

IN THE SUPREME COURT OF OHIO

Bank of America, N.A.,	:	Supreme Court Case No. 2014-1629
	:	
Plaintiff-Appellee,	:	On Appeal from the Warren County
	:	Court of Appeals, Twelfth Appellate
v.	:	District
	:	
Jeffrey Jackson, et al.,	:	Appeals Case No. CA2014-01-018
	:	
Defendants-Appellants.	:	

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**MEMORANDUM IN OPPOSITION TO JURISDICTION  
FILED BY PLAINTIFF-APPELLEE NATIONSTAR MORTGAGE LLC**

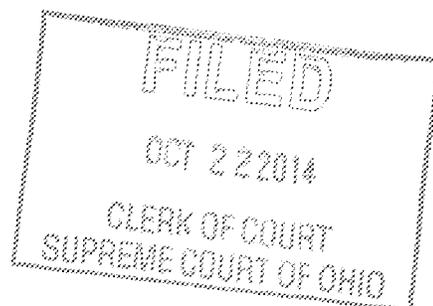
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## THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

There is no great general interest in this case. It is an ordinary appeal from a summary judgment granted in a foreclosure action filed by the original lender, Bank of America, N.A. (“BOA”) who, during the course of the foreclosure action, executed an assignment of the note and mortgage to Nationstar Mortgage LLC (“Nationstar”).

Appellants Jeffery L. Jackson and Shelly R. Jackson did not dispute that they had signed the note and mortgage, or that the note and mortgage were originally issued to BOA, or that the Jacksons had defaulted, or the amount due. Instead, the Jacksons only argued that there was a lack of standing and that there was insufficient foundation to authenticate a letter that gave notice of the loan’s default.

The Jacksons argue this case is of great general interest because their first proposition of law is supposedly pending in *SRMOF Trust 2009-1 v. Lewis*, Ohio Sup. Ct. Case No. 2014-0485. Br. at 1. But the propositions of law and the cases are not the same. Unlike this case, *Lewis* was not filed by the lender that originated the loan, and the question in *Lewis* is whether a successor who seeks to foreclose a mortgage (but does not seek a judgment on the note, the personal liability for which was discharged in bankruptcy) must show that it was *both* assigned the mortgage *and* had an interest in the note when the complaint was filed. In contrast, the first proposition of law in this case only asks whether a plaintiff who seeks to enforce a note “must possess, at the institution of the suit, the right to enforce the debt secured by the mortgage.” The Jacksons do not attempt to explain how the outcome of *Lewis* could affect this case.

The Jacksons alternatively suggest there is great general interest for the propositions of law they offer about the sufficiency of evidence for summary judgment in foreclosure actions. Br. at 1-2. The Jacksons argue that Ohio courts are supposedly applying “drastically different”

standards, but if that were true, then a conflict would be certifiable (and the Twelfth District in this case denied the Jacksons' motion to certify conflicts).<sup>1</sup> Ohio courts are applying the well-settled law about the foundation required for affidavits. The difference in result of any given summary judgment case is more likely due to each matter's individual facts and particular forms of evidence, which Ohio's trial courts are vested with the discretion to evaluate with further review by the courts of appeal. The Jacksons have not attempted to demonstrate how the lower courts' evaluation of the evidence in this particular action is a matter of great general interest. There is no general interest in the supposed evidentiary error correction that the Jacksons seek here.

Finally, the Jacksons alternatively argue that this is a case of great general interest because they think it "presents an issue that is unique to the area of negotiable instruments—the right of a defendant to inspect a negotiable instrument being enforced against him." Br. at 1, and 2-3. But cases are not of great general interest simply because an appellant identifies what he or she believes is an issue of law in the case. If that were the standard, then virtually all cases offered for the Court's consideration would be of great general interest because most cases involve some question of law. The Jacksons do not suggest or explain why there is some compelling reason for new law or to change existing law. They do not suggest or explain that there is some deficiency in the law. They merely suggest the law is important. But all law is important. Simply identifying that a legal issue is implicated in an appeal does not make it one of great general interest.

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<sup>1</sup> The Jacksons cite *Wells Fargo Bank, N.A. v. Smith*, 12th Dist. Brown No. CA12-04-006, 2013-Ohio-0855, ¶ 39, as conflicting with *TPI Asset Mgt. v. Conrad-Eiford*, 2d Dist. Clark No. 10CA0044, 2011-Ohio-1405, ¶ 22. Br. at 2. First, the quoted material cited for the *Smith* case in the Jacksons' brief does not appear in the *Smith* case, although the proposition that "[a]bsent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E)" does appear at paragraph 16 (not 39). Second, the statement in *TPI* that an affiant's statement that he is "authorized ... to make this affidavit" is not the same thing as an affiant's statement that the affidavit is based upon his or her own personal knowledge.

The Jacksons' Memorandum does not show that their case presents a matter of great general interest. The Court should decline jurisdiction.

### STATEMENT OF THE CASE AND FACTS

On August 4, 2011, Bank of America, N.A. ("BOA") filed a Complaint against Defendants-Appellants Jeffrey L. Jackson and Shelly R. Jackson, seeking judgment on a note that is originally payable to BOA ("Note") and to foreclose the mortgage ("Mortgage") securing the Note. *Bank of Am., N.A. v. Jackson*, 12th App. No. CA2014-01-018, 2014-Ohio-2480 (the "Decision"), ¶¶2-3.

On February 10, 2012, BOA moved for summary judgment, supported by the December 9, 2011 affidavit of Katherine Weir, who is an officer of BOA (an Assistant Vice President), who stated in the affidavit that she has personal knowledge, that the copies of the Note and Mortgage attached to the affidavit were true and accurate copies of BOA records created and maintained in the ordinary course of business, and that BOA had the original note. *See id.* ¶¶13-15.

On November 8, 2012, an assignment of the Mortgage and Note to Nationstar was recorded in the Warren County Recorder's Office.

On March 25, 2013, the Jacksons opposed BOA's summary judgment motion and cross-moved for summary judgment, asserting that BOA was not a party entitled to enforce the Note and Mortgage (even though BOA was the party to whom the Note was originally payable) either at the time the Complaint had been filed or at the time they filed their Memorandum Contra. The Jacksons, however, presented no evidence of who had possession of the Note (if not BOA). The Jacksons own affidavits each admitted "I do not have any evidence as to who actually owns my mortgage loan." But, they offered letters that they had received from Nationstar long after the Complaint had been filed and Ms. Weir had executed her affidavit, which said that Freddie Mac was the creditor and that Nationstar was now their loan servicer (having taken over servicing

from BOA). Those letters, as well as a print-out from Freddie Mac's website that Mrs. Jackson said she generated on March 21, 2013, were the reason they contended there was a genuine issue of material fact about who possessed the Note on the date of the Complaint and at the time of their Memorandum Contra.

The Jacksons also argued that BOA had not proven the loan had been accelerated because the affidavit could not authenticate the notice of default and demand letter attached to it. Although the Jacksons had each presented their own affidavits, neither of them said they had not received the letter. Instead, the Jacksons only questions whether Ms. Weir could authenticate the letter. This was the subject of the Jacksons' Motion to Strike Portions of the Affidavit of Katherine Weir, which they filed with their Memorandum Contra on March 25, 2013.

On March 25, 2013, the Jacksons also moved for inspection of the original Note. But the motion did not demonstrate that the Jacksons had served a production request pursuant to Civil Rule 34 to do such an inspection.

On April 15, 2013, BOA filed a motion to substitute Nationstar as the plaintiff because the Note and Mortgage had been transferred by BOA to Nationstar after the Complaint had been filed. BOA attached a copy of the assignment, which states that BOA is assigning and transferring *both* the Note and the Mortgage to Nationstar.

That same day, BOA also opposed the Jacksons' Motion to Strike Portions of the Affidavit of Katherine Weir, as well as the Jacksons' motion to inspect the original Note. As to the latter, BOA's counsel represented to the Court that they had received the original from Nationstar, that it was presently in a fireproof safe in counsel's office, and that if the Trial Court were to order inspection, that BOA be granted a protective order allowing the Jacksons to view it while it remained in counsel's possession.

On May 2, 2013, the Jacksons served a response to the substitution motion. They did not object to BOA's submission of the Mortgage assignment with the motion. They did not assert that the Trial Court could not consider it as evidence. Instead, the Jacksons conceded that "Nationstar holds legal title to the mortgage." Memo Contra, 1. While they agreed that Nationstar was a necessary party, the Jacksons nevertheless argued that the Trial Court should not substitute Nationstar for BOA as plaintiff "to assume prosecution of this case" because they claimed that—notwithstanding the actual terms of the assignment which said BOA was also transferring the Note to Nationstar, and the law that states that a note follows a mortgage assignment unless there is evidence that the two were intended to be severed from one another—"an assignment of a mortgage does not convey to the assignee the entitlement to enforce the note." *Id.*

On August 12, 2013, the Trial Court granted the substitution motion, finding that the Note and Mortgage had "been transferred to Nationstar Mortgage, LLC" as had been shown by the Mortgage assignment that was recorded on November 8, 2012. Order, 2-3. The same day, the Trial Court also denied the Jacksons' motions to strike and to inspect the original Note.

On August 14, 2013, the Trial Court filed its decision granting summary judgment to Nationstar. On January 10, 2014, the Trial Court entered final judgment. On January 27, 2014, the Jacksons filed a Notice of Appeal to the Twelfth District.

On March 5, 2014, the Jacksons filed appellate brief. They did not assign error to the Trial Court's decision to substitute Nationstar for BOA. Instead, they only assigned error to (1) the Trial Court's decision denying their motion to strike Ms. Weir's affidavit for an alleged lack of foundation, (2) the Trial Court's decision not to force production of the original Note for inspection, (3) the Trial Court's decision granting Nationstar summary judgment because there

was supposedly a genuine issue of fact about who held the Note and about whether the loan had been accelerated, and (4) the Trial Court's decision granting summary judgment because BOA had allegedly failed to show it had standing at the time it filed the Complaint.

On June 9, 2014, the Twelfth District issued its Decision, overruling all of the Jacksons' assignments of error. As to the Jacksons' argument that it had to be demonstrated that BOA had possession of the Note as of the Complaint date, the Twelfth District explained that BOA "did not need to" because the Trial Court had already determined when it granted the substitution motion that Nationstar had the right to enforce the Note and Mortgage—which was a decision to which the Jacksons had not assigned error and which was supported by the assignment to which the Jacksons had not objected. *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶¶24-25, 36.

The Twelfth District held that Ms. Weir's affidavit sufficiently demonstrated that she had personal knowledge, and affirmed the Trial Court's denial of the Jacksons' motion to strike. *Id.* ¶¶ 8-14. The Twelfth District also held that notice of default letter had been properly authenticated. *Id.* ¶ 15. Finally, the Twelfth District affirmed the Trial Court's denial of the motion for inspection of the original Note. *Id.* ¶¶ 19-26.

On June 19, 2014, the Jacksons filed a Motion for Reconsideration and a Motion to Certify Conflicts. The Twelfth District denied those Motions on August 7, 2014.

#### **ARGUMENT OPPOSING APPELLANTS' PROPOSITIONS OF LAW**

**Appellants' Proposition of Law No. 1: In order to establish standing in a foreclosure action, a plaintiff must possess, at the institution of the suit, the right to enforce the debt secured by the mortgage.**

The Jacksons assert that this is the same proposition of law pending in *SRMOF Trust 2009-1 v. Lewis*, Ohio Sup. Ct. Case No. 2014-0485. But as previously explained on page 1

above, the propositions of law and the cases are not the same. The Jacksons also do not attempt to explain the application of this proposition of law to this case.

This proposition of law is also ambiguous. It is not clear whether it is addressing standing to pursue foreclosure of a mortgage, or if it is addressing standing to enforce a note, or both. There is a difference between the two causes of action, which can be separately maintained independently from one another. *See Spence v. Insurance Co.*, 40 Ohio St. 517, 520-21 (1884) (“separate actions may therefore be maintained, one to foreclose and the other for a personal judgment”); *Doyle v. West*, 60 Ohio St. 438, 444, 54 N.E. 469 (1899) (foreclosure of a mortgage may be had without pursuing a claim on the note; determination in a foreclosure action of the question of fact about the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note); *Bank of New York Mellon v. Frey*, 6th Dist. Sandusky No. S-12-044, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only); *The Broadview Savings & Loan Co. v. Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, 45002, 1982 Ohio App. LEXIS 12139, \*7 (Dec. 30, 1982) (because they are distinct causes of action that may be pursued separately, a dismissal with prejudice of a prior foreclosure action did not bar a subsequent action filed to enforce the note).

Indeed, a person with an interest in the mortgage may enforce it, even when the note is not enforceable. *Fisher v. Mossman*, 11 Ohio St. 42, 45-46 (1860) (where an action can no longer be brought upon the note, the mortgage may be enforced if brought within the statute of limitations for enforcing mortgages); *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, ¶¶ 9, 14 (in rem action to proceed on mortgage may proceed even if the in personam claim on the note is barred).

Even if the Court accepted this proposition of law, it would not change the outcome of this case. Here, the record only supports the conclusion that BOA was the person entitled to enforce the Note when the Complaint was filed. BOA was the original lender. That ends the analysis. Certainly the original lender has standing to file a foreclosure action to enforce its note and mortgage interests.

The fact that the copy of the Note in the record bears an indorsement in blank does not change the analysis, as that fact alone does not establish that anyone other than BOA had the Note on the date of the Complaint. *Bank of Am., N.A. v. Merlo*, 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, ¶¶ 14 (a blank indorsement “merely *allows* BAC to negotiate the instrument if it later chose to do so”; the indorsement “is no evidence that BAC ever transferred possession of the note”). Although the note was indorsed in blank when BOA filed the Complaint in this case, there is no evidence in the record that BOA had ever transferred the note out of its possession before the Complaint date.

BOA was the original lender and also presented an affidavit stating it possessed the Note. A copy of the Note was also attached to the Complaint, which itself is probative of BOA’s possession. *Nationstar Mortg., LLC v. Perry*, 8th Cuyahoga App. No. 99497, 2013-Ohio-5024, ¶ 12. There is no evidence in the record that shows that anyone other than BOA possessed the Note when BOA filed the Complaint. The post-Complaint and post-assignment letters from Nationstar, which the Jacksons submitted in opposition to the motion for summary judgment, do not demonstrate that BOA did not possess the Note on the Complaint date. They are probative of where the Note went after the Complaint date. The Jacksons’ ambiguous first proposition of law would simply have no effect on this case.

**Appellants' Proposition of Law No. 2: Information obtained from an affiant's review of hearsay business records is insufficient to provide the personal knowledge required to satisfy Civ. R. 56(E).**

The Jacksons offer no explanation for how this proposition of law would apply in this case.

This proposition of law also conflates two different issues. It refers to the personal knowledge requirement of Civil Rule 56(E), which requires some evidence from which a court can conclude that an affiant has sufficient personal knowledge to testify about the matters in the affidavit. The general rule is that an affiant's statement that he or she has the requisite personal knowledge is sufficient to make a prima facie showing of foundation. Decision, ¶ 10. The foundation can also be inferred from the affiant's identification of his or her title and other statements made in the affidavit. *Id.*

The *TPI* case referred to by the Jacksons for their proposition of law, however, cites *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.*, 8 Ohio App.3d 155, 456 N.E.2d 551 (10th Dist. Ct. App. 1982), for the different proposition that “[t]here is no hearsay exception, either in Evid. R. 803 or 804, that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.” *St. Paul Fire & Marine Ins. Co.*, 8 Ohio App.3d at 157. That law about presenting hearsay is a question entirely different from the law that determines whether an affiant has personal knowledge.

Here, both the Trial Court and Court of Appeals properly concluded that the record demonstrated that the affiant had personal knowledge sufficient for a foundation for the affidavit because the affidavit state she had personal knowledge and because of her position as an officer of BOA. Decision ¶¶ 13-14. The second proposition of law goes nowhere for the Jacksons.

**Appellants' Proposition of Law No. 3: An affiant who claims personal knowledge based solely upon a review of business records may not provide**

**testimony about facts not contained in properly authenticated business records provided to the court in accordance with Civ.R. 56(E).**

The Jacksons offer no explanation for how this proposition of law would apply in this case. This proposition also appears to be duplicative in some respects of the Jacksons' second proposition of law, in that it too refers to the hearsay rule applied in the *St. Paul Fire & Marine Ins. Co.* case.

The application of attachment provision of Civil Rule 56(E) is unremarkable and does not change the outcome of this case. The Rule provides that “[s]worn or certified copies of all papers or parts of papers *referred to in* an affidavit shall be attached to or served with the affidavit.” Civ.R. 56(E) (emphasis added). Here, there are no documents specifically referred to in the affidavit that were not attached. The affidavit referred to the Note, and it was attached. Same with the mortgage. Same with the default notice. Same with the loan history. The Jacksons have not identified any business record referred to in the affidavit that was not attached to it. Moreover, the Jacksons never argued in the Trial Court that Civil Rule 56(E) required that every business record that the affiant had reviewed regarding the loan had to be attached to the affidavit.

**Appellants' Proposition of Law No. 4: An affiant may not authenticate a business record of an entity with which she has no affiliation without providing proper foundation for admission of the record.**

The Jacksons offer no explanation for how this proposition of law would apply in this case. Even if the Court accepted this proposition of law, it would not change the outcome of this case. The affiant here authenticated documents maintained in the ordinary course of her own company's business records. The record does not establish that the affiant was authenticating someone else's records. This proposition is also necessarily fact specific, which does not make this case one of great general interest.

**Appellants' Proposition of Law No. 5: In an action to enforce a negotiable instrument, person [sic] against whom the instrument is sought to be enforced is entitled to inspect the instrument upon motion to the court.**

The Jacksons offer no explanation for how this proposition of law would apply in this case. Even if the Court accepted this proposition of law, it would not change the outcome of this case because the Trial Court nevertheless had before it uncontroverted and admissible duplicate evidence of the original Note. Decision, ¶¶ 23-24. The Rules of Evidence permit such duplicates. Evid. R. 1003. Nor is there a risk of "double liability" if the actual original note is not produced because there is a statutory right of restitution that would permit recovery from the party who wrongfully received payment. R.C. 1303.58.

**Appellants' Proposition of Law No. 6: When conducting a de novo review of a grant of summary judgment, a court of appeals may not consider unauthenticated documents not relied upon by the movant to support its motion in the trial court.**

The Jacksons offer no explanation for how this proposition of law would apply in this case. Even if the Court accepted this proposition of law, it would not change the outcome of this case. Nationstar assumes this proposition must be referring to the Jacksons' contention that the Court of Appeals had relied upon a copy of the Note that was not authenticated. Motion for Reconsideration, p. 4 (referring to fn. 2 in the Decision). The Court of Appeals did not such thing. While the Court of Appeals pointed out that there was another copy of the Note in the record attached to the "Notice of Filing Note," the Court of Appeals did not rely upon that copy for its Decision. Instead, the Court of Appeals specifically explained that "[r]egardless of the Jacksons' arguments, the *imaged* copy of the note [attached to Ms. Weir's affidavit] was admissible." Decision, ¶ 24. The Court of Appeals did not rely upon an unauthenticated copy of the Note.

**CONCLUSION**

There is nothing of public or great general interest in this case. At best, the Jacksons merely seek correction where there was no error by either the Trial Court or the Court of Appeals. The Court should decline jurisdiction.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on October 22, 2014:

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