[Cite as *Fed. Home Loan Mtge. Corp. v. Rufo,* 2012-Ohio-5930.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

FEDERAL HOME LOAN MORTGAGE CORPORATION,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-A-0011**
- vs -	:	
JANE RUFO, et al.,	:	
Defendant-Appellant.		

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CV 795.

Judgment: Reversed and remanded.

Ellen L. Fornash, and *Elizabeth S. Fuller,* Lerner, Sampson & Rothfuss, P.O. Box 5480, Cincinnati, OH 45201-5480 (For Plaintiff-Appellee).

Anne M. Reese, Legal Aid Society of Cleveland, 121 East Walnut Street, Jefferson, OH 44047; and *Philip D. Althouse,* Legal Aid Society of Cleveland, 1530 West River Road, Suite 301, Elyria, OH 44035 (For Defendant-Appellant Jane Rufo).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jane Rufo, appeals the summary judgment of foreclosure entered in favor of Appellee, Federal Home Loan Mortgage Corp. (“Freddie Mac”), by the Ashtabula County Court of Common Pleas. At issue is whether Freddie Mac’s lack of standing when it filed this mortgage foreclosure action could be cured by the assignment of the mortgage and promissory note to it prior to the entry of final

judgment. For the reasons that follow, the trial court's judgment is reversed and this matter is remanded for the trial court to dismiss the complaint without prejudice.

{¶2} On September 21, 2007, appellant and her daughter, Jennifer Rufo, purchased a home in Ashtabula, Ohio. Appellant applied for and received a residential home loan from U.S. Bank, N.A. in the amount of $114,000. In return for the loan, appellant executed a note in that amount in favor of U.S. Bank. In order to secure the loan, appellant and Jennifer executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for U.S. Bank.

{¶3} Subsequently, appellant defaulted on the note, and the amount owed was accelerated. On July 21, 2010, Freddie Mac filed this action, naming appellant and Jennifer as defendants. Freddie Mac alleged it was the holder of the note on which appellant defaulted. Freddie Mac attached a copy of the mortgage to the complaint, but did not attach a copy of the note, alleging it was currently unavailable.

{¶4} One month later, on August 17, 2010, MERS, as nominee for U.S. Bank, assigned said mortgage to Freddie Mac.

{¶5} On October 5, 2010, Freddie Mac filed a "Notice of Filing [1.] Assignment of Mortgage and [2.] Note with Blank Indorsement." Copies of the August 17, 2010 assignment of the mortgage to Freddie Mac and the September 21, 2007 note payable to U.S. Bank were attached to this notice.

{¶6} In October 2010, appellant and Jennifer filed separate motions for a more definite statement and, alternatively, motions to dismiss the complaint for lack of standing. Freddie Mac filed briefs in opposition to these motions.

{¶7} On November 24, 2010, appellant filed an answer denying the material allegations of the complaint and asserting various affirmative defenses, including Freddie Mac's alleged lack of standing.

{¶8} On April 25, 2011, the trial court entered judgment denying appellant's and Jennifer's motions for a more definite statement and to dismiss.

{¶9} On June 8, 2011, Freddie Mac filed a motion for default judgment against Jennifer. Also, on that date, Freddie Mac filed a motion for summary judgment against appellant. In support of its summary-judgment motion, Freddie Mac filed the affidavit of Corie Spencer, an officer of U.S. Bank, which, she stated, was a servicing agent for Freddie Mac. Ms. Spencer stated that, based on her review of U.S. Bank's records for this account, Freddie Mac is the holder of the instant note and mortgage. She stated that appellant is in default on the note and that the amount owed on the account had been accelerated, making the entire balance of $111,080 due. Ms. Spencer authenticated the promissory note, the mortgage, and the assignment of the mortgage from MERS to Freddie Mac.

{¶10} Appellant filed a brief in opposition to Freddie Mac's motion for summary judgment, arguing that Freddie Mac lacked standing. However, appellant did not dispute she defaulted on the note; the amount claimed due by Freddie Mac; or the authenticity of the note, mortgage, and the assignment of the mortgage.

{¶11} On February 13, 2012, the trial court entered its judgment and decree in foreclosure, implicitly finding that Freddie Mac had standing. The court found that Jennifer was in default, and entered summary judgment against appellant.

{¶12} A sheriff's sale was scheduled for June 16, 2012. On June 8, 2012, appellant filed a motion to stay. On that same date, the trial court entered judgment staying execution of the order of sale pending appeal.

{¶13} Appellant now appeals, asserting two assignments of error. For her first assigned error, she alleges:

{¶14} "The trial court erred to the prejudice of the Appellant by granting Summary Judgment where the Appellee failed to sustain its burden to prove that it had standing to sue by providing evidence that it had both (1) possession of an endorsed Note on the date the Complaint was filed and (2) ownership of the Mortgage on the date the Complaint was filed."

{¶15} "Subject matter jurisdiction is a court's power to hear and decide a case on the merits." *Morrison v. Steiner*, 32 Ohio St.2d 86 (1972), paragraph one of the syllabus. "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. When the trial court lacks subject matter jurisdiction, its final judgment is void. *Id*. at ¶12.

{¶16} In Ohio, courts of common pleas have subject matter jurisdiction over justiciable matters. Ohio Constitution, Article IV, Section 4(B).

{¶17} "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 (1998). Standing involves a determination of whether a party has alleged a personal stake in the outcome 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, ¶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 (1973).

{¶18} 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. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, Ohio St.3d, 2012-Ohio-5017, ¶28.

{¶19} Whether standing exists is a matter of law that is reviewed de novo. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶23.

{¶20} Standing is similar to the requirement in Civ.R. 17(A) that every action "shall be prosecuted in the name of the real party in interest." The 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.'" *Midwest Business Capital v. RFS Pyramid Management*, LLC, 11th Dist. No. 2011-T-0030, 2011-Ohio-6214, ¶19, quoting *Shealy v. Campbell*, 20 Ohio St.3d 23, 24 (1985). Where the action has *not* been initiated by the real party in interest, Civ.R. 17(A) provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. Civ.R. 17 allows a representative of the real party in interest to file an action and to later be substituted by the real party in interest as long as the representative plaintiff also had standing in his

own right to file the action. *Schwarzwald*, *supra*, at ¶37-44. *The real-party-in-interest rule concerns only proper party joinder, not standing. Id*. at ¶33.

{¶21} In contrast to standing, which is jurisdictional, Civ.R. 17(A) is considered procedural and is waived if not specifically pled. *Travelers Indemn. Co. v. R.L. Smith Co*., 11th Dist. No. 2000-L-014, 2001 Ohio App. LEXIS 1750, *8 (Apr. 13, 2001).

{¶22} Under her first assigned error, appellant argues Freddie Mac failed to prove it had standing because it presented no evidence it held the note and mortgage at the time it filed the complaint. Appellant therefore argues that standing is jurisdictional and must exist when the complaint is filed.

{¶23} In contrast, Freddie Mac argues it had standing to prosecute this action. Initially, Freddie Mac argues it held the note and mortgage three years before it filed the complaint based on a document referred to by Ms. Spencer in her affidavit as a "loan acquisition." However, this document is merely an unauthenticated e-mail from an unidentified sender to an unidentified recipient in which the sender states, "Freddie funded this loan on 11/13/2007." This document does *not* state that Freddie Mac acquired the note or mortgage at that time. As a result, it is of no legal significance.

{¶24} Further, Freddie Mac argues that, even if it cannot prove it held the note or mortgage when it filed its complaint, it acquired standing when it became the holder of these instruments after the complaint was filed. It therefore argues that standing is not jurisdictional, and can be acquired after the complaint is filed.

{¶25} Thus, the issue before us is whether Freddie Mac was required to have standing at the time it filed this action or whether its lack of standing was cured pursuant

to Civ.R. 17(A) by the assignment of the mortgage and note after the action was filed but before final judgment was entered.

{¶26} The Supreme Court of Ohio in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70 (1998), stated that, pursuant to Civ.R. 17, "[t]he lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter." *Id.* at 77.

{¶27} Relying on the Supreme Court's pronouncement in *Jones*, *supra*, this court held that standing is not jurisdictional in the foreclosure context in *Aurora Loan Servs.*, *LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, ¶18; *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. No. 2011-L-025, 2012-Ohio-124, ¶13-14; *Everhome Mortg. Co. v. Behrens*, 11th Dist. No. 2011-L-128, 2012-Ohio-1454, ¶12, 16; and *Bank of New York Mellon Trust Co, N.A. v. Shaffer*, 11th Dist. No. 2011-G-3051, 2012-Ohio-3638, ¶32.

{¶28} However, the Supreme Court recently addressed the identical issue before us in *Schwartzwald*, *surpa.* In *Schwartzwald*, the Supreme Court criticized its ruling in *Jones*, *supra*, that standing is not jurisdictional. The Supreme Court in *Schwartzwald* held that standing is required to present a justiciable controversy and is a jurisdictional requirement. *Id.* at 21-22. The Court held that, because standing is required to invoke the trial court's jurisdiction, standing is determined as of the filing of the complaint. *Id*. at ¶24. Further, the Court held that a mortgage holder cannot rely on events occurring after the complaint is filed to establish standing. *Id*. at ¶26. Thus, the plaintiff cannot rely on Civ.R. 17(A) to cure its lack of standing by obtaining an interest in the subject of the litigation after the action is filed and substituting itself as the real party

in interest. *Id*. at ¶36. Finally, the Court held that when the evidence demonstrates the mortgage lender lacked standing when the foreclosure action was filed, the action must be dismissed without prejudice. *Id*. at ¶40.

{¶29} To the extent this court's prior holdings in *Cart*, *supra*; *Yeager*, *supra*; *Behrens*, *supra*; and *Shaffer*, *supra*, are inconsistent with the Supreme Court's holding in *Schwartzwald* that standing is jurisdictional, we overrule our holdings.

{¶30} Thus, pursuant to *Schwartzwald*, standing is jurisdictional. As a result, Freddie Mac was required to have an interest in the note or mortgage when it filed this action in order to have standing to invoke the jurisdiction of the trial court.

{¶31} Further, appellant argues that Ms. Spencer's affidavit was insufficient to demonstrate that Freddie Mac held the note when it filed the complaint. Appellant argues that Ms. Spencer's statement that Freddie Mac is "the holder of, or is otherwise entitled to enforce" the promissory note is insufficient to prove it is entitled to enforce the note. Appellant argues that because this statement is made in the alternative, it is insufficient to prove either alternative. R.C. 1303.31 provides:

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

{¶33} "(1) The holder of the instrument;

{¶34} "(2) A non-holder in possession of the instrument who has the rights of a holder; [or]

{¶35} "(3) A person not in possession of the instrument who is entitled to enforce the instrument * * *."

{¶36} Ms. Spencer's statement in her affidavit that Freddie Mac is the holder of, or otherwise entitled to enforce the note, does not allege any facts, only legal conclusions, which are insufficient to meet its burden on summary judgment. Affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R. 56(E). *State v. Licsak*, 41 Ohio App.2d 165, 169 (10th Dist.1974); *Rice v. Johnson*, 8th Dist. No. 63648, 1993 Ohio App. LEXIS 4109 (Aug. 26, 1993). Due to the complete lack of any factual statements in the affidavit, it is impossible for us to tell, for example, how or when Freddie Mac came to hold or otherwise became entitled to enforce the note.

{¶37} Moreover, appellant argues that U.S. Bank failed to transfer the note to Freddie Mac because, she claims, such transfer required an endorsement on the note from U.S. Bank to Freddie Mac and there is no endorsement. Although the note was originally payable to U.S. Bank, it was endorsed "in blank" by U.S. Bank. "When an instrument is endorsed in blank, [i.e., it does not identify the payee,] the instrument becomes payable to bearer and may be negotiated by transfer of possession alone * * *." R.C. 1303.25(B). In contrast, "if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder." R.C. 1303.21(B). Because the promissory note at issue here was endorsed in blank, it was payable to bearer and could be negotiated by transfer of possession alone; endorsement by the holder was unnecessary.

{¶38} However, Ms. Spencer does not state in her affidavit *when* the note was transferred to Freddie Mac. Moreover, the record contains no evidence expressly stating the date of transfer of the note to Freddie Mac. As a result, based on the

analysis that follows, the assignment of the mortgage to Freddie Mac on August 17, 2010, one month after the complaint was filed, also resulted in the transfer of the note to Freddie Mac on that date.

{¶39} MERS' assignment of the mortgage to Freddie Mac was sufficient to transfer *both the mortgage and the note to Freddie Mac*. Section 5.4 of the Restatement III, Property (Mortgages) discusses the transfer of a promissory note, secured by a mortgage and the transfer of the mortgage itself by the original mortgagee to a successor mortgagee. Such transfers occur in what is commonly referred to as the "secondary mortgage market," as opposed to the "primary mortgage market" in which mortgage loans are originated by lenders and executed by borrowers. *See Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, ¶27. In *Dobbs*, the Fifth District held:

> **{¶40}** The Restatement asserts as its essential premise * * * that it is nearly always sensible to keep the mortgage and the [note] it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the [note] destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the [note] from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined * * *. Thus, *the Restatement* [*provides*] *that transfer of the* [*note*] *also transfers the mortgage and vice versa*. Section

> 5.4(b) [provides] "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the [note] the mortgage secures unless the parties to the transfer agree otherwise." *Thus,* [*the note*] *follows the mortgage if the record indicates the parties so intended.* (Emphasis added.) *Dobbs*, *supra*, at ¶28.

{¶41} The Fifth District in *Dobbs*, *supra*, noted that, "[i]n Ohio it has been held that transfer of the note implies transfer of the mortgage. * * * '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.'" *Dobbs*, *supra*, at ¶29-30, quoting *LaSalle Bank N.A. v. Street*, 5th Dist. No. 08CA60, 2009-Ohio-1855, ¶28. The Fifth District in *Dobbs* extended this rationale, holding that *the assignment of a mortgage, without an express transfer of the note, is sufficient to transfer both the mortgage and the note, if the record indicates that the parties intended to transfer both*. *Id*. at ¶31.

{¶42} In the instant case, the mortgage provides that it secures to the Lender, U.S. Bank, the performance of appellant's agreements under the promissory note. Further, the note provides that the mortgage, dated the same date as the note, protects the holder of the note from loss that might result if appellant does not keep the promises made in the note.

{¶43} In addressing the provisions in the note and mortgage at issue in *Dobbs*, *supra*, which are virtually identical to those at issue here, the Fifth District held: "Because the note refers to the mortgage and the mortgage, in turn, refers to the note,

we find a clear intent by the parties to keep the note and mortgage together, rather than transferring the mortgage alone." *Id*. at ¶36.

{¶44} We find the Fifth District's holding in *Dobbs*, *supra*, to be persuasive, and hold that the instant note and mortgage evidence the parties' intent to keep the instruments together. We thus hold the assignment of the mortgage, without an express transfer of the note, was sufficient to transfer both the mortgage and the note. Since the mortgage was assigned on August 17, 2010, one month after the complaint was filed, the note was effectively transferred on that date.

{¶45} We therefore hold that, pursuant to *Schwartzwald*, *supra*, because Freddie Mac failed to establish it held the note before filing the complaint, it did not have standing to bring this foreclosure action against appellant. As a result, the trial court erred in granting summary judgment in favor of Freddie Mac because it was not entitled to judgment as a matter of law. We sustain appellant's first assignment of error, reverse the court's summary judgment in favor of Freddie Mac, and order the trial court to dismiss the complaint without prejudice.

{¶46} For its second assigned error, appellant alleges:

{¶47} "The trial court erred to the prejudice of the appellant by overruling her Motion for a More Definite Statement and Motion to Dismiss. The filing of a Notice of Assignment of Mortgage and Indorsed Note is not a substitute for filing an Amended Complaint. If no Amended Complaint can be filed to correct the deficient documents, the remedy is to dismiss the Complaint without prejudice."

{¶48} Having sustained appellant's first assignment of error, we find her second assigned error to be moot.

{¶49} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.