

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,

Plaintiff-Appellant,

v.

BRIAN HORN, *et al.*,

Defendants-Appellees.

* Case No. 2013-1534
*
* On Appeal from the Lorain County
* Court of Appeals, Ninth Appellate
* District
*
* Court of Appeals
* Case No. 12CA010230
*
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**MEMORANDUM OF APPELLANT WELLS FARGO BANK, N.A.
IN OPPOSITION TO MOTION FOR RECONSIDERATION**

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I. INTRODUCTION

In *Wells Fargo Bank, N.A. v. Horn*, Slip Opinion No. 2015-Ohio-1484 (the “Opinion”), this Court decided a discretionary appeal raising issues arising from *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In *Schwartzwald*, the Court held that if challenged during an action, a plaintiff had to show standing as of the date that the complaint was filed.

In this case, the Ninth District interpreted *Schwartzwald* to mean that a plaintiff had to attach to its complaint all documentary evidence showing its standing. This Court reversed, holding “although the plaintiff in a foreclosure action must have standing at the time suit is commenced, proof of standing may be submitted subsequent to the filing of the complaint.” Opinion, *syllabus*.

Defendant-Appellee Brian Horn filed a Motion for Reconsideration to “fix” what he contends are errors in the language of the Opinion. Horn asserts that there is an inconsistency between the Opinion and *Schwartzwald* as to what must be alleged in or attached to the Complaint. Horn contends that the Court’s use of the phrase “real party in interest” in the Opinion is contrary to *Schwartzwald*. Finally, he asserts that the Court’s discussion of Civ.R. 10(D) and its interplay with the pleading requirements of Civ.R. 8 is incorrect.

Horn’s supposed legal errors are contrary to the law expressed in the Opinion and *Schwartzwald*. Horn does not seek to bring issues to the Court’s attention which it did not address, but only seeks to contradict the Court’s rationale on the matters expressly addressed in the Opinion. That is not an appropriate basis for reconsideration. The Motion should be denied.

II. ARGUMENT

A. There is no conflict between the Opinion and *Schwartzwald*.

Horn first argues that there is a conflict between a sentence in ¶ 18 of the Opinion and ¶ 7 of *Schwartzwald*, and suggests the Court “clarify” the Opinion to eliminate any uncertainties. Motion, 2-3. The Opinion contains the sentence: “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.” Horn suggests that the Court modify this sentence by adding the following language: “The complaint’s allegation that Wells Fargo was the holder of the Horns’ note ***coupled with the attachment of a copy of the note, [i]ndorsed in blank*** 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” (emphasis in original). Motion, 2-3. This has no merit.

The Opinion made clear that, at the pleading stage, standing is determined based upon the allegations of the complaint. Opinion, ¶ 18. As the Opinion also made clear, compliance with Civ.R. 10(D)’s requirements for attaching documents is not part of the pleading process. Opinion, ¶¶ 14-16. Accordingly, “to require a plaintiff to attach proof of standing to a foreclosure complaint would [] run afoul of Ohio’s notice pleading requirements’ and a plaintiff at the pleading stage is not required to establish its standing beyond the allegations off the Complaint.” Opinion, ¶ 13, citing *Bank of Am., N.A. v. Hafford*, 6th Dist. Sandusky No. S-13-021, 2014-Ohio-739. The proposed addition is directly contrary to the Court’s holding.

Nothing in *Schwartzwald* suggests a different result. In *Schwartzwald*, in response to a motion for summary judgment in which the defendant challenged standing, the plaintiff failed to introduce any evidence that it had an interest in either the note or mortgage as of the date of the

complaint, but argued that it did not matter because any defect in standing could be cured. 2012-Ohio-5017, ¶ 18. This Court rejected that argument, and held that if challenged, a plaintiff had to show standing as of the filing of the complaint. *Id.* In contrast, in this case, the summary judgment record showed that Wells Fargo was the creditor at the time of the filing of the Complaint, and in fact became the corporate successor to the original creditor *years* before the filing of this action. Accordingly, Wells Fargo met the requirements of *Schwartzwald*.

And that led to the problem with the Ninth District’s interpretation of *Schwartzwald*. *Schwartzwald* was a summary judgment case and did not address pleading standards. Nonetheless, even though the summary judgment record showed that Wells Fargo had standing when it filed this action, the Ninth District interpreted *Schwartzwald* to have effectively changed Ohio’s pleading requirements, and (improperly) concluded that *Schwartzwald* required that the proof of standing which Wells Fargo submitted at summary judgment to have been attached to the Complaint, and because it was not, the Complaint had to be dismissed.

The Opinion made clear that *Schwartzwald* did not change pleading requirements. While under *Schwartzwald*, if challenged, a plaintiff must show that it had standing as of the time of the filing of the complaint, for the purposes of pleading, standing is based on the allegations of the complaint.

Horn’s proposed additions to ¶ 18—which would require a plaintiff to attach proof of standing to a complaint—are contrary to the Opinion and would perpetuate the very confusion caused by the Ninth District’s misreading of *Schwartzwald*. There is no basis for reconsideration.

B. The “real party in interest” argument has no merit.

Horn next contends that ¶ 18 of the Opinion is contrary to *Schwartzwald* because it improperly “conflates” the concepts of “standing and real party in interest.” Motion, 4. The

Motion requests the Court to modify the same sentence identified above to provide: “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” (emphasis and strikethrough in original). *Id.* It is the Motion, not the Opinion, which has “conflated” these concepts.

As the Court recognized in *Schwartzwald*, being a “real party in interest” is a different concept from standing. A person has “standing” if s/he has suffered an injury which the law recognizes; “real party in interest” refers to the person upon whom the law confers the right to seek redress for the injury. If there is damage to the corpus of a trust, both the beneficiaries and the trustee may have “standing” in the sense that both have been injured, but only the trustee is the “real party in interest.” Civ.R. 17(A).

Similarly, the law recognizes that an “owner” may have an interest in a promissory note and would be injured if the note were not paid (R.C. 1303.31(B)), and thus could have “standing” to bring a court action. However, the “holder” or a “person in possession with the rights of a holder” are persons upon whom the law confers the right to enforce a promissory note (R.C. 1303.31(A)), and, therefore, are the real party in interest. Standing and real party in interest are different concepts.

In *Schwartzwald*, there was no evidence that the plaintiff was the named mortgagee *or* the “holder” *or* even the “owner” of the note at the time the complaint was filed, and, therefore, no evidence that the plaintiff was the real party in interest, much less that it had standing. 2012-Ohio-5017, ¶ 18. The plaintiff nonetheless contended that Civ.R. 17 permits a real party in interest to ratify or be substituted in the action, and, therefore, Civ.R. 17 permitted a plaintiff’s lack of standing to be “cured” by obtaining standing after the case had been filed. *Schwartzwald*

held that while Civ.R. 17 allows a real party in interest to be substituted in or to ratify, nothing in that Rule permits a court action to be commenced by someone who never had standing in the first instance. *Id.*, ¶ 38.

In this case, the Opinion's use of the phrase "real party in interest" was perfectly appropriate. As the corporate successor to the original creditor, Wells Fargo not only had standing, but it was the "holder" of the Note, and thus the real party in interest under both R.C. 1303.31(A) and Civ.R. 17. Accordingly, the sentence "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" was correct. There is no basis for reconsideration.

C. As stated by this Court, "Civ.R. 10 is inapplicable."

Finally, Horn contends that the Court's discussion of Civ.R. 10(D) was improper. Motion, 5. In the Opinion, the Court noted that "Civ.R. 10(D)(1) states that when a claim or defense is premised on an account or other written instrument, a party must attach a copy of the account or written instrument to the pleading." *Id.*, ¶ 15. The Court went on to hold that "failing to attach documents to a complaint . . . does not equate to a lack of standing" and that the appropriate recourse for failing to attach a required document is a motion for a more definite statement under Civ.R. 12(E). *Id.*, ¶ 16. Horn states that he is "concerned . . . that lower courts will read the [Opinion] to mean that a plaintiff suing to enforce a negotiable instrument need not attach a copy of the instrument to its complaint." Motion, 5.

The concern is misplaced. This issue is explicitly addressed in the Opinion: if the instrument is not attached, the defendant's recourse is Civ.R. 12(E), not a motion to dismiss for lack of standing. Opinion, ¶ 16. There is no error to address.

III. CONCLUSION

Motions for reconsideration are to point out issues which the Court's decision did not address. The Court expressly addressed each of the issues raised by the Motion, albeit in a manner that Horn did not like. There is no basis for reconsideration. The Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S. ordinary mail, postage prepaid, this 11th day of May, 2015:

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