[Cite as *Wells Fargo Bank, N.A. v. Cook*, 2016-Ohio-1060.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

WELLS FARGO BANK, NA, PLAINTIFF-APPELLEE, VS. CHRISTINA M. COOK, ET AL., DEFENDANTS-APPELLANTS.	)))))))))	CASE NO. 15 CO 0013, 0019 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2014 CV 00046

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 4, 2016

[Cite as *Wells Fargo Bank, N.A. v. Cook*, 2016-Ohio-1060.]
ROBB, J.

{¶1} Defendant-Appellant Michael Cook appeals the decision of Columbiana County Common Pleas Court granting summary judgment and a decree in foreclosure in favor of Plaintiff-Appellee Wells Fargo Bank, N.A. Two issues are raised in this appeal. The first is whether Appellee had standing to seek foreclosure. The second issue is whether summary judgment was appropriately granted on the Fair Debt Collection Practices Act (FDCPA) and breach of contract claims. At oral argument, Appellant withdrew the assignment of error that the trial court improperly granted summary judgment on the breach of contract claim. Therefore, this opinion solely addresses the standing and the FDCPA arguments. For the reasons discussed below, both of those arguments lack merit. The trial court's decision is affirmed.

Statement of the Case

{¶2} On January 27, 2014, Appellee filed a complaint for foreclosure against Appellant for the property at 220 Roslyn Avenue, Wellsville, Ohio. The complaint alleged Appellant was in default on the note and mortgage.

{¶3} Both the note and mortgage were attached to the complaint. The parties to the note were Union National Mortgage Co., Appellant, and Defendant Christina Cook. On the bottom of the last page of the note was a stamp showing the note was negotiated to Appellee. An additional page attached to the note contained a stamp and signature from a representative of Appellee indicating Appellee endorsed the note in blank. A copy of the mortgage between Union National Mortgage Co. and the Cooks was also attached to the complaint. A Corporate Assignment of Mortgage for the property at 220 Roslyn Avenue from Mortgage Electronic Registration Systems, Inc., nominee for Union National Mortgage Co., to Appellee was also attached. The date of this assignment was October 7, 2013.

{¶4} In March 2014 and April 2014, Appellant filed an answer and amended answer. He asserted multiple defenses, including that Appellee lacked standing, violations of the FDCPA, and breach of contract. Appellant also counterclaimed for a violation of the FDCPA.

{¶5} In May 2014, Appellee moved to dismiss the counterclaim arguing it was not subject to the FDCPA because Appellee is not a debt collector. Appellant filed a response to the motion. 6/12/14 Response. The trial court denied the motion indicating the evidence does not clearly establish when the note was assigned to Appellee and thus, it could not be determined if Appellee was a debt collector. 6/17/14 J.E.

{¶6} Thereafter, Appellee filed an answer to the counterclaim. 6/30/14 Answer.

{¶7} Appellee filed its first motion for summary judgment in October 2014. Attached to this motion was an affidavit from Alissa Doepp, Vice President Loan Documentation for Appellee. Her affidavit explained the note was negotiated to Appellee, and Appellee endorsed it in blank. She averred the note was not in default when Appellee acquired it. According to her, the note was in Appellee's possession, either directly or through an agent, on the date the complaint was filed and through the present. She also avowed the mortgage was assigned on October 7, 2013, and in April 2011, the Cooks executed a Loan Modification Agreement with Appellee. The note, mortgage, and assignment of mortgage attached to the complaint were referenced and attached to her affidavit. The Loan Modification Agreement was also incorporated and attached. Through this affidavit Appellee asserted it had standing to foreclose, and it was not a debt collector.

{¶8} Appellant filed a response to summary judgment.

{¶9} On December 2, 2014, the trial court denied the motion for summary judgment. It held the affidavit attached to the motion did not demonstrate Appellee was in possession of the note at the time the action was filed. It found the evidence submitted did not show when the note was acquired for purposes of the other causes of action.

{¶10} In January 2015, Appellee filed an amended motion for summary judgment. Attached to this motion were Alissa Doepp's first affidavit and attachments, and a supplemental affidavit. In the affidavit, Doepp asserted Appellee was the custodian of the note; it acquired possession on December 22, 2004; and on the date

the complaint was filed it had possession of the original note. She avowed the note was not in default when Appellee acquired it, and the Cooks first scheduled payment was timely. She also claimed a written letter offering a face-to-face meeting was sent by certified mail on September 23, 2013, but it was unclaimed. Attached to the affidavit were documents allegedly supporting her averments. Also attached to the amended motion for summary judgment was an affidavit from Chris Bates, a Field Agent for JMA Services. He testified Appellee retained JMA to arrange a face-to-face meeting with the Cooks. He visited the property, but no one answered the door. He left a property flyer containing information to enable the Cooks to arrange a face-to-face meeting.

{¶11} Appellant filed a response to the motion asserting there were still genuine issues of material fact regarding Appellee's standing to foreclose and if it was a debt collector. 1/30/15 Appellant Motion in Opposition. He asserted there were inconsistencies between the two Doepp affidavits, and those inconsistencies created a genuine issue of material fact.

{¶12} On February 6, 2015, the trial court granted Appellee's summary judgment motion. The court found the Cooks failed to present any evidence to refute the affidavit and supplemental affidavit of Doepp establishing Appellee had standing. It stated, "without more the claimed inconsistencies fall short of creating a genuine issue of material fact that defeats a motion for summary judgment." As for the FDCPA claim, the Cooks also failed to respond with any evidence contradicting the averments in Doepp's affidavit concerning when the note was negotiated and whether it was in default when acquired. As to the breach of contract claim, the court held summary judgment for Appellee was proper because the Cooks failed to present any evidence the payments under the note were current. The Court reasoned that this was a material breach and accordingly, under state law contract analysis, the claim was not viable. 2/6/15 J.E.

{¶13} The Judgment Entry and Decree of Foreclosure were issued on February 26, 2015.

{¶14} Appellant filed a timely notice of appeal on March 27, 2015. That same day, he also filed a Civ.R. 60(B) Motion to Vacate with the trial court. Appellee opposed the motion to vacate. 4/8/15 Appellee Motion in Opposition. Due to the notice of appeal, the trial court was without jurisdiction to rule on the motion to vacate. Accordingly, Appellant requested a limited remand. 4/9/15 Request. We granted the limited remand to allow the trial court to rule on the Civ.R. 60(B) motion. 4/27/14 J.E. On June 23, 2015, the trial court denied the Civ.R. 60(B) motion. Appellant timely appealed that decision. The matter was returned to this court's active docket on July 31, 2015 and the appeals were consolidated.

{¶15} Although Appellant appeals the denial of his Civ.R. 60(B) motion, he does not discuss the Civ.R. 60(B) standard or our standard for reviewing the denial of a motion to vacate. The sole focus of his consolidated appeal is on the trial court's decision to grant summary judgment for Appellee. While the text of the assignment of error may reference Civ.R. 60(B), no arguments are made in the body of the brief asserting why the denial of the motion to vacate was improper. Accordingly, this opinion solely focuses on the grant of summary judgment.

Standard of Review

{¶16} We review a trial court's decision to grant summary judgment de novo. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test, Civ.R. 56(C), as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994).

First Assignment of Error – Standing

> The trial court erred in granting summary judgment, and in denying vacation of the summary judgment award under ORCP 60(b), when Appellee was not entitled to summary judgment as Appellee did

> not demonstrate it is the holder of the note with entitlement to enforce the indebtedness; nor did Appellee demonstrate its standing to file the complaint.

{¶17} This assignment of error addresses Appellee's standing to foreclose.

{¶18} In a mortgage foreclosure action, the mortgage lender must establish an interest in the promissory note or in the mortgage in order to have standing to invoke the jurisdiction of the common pleas court. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012–Ohio–5017, ¶ 28. A plaintiff must have standing at the time the complaint is filed; however, plaintiff does not need to prove standing in the complaint. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶ 12. Rather, standing may be submitted subsequent to the filing of the complaint. *Id*. Whether standing exists is a matter of law that we review de novo. *Bank of Am., NA v. Barber*, 11th Dist. No.2013–L–014, 2013–Ohio–4103, ¶ 19.

{¶19} The debate among the appellate courts is whether the language of the Ohio Supreme Court's decision in *Schwartzwald* means the mortgage lender must have an interest in both the note and mortgage or is it enough to have an interest in one or the other. That issue is currently pending before the Ohio Supreme Court. *Deutsche Bank Natl. Trust Co. v. Holden*, 140 Ohio St.3d 1414, 2014-Ohio-3785, 15 N.E.3d 883. Our court's position (which is among the majority position of the appellate courts) is that mortgage lender has standing if it either is the holder of the note or had been assigned the mortgage prior to the complaint being filed. *U.S. Bank Natl. Assn. v. Kamal*, 7th Dist. No. 12 MA 189, 2013-Ohio-5380, ¶ 16.

{¶20} Due to the facts in the case sub judice, we do not need to reassess our previous holdings. As discussed below, there are no genuine issues of material fact that Appellee was assigned the mortgage and was the holder of the note prior to the complaint being filed.

Mortgage

{¶21} Although Appellant's argument under this assignment of error focuses solely on the note, the documents attached to the complaint, the motion for summary

judgment and the amended motion for summary judgment establish Appellee was assigned the mortgage on October 7, 2013. The assignment, which is titled "Corporate Assignment of Mortgage," and the original mortgage were incorporated by affidavit and attached to the summary judgment motion and amended summary judgment motion. These documents were also attached to the complaint which was filed on January 27, 2014. This was proper summary judgment evidence. Civ.R. 56(C) (affidavits proper summary judgment evidence); *Ohio Dept. of Job & Family Servs. v. Amatore*, 7th Dist. No. 09 MA 159, 2010-Ohio-2848, ¶ 39 (attachment is a part of the pleadings and is proper evidence to rely on when moving for summary judgment; it does not have to be attached to the motion for summary judgment with an accompanying affidavit). Consequently, it is undisputed that Appellee was assigned the mortgage when the complaint was filed.

Note

{¶22} As to the note, a plaintiff must show it is a holder of the note in order to have standing to enforce the note. *U.S. Bank Trust, N.A. v. Jacobs*, 6th Dist. No. L-14-1268, 2015-Ohio-4632, ¶ 17. A holder of a negotiable instrument is the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is in possession." *Jacobs* citing R.C. 1301.201(B)(21)(a). Thus, "[a]n entity which possesses a note indorsed in blank is a holder entitled to enforce the note." *Bank of New York Mellon v. Bobo*, 4th Dist. No. 14CA22, 2015-Ohio-4601, ¶ 30, citing *Bank of America, N.A. v. Pasqualone*, 10th Dist. No. 13AP–87, 2013–Ohio–5795, ¶ 35, fn. 14 and *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013–Ohio–1657, ¶ 62.

{¶23} The note was attached to the complaint, incorporated through an affidavit and attached to the summary judgment motion, and incorporated through an affidavit and attached to the amended summary judgment motion. On the last page of the note is a stamp showing the note was negotiated to Appellee. Attached to the note is an additional page showing Appellee endorsed the note in blank.

{¶24} Since the note was endorsed in blank, the note was bearer paper. R.C. 1303.10(A)(2). As bearer paper, in order to be entitled to summary judgment,

Appellee must show it had possession of the note at the time of the filing of the complaint. *Jacobs* at ¶ 17; R.C. 1303.201(B)(21)(a).

{¶25} Case law indicates such proof can be accomplished by a copy of the note attached to the complaint and an affidavit from a knowledgeable employee of Appellee averring the note was in Appellee's possession on the day the complaint was filed. *Jacobs* at ¶ 18; *Deutsche Bank Natl. Trust Co. v. Thomas*, 10th Dist. No. 14AP-809, 2015-Ohio-4037, ¶ 13; *U.S. Bank, N.A. v. Adams*, 6th Dist. No. E–11–070, 2012–Ohio–6253, ¶ 18.

{¶26} Appellant does dispute these holdings. Rather, he is of the position that there is a genuine issue of material fact because the affidavits from Appellee's employee, Alissa Doepp, are inconsistent about whether Appellee had possession of the note on the date the complaint was filed.

{¶27} In the affidavit attached to the Motion for Summary Judgment, Alissa Doepp, Vice President Loan Documentation for Appellee, averred:

> 2. The Cooks executed a note dated December 10, 2004 ("Note") in favor of Union National Mortgage Company. The Note was specifically indorsed to Wells Fargo, who indorsed the Note in blank. Attached to this Affidavit as Exhibit 1 is a copy (with loan and file numbers redacted) of the Note. The Note was not in default when Wells Fargo acquired it. On January 27, 2014 and presently, either directly or through an agent, Wells Fargo had and has possession of the Note.

9/12/14 Doepp Affidavit.

{¶28} Attached to the amended motion for summary judgment is a second affidavit from Alissa Doepp. In this affidavit she avowed:

> 2. The Cooks executed a note dated December 10, 2004 ("Note") in favor of Union National Mortgage Company. The Note was specifically indorsed to Wells Fargo, who indorsed the Note in blank.
>
> 3. Wells Fargo is the custodian of the Note. Wells Fargo acquired possession of the Note on December 22, 2004. Wells Fargo's records

> substantiating its possession of the Note are attached as Exhibit 1. On January 27, 2014, Wells Fargo had possession of the original Note.

12/23/14 Doepp Affidavit.

{¶29} Appellant asserts the above statements are inconsistent and create a genuine issue of material fact as to whether Appellee had standing to enforce the note on the day the complaint was filed. He argues summary judgment is improper where there is inconsistent evidence for which there is no credible explanation. He cites three cases in support of his position - *Fannie Mae v. Trahey*, 9th Dist. No. 12CA010209, 2013-Ohio-3071, *U.S. Bank, N.A. v. McGinn*, 6th Dist. No. S-12-004, 2013-Ohio-8 and *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657.

{¶30} In all three of the cases cited by Appellant, multiple versions of the note sought to be enforced were presented to the trial court by the plaintiff in an attempt to establish standing. The versions differed because different endorsements were on the note presented. This created an issue of who was the holder of the note, i.e. who had standing to enforce the note. *Trahey* at ¶ 11-12 (two copies of the promissory note, each containing different indorsements filed with trial court); *McGinn* at ¶ 22 (additional special endorsement on the second copy of the note); *Najar* at ¶ 59 (two different copies of the note in the record—one with endorsements and one without). In *Trahey*, the appellate court held that because neither copy indicated when the various indorsements were made, the indorsements created a genuine issue of material fact as to whether the party seeking to enforce the note had standing. *Trahey* at ¶ 11-12. In both *McGinn* and *Najar*, the plaintiff, in an attempt to dispel the genuine issue of whether it had standing, provided an affidavit from its employee or agent explaining why the notes contained inconsistencies. *McGinn* at ¶ 23; *Najar* at ¶ 59. The *McGinn* court found the affidavit did not resolve the inconsistency because the language of the affidavit was indecisive. *McGinn* at ¶ 24 ("Rather than providing a definitive explanation for the additional endorsements on the original note, Knapp states that he believes that the wrong copy of the complaint [sic] was inadvertently attached to the foreclosure complaint. However, Civ.R. 56(E) requires personal

knowledge. Indeed, believing something to be true is different that [sic] knowing something is true."). The *Najar* court, however, found the reason in the affidavit to be reasonable and credible, and as such, it resolved the issue of whether the party seeking to enforce the note had standing. *Najar* at ¶ 60 ("Kistler's explanation is credible and supported by other facts and documents in the record. Appellant offered no facts or evidence contradicting the explanation provided. Accordingly, the existence of both the endorsed note and the unendorsed note in the record did not create a triable issue of fact.").

{¶31} In those cases, the appellate court's analysis concerned inconsistencies between multiple notes filed with the trial court and whether the evidence offered to explain those inconsistencies was sufficient to resolve the genuine issue of material fact that the inconsistent notes created. As the trial court correctly pointed out, the facts before us do not deal with inconsistencies in the notes that were attached to the various summary judgment motions and the complaint. All of the notes attached were identical; they all contained the same endorsements. Appellant does not dispute that the notes filed with the trial court are consistent. Rather, he alleges the above quoted statements from Doepp's two affidavits are inconsistent. Consequently, considering the arguments and facts of the case at hand and the three cases cited by Appellant, the case at hand is factually distinguishable.

{¶32} In reviewing Doepp's affidavit, this court concludes the affidavits are consistent. Appellant asserts they are inconsistent because in Doepp's first affidavit she averred the note was either in Appellee's possession or in its agent's possession on the date the complaint was filed. But, in the second affidavit, she indicated Appellee had possession of the note on the date the complaint was filed. Those statements are consistent. The statement in the first affidavit is a statement indicating two places that the note could be; it was an indication the note was either in place A or place B. The statement in the second affidavit is an averment the note was in Appellee's possession on the date the complaint was filed. Inconsistent statements would be that in the first affidavit Doepp stated the note was in place A or B, but in the second affidavit she stated the note was in place C. Another variation

would be that in the first affidavit Doepp stated the note was in place A, but in the second affidavit she stated it was in place B.

{¶33} Furthermore, in looking at how the two affidavits came about also supports the conclusion that the statements are consistent. Appellant opposed the original summary judgment motion based on the argument that Appellee did not know whether the note was with it or with its agent. The trial court accepted this argument. It would appear Appellee did more investigating and discovered the note was in its possession and not in its agent's possession. This progression indicates the supplemental affidavit was the result of having to clarify who had possession.

{¶34} Additionally, it is noted, Appellee's reliance on the statement that the note was either in its possession or its agent's possession was not a vague statement having no support in the law for establishing standing. Case law from the Tenth Appellate District indicates an agent's possession of the note is sufficient to establish standing. *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP–953, 2013–Ohio–3340, ¶ 26 (concluding plaintiff had constructive possession of blank-indorsed note where the plaintiff's servicing agent held physical possession of the note on behalf of the plaintiff and, therefore, the plaintiff was the holder of the note). *See, U.S. Bank Natl. Assn. v. Urbanski*, 10th Dist. No. 13AP–520, 2014–Ohio–2362, ¶ 10 (concluding the plaintiff qualified as holder of the note because a blank-indorsed copy of the note was attached to the complaint and an employee of the plaintiff's loan servicer averred in an affidavit that plaintiff was in possession of the original note when the complaint was filed).

{¶35} Admittedly, the Ninth Appellate District has indicated a similar statement regarding a lender or its agent having possession of the note was not sufficient to establish standing. *Deutsche Bank Natl. Trust Co. v. Dvorak*, 9th Dist. No. 27120, 2014-Ohio-4652, ¶15. However, in doing so the appellate court did not rely solely on the statement, but also supported its decision with other problems with the lender's affidavits. Specifically, there were questions as to whether they were based on personal knowledge, and compliance with Civ.R. 56(C) and (E). *Id*. at ¶ 13-15.

{¶36} Also, the facts set forth in *Dvorak* do not clearly establish that it is similar to the case at hand. The record before this court evinces a copy of the note endorsed in blank by Appellee was attached to the complaint. The facts as set forth by the Ninth Appellate District in *Dvorak* do not indicate whether the note was attached to the complaint in that case. A copy of a note endorsed in blank attached to a foreclosure complaint may not establish, by itself, that the plaintiff had standing to bring the action. However, that attachment does carry some weight when it is taken in conjunction with an affidavit indicating the note was in the plaintiff's or its agent's possession.

{¶37} There are no inconsistencies between the statements in Doepp's two affidavits; her averments were sufficient to establish standing. As the trial court noted, Appellant did not present any evidence to contradict Doepp's statements. Without contradictory evidence, Appellee was entitled to summary judgment on the standing issue.

{¶38} Appellant also argues Exhibit 1 attached to Doepp's supplemental affidavit does not establish Appellee is the current holder of the Note. He asserts Exhibit 1 is "not self-evident, nor self-explanatory as to Appellee's possession of the Note; are comprised of undefined, unexplained coded words; are replete with unexplained redactions of information; and the alleged facts to be derived from the content of the Exhibit 1 are documents not explained by affiant, Ms. Doepp." Appellant Brief at 9.

{¶39} In Doepp's supplemental affidavit she indicated Exhibit 1 was Appellee's record substantiating its possession of the note. In looking at Exhibit 1, it is hard to decipher. It appears to be a log of the note in question. Although it is difficult to understand, when it is taken in conjunction with the other information in her affidavit, it appears Appellee was in possession of the note when the complaint was filed.

{¶40} Regardless, given the case law, Exhibit 1 was not needed to show Appellee was holder of the note on the day the complaint was filed. As stated above, case law clearly indicates a party seeking to enforce a note establishes standing by

presenting a copy of the note endorsed in blank along with an affidavit containing averments that it had possession of the note. *Jacobs*, 6th Dist. No. L-14-1268, 2015-Ohio-4632, ¶ 18; *Thomas*, 10th Dist. No. 14AP-809, 2015-Ohio-4037, ¶ 13; *Adams*, 6th Dist. No. E–11–070, 2012–Ohio–6253, ¶ 18.

{¶41} This assignment of error is meritless for all the above stated reasons.

Second Assignment of Error

> The trial court erred in granting summary judgment to Plaintiff/Appellee on the counterclaims of Defendant/Appellant on the Fair Debt Collection Practices Act and for Breach of Contract.

{¶42} Two arguments are asserted under this assignment of error. The first is the trial court incorrectly granted summary judgment to Appellee on Appellant's Fair Debt Collections Practices Act (FDCPA) claim. The second argument concerns the trial court's grant of summary judgment on Appellant's breach of contract claim. Appellant withdrew the contract claim at oral argument. Accordingly, the breach of contract claim arguments will not be addressed.

Fair Debt Collections Practices Act

{¶43} In granting summary judgment to Appellee on the FDCPA claim, the trial court found from the evidence submitted by Appellee that it acquired the note on December 22, 2004, the note was not in default when it was acquired, and it was not treated as if it was in default. In order to establish a claim under the FDCPA, the trial court held that Appellee had to be a debt collector. The unchallenged evidence established it was not a debt collector. On that basis, the trial court granted summary judgment.

{¶44} Appellant argues the decision is incorrect and there is a genuine issue of material fact as to whether Appellee continuously maintained interest in the note. Appellant's focus is on Doepp's supplemental affidavit and Exhibit 1 attached to the affidavit. Specifically, as to Exhibit 1, he asserts there are no explanations for the log or indication what certain transactions mean. Thus, he asserts there is a question of fact as to whether Appellee is a debt collector on this note.

{¶45} Appellee counters asserting it is not in the business of debt collection; it is a creditor and excluded from the definition of a debt collector under the FDCPA. It also argues Doepp's affidavit shows the note was acquired when it was not in default, and Appellant made the first regularly scheduled payment. When the note went into default, Appellee did not file a collection action, but instead entered into a loan modification agreement with Appellant. Appellee contends Appellant presented no evidence to show Appellee was a debt collector under the FDCPA.

{¶46} To establish a claim under the FDCPA, "a plaintiff must establish: (1) he or she is a 'consumer' as defined by 15 U.S.C. 1692a(3); (2) the 'debt' arises out of transactions that are 'primarily for personal, family, or household purposes,' 15 U.S.C. 1692a(5); (3) the defendant is a 'debt collector' as defined by 15 U.S.C. 1692a(6); and (4) the defendant violated any of the prohibitions of 15 U.S.C. 1692e." *United States Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP–953, 2013–Ohio–3340, ¶ 39, citing *Whittaker v. Deutsche Bank Natl. Trust Co*., 605 F.Supp.2d 914, 926 (N.D.Ohio 2009). Failure to prove any one of these elements is fatal to a plaintiff's FDCPA claim. *Id*.

{¶47} In the case at hand, the issue is with the third requirement. Appellee argued in its summary judgment motion that Appellant's counterclaim could not survive because Appellee is a creditor, not a debt collector.

{¶48} A "debt collector" is defined by the FDCPA as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). "A creditor, on the other hand, refers to an entity that 'offers or extends credit creating a debt or to whom a debt is owed.'" *Wells Fargo Bank v. Hammond*, 2014-Ohio-5270, 22 N.E.3d 1140, ¶ 50 (8th Dist.); *Wells Fargo Bank, N.A. v. Gerst*, 5th Dist. No. 13 CAE 05 0042, 2014-Ohio-80, ¶ 28. The Act specifically excludes from its definition of a "debt collector" any person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to

the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

{¶49} The Eighth and Fifth Appellate District have stated that "it is well established that creditors and mortgage service companies are not 'debt collectors' and are not subject to liability under the FDCPA. *Hammond* at ¶ 50 (counterclaim against Wells Fargo failed as a matter of law), citing *RBS Citizens, N.A. v. Zigdon*, 8th Dist. No. 93945, 2010-Ohio-3511, 2010 WL 2961534, ¶ 41, citing *Scott v. Wells Fargo Home Mtge. Inc.*, 326 F.Supp.2d 709 (E.D.Va.2003); *Gerst* at ¶ 28 (summary judgment granted to Wells Fargo on FDCPA).

{¶50} The Twelfth and Ninth Appellate District have not made such a blanket holding concerning creditors and mortgage service companies. *Bank of New York Mellon v. Brock*, 12th Dist. No. CA2014-01-003, 2014-Ohio-3085, ¶ 28; *U.S. Bank v. Schubert*, 9th Dist. No. 13CA010462, 2014-Ohio-3868, ¶ 23-24 (indicating the Eighth and Fifth Appellate Districts are correct that mortgage servicers are not debt collectors when the servicing company is merely attempting to collect a current debt, as it stands in the shoes of the mortgagee, however mortgagee and mortgage servicing companies become debt collectors when they obtain a debt at a time it is already in default). They have indicated, "the FDCPA 'treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not.' *Schlosser v. Fairbanks Capital Corp*., 323 F.3d 534, 536 (7th Cir.2003)." *Brock* at ¶ 28. *See also Schubert* at ¶ 23-24.

{¶51} Doepp's supplemental affidavit provides:

> 3. Wells Fargo is the custodian for the Note. Wells Fargo acquired possession of the Note on December 22, 2004. Wells Fargo's records substantiating its possession of the Note are attached as Exhibit 1. On January 27, 2014, Wells Fargo had possession of the original Note.
>
> 4. The Note was not in default when Wells Fargo acquired it, and Wells Fargo did not treat the Note as if it were in default. The Cooks made

> their first payment on the Note to Wells Fargo on January 26, 2005. At that time, the Note was due for February 1, 2005.
>
> 5. In April 2011, Wells Fargo and the Cooks executed a Loan Modification Agreement. After that, the Cooks fell behind on their payments and the loan is currently due for the August 1, 2013 payment and all subsequent payments.

12/23/14 Doepp Supplemental Affidavit.

{¶52} These statements indicate Appellee acquired the note when it was not in default. The evidence submitted by Appellee clearly indicates Appellee was acting as a creditor, not a collector; the loan was not in default when acquired and after Appellant defaulted, Appellee entered into a loan modification agreement with Appellant. Those are acts of a creditor, not a debt collector. Appellant offered no evidence to refute those statements. Thus, he has presented no evidence that Appellee satisfies the predicates for debt collector status under the FDCPA. *Bank of Am., N.A. v. Robledo*, 10th Dist. No. 13AP-278, 2014-Ohio-1185, ¶ 22-25.

{¶53} For those reasons, the trial court did not err in granting summary judgment to Appellee on the FDCPA claim.

Conclusion

{¶54} For the reasons expressed above, the trial court's decision is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.