

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

AURORA LOAN SERVICES, LLC,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-A-0026
CHRISTINE CART, a.k.a.	:	
CHRIS CART, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CV 664.

Judgment: Affirmed.

Adam R. Fogelman and Elizabeth S. Brashear, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, 8th Floor, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Christine Cart, pro se, 7234 State Route 45, Orwell, OH 44076 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Christine Cart, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, overruling her Motion to Vacate Void Judgment and Dismiss Action. For the following reasons, we affirm the decision of the court below.

{¶2} On May 9, 2008, plaintiff-appellee, Aurora Loan Services, LLC, filed a Complaint against Christine Cart, Steve Cart, and Joan Hoyt. Aurora Loan alleged that

it was the “owner and holder of a note,” secured by a mortgage, and in default in the amount of \$85,070.74. Aurora Loan sought to have the mortgage foreclosed and the subject property sold.

{¶3} Service of process was made against the defendants by certified mail and personal service. The defendants returned the documents served upon them marked with the notation, “refused for cause.”

{¶4} On August 29, 2008, upon Aurora Loan’s Motion for Default, the trial court entered a Judgment and Decree in Foreclosure and Reformation of Mortgage.

{¶5} On November 10, 2008, Christine and Steve Cart filed a Motion for Relief, and Motion for Immediate Stay of Execution, and other requests.

{¶6} On November 17, 2008, the subject property was sold at auction for \$46,000, to Aurora Loan.

{¶7} On January 9, 2009, the trial court entered its Journal Entry Confirming Sale, Ordering Deed and Distributing Sale Proceeds. On the same day, the court entered a Judgment Entry, denying the Carts’ motions and other requests.

{¶8} On May 8, 2009, Christine Cart filed a Motion to Vacate Void Judgment and Dismiss Action. Cart argued the underlying Judgment in Foreclosure was void for the reason that Aurora Loan lacked standing to initiate the foreclosure action, since it did not prove that it owned the note and mortgage on the date the Complaint was filed. Cart relied on the case of *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, for the proposition that “in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.” *Id.* at ¶24, citing *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, at ¶16.

{¶9} On May 13, 2009, the trial court overruled Cart's Motion, noting that the arguments raised either were, or "should have been previously brought to the Court's attention, and therefore *** are barred by the doctrine of res judicata."

{¶10} On May 26, 2009, Cart filed her Notice of Appeal. On appeal, Cart raises the following assignments of error:

{¶11} "[1.] Whether the trial court erred in overruling the Motion to Vacate for reasons of *res judicata*."

{¶12} "[2.] That the trial court erred in determining it had jurisdiction to proceed in the foreclosure action where the Plaintiff lacked standing, contrary to recent Court of Appeals and Federal Court Decisions."

{¶13} The assignments of error will be considered jointly.

{¶14} Cart's Motion to Vacate Void Judgment is properly characterized as a common law motion to vacate, inasmuch as it contends that the underlying judgment of the trial court is void ab initio. The authority of the trial court to vacate such a judgment is an inherent power of the court. *Westmoreland v. Valley Homes Mut. Housing Corp.* (1975), 42 Ohio St.2d 291, 294. "A proceeding to vacate a judgment on the ground that it is void for want of jurisdiction is not subject to the provisions of [Civil Rule 60(B)], which apply to the vacation or modification of only those judgments which are merely voidable and not those which are void *ab initio*." *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, at paragraph one of the syllabus; *Patton v. Deimer* (1988), 35 Ohio St.3d 68, at paragraph four of the syllabus. See also *Molz v. Magdych*, 11th Dist. No. 96-T-5396, 1996 Ohio App. LEXIS 3553, at *4 ("In applying Civ.R. 60(B), this court has expressly held that a motion for relief from judgment under the rule is not the proper mechanism for challenging a *void* judgment; instead, the proper motion is a common-

law *motion to vacate* based upon the inherent power of a trial court to set aside a judgment which has been rendered without the necessary jurisdiction.”) (emphasis sic).

{¶15} The standard of review applied to a judgment on a common law motion to vacate is abuse of discretion. *Terwood v. Harrison* (1967), 10 Ohio St.2d 170, 171.

{¶16} “A jurisdictional defect cannot be waived,” and, therefore, “the lack of [subject-matter] jurisdiction can be raised at any time.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275 (citations omitted); *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶11 (“[b]ecause 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”).

{¶17} Accordingly, that aspect of the doctrine of res judicata barring a litigant from raising issues that could have been raised at a prior point in the proceedings does not apply where the underlying judgment is void for lack of subject-matter jurisdiction. *State v. Wilson*, 73 Ohio St.3d 40, 45 n.6 (citation omitted), 1995-Ohio-217; *Fisher v. Fisher*, 10th Dist. No. 01AP-1041, 2002-Ohio-3086, at ¶27 (“[p]rinciples of res judicata did not prevent defendant from seeking relief with a second motion to vacate judgment”).

{¶18} Cart claims the underlying judgment is not valid, i.e. void, on the grounds that Aurora Loan was not the real party in interest and, thus, lacked standing to initiate the foreclosure action. However, “[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *Jones*, 84 Ohio St.3d at 77. “Because compliance with Civ.R. 17 is not necessary to invoke the jurisdiction of the court of common pleas, ***, the failure to name the real party in interest is an objection or defense to a claim which is waived if not timely asserted.” *Washington*

Natl. Bank v. Novak, 8th Dist. No. 88121, 2007-Ohio-996, at ¶16. See also *Freedom Mortgage Corp. v. Groom*, 10th Dist. Nos. 08AP-761 and 09AP-162, 2009-Ohio-4482, at ¶21 (“[a]lthough Freedom Mortgage may have lacked standing, that deficiency is not jurisdictional and, consequently, could not void the default judgment of foreclosure”); *Portfolio Recovery Associates, LLC v. Thacker*, 2nd Dist. No. 2008 CA 119, 2009-Ohio-4406, at ¶14 (“the issue of standing or the ‘real-party-in-interest’ defense is waived if not timely asserted”) (citation omitted); *First Union Natl. Bank v. Hufford*, 146 Ohio App.3d 673, 677, 2001-Ohio-2271 (“several courts have indicated that failure to name the real party in interest is an objection or defense to a claim which is waived if not timely asserted”) (citations omitted).¹

{¶19} Since Cart has not alleged facts sufficient to render the underlying judgment of foreclosure void, her Motion to Vacate was properly denied, albeit for reasons other than those stated by the trial court. The two assignments of error are without merit.

{¶20} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, overruling Cart’s Motion to Vacate Void Judgment and Dismiss Action, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.

1. Cart relies upon the case of *Northland Ins. Co. v. Illuminating Co.*, 11th Dist. No. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, for the proposition that the issue of standing can be raised “at any time.” *Northland* is distinguishable in that it was the direct appeal of the underlying judgment and involved assets properly belonging to a bankruptcy estate. *Id.* at ¶19. Under Ohio law, “standing [is] jurisdictional only in limited cases involving administrative appeals, where parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction.” *Jones*, 84 Ohio St.3d at 77 n. 4.