[Cite as *JPMorgan Chase Bank, Natl. Assn. v. Hudson*, 2015-Ohio-1490.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-A-0068**
- vs -	:	
JUDITH E. HUDSON, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CV 00444.

Judgment: Affirmed.

Paul M. Nalepka, Lerner Sampson & Rothfuss, 120 East Fourth Street, Cincinnati, OH 45202 (For Plaintiff-Appellee).

David N. Patterson, 33579 Euclid Avenue, Willoughby, OH 44094 (For Defendants-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Judith and William Hudson ("the Hudsons"), appeal from the October 8, 2014 judgment of the Ashtabula County Court of Common Pleas, granting summary judgment and entering a decree of foreclosure in favor of appellee, JPMorgan Chase Bank, National Association ("Chase"). On appeal, the Hudsons challenge Chase's standing. For the reasons that follow, we affirm.

{¶2} By way of background, on February 10, 2005, the Hudsons executed a promissory note and mortgage in favor of Washington Mutual Bank, FA. The amount at issue was for $112,000 for property located at 4297 State Route 534, Geneva, Ohio 44041. The note is indorsed in blank. A Loan Modification Agreement occurred on April 1, 2006.

{¶3} Washington Mutual Bank, FA later became known as Washington Mutual Bank ("Washington Mutual"). On September 25, 2008, Washington Mutual was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation ("FDIC"), an agency of the United States government, was named receiver. On that date, the FDIC, as receiver of Washington Mutual, entered into a Purchase and Assumption Agreement with Chase. As a result, Chase became the owner of all loans and loan commitments of Washington Mutual by operation of law.

{¶4} Thereafter, on May 18, 2011, Chase filed a complaint in foreclosure against the Hudsons and Fifth Third Bank.[1] Copies of the note and mortgage were attached to the complaint. Also attached was an October 2, 2008 affidavit from Robert C. Schoppe, an authorized representative of the FDIC, averring that Chase became the owner of all loans and loan commitments of Washington Mutual on September 25, 2008 by operation of law. The Hudsons did not file a timely answer to the complaint.

{¶5} On June 20, 2012, Chase filed a motion for default judgment. On August 31, 2012, Mr. Hudson filed a "Pro Se Answer." He did not raise any issue regarding standing at that time. The Hudsons requested and were granted mediation, which was

1. The complaint alleged that $111,512.18 was due on the loan, in addition to interest and fees. The trial court ultimately granted default judgment against Fifth Third Bank, who is not a named party to this appeal.

unsuccessful. Following a hearing, the trial court granted Chase's motion for default judgment and entered a finding and decree in foreclosure on October 22, 2012.

{¶6} A praecipe for order of sale was filed on April 30, 2013. The property was appraised on July 3, 2013 for $81,000. Advertisements ran in *Jefferson Gazette*, a local newspaper. The property was set to be sold at a sheriff's sale scheduled for August 19, 2013. However, on July 23, 2013, Chase filed a motion to withdraw the property from the scheduled sheriff's sale because it was in the process of reviewing the file for loss mitigation options and did not wish to execute on its judgment at that time. The following day, the trial court granted Chase's motion and withdrew the property from the scheduled sheriff's sale at that time.

{¶7} An order of sale was later issued on August 30, 2013. The property was set for another sheriff's sale to take place on November 25, 2013. Prior to the sale, on November 15, 2013, the Hudsons, through counsel, filed a motion to set aside the default judgment and order of sale and requested an emergency stay of the proceedings. Five days later, the trial court granted the Hudsons' motion, vacated the default judgment, and cancelled the November 25, 2013 sheriff's sale. The court gave the Hudsons 30 days to file an amended answer, which they did on December 9, 2013. The Hudsons raised the issue of standing at that time.

{¶8} On March 24, 2014, the court ordered Chase to show cause on or before April 25, 2014 as to why this 2011 case should not be dismissed under Civ.R. 41(B)(1) for failure to prosecute. On April 17, 2014, Chase filed a motion for summary

judgment.[2] The Hudsons filed a brief in opposition on April 25, 2014. Chase filed a reply on June 18, 2014. On July 30, 2014, the trial court granted Chase's motion for summary judgment. On October 8, 2014, the court filed an entry granting summary judgment and decree in foreclosure.[3] The Hudsons filed a timely appeal and assert the following assignment of error for our review:[4]

{¶9} "Reviewing the Appellee's Motion for Summary Judgment *de novo*, the Record is clear and convincing that the trial court erred to the prejudice of Appellants by granting Appellee's Motion for Summary Judgment in favor of Appellee on the foreclosure Complaint."

{¶10} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g*. Civ.R. 56(C).

{¶11} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d

2. Attached to Chase's motion was a March 21, 2014 affidavit from its Vice President, Samuel B. Muller, referencing Chase's records relating to the Hudsons' loan and averring that Chase possessed the note prior to and at the time of filing the complaint.
3. The trial court stayed its judgment pending appeal.

4. Chase did not file an appellate brief.

356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶12} Mortgage foreclosure cases, more than any other subject matter of litigation in the past several years, returned the requirement of establishing "standing" to the procedural forefront of litigation. For over 15 years, standing challenges were addressed by foreclosure attorneys and Ohio courts by relying on *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70 (1998), a plurality opinion holding that a lack of standing does not deprive the court of subject matter jurisdiction and can be cured under Civ.R. 17. *Id.* at 77.

{¶13} Following a split among the districts, the Supreme Court of Ohio in 2012 ultimately dismissed the *Suster* analysis as non-binding, noting its plurality status. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. The Court held in *Schwartzwald* that the issue of standing can be raised at anytime during the pendency of the proceedings. *Id.* at ¶22. Pursuant to *Schwartzwald,* standing is required to present a justiciable controversy and is a jurisdictional requirement. *Id.* at

¶21-22. The Court held that since standing is required to invoke the trial court's jurisdiction, standing is determined *as of the filing of the complaint*. *Id*. at ¶24. 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. *Id.* at ¶28. The Court further held that "a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest." *Id.* at ¶39.

{¶14} Arguments have been made that *Schwartzwald* is ambiguous. However, the issue of whether or not *Schwartzwald* equates standing with a lack of subject matter jurisdiction has most recently been addressed by the Supreme Court of Ohio in *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275. In clarifying its holding in *Schwartzwald*, the Court in *Kuchta* held that while standing is a jurisdictional requirement in that a party's lack of standing will prevent him from invoking the court's jurisdiction over his action, a party's ability to invoke the court's jurisdiction involves the court's jurisdiction over a particular case, not subject matter jurisdiction. *Id.* at ¶22.

{¶15} Specifically, the Court in *Kuchta* stated the following at ¶17-23:

{¶16} "* * * It is true that the issue of subject-matter jurisdiction can be challenged at any time and that a court's lack of subject-matter jurisdiction renders that court's judgment void ab initio. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, * * * ¶11. But * * * a court of common pleas that has subject-matter jurisdiction over an action does not lose that jurisdiction merely because a party to the action lacks standing.

{¶17} "The general term 'jurisdiction' can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. *Id*. at ¶11-12. The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of 'jurisdiction' is applicable in various legal analyses. * * *

{¶18} "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. *Morrison v. Steiner*, 32 Ohio St.2d 86, 87 * * * (1972). A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. *Suster*, [*supra,* at] 75; *Handy v. Ins. Co*., 37 Ohio St. 366, 370 (1881). A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. *Pratts* at ¶12. This latter jurisdictional category involves consideration of the rights of the parties. If a court possesses subjectmatter (sic) jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void. *Id*. at ¶12.

{¶19} "* * * Ohio's common pleas courts are endowed with 'original jurisdiction over all justiciable matters (* * *) as may be provided by law.' Article IV, Section 4(B), Ohio Constitution. Jurisdiction has been 'provided by law' in R.C. 2305.01 * * *. * * * We have also long held that actions in foreclosure are within the subject-matter jurisdiction of a court of common pleas. *Robinson v. Williams*, 62 Ohio St. 401, 408, * * * (1900) * * *.

{¶20} "* * *

{¶21} "Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court--even a court of competent subject-matter jurisdiction--over the party's attempted action. *Schwartzwald* at ¶22; *Tubbs Jones*, 84 Ohio St.3d at 77 * * *; *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178, * * * (1973). But an inquiry into a party's ability to *invoke* a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction.

{¶22} "A determination of standing necessarily looks to the rights of the individual parties to bring the action, as they must assert a *personal* stake in the outcome of the action in order to establish standing. *Ohio Pyro, Inc. v. Ohio Dep't. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, * * * ¶27. Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action, *Schwartzwald* at ¶40, and any judgment on the merits would be subject to reversal on appeal. But a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief. *Tubbs Jones* at 77." (Emphasis sic.) (Citations and parallel citations omitted.)

{¶23} Although summary judgment is a "very potent procedural tool" used by judges which circumvents a plaintiff's ability to proceed to trial, it was properly utilized in this case. *See* Beiner, *The Misuse of Summary Judgment,* 34 Wake Forest L. Rev. 71 (1999). Contrary to the Hudsons' assertions, there was no improper burden shifting in this case. Based on the facts presented and construing the evidence most strongly in favor of the Hudsons, there is no genuine issue as to any material fact, reasonable

minds can come to but one conclusion which is adverse to the Hudsons, and Chase is entitled to judgment as a matter of law on its claims against them.

{¶24} The Hudsons raised the issue of standing in their December 9, 2013 amended answer. The Hudsons claim on appeal that a real party in interest must hold the note *and* the mortgage at the time it files a complaint in order to have standing. They cite to a 142-year-old case that a note and mortgage are "inseparable." *Carpenter v. Longan*, 83 U.S. 271, 274 (1873).

{¶25} We note, however, that "'a party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it *either* (1) has had a mortgage assigned or (2) is the holder of the note.'" *See Bank of New York Mellon Trust Company, N.A. v. Hentley*, 8th Dist. Cuyahoga No. 99252, 2013-Ohio-3150, ¶25, quoting *CitiMortgage v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶¶21-22; *Schwartzwald, supra,* at ¶28.

{¶26} As stated, on February 10, 2005, the Hudsons executed a promissory note and mortgage in favor of Washington Mutual. The Hudsons point out that there is no record of any "'assignment'" from Washington Mutual, any Trust, or the FDIC to Chase. However, the Hudsons do not dispute that the note is indorsed in blank nor do they present any evidence to controvert the fact that Chase was in possession of the note at the time the complaint was filed. *See* R.C. 1303.25(B) (A blank indorsement causes the note to be "payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.")

{¶27} Chain of title was established in this case. A receiver has "the authority to endorse the note to the bank under the powers granted to it by the Financial Institutions

Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821(d)(2)(A)(i) (the FDIC 'shall, as (* * *) receiver, and by operation of law, succeed to (* * *) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, account holder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution')." *Everbank v. Katz*, 8th Dist. Cuyahoga No. 100603, 2014-Ohio-4080, ¶6.

{¶28} As indicated, on September 25, 2008, Washington Mutual was closed by the Office of Thrift Supervision and the FDIC was named receiver. On that date, the FDIC, as receiver of Washington Mutual, entered into a Purchase and Assumption Agreement with Chase. As a result, Chase became the owner of all loans and loan commitments of Washington Mutual.

{¶29} In fact, on October 2, 2008, Robert C. Schoppe, an authorized FDIC representative, averred via affidavit that Chase became the owner of all loans and loan commitments of Washington Mutual on September 25, 2008 by operation of law. Thus, Chase held the note, indorsed in blank, and, as a result, the mortgage, prior to and at the time it filed its complaint on May 18, 2011. Copies of the note, mortgage, and Mr. Schoppe's affidavit were all attached to the complaint. Upon review, Chase had standing to foreclose at the time it filed its complaint. *See Hentley, supra,* at ¶25.

{¶30} The Hudsons attack the sufficiency of Chase's "proffered rubber-stamped Affidavit from Alan Haben." However, no such affidavit from "Alan Haben" has been filed in this case. Assuming that the Hudsons instead meant to challenge the credibility of Samuel B. Muller's affidavit, their hearsay and inadmissibility arguments still fail.

{¶31} Civ.R. 56(E) states in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit."

{¶32} Chase's motion for summary judgment is supported by the affidavit testimony of Samuel B. Muller, which properly authenticates Chase's business records. The Hudsons' opposition, on the other hand, is not supported by any evidentiary material.

{¶33} Mr. Muller's affidavit indicates that he is Vice President of Chase and is authorized to make the affidavit on its behalf. As such, he has access to and is able to review the business records relating to the Hudsons' loan. Mr. Muller averred that he was over the age of 18 and competent to testify; had reviewed Chase's records; that he had personal knowledge of how the records were kept and maintained; that the records were kept in the ordinary course of regularly-conducted business activities; that the documents attached to the affidavit were true and accurate copies; and that Chase possessed the note prior to and at the time of filing the complaint. He also provided information about the Hudsons' default and the sums owed as a result of that default. Attached to Mr. Muller's affidavit were copies of the note, modification agreement, mortgage, demand letter, and payment history.

{¶34} We find Mr. Muller's affidavit sufficient under Civ.R. 56(E). Given his identity as a company vice president, it was reasonable for the trial court to infer that he had personal knowledge of the facts in the affidavit. *See JPMorgan Chase Bank, N.A. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶14.

{¶35} Upon consideration, because no genuine issues of material fact remain, the trial court properly granted Chase's motion for summary judgment. For the foregoing reasons, the Hudsons' sole assignment of error is not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.