Supreme Court of Ohio Clerk of Court - Filed May 04, 2015 - Case No. 2013-1534

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.	*	**CASE NO. 2013-1534**
Appellant	*	**On Appeal from the Lorain County Court of Appeals, 9th District Case Nos. 12CA010230**
-vs-	*	
BRIAN HORN, et al.	*	
Appellee.	*	

MOTION OF APPELLEE BRIAN HORN TO RECONSIDER

Scott A. King (0037582)
Terry W. Posey, Jr. (0078292)
THOMPSON HINE LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45342-4934
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
Scott.King@Thompsonhine.com
Terry.Posey@Thompsonhine.com

Counsel for Appellant Wells Fargo Bank

Andrew M. Engel (0047371)
(Counsel of Record)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
7925 Paragon Road
Centerville, OH 45459
(937) 221-9819/Fax: (937) 433-1510
aengel@kacelawllp.com

Christine M. Cooper (0079160)
Chad D. Cooper (0074322)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
810 Sycamore Street, 3rd Floor
Cincinnati, OH 45202
(513) 579-2323/Fax: (513) 263-9003
cmcooper@kacelawllp.com
cdcooper@kacelawllp.com
Counsel for Appellee Brian Horn

Appellee Brian Horn moves the Court to reconsider its Opinion of April 22, 2015 for the reasons set forth in the accompanying memorandum.

Respectfully submitted,

/s/ Andrew M. Engel
Andrew M. Engel (0047371)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
7925 Paragon Road
Centerville, OH 45459
(937) 221-9819/Fax: (937) 433-1510
aengel@kacelawllp.com

Christine M. Cooper (0079160)
Chad D. Cooper (0074322)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
810 Sycamore Street, 3rd Floor
Cincinnati, OH 45202
(513) 579-2323/Fax: (513) 263-9003
cmcooper@kacelawllp.com
cdcooper@kacelawllp.com

Counsel for Appellee Brian Horn

MEMORANDUM

Appellee asks the Court to reconsider its Opinion to clarify three points in the Opinion regarding the pleading standard in foreclosure cases. In paragraph 18 of the Opinion, the Court stated:

> [T]he complaint needed only to set forth a short and plain statement of the claim showing that Wells Fargo was entitled to relief. Civ.R. 8(A). *The complaint's allegation that Wells Fargo was the holder of the Horns' note was sufficient to show for pleading purposes that Wells Fargo was the real party in interest* and that it was arguably entitled to a decree of foreclosure.

Wells Fargo Bank, N.A. v. Horn, Slip Opinion No. 2015-Ohio-1484, ¶18 (emphasis added).

Later, the Court states that "Wells Fargo submitted proof of standing regarding the fact that it

was the real party in interest through an affidavit." Id. ¶19. Also, in a section called ***Civ.R. 10 Is Inapplicable,*** the Court stated "[c]onsequently, we address Civ.R. 10(D) in our analysis to clarify that it has no role in resolving whether Wells Fargo has standing in this case." *Id*. at ¶14.

These statements are likely to cause confusion in Ohio's lower courts because they appear to make definitive statements of law. They also seemingly reach legal conclusions that are contrary to the holdings in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214 and other decisions of this Court. Appellee asks that the Court clarify its decision to reconcile these statements with prior decisions of this Court.

A. A Complaint Fails To Properly Allege Standing For Pleadings Purposes If The Other Facts Alleged In It Contradict The Allegation.

In stating that "[t]he complaint's allegation that Wells Fargo was the holder of the Horns' note was sufficient [to allege standing]" the Court appears to contradict one of the holdings in *Schwartzwald*. In its complaint in this case, Wells Fargo both alleged holder status and attached a copy of the Note endorsed in blank. The attachment of the Note is critical, and distinguishes this case from *Schwartzwald.*

In *Schwartzwald*, Federal Home Loan Mortgage Corp. alleged in its complaint that it was the holder of the Note. But it also alleged that it could not locate a copy of the note to attach to the complaint. *Schwartzwald*, ¶7. Thus, the allegation of holder status was patently false because it is impossible to be a holder under R.C. 1301.201(a) without possession of the note. In other words, the inability to produce a copy of the note directly contradicted the general allegation of holder status.

A situation similar to that in *Schwartzwald* would arise if a Bank A brought suit on a negotiable instrument that was payable to Bank B. An allegation of holder status by

Bank A is not, by itself, sufficient to allege standing because the note was not payable to Bank A. The defendant is such a case could file a motion under Civ. R. 12(B)(6) and should prevail. But the Court's statement in this case seems to indicate that the mere allegation of holder status, by itself, is always sufficient to plead standing in a foreclosure case.

Horn requests that the Court amend its Opinion slightly to address this factual difference between the two cases. He would ask for the addition of a few words to paragraph 18 of the decision to reference that the note, endorsed in blank, was attached to the Complaint.

> The complaint's allegation that Wells Fargo was the holder of the Horns' note, ***coupled with the attachment of a copy of the note, endorsed in blank***, was sufficient to show for pleading purposes. . .

This slight addition will not alter the holding of this Court, but will merely clarify the facts considered by this Court in reaching its decision.

B. The Issue Of Standing Does Not Equate With Civ. R. 17's Real Party In Interest Status.

One of the most significant holdings in *Schwartzwald* relates to the distinction between the concept of standing and Civ. R. 17(A)'s concept of real party in interest. Prior to this Court's decision in *Schwartzwald*, most of Ohio's Courts of Appeals permitted a lack of standing to be "cured" under Civ. R. 17 by substituting a party into the case or by obtaining an interest in the subject of the lawsuit after the complaint was filed. *Schwartzwald*, ¶29. Those courts interpreted the concepts of standing and real party in interest status as being synonymous. But in *Schwartzwald*, this Court stated:

> Civ.R. 17(A) does not address standing; rather, the point of the rule is that "suits by representative plaintiffs on behalf of the real parties in interest

> are the exception rather than the rule and should only be allowed when the real parties in interest are identifiable and the res judicata scope of the judgment can be effectively determined."

Schwartzwald, ¶33.

In this case, the Court's Opinion seems to regress by conflating standing and real party in interest. At paragraph 18 of the Opinion, the Court states that the allegations in Wells Fargo's complaint were sufficient to show it "*was the real party in interest.*" Later, it uses the two terms confusingly when it states: "Wells Fargo submitted proof of standing regarding the fact that it was the real party in interest through an affidavit." Id. ¶19. Such wording is likely to cause considerable confusion in the lower courts.

Horn asks that the Court modify its language slightly to clarify the issue decided by the Court. He suggests the following modification to paragraph 18:

> The complaint's allegation that Wells Fargo was the holder of the Horns' note was sufficient to ~~show~~ ***allege*** for pleading purposes that Wells Fargo ~~was the real party in interest~~ ***possessed standing*** and that it was arguably entitled to a decree of foreclosure.

He also asks that the Court modify paragraph 19 of the complaint as follows: "Wells Fargo submitted proof of standing ~~regarding the fact that it was the real party in interest~~ through an affidavit."

These two modest modifications will avoid reintroducing into Ohio's jurisprudence the confusion regarding relationship between standing and real party in interest status.

C. Failure to Comply With Civ. R. 10(D) is Not a Basis To Dismiss For Lack Of Standing.

Because the parties discussed Civ. R. 10(D) at argument, the Court included a discussion of the role of that Rule in its analysis. It titled that portion of the Opinion "***Civ. R 10(D) Is***

Inapplicable." The Court notes that: "Consequently, we address Civ.R. 10(D) in our analysis to clarify that it has no role in resolving whether Wells Fargo has standing in this case." *Horn* at ¶14.

The substance Court's discussion of Civ. R. 10(D) does not, however, indicate that the Rule has no role at all in foreclosure cases. Rather, the Court merely states that a plaintiff's failure to comply with Civ. R. 10(D) does not deprive the plaintiff of standing. It correctly notes that a failure to comply with the Rule is a pleading deficiency that may be raised by a defendant through a motion for more definite statement. *Id*. at ¶16.

Horn is concerned, however, that lower courts will read the Court's decision to mean that a plaintiff suing to enforce a negotiable instrument need not attach a copy of the instrument to its complaint. Such a reading contradicts the plain language of Rule 10(D) and would deprive defendants in these cases from knowing at the basis of the plaintiff's claim.

To clarify the decision, Horn suggests the following modest revisions. The title of this portion of the decision could be modified to read "**Failure to Comply with Civ. R. 10(D) Does Not Deprive A Plaintiff Of Standing**." He also suggests that paragraph 14 be modified as follows: "Consequently, we address Civ.R. 10(D) in our analysis to clarify that ~~it has no role in resolving~~ ***compliance with the Rule does not dictate*** whether Wells Fargo has standing in this case."

Horn respectfully suggests that these modifications will remove the source for any potential confusion while preserving the Court's reasoning on the issue.

CONCLUSION

Appellee respects the Court's decision in this matter. But he is also cognizant that the legal issues presented in foreclosure cases are complex. The courts of this state have struggled

with the application of rules of procedure to foreclosure cases. It would be unfortunate if a misreading of the Court's decision in this case introduces more uncertainty in these cases.

For the foregoing reasons, Appellee Brian Horn asks that the Court reconsider its decision and modify it as suggested above.

Respectfully submitted,

/s/ Andrew M. Engel
Andrew M. Engel (0047371)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
7925 Paragon Road
Centerville, OH 45459
(937) 221-9819/Fax: (937) 433-1510
aengel@kacelawllp.com

Christine M. Cooper (0079160)
Chad D. Cooper (0074322)
KENDO, ALEXANDER, COOPER & ENGEL, LLP
810 Sycamore Street, 3rd Floor
Cincinnati, OH 45202
(513) 579-2323/Fax: (513) 263-9003
cmcooper@kacelawllp.com
cdcooper@kacelawllp.com

Counsel for Appellee Brian Horn

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon 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 4th day of May, 2015.

/s/ Andrew M. Engel
Andrew M. Engel