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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **MATRIX FINANCIAL SERVICES CORP,**

3                   **Plaintiff-Appellant,**

4 **v.**

**No. 34,635**

5 **ADELE LARRIBAS,**

6                   **Defendant-Appellee,**

7 **and**

8 **ELAINE CHAVEZ, and if married,**

9 **JOHN DOE B (true name unknown), her spouse;**

10 **and SECRETARY OF HOUSING AND**

11 **URBAN DEVELOPMENT,**

12                   **Defendants.**

13 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

14 **Victor S. Lopez and Nan G. Nash, District Judges**

15 Little, Bradley & Nesbitt, P.A.

16 Sandra A. Brown

17 Lucinda R. Silva, Of Counsel

18 Albuquerque, NM

19 for Appellant

20 JRSPC, LLC

21 Joshua R. Simms

22 Albuquerque, NM

1 for Appellee

2 **MEMORANDUM OPINION**

3 **HANISEE, Judge.**

4 {1} Plaintiff-Appellant Matrix Financial Services Corporation (Matrix) appeals  
5 from the district court's order granting Defendant-Appellee Adele Larribas's  
6 (Larribas) motion to vacate foreclosure judgment due to lack of standing and  
7 dismissing Matrix's foreclosure complaint with prejudice. On appeal, Matrix argues  
8 that the district court erred in considering the motion in the first place; in granting the  
9 motion when Larribas failed to articulate her standing objections or otherwise respond  
10 or appear at the hearing regarding the same; in finding that standing had to be proven  
11 with a dated indorsement as of the filing of the complaint; in concluding that Matrix  
12 did not prove that it had standing as of the filing of the complaint based on the record  
13 presented; and in dismissing Matrix's foreclosure complaint *with* prejudice.

14 {2} As discussed more fully in this Opinion, our Supreme Court recently clarified  
15 that a party who fails to challenge standing prior to the completion of a trial on the  
16 merits, or while litigation is still active, waives his standing arguments. *See Deutsche*  
17 *Bank Nat'l Trust Co. v. Johnston*, No. 34,726, 2016 WL 852521, 2016-NMSC-013,  
18 ¶¶ 10-19, \_\_\_ P.3d \_\_\_. In light of this clarification, we hold that Larribas waived her  
19 right to challenge Matrix's evidence regarding standing because she failed to make

1 such a challenge prior to entry of the final judgment. Because resolution of this issue  
2 is dispositive of this appeal, we do not reach the remaining issues raised by Matrix.  
3 We reverse and remand with instructions to reinstate the vacated judgment.

#### 4 **BACKGROUND**

5 {3} Matrix filed a complaint for foreclosure against Larribas, as well as other  
6 defendants not relevant to this appeal. Larribas filed an answer, asserting, *inter alia*,  
7 the affirmative defense that Matrix lacks standing to foreclose, without any  
8 explanation as to how or why Matrix lacks standing. Thereafter, Matrix filed a motion  
9 for summary judgment, including additional factual information and an affidavit  
10 attesting to its standing. Larribas did not respond to the motion and did not challenge  
11 the evidence Matrix provided to show that it did, in fact, have standing to bring the  
12 foreclosure complaint. A hearing was held on the motion for summary judgment, at  
13 which Larribas did not appear. The district court entered summary and default  
14 judgment in Matrix's favor. A special master's sale was held, and the district court  
15 entered an order approving the sale and the special master's report.

16 {4} Nearly four months after the summary and default judgment was entered,  
17 Larribas filed a motion to vacate the sale and declare the judgment void, challenging  
18 Matrix's standing pursuant to Rule 1-060(B) NMRA. Matrix responded to the motion  
19 and also filed an affidavit by its counsel regarding possession of the original note; an

1 affidavit by an authorized signer for Matrix, attesting to Matrix’s standing at the time  
2 of filing the complaint; and a custodian’s affidavit, attesting to Matrix’s custodian’s  
3 physical possession of the original note since 2004. Two hearings were held, at which  
4 Larribas presented no evidence and after which the district court nonetheless granted  
5 Larribas’s motion. By its order, the district court vacated the foreclosure judgment and  
6 dismissed the foreclosure complaint with prejudice. Matrix appeals.

7 **DISCUSSION**

8 {5} Matrix first argues that Larribas’ motion to vacate does not meet the threshold  
9 requirement of timeliness and the district court erred in entertaining the untimely Rule  
10 1-060(B)(4) motion and refusing to recognize and enforce the finality of the summary  
11 and default judgment. Our Supreme Court recently addressed this issue in *Johnston*,  
12 2016-NMSC-013, ¶¶ 10-19.

13 {6} In *Johnston*, the Supreme Court first explained and clarified New Mexico law  
14 on whether standing is jurisdictional. The Court explained that,

15 [a]s a general rule, standing in our courts is not derived from the state  
16 constitution, and is not jurisdictional. However, when a statute creates a  
17 cause of action and designates who may sue, the issue of standing  
18 becomes interwoven with that of subject matter jurisdiction. Standing  
19 then becomes a jurisdictional prerequisite to an action. . . . [W]e take this  
20 opportunity to clarify . . . and hold that mortgage foreclosure actions are  
21 not created by statute. Therefore, the issue of standing in those cases  
22 cannot be jurisdictional.

1 *Id.* ¶ 11 (alteration, internal quotation marks, and citations omitted). Further, since a  
2 cause of action to enforce a promissory note was not created by statute, standing is not  
3 jurisdictional in such a case. *Id.* ¶ 10; *see also id.* ¶ 12 (explaining further).  
4 Accordingly, “only prudential rules of standing[.]” *Id.* ¶¶ 10, 12.

5 {7} With regard to such prudential rules, the Court explained that, “[a]lthough the  
6 [Uniform Commercial Code’s (UCC)] definition of who may enforce a note does not  
7 create a jurisdictional prerequisite . . . , it nonetheless guides our determination of  
8 whether the plaintiff can articulate a direct injury that the cause of action is intended  
9 to address.” *Id.* ¶ 14. Specifically, a party seeking to enforce a negotiable instrument  
10 such as a promissory note, must “establish that it [falls] into one of the[ ] three  
11 statutory categories [in NMSA 1978, Section 55-3-301 (1992), identifying who is  
12 entitled to enforce an instrument,] that would establish both its right to enforce [the  
13 h]omeowner’s promissory note and its basis for claiming that it suffered a direct injury  
14 from [the h]omeowner’s alleged default on the note.” *Johnston*, 2016-NMSC-013, ¶  
15 14.

16 {8} The Court further stated that, because standing is not jurisdictional, the  
17 possibility remains that a homeowner can waive the issue. *Id.* ¶ 15. The Court then  
18 analogized arguments based on lack of prudential standing to asserting that a litigant

1 has failed to state a legal cause of action, and held that Rule 1-012(H)(2) NMRA  
2 applies to issues of prudential standing. *Johnston*, 2016-NMSC-013, ¶ 16.

3 Rule 1-012(H)(2) states:

4 A defense of failure to state a claim upon which relief can be granted, a  
5 defense of failure to join a party indispensable under Rule 1-019 NMRA  
6 and an objection of failure to state a legal defense to a claim may be  
7 made in any pleading permitted or ordered under Rule 1-007 NMRA, or  
8 by motion for judgment on the pleadings, or at the trial on the merits.

9 Thus, as analogized, a defense that the plaintiff lacks standing “may be made in any  
10 pleading permitted or ordered under Rule 1-007, or by motion for judgment on the  
11 pleadings, or at the trial on the merits.” In other words, a challenge to standing must  
12 be made prior to or at the trial on the merits, Rule 1-012(H)(2); *Johnston*, 2016-  
13 NMSC-013, ¶ 16, or at any point in an *active* litigation, *id.* ¶ 18 (“When standing is  
14 a prudential consideration, it can be raised for the first time at any point in an active  
15 litigation[.]”). Judgment on a motion for summary judgment necessarily precludes  
16 trial, so for purposes of applying Rule 1-012(H)(2) to a case in which summary  
17 judgment is granted, the entry of the final judgment serves as the ending point to  
18 active litigation. *See Paez v. Burlington N. Santa Fe Ry.*, 2015-NMCA-112, ¶ 26, 362  
19 P.3d 116 (“The purpose of summary judgment is to pierce the boilerplate of the  
20 pleadings and assay the parties’ proof in order to determine whether trial is actually  
21 required.” (internal quotation marks and citation omitted)); *see also* Rule 1-060(B)(6)

1 (stating that “[a] motion under this paragraph does not affect the finality of a judgment  
2 or suspend its operation”); *Martinez v. Friede*, 2004-NMSC-006, ¶ 17, 135 N.M. 171,  
3 86 P.3d 596 (noting that a district court’s power to reopen judgment and grant a new  
4 trial under Rule 1-060(B) has “no effect on the parties’ ability to calculate the time in  
5 which they must file their notice of appeal . . . because a motion under Rule 1-060(B)  
6 does not affect the finality of a judgment or suspend its operation” (internal quotation  
7 marks and citation omitted)), *superseded by rule on other grounds as stated in State*  
8 *v. Moreland*, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363; *cf. In re Estates of*  
9 *Hayes*, 1998-NMCA-136, ¶ 17, 125 N.M. 820, 965 P.2d 939 (stressing that, “if the  
10 time period for filing a notice of appeal on the underlying judgment has elapsed, a  
11 Rule 1-060(A) order does not establish a new time period for appealing the original  
12 judgment”).

13 {9} The homeowner in *Johnston* did not waive standing because he raised the issue  
14 in a motion prior to trial. *Johnston*, 2016-NMSC-013, ¶ 17. Conversely, in the present  
15 case, Larribas filed her motion to vacate the judgment, only then challenging Matrix’s  
16 evidence attesting to its standing, several months *after* the final judgment was entered.  
17 Because Larribas did not challenge Matrix’s standing evidence until months after the  
18 litigation was no longer active, we conclude that Larribas waived her right to

1 challenge Matrix’s prudential standing. *See Johnston*, 2016-NMSC-013, ¶¶ 15-19;  
2 Rule 1-012(H)(2).

3 {10} Moreover and importantly, *Johnston* held that “a final judgment on any . . .  
4 cause of action [other than one that lacks standing as a jurisdictional matter], including  
5 an action to enforce a promissory note such as this case, *is not voidable under Rule*  
6 *1-060(B)* due to a lack of prudential standing.” *Johnston*, 2016-NMSC-013, ¶ 34  
7 (emphasis added). Likewise, in the present case, the final judgment granting Matrix  
8 summary and default judgment is not voidable under Rule 1-060(B) due to a lack of  
9 prudential standing. *Johnston*, 2016-NMSC-013, ¶ 34; *see also Ealy v. McGahen*,  
10 1933-NMSC-033, ¶ 19, 37 N.M. 246, 21 P.2d 84 (“Where an action or suit is  
11 regularly commenced and prosecuted, judgment regularly entered, even though by  
12 default, the defendant cannot thereafter on motion vacate such judgment on the ground  
13 of the existence of a complete defense to the action, which defense was available to  
14 the defendant before the entry of the judgment.”). We therefore conclude that the  
15 district court erred in considering the merits of Larribas’s post-final judgment, Rule  
16 1-060(B) challenge to Matrix’s prudential standing, and in granting Larribas’s motion  
17 to vacate on such grounds.

1 **CONCLUSION**

2 {11} For the foregoing reasons, we reverse the district court's order granting  
3 Larribas's motion to vacate, and we remand to the district court with instructions to  
4 reinstate the judgment and foreclosure complaint.

5 {12} **IT IS SO ORDERED.**

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**J. MILES HANISEE, Judge**

8 **WE CONCUR:**

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10 **RODERICK T. KENNEDY, Judge**

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12 **STEPHEN G. FRENCH, Judge**