

ORIGINAL

IN THE SUPREME COURT OF OHIO

HSBC Bank, USA, : On Appeal from the Fairfield  
Plaintiff-Appellee, : County Court of Appeals,  
 : Fifth Appellate District  
v. :  
 : Court of Appeals 14-1489  
Allan B. Maust, et al. : Case No. 13 CA 82  
Defendants-Appellants. : (Common Pleas Case No. 12 CV 62)

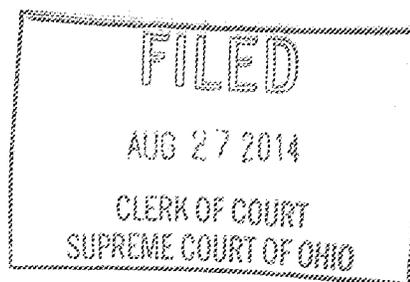
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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANTS-APPELLANTS, ALLAN B. MAUST AND REBECCA MAUST

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This case presents two substantial issues that are of significance – one being the role that § 5301.252 of the Ohio Revised Code plays in this case which states a person having knowledge of facts may affect the title to real estate by allowing them to record an affidavit stating these facts in the county recorder’s office.

In the instant case, the initial holder of the note, Fifth Third Bank, after filing an Assignment transferring ownership of the note and mortgage to U.S. Bank Mortgage Company, filed such an affidavit in the Fairfield County Recorder’s Office suggesting the assignment it had filed, which resulted in a foreclosure action being filed by U.S. Bank, had been done “in error.” The trial court took the position that the affidavit effectuated a failure to transfer or setting aside the transfer of the assignments filed of record with the recorder’s office. This position was upheld by the Court of Appeals.

The question of significance that needs to be decided is what is the scope and role of the affidavit permitted by § 5301.252 of the Revised Code. It is the position of the Appellants that while that affidavit may be filed, it does not effectuate a transfer of the ownership interest in the property. The ruling of the trial court, as upheld by the Court of Appeals, presents a substantial question as to what the status is with regard to maintaining titled ownership interest in real estate or in a note or mortgage. If the approach taken by the trial court and the Court of Appeals is followed, it means that a person may file an assignment of ownership with the recorder’s office and then later submit an affidavit stating it was a mistake. That affidavit then operates to void the ownership transfer that had previously taken place without any input by the assignee or a hearing

in the appropriate court.

The issues presented in terms of the possible “clouds” on title and issues with regard to ownership interest are of substantial importance.

The second issue is the trial court ruled that the cross claim where the Appellants joined Fifth Third Bank as the initial owner of the note and mortgage because the issue as to their attempted use of the affidavit and processes to set aside a recorded transfer to U.S. Bank failed to state a claim for relief.

Appellants filed a cross complaint against Fifth Third Bank, the original mortgage holder, and the individual who initially filed assignments of ownership of the note and mortgage to U.S. Bank. Appellee, Fifth Third Bank, then filed what purported to be an affidavit pursuant to § 5301.252 of the Revised Code, that the assignments of ownership to U.S. Bank were in error and, therefore, should be disregarded. They then filed what purported to be an assignment to Appellee in this case. Thus, Fifth Third Bank was an essential participant in the situation effectuating the issue of transfer of the note and mortgage to Appellee for having previously transferred the documents to U.S. Bank and U.S. Bank Mortgage Company.

The cross complaint sought to have the issue litigated as to whether or not their purported transfer was valid. Clearly, that issue is part and parcel of the claim in this case. For the court to say it was a foreclosure action and, therefore, issues critical as to the determination of the issues in that case, fails to state a claim upon which relief may be granted, improperly narrows the rights of the Appellants to have all issues litigated between the parties at the same time.

These two issues are substantial given the ongoing circumstances not only in this case, but in the terms of issues regarding foreclosure and the purported transfers of ownership of notes and

mortgages to trusts, etc. the procedures in terms of the provisions of § 5301.252 of the Revised Code and issues with regard to joinder and the right of a claimant to have the issues litigated together with the foreclosure action presents substantial issues for the protection of the public.

### **STATEMENT OF THE CASE AND FACTS**

The litigation that was pending in the Fairfield County Court of Common Pleas, which is the subject of this appeal, is the third foreclosure action against Defendants-Appellants, Allen and Rebecca Maust (hereinafter “Appellants”), in the last three (3) years. The initial foreclosure action was filed by Third-Party Defendant, Fifth Third Mortgage Company, against Appellants on August 3, 2009 in the Fairfield County Court of Common Pleas, Case No. 09 CV 1015.

Following the filing of the initial foreclosure action, Appellants learned for the first time on October 18, 2009, from Fifth Third Mortgage Company, that their note had been sold to U.S. Bank. Fifth Third Mortgage Company then dismissed the initial foreclosure action on November 11, 2009 because it was not the real party in interest and U.S. Bank was not named as a party to the foreclosure action. From November 2009 through the spring of 2010, Appellants repeatedly requested information from Fifth Third Mortgage Company as to whom they needed to contact at U.S. Bank to handle refinancing issues and was denied any such information from Fifth Third Mortgage Company.

On May 18, 2010, after dismissing the initial foreclosure action, and prior to the filing of the second foreclosure action, Fifth Third Mortgage Company filed a fully enforceable and notarized Assignment of Mortgage with Fairfield County Recorder’s Office, which assigned and transferred all rights, title and interest in the Appellant’s mortgage to U.S. Bank.

After acquiring all rights, title and interest in Appellants’ mortgage, U.S. Bank filed the

second foreclosure action against the Appellants on August 4, 2010 in the Fairfield County Court of Common Pleas, Case No. 10 CV 947.

After filing the second foreclosure action against Appellants, Fifth Third Mortgage Company altered the May 18, 2010 Assignment of Mortgage and filed the altered instrument with the Fairfield County Recorder's Office changing the assignee from "U.S. Bank" to "U.S. Bank Home Mortgage" – a completely separate and distinct legal entity. The purported August 31, 2010 Assignment of Mortgage is the same instrument Fifth Third Mortgage Company filed three (3) months prior on May 18<sup>th</sup> with only the name of the assignee changed, but was not acknowledged before a notary public, and was filed in violation of the established recording laws of the State of Ohio.

On the same date Fifth Third Mortgage Company filed the altered Assignment of Mortgage with the Fairfield County Recorder's office, a First Amended Complaint was filed in Case No. 10 CV 947 changing the plaintiff from "U.S. Bank" to "U.S. Bank Home Mortgage." U.S. Bank Home Mortgage and Appellants then reached an agreement whereby U.S. Bank Home Mortgage could dismiss the second foreclosure action without prejudice for the sole purpose to allow Appellants the opportunity to submit updated financial information for refinancing purposes to save their home from foreclosure. Appellants submitted the requested information to counsel for Plaintiff, Jeffrey M. Hendricks, who represented he was counsel for both Fifth Third Mortgage Company and U.S. Bank Home Mortgage so it could be passed onto the appropriate individuals to commence refinancing. Despite several attempts, Fifth Third Mortgage Company and U.S. Bank Home Mortgage did not respond to the materials submitted by Appellants.

On September 23, 2011, Mr. Griffith, Vice President of Fifth Third Mortgage Company,

executed and recorded an Affidavit of Facts Relating to Real Estate pursuant to Ohio Revised Code § 5301.252, alleging the initial Assignment of Mortgage to U.S. Bank and the second Assignment of Mortgage to U.S. Bank Home Mortgage were incorrect and done erroneously. Fifth Third Mortgage Company then executed and filed a third Assignment of Mortgage to Plaintiff, HSBC Bank USA (hereinafter “Appellee”) claiming it was the real party at interest and holder of Appellants’ mortgage.

The September 2011 Assignment of Mortgage to Appellee was once again a fraudulent document, invalid, null and void as Fifth Third Mortgage Company no longer held Appellants’ mortgage as it previously assigned all rights, title and interest to U.S. Bank in May of 2010, and was without the authority or ability to assign Appellants’ mortgage to Appellee.

On January 20, 2012, Appellee filed the third foreclosure action against Appellants in the Fairfield County Court of Common Pleas, Case No. 12 CV 62, which is the action that is the subject of this appeal, claiming it was the holder of Appellants’ mortgage by virtue of the fraudulent and invalid Assignment of Mortgage Fifth Third Mortgage Company executed and recorded on September 23, 2011. On or about February 28, 2012, Appellants filed their Answer and Counterclaim against Appellee, and a Third-Party Complaint against Fifth Third Mortgage Company and two (2) of its employees, Jeff Brennan and Bradley Griffith, U.S. Bank and U.S. Bank Home Mortgage. On or about April 27, 2012, Fifth Third Mortgage Company filed its Answer to Appellants’ Third-Party Complaint, and Motion to Dismiss Jeff Brennan and Bradley Griffith. The trial court dismissed Mr. Brennan and Mr. Griffith from the action on or about July 5, 2012.

On or about July 20, 2012, Fifth Third Mortgage Company then filed its Motion for

Judgment on the Pleadings claiming that it was entitled to judgment as a matter of law because Appellants' liability on the note and mortgage are primary to them and Appellants' claims in the Third-Party Complaint against it is separate and arises from other facts and circumstances. Appellants filed their Memorandum Contra to Fifth Third Mortgage Company's Motion for Judgment on the Pleadings on August 9, 2012. On August 13, 2012, the trial court dismissed Fifth Third Mortgage Company from the lawsuit based upon the same rationale it set forth in its July 5, 2012 Entry Sustaining Mr. Brennan and Mr. Griffith's Motion to Dismiss Third-Party Complaint.

On March 13, 2013, Appellee filed a Motion for Summary Judgment requesting a judgment in order to foreclosure on Appellants' mortgage. On April 25, 2013, Appellants' filed their Memorandum Contra to Plaintiff's Motion for Summary Judgment arguing: (1) Plaintiff is not the holder of Appellants' mortgage and there is a genuine question of act as to who has current ownership of Appellants' mortgage; and (2) Plaintiff lacks standing to foreclose on Appellants' mortgage and its motion for summary judgment must be denied as a matter of law. On September 10, 2013, the trial court granted Appellee's Motion for Summary Judgment.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I:** The filing of the Affidavit of Facts pursuant to § 5301.252 of the Revised Code does not create an interest in property nor can it be used to effectuate a revision of the assignments of ownership filed of record in the court system.

In this case, on May 18, 2010, Fifth Third Mortgage Company filed an Assignment of Mortgage vesting all rights, title and interest in Appellants' mortgage to U.S. Bank. A second Assignment was filed shortly thereafter wherein Fifth Third Bank purported to assign it to U.S. Bank Mortgage Company (in reality, the document was the same as the one originally filed with an

individual at the bank changing the name from U.S. Bank to U.S. Bank Mortgage Company). Fifth Third Bank then filed the Affidavit of Facts pursuant to § 5301.252 of the Revised Code representing that the assignments previously filed were filed in error and, as a result, the assignments were not to be considered effective. Fifth Third Bank then filed a third Assignment of Mortgage to Appellee.

It is submitted that the filing of an Affidavit of Fact pursuant to § 5301.252 of the Revised Code does not create an interest in the property or an encumbrance on the title. Rather, it is evidence of an adverse interest, not an interest itself. Compare *Bradford v. Reid* (1998), 126 Ohio App.3d 448, 453. As an Affidavit of Facts does not create an interest in real estate nor is it an effective vehicle by which a previous assignment can be set aside or disregarded, it is only evidence of facts stated within the warrant. Simply filing an Affidavit of Facts does not invalidate the otherwise valid, and fully enforceable, assignment of mortgage such as Fifth Third Mortgage Company filed in this case on May 18, 2010, vesting all of its rights, title and interest in the Appellants' mortgage to U.S. Bank. The Affidavit of Facts likewise cannot invest Fifth Third Mortgage Company with an interest in Appellants' mortgage so it could attempt to reassign it to Appellee. The only way to invest an interest in Appellants' mortgage to Appellee following the May 18<sup>th</sup> Assignment of Mortgage would have been for U.S. Bank to execute and file such an assignment of error. This never occurred in the instant case.

The result is that the provisions of § 5301.252 of the Revised Code does not provide a vehicle whereby ownership interest in a piece of real estate, including a mortgage and note, having been duly assigned and recorded, can be set aside or vacated based on the filing of an affidavit suggesting the person transferring the real estate (the Affiant in this case) did it in error. This

approach has the effect of actually causing the previous assignments of ownership recorded to be disregarded.

It follows then that in a situation such as this, for the trial court to say that the filing of that affidavit had the effect of returning the interest in the note and mortgage to Fifth Third Bank, the initial assignor and filer of the affidavit, is not permitted pursuant to the provisions of § 5301.252 of the Revised Code. The granting of summary judgment based on that premise was inappropriate because clearly there were disputed issues of fact as to whether or not the assignments to U.S. Bank were valid, and whether U.S. Bank had, in some fashion, assigned its ownership interest to another entity.

**Proposition of Law No. II:** Where an initial holder of a note and mortgage purports to assign and record a mortgage to another institution and then invalidly purports to file an affidavit pursuant to § 5301.252 of the Revised Code, and file a third assignment to another bank, an action by the maker of the note and mortgage to have the validity of those transfers determined in a foreclosure action initiated by the financial institution who was the third person to whom the mortgage was purportedly assigned fails to state a claim upon which relief may be granted.

The standard for review on judgment of the pleadings is a de novo standard that requires the appellate court to independently review the complaint and determine if the dismissal was appropriate. Compare *BAC Home Loans Servicing, LP v. Willison*, 11 CA 125, 2012-Ohio-2898, at ¶8.

Section 5301.01 of the Revised Code mandates that all assignments pertaining to deeds, mortgages or land contracts be signed by the grantor and acknowledged before a judge, clerk of courts, county auditor, county engineer, notary public or mayor (see Revised Code § 5301.01). Whereas here the initial grantee assigns the note and mortgage pursuant to the requirements of § 5301.01 of the Revised Code to another financial institution and then attempts to utilize the

provisions of § 5301.252 by filing an affidavit saying that assignment was an error, a claim suggesting that the attempt to utilize the affidavit improperly states a claim upon which relief may be granted as to the issue as to the validity of the transfer of the real estate to three (3) different banks represents a claim upon which relief may be granted and the truth of such claim, which is not seriously disputed in this case presents a justifiable issue.

The decision from the Court of Appeals in this case is interesting because finding the trial court did not err in granting Fifth Third Mortgage Company's judgment on the pleadings is premised on the primary claim in this case as an action on a promissory note and mortgage. However, as pled and argued throughout, the issue as to whether or not Appellee is the valid holder and the real party in interest as to the note and mortgage is central to the case.

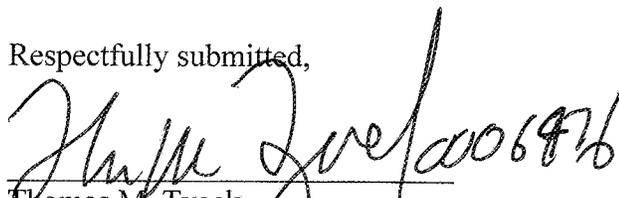
The Court of Appeals, in its opinion, purports to rely on the premise that the matter be a derivative of the outcome of the main claim. In the instant case, that is precisely the situation as the issue, in part of the main claim filed by Appellee, is whether or not Appellee is the true holder and real party in interest with regard to the note and mortgage in question. It is the position of the Appellants that the ownership had been assigned to U.S. Bank and the attempt to set aside that transfer pursuant to § 5301.252 of the Revised Code is not permitted by the statutes. Thus, the cross claim in this case brought to the court the critical issue as to whether or not the purported transfer and assignment by Fifth Third Bank was valid and thus, granted standing to Appellee to proceed in the foreclosure action.

### **CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this Court accept

jurisdiction in this case so that the important issues presented will be reviewed on the merits.

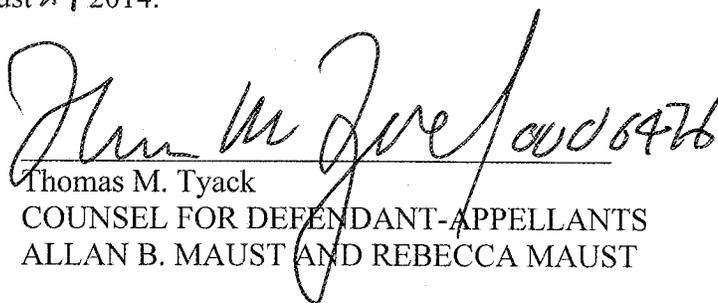
Respectfully submitted,



Thomas M. Tyack  
Counsel of Record  
COUNSEL FOR DEFENDANTS-APPELLANTS  
ALLAN B. MAUST AND REBECCA MAUST

**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to David Hanson, Esq., counsel of record for Plaintiff-Appellee, 1400 Goodale Blvd, Suite 200, Columbus, Ohio 43212, on August 27 2014.



Thomas M. Tyack  
COUNSEL FOR DEFENDANT-APPELLANTS  
ALLAN B. MAUST AND REBECCA MAUST

[Cite as *HSBC Bank, USA v. Maust*, 2014-Ohio-3170.]

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

HSBC BANK, USA

Plaintiff-Appellee

-vs-

ALLAN B. MAUST, et al.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 13 CA 82

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 12 CV 62

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 16, 2014

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*Wise, J.*

{¶1} Defendants Allan and Rebecca Maust appeal a summary judgment of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of Plaintiff-Appellee HSBC Bank USA on its complaint for foreclosure. Third-Party Defendant-Appellee Fifth Third Mortgage Company, et al. is also a party to this appeal.

STATEMENT OF THE FACTS AND CASE

{¶2} In 2009, Fifth Third Mortgage Company initiated a foreclosure suit against the Allan and Rebecca Maust in the Fairfield County Court of Common Pleas, Case No. 2009 CV 01015. Fifth Third subsequently dismissed that action.

{¶3} On May 18, 2010, Fifth Third filed with the Fairfield County Recorder an Assignment of Mortgage, executed by Fifth Third Vice President Brad Griffith, to U.S. Bank ("First Assignment").

{¶4} On August 4, 2010, U.S. Bank filed a foreclosure action against the Mausts in Fairfield County Common Pleas Court, Case No. 2010 CV 00947.

{¶5} Subsequently, on August 31, 2010, Fifth Third filed with the Fairfield County Recorder an Assignment of Mortgage, executed by Brad Griffith, to U.S. Bank Home Mortgage ("Second Assignment"). On the date the Second Assignment was recorded, an Amended Complaint was filed in the pending foreclosure action to change the name of the Plaintiff from U.S. Bank to U.S. Bank Home Mortgage.

{¶6} In January, 2011, Case No. 2010 CV 947 was dismissed without prejudice.

{¶7} On September 13, 2011, Brad Griffith executed an Affidavit of Facts Relating to Real Estate ("Affidavit of Facts") in which Griffith averred that the First

Assignment and Second Assignment were incorrect, in that each had named the wrong assignee. Griffith averred that the correct assignee was HSBC Bank. *Id.*

{¶8} At the same time, Fifth Third recorded an assignment of mortgage to the correct assignee, HSBC Bank.

{¶9} On January 20, 2012, HSBC Bank filed a Complaint for Foreclosure with a Count for Reformation, which is the subject of this appeal.

{¶10} On February 22, 2012, the Mausts filed an Answer, Counterclaim and Third-Party Complaint. The Third-Party Complaint named Fifth Third Mortgage Company, U.S Bank, U.S. Bank Home Mortgage, Jeff Brennan and Brad Griffith as Third-Party Defendants.

{¶11} On April 27, 2012, Third-Party Defendants Brad Griffith and Jeff Brennan filed individual motions to dismiss.

{¶12} On May 23, 2012, the Mausts filed memoranda contra to the motions to dismiss.

{¶13} On July 7, 2012, the trial court granted the motions to dismiss filed by Brad Griffith and Jeff Brennan.

{¶14} On July 20, 2012, Third-Party Defendants U.S. Bank dba U.S. Bank Home Mortgage and Fifth Third Mortgage Company filed individual Motions for Judgment on the Pleadings.

{¶15} On August 9, 2012, the Mausts filed memoranda contra to the motions for judgment on the pleadings.

{¶16} On August 13, 2012, the trial court granted the motions for judgment on the pleadings filed by U.S. Bank and Fifth Third Mortgage Company.

{¶17} On March 13, 2013, HSBC Bank moved for summary judgment in its favor on its complaint and on the Mausts' counterclaim.

{¶18} On September 10, 2013, the trial court granted Appellee's motion for summary judgment.

{¶19} Appellants now assign the following errors to the trial court:

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS THERE WERE QUESTIONS OF FACT AS TO WHETHER PLAINTIFF IS THE REAL PARTY IN INTEREST.

{¶21} "II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW.

{¶22} "III. THE TRIAL COURT ERRED IN GRANTING THIRD-PARTY DEFENDANT FIFTH THIRD MORTGAGE COMPANY'S JUDGMENT ON THE PLEADINGS."

SUMMARY JUDGMENT STANDARD

{¶23} Civ.R. 56 states in pertinent part:

{¶24} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶25} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶26} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

{¶27} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set

forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

I., II.

{¶28} In their first two Assignments of Error Appellant argues that the trial court erred in granting summary judgment in favor of HSBC Bank USA. We disagree.

{¶29} Upon review, with regard to the Note and Mortgage in this case, we find the evidence produced in support of Appellee's motion for summary judgment demonstrated:

#### THE MORTGAGE

{¶30} On December 22, 2006, Appellants executed a Mortgage in favor of Fifth Third Bank;

{¶31} In 2010, Fifth Third Bank assigned the mortgage to U.S. Bank and U.S. Bank Home Mortgage.

{¶32} On September 13, 2011, an Affidavit of Facts was filed by Fifth Third Bank Officer Brad Griffith stating that the assignments were made in error .

{¶33} On September 13, 2011, Fifth Third Bank assigned the Mortgage to Appellee HSBC Bank USA.

#### THE PROMISSORY NOTE

{¶34} On December 22, 2006, Appellants executed a Note (and Mortgage) in favor of Fifth Third Bank.

{¶35} Fifth Third Bank indorsed the Note in blank.

{¶36} HSBC Bank USA is currently in possession of the Note.

SUMMARY JUDGMENT

{¶37} Appellee, in support of its motion for summary judgment, attached an Affidavit of Brad Taylor authenticating the Note and Mortgage signed by the Mausts, that the Mausts were in default, and that such Note and Mortgage was assigned to HSBC Bank.

{¶38} We further find, with regard to the erroneous assignments or mortgage, an Affidavit of Facts Relating to Real Estate pursuant to R.C. §5301.252 was filed correcting the inadvertent errors.

{¶39} R.C. §5301.252, provides as follows:

{¶40} "(A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate.

{¶41} "(B) The affidavits provided for under this section may relate to the following matters:

{¶42} "(1) Age, sex, birth, death, capacity, relationship, family history, heirship, names, identity of parties, marriage, residence, or service in the armed forces;

{¶43} "(2) Possession;

{¶44} "(3) The happening of any condition or event that may create or terminate an estate or interest;

{¶45} “(4) The existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way;

{¶46} “(5) In an affidavit of a registered surveyor, facts reconciling conflicts and ambiguities in descriptions of land in recorded instruments.

{¶47} “(C) The county recorder for the county where such affidavit is offered for record shall receive and cause the affidavit to be recorded as deeds are recorded, and collect the same fees for recording such affidavit as for recording deeds.

{¶48} “(D) Every affidavit provided for under this section shall include a description of the land, title to which may be affected by facts stated in such affidavit, and a reference to an instrument of record containing such description, and shall state the name of the person appearing by the record to be the owner of such land at the time of the recording of the affidavit. The recorder shall index the affidavit in the name of such record owner.

{¶49} “(E) Any person who knowingly makes any false statement in any affidavit provided for in this section is guilty of falsification under division (A)(6) of section 2921.13 of the Revised Code.”

{¶50} Under R.C. §5301.252(B)(3), an affidavit may state facts relating to “[t]he happening of any condition or event that may create or terminate an estate or interest \*\*\*.” Here, the Affidavit provides notice that the two previous assignments of mortgage were done in error, and thus, clearly relate to the happening of an event that may create or terminate an interest in land. Therefore, they relate to a matter set forth in R.C. §5301.252(B).

{¶51} Furthermore, these affidavits state that (1) they are made by a person having knowledge of the facts or competent to testify concerning them in open court; (2) they include a reference to an instrument of record containing a description of the land affected by the affidavits; and (3) they state the name of the corporation which held record title to the land at the time of their filing. Therefore, such Affidavit also meets the other requirements of R.C. 5301.252.

{¶52} We find that based on the foregoing, Appellee met its initial Civ.R. 56 burden, and the burden shifted to Appellants to submit competent evidence to show that genuine issues of material fact remained.

{¶53} We find that Appellants, in their memorandum contra, failed to meet their burden. Appellants do not dispute that they are in default on the Note or that Appellee is the proper holder of the Note. Further, they do not dispute the Affidavit of Facts was properly filed.

{¶54} Based on the foregoing, we find that the trial court correctly found Appellee was entitled to summary judgment.

{¶55} Appellants' First and Second Assignments of Error are overruled.

III.

{¶56} In their Third Assignment of Error, Appellants argue that the trial court erred in granting Appellee Fifth Third Mortgage Company's motion for judgment on the pleadings. We disagree.

{¶57} A third-party complaint is a vehicle through which defendants are permitted to assert claims against non-parties of a type specified under Civ.R. 14(A) without leave of court:

{¶58} “At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him*. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than fourteen days after he serves his original answer.” (Emphasis added.) See Civ.R. 14(A).

{¶59} Even when a third-party claim arises out of the same transaction or occurrence as the primary claim, it will not meet the requirements of Civ.R. 14(A) where the third-party complaint asserts an independent cause of action. *Franklin Cty. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003–Ohio–1331, 787 N.E.2d 59, ¶ 16 (10th Dist.); *State Farm Mut. Auto Ins. Co. v. Charlton*, 41 Ohio App.2d 107, 109, 322 N.E.2d 333 (10th Dist.1974). “[T]he alleged right of the defendant to recover, or the duty allegedly breached by the third-party defendant, must arise from the plaintiff's successful prosecution of the main action against defendant.” *Renacci v. Martell*, 91 Ohio App.3d 217, 221, 632 N.E.2d 536 (9th Dist.1993). As recognized by the Ninth District Court of Appeals in *Renacci*, a third-party complaint must assert a claim of derivative liability:

{¶60} In order for a claim to be appropriately brought pursuant to Civ .R. 14(A), it must be “derivative of the outcome of the main claim.” *United States v. Joe Grasso & Son, Inc.* (C.A.5, 1967), 380 F.2d 749, 751. The third-party defendant must be “secondarily liable” or “liable over.” *Id.* “[I]t is clear that impleader under Rule 14 requires that the liability of the third party be dependent upon the outcome of the main claim.” *Id.* at 751–752. *Renacci* at 220, 632 N.E.2d 536.

{¶61} In the instant case, the trial court, in granting Fifth Third Mortgage Company's motion or judgment on the pleadings, found Appellant's third party claims against it were not proper pursuant to Civ.R. 14 because such were not derivative of or dependant on the outcome of the main claim in this action.

{¶62} Upon review, we find that the trial court did not err in granting Fifth Third Mortgage Company's motion for judgment on the pleadings as the primary claim in this case is an action on a promissory note and mortgage securing the note based upon a default in payments required under the note.

{¶63} Appellants' Third Assignment of Error is overruled.

{¶64} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

By: Wise, J.

Delaney, J., concurs.

Farmer, P. J., concurs separately.

JWW/d 0625

*Farmer, J., concurs*

{¶65} Although I concur with the majority's result in Assignment of Error II, I would find that the affidavit pursuant to R.C. 5301.252 is not sufficient in and of itself to establish that appellee has standing. However, the naming of the previous purported interest holders (U.S. Bank and U.S. Bank Home Mortgage) as party defendants and the motion for judgment on the pleadings filed by U.S. Bank, coupled with the granting of the motion by the trial court on August 13, 2012, are sufficient to correct any previous lien errors.

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HON. SHEILA G. FARMER

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

FILED

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CLERK OF COURTS  
FAIRFIELD CO. OHIO

HSBC BANK, USA

Plaintiff-Appellee

-vs-

ALLAN B. MAUST, et al.

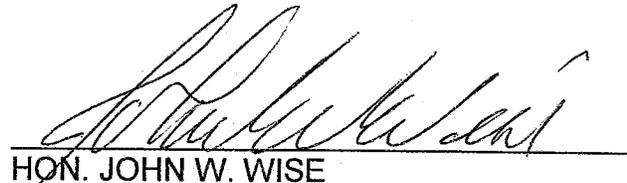
Defendants-Appellants

JUDGMENT ENTRY

Case No. 13 CA 82

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to Appellants.

  
HON. JOHN W. WISE

  
HON. SHEILA G. FARMER

  
HON. PATRICIA A. DELANEY