrating that standing existed. Standing was confirmed by the fact that the original Note and Mortgage, when found

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

by Wells Fargo, was given to Plaintiff, pursuant to the contractual agreement between the parties.

This Court notes several distinctions between this matter and *Schwartzwald*. First, *Schwartzwald* did not involve a scenario of a lost note and a transfer via a contractual agreement. *Schwartzwald* involved two banks, one of which filed for foreclosure before it had been assigned the Note by the other. The receiving bank clearly did not have an interest in the note sufficient to make that bank a real party in interest under Civil Rule 17. In the matter before this Court, Plaintiff the owner of the Note and had an interest in the Note prior to the filing of the Complaint, in compliance with Civil Rule 17. Plaintiff was the party damaged by Defendant's default. Therefore, Plaintiff was the real party in interest.

Second, *Schwartzwald* held that lack of standing could not be corrected with a later transfer or assignment of the note. In the matter before this Court, the interest in Defendant's Note was transferred via the Lost Note Agreement prior to the filing of the Complaint.

Third, *Schwartzwald* found that Federal Home Loan did not suffer an injury at the time the suit was commenced as it did not own the debt prior to the filing of the Complaint. In this matter, Plaintiff owned the debt approximately one year prior to the filing of the Complaint as is evidenced by the language transferring all interest in the Defendant's Note to Plaintiff's servicer. Therefore, Plaintiff was the party to be directly injured by Defendant's default.

Fourth, *Schwartzwald* held that lack of standing could not be cured by obtaining an interest in the subject of the litigation after its commencement. In this matter, Plaintiff had obtained the interest of the subject of the litigation prior to the commencement of the suit. Therefore, there was no lack of standing to be cured.

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

Finally, *Schwartzwald* did not involve a securitized trust. Securitized trusts are unique entities that are governed by a Trust Agreement and a variety of companion documents which set forth the parties involved in the Trust. Securitized trusts, by their nature, involve multiple entities. Given the nature of the Agreement between Wells Fargo and Selene Finance, it is possible that Wells Fargo was involved in the trust or had rights and obligations relevant to the trust under one or more of the trust documents and that the transfer of Defendant's Note by a Lost Note Agreement was sufficient between the parties due to their relationship relative to the Trust. However, Defendant never requested the trust documents in discovery and, therefore, the exact nature of relations between Wells Fargo and Plaintiff was not adequately explored by Defendant.

Conclusion

Defendant has not presented a successful 60(B) Motion as there is no meritorious defense. There is no basis for applying *Schwartzwald* retroactively. Even if *Schwartzwald* were to be applied retroactively, the unique scenarios in this matter were not addressed by *Schwartzwald*. What Defendant seeks is a second chance to avoid foreclosure. Although that is understandable, it is not appropriate. The result of vacating the Entry Granting Plaintiff's Motion for Summary Judgment would only serve to burden Plaintiff to refile and allow Defendant more time to remain in the house for which she is neither paying the mortgage on nor escrowing those payments for her future. This course would effectively cause undue prejudice to the Plaintiff who had taken adequate legal measures to secure ownership of the Defendant's Note approximately one year prior to filing the Complaint in this matter. Based

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

on the foregoing, Defendant's Motion to Vacate is hereby denied. All issues between the parties having hereby been resolved, there is no just cause for delay.

ENTER


Patricia S. Oney, Judge

cc:

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Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

1303.31 Person entitled to enforce instrument - UCC 3-301.

(A) "Person entitled to enforce" an instrument means any of the following persons:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Effective Date: 08-19-1994

A-5

1303.38 Enforcement of lost, destroyed or stolen instrument - UCC 3-309.

(A) A person 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 of process.

(B) A person seeking enforcement of an instrument under division (A) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, divisions (A) and (B) of section 1303.36 of the Revised Code applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection for the person required to pay the instrument may be provided by any reasonable means.

Effective Date: 08-19-1994

A-6