[Cite as *CitiMortgage v. Smart*, 2015-Ohio-4247.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

CITIMORTGAGE, INC.,	:	
	:	Case No. 14CA23
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
CAROLYN SMART, et al.,	:	
	:	
Defendants-Appellants.	:	**Released: 09/28/15**

APPEARANCES:

Bruce M. Broyles, Boardman, Ohio, for Appellants.[1]

Harry W. Cappel, Jeffrey M. Hendricks, and Jeffrey J. Hanneken, Graydon Head & Ritchey LLP, Cincinnati, Ohio, for Appellee.

McFarland, A.J.

{¶1} Appellants Elizabeth Bobo and Marilyn Bobo appeal the May 6, 2014 judgment entry and decree in foreclosure of the Athens County Court of Common Pleas.[2] Appellants assert the trial court erred in granting summary judgment to Appellee CitiMortgage, Inc. Having reviewed the record, we find CitiMortgage failed to satisfy its initial burden of proving that the condition precedent of notice

[1] Appellants filed notice of appeal on June 3, 2014. Appellants' brief, filed on September 15, 2014, listed Attorney Broyles as appellate counsel. On January 14, 2015, Appellants' counsel filed a motion for leave of court to withdraw as counsel. On January 20, 2015, this court granted counsel's motion.

[2] The notice of appeal lists October 23, 2013 as the date of the judgment entry appealed from. Our review of the record reveals this is actually the date Appellee filed its motion for summary judgment. As neither party has raised any assignment of error with regard to this discrepancy, we find it to be a clerical error. We hereby, sua sponte, amend the notice of appeal to reflect the correct date of "May 6, 2014" in the trial court's entry of judgment and decree in foreclosure as the date of the judgment being appealed from.

had been met. Accordingly, we sustain Appellants' sole assignment of error on this basis, and reverse the judgment of the trial court.

FACTS

{¶2} On September 17, 2008, Carolyn Smart executed a note in favor of CitiMortgage, Inc. (CitiMortgage) in the principal amount of $150,000.00. Appellants did not sign the note. Smart also executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for CitiMortgage. Along with Smart, Appellants did sign the mortgage. Later in time, MERS assigned the mortgage to CitiMortgage.

{¶3} Smart failed to make timely payments due under the mortgage loan. CitiMortgage accelerated the amount due under the note. On September 21, 2012, CitiMortgage filed its complaint for foreclosure. On November 5, 2012, Appellants filed a pro se answer and counterclaim. On December 3, 2012, CitiMortgage filed a reply to the counterclaim. Discovery proceedings began.

{¶4} On October 23, 2013, CitiMortgage filed a motion for summary judgment. The motion was supported with an affidavit of Kelly Cullen, CitiMortgage's business operations analyst. Cullen stated she had personal knowledge of the facts contained in the affidavit, was familiar with the business records maintained by CitiMortgage, and had reviewed the business records relating to the mortgage loan which was the subject of this action. She also stated

CitiMortgage's records were kept in the course of its business of servicing mortgage loans. Cullen's affidavit was comprised of 13 paragraphs. Cullen provided additional statements in her affidavit which will be discussed further herein, where relevant.

{¶5} Appellants filed a memorandum in opposition to the motion for summary judgment. However, Appellants subsequently retained counsel who filed a motion (which the trial court granted) to strike the previously filed memorandum in opposition. On December 9, 2013, counsel filed a memorandum in opposition to the motion for summary judgment on behalf of Appellants. On January 23, 2014, CitiMortgage filed a reply in support of its motion for summary judgment.

{¶6} On April 22, 2014, the trial court entered its decision granting summary judgment. On May 6, 2014, the trial court entered its judgment entry and decree of foreclosure.

{¶7} This timely appeal followed.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT STILL IN DISPUTE."

A. STANDARD OF REVIEW

{¶8} "Appellate courts review summary judgments de novo." *Wells Fargo v. Phillabaum*, 192 Ohio App.3d 712, 2011-Ohio-1311, 950 N.E.2d 245, at ¶ 7, citing

Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167 and *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327. "In other words, we afford no deference whatsoever to a trial court's decision, and, instead, conduct our own independent review to determine if summary judgment is appropriate." *Wells Fargo* at ¶ 7, citing *Woods v. Dutta* (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18 and *Phillips v. Rayburn* (1996), 113 Ohio App.3d 374, 377, 680 N.E.2d 1279.

{¶9} "Summary judgment is appropriate only when (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to judgment as a matter of law." *Greene v. Seal Twp. Bd. of Trustees*, 194 Ohio App.3d 45, 2011-Ohio-1392, 954 N.E.2d 1216, at ¶ 9, citing *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, and Civ.R. 56(C).

{¶10} "The party moving for summary judgment has the initial burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Greene* at ¶ 10, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264. "The moving party must inform the trial court of the basis of the motion and must identify those portions of the record that

demonstrate the absence of a material fact." *Id.*, citing *Dresher* at 293. When seeking to have the nonmoving party's claims dismissed, "the moving party must specifically refer to the 'pleadings, depositions, answers to interrogatories, * * * written stipulations of fact, if any,' that affirmatively demonstrate that the nonmoving party has no evidence to support [its] claims." *Id.*, citing *Dresher* and Civ.R. 56(C). "If the moving party satisfies its initial burden, the nonmoving party then has the reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. If the nonmovant does not satisfy this evidentiary burden and the movant is entitled to judgment as a matter of law, the court should enter a summary judgment accordingly." *Id.*, citing *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 145, 677 N.E.2d 308, citing *Dresher* at 295. "Mere speculation and unsupported conclusory assertions are not sufficient." *Hansen v. Wal-Mart Stores, Inc.*, 4th Dist. Ross No. 07CA2990, 2008-Ohio-2477at ¶ 8, citing *Boulton v. Vadakin*, 4th Dist. Washington No. 07CA26, 2008-Ohio-666, at ¶ 20.

B. LEGAL ANALYSIS

{¶11} Appellants raise issues as to: (1) whether or not CitiMortgage gave them proper notice of acceleration/default; (2) whether or not CitiMortgage had standing to bring suit; and (3) whether or not CitiMortgage proceeded in the

foreclosure proceedings with "clean hands." At the outset, we will address Appellant's second issue with regard to standing.

> Does a genuine issue of material fact remain in dispute when evidence is presented that Fannie Mae is the owner of the promissory note and Fannie Mae guidelines state that Fannie Mae remains the holder of the Note.

{¶12} Appellants argue that CitiMortgage is not entitled to judgment as a matter of law as CitiMortgage does not possess any right to receive payment from the promissory note, is not entitled to enforce the promissory note, and is not a holder of the promissory note. While acknowledging that CitiMortgage has actual physical possession of the note, Appellants contend that Fannie Mae owns the loan which is the subject of the litigation. Appellants rely upon a printout of the "Fannie Mae look-up tool," purportedly attached to their memorandum contra.[3]

{¶13} Appellee responds that Appellee has standing to bring the action and enforce the note. Appellee has possession of the original note, which was made payable to Appellee. Therefore, Appellee is the holder of the note and entitled to enforce it. Furthermore, CitiMortgage points out Appellants have not conclusively established that Fannie Mae owns the mortgage loan and, assuming arguendo, that Fannie Mae does own the loan, Ohio courts addressing the issue find it to be

[3] Appellants also direct us to a New York trial court case, *JP Morgan Chase Bank, N.A. v. Butler,* 975 N.Y.S.2d 366, 2013 N.Y. Misc. LEXIS 2761, in which the Court found that the JP Morgan Chase Bank and Fannie Mae were perpetuating a fraud upon the court by designating JP Morgan Chase as the "holder" of the mortgage note at issue. The New York court found that Fannie Mae "at all times had possession of and is the holder of the mortgage note." We agree with Appellee that the *Butler* case is inapplicable to the facts presented herein as there is no evidence that has been presented that Fannie Mae or any other entity paid off the mortgage loan, as occurred in *Butler*.

irrelevant. CitiMortgage argues the relevant inquiry is whether CitiMortgage had the right to enforce the note and mortgage at the time the foreclosure complaint was filed. CitiMortgage points out the "Fannie Mae look up tool" is not authenticated by a signed affidavit.

{¶14} Whether a party has established standing to bring an action before the court is a question of law, which we review de novo. *U.S. Bank National Assoc. v. Bobo,* 4th Dist. Athens No. 13CA45, 2014-Ohio-4975, ¶ 35[4]; *Cuyahoga Cty. Bd. of Commrs. v. State,* 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23. Parties must have standing for a court to decide the merits of a dispute. *Bobo, supra; Utility Serv. Partners, Inc. v. Pub. Utilities Comm. of Ohio*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 586, ¶ 49. Because standing to sue is required to invoke the jurisdiction of the common pleas court, standing is determined at the commencement of the action, and post-filing events that supply standing that did not exist on filing may be disregarded. *Bobo, supra; Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 24-26. A party has standing to sue if it has a personal stake in the outcome of the controversy. *Bobo, supra*, at ¶ 36; *Moore v. Middletown,* 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 21. For foreclosure cases, standing revolves around

[4] In *U.S. Bank v. Bobo, supra,* this court affirmed the trial court's grant of summary judgment in a foreclosure action to U.S. Bank National Association. Elizabeth L. Bobo was the sole appellant in the prior appeal.

whether the plaintiff seeking foreclosure has an interest in the note and/or mortgage at the time it filed suit. *Bobo, supra; Schwartzwald* at ¶ 28.[5]

{¶15} CitiMortgage's employee Cullen's affidavit, attached to CitiMortgage's motion for summary judgment, states that a copy of the promissory note, identifying Smart as the borrower, was attached to the affidavit. Cullen stated that CitiMortgage is in physical possession of the note. Cullen further stated she personally compared the original note against a copy of the note attached to the affidavit and verified the copy is accurate. The record reveals the note is attached as Exhibit A.

{¶16} Likewise, Cullen stated in her affidavit that CitiMortgage is the mortgagee of record under the mortgage, signed by Smart and Appellants, that was given to secure payment of the note. Cullen stated the mortgage is part of the documentation for the mortgage loan. She further stated a true and accurate copy

[5] In *Schwartzwald,* the Supreme Court of Ohio held that because the mortgagee "failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court." *Id.,* at ¶ 28. Based on the language used in *Schwartzwald* at ¶ 28, the Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth District Courts of Appeals have all held that the plain language of the Supreme Court's opinion requires that a plaintiff in a foreclosure action establish an interest only in the note or the mortgage at the time the suit is filed. (Internal citations omitted.) *Bobo, supra,* at ¶ 37. Nevertheless the First and Ninth District Courts of Appeals have held that the language used by the Supreme Court at ¶ 28 in *Schwartzwald* was not intended to decide the precise issue of whether standing in a foreclosure action could be established by proof that the plaintiff had an interest in the note or mortgage without having an interest in both. *Bobo, supra,* at ¶ 38. These courts follow longstanding pre-*Schwartzwald* authority to hold that an entity must have an interest in the note and mortgage at the time the foreclosure action is commenced to have the requisite standing. In *Bobo, supra,* at ¶ 39, we noted we need not resolve the conflict whether an interest in both the note and mortgage is required because U.S. Bank established it had an interest in both at the time it filed its complaint in foreclosure. The Supreme Court has recently clarified its holding in *Schwartzwald* in *Bank of America, N.A. v. Kuchta,* - Ohio St.3d - 2014-Ohio-4275, ¶ 22. The Court 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. See, also, *Bank of New York Mellon v. Grund,* 11th Dist. Lake No. 2014-L-025, 2015-Ohio-466, ¶ 24.

of the mortgage was attached to the affidavit. The mortgage is attached as Exhibit B.

{¶17} Finally, Cullen testified the mortgage was assigned to CitiMortgage. She stated a true and accurate assignment of the mortgage was attached to her affidavit. We note it is attached as Exhibit C. Our review of the record demonstrates Cullen's statements are supported by the evidence.

{¶18} Promissory notes are negotiable instruments, governed by Article 3 of the Uniform Commercial Code. R.C. 1301.201, general definitions, provides:

> (B)(21) "Holder" means:
>
> (a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession….

{¶19} R.C. 1303.31 further provides:

> (A) "Person entitled to enforce" an instrument means any of the following persons:
>
> (1) The holder of the instrument;
>
> (2) A nonholder in possession of the instrument who has the rights of a holder;
>
> (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.
>
> (B) A person may be a "person entitled to enforce the instrument even though the person is not the owner of the instrument…."

{¶20} Cullen's affidavit establishes that CitiMortgage was in physical

possession of the original note on September 21, 2012, the date the complaint in foreclosure was filed. The language in the note in paragraph 1 identifies "The Lender" as CitiMortgage, Inc. Furthermore, paragraph 1 states: "The Lender * * * who is entitled to receive payments under this Note is called the "Note Holder." Clearly, CitiMortgage held the note at the time of the filing of the complaint and is entitled to enforce it.

{¶21} Likewise, the mortgage lists CitiMortgage as the "Lender." Cullen's affidavit establishes the assignment of the mortgage from MERS to CitiMortgage occurred on July 13, 2012, again prior to the filing of the complaint. Again, it is clear CitiMortgage originated the loan, was the holder of the note and mortgage at the time of the filing of the foreclosure complaint, and thus had standing to bring the action.

{¶22} We also observe that Appellants are unable to conclusively establish Fannie Mae's interest, if any, in the mortgage loan. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion [for summary judgment] and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Natl. City Mortg. Co., v. Richards,* 182 Ohio App.3d 534, 2009-Ohio-2556, 913 N.E.2d 1007 (10th Dist.), quoting *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the nonmoving

party meets its initial burden, the nonmovant must set forth specific facts demonstrating a genuine issue for trial. *Richards, supra; Dresher,* at 293, 662 N.E.2d 264. The Fannie Mae look up tool is referenced in Appellants' brief at page 6 as a self-authenticating document. On page 3 of the memorandum, it is stated that a copy of the affidavit of Elizabeth Bobo was attached and the original would be filed with the court. The transcript of docket and journal entries does not indicate that this was accomplished. No affidavit of Elizabeth Bobo, or any other person on behalf of Appellants, appears in the trial court's record or in the file submitted for this Court's review. The Fannie Mae look up tool was not provided via affidavit or otherwise. It was not made part of the record submitted for this court's review. As such, we decline to consider it.

{¶23} Even if Appellants could establish Fannie Mae as the owner of the mortgage loan, we find this irrelevant. In *Bank of America, N.A. v. Merlo,* 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, the appellant argued because appellee stated in an interrogatory response that "Fannie Mae is the owner of the Note," it was suggested that appellee no longer held the note. The 11th District appellate court held appellant's argument was defeated by the express language of R.C. 1303.31(B), which provides: "A person may be a 'person entitled to enforce' the instrument [i.e., the holder of the note,] even though the person is not the owner of the instrument * * *." *Id.,* at ¶ 15. Similarly, in *Fifth Third Mortgage Co., v.*

Orebaugh, 12th Dist. Butler No. CA2012-08-153, 2013-Ohio-1730, the appellate court rejected Orebaugh's contention that summary judgment was not proper because Fannie Mae and the United States had not been joined as parties to the case when Fannie Mae owned the note and mortgage at issue. Citing *BAC Home Loans Servicing LP v. Kolenich*, 12th Dist. Butler No. CA2012-01-001, 2012-Ohio-5006, at ¶ 38-39, the *Orebaugh* court held:

> "The current holder of the note and mortgage is entitled to bring a foreclosure action against a defaulting borrower even if the current holder is not the owner of the note and mortgage. *Kolenich* at ¶ 8, citing R.C. 13103-31(A) (person entitled to enforce negotiable instrument includes the holder of the instrument) and R.C. 1303.31(B) (person may be a 'person entitled to enforce' the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument)."

{¶24} As recognized in Footnote 5 above, there continues to be a conflict as to whether the plain language of *Schwartzwald* requires a plaintiff in a foreclosure action to establish an interest in only the note or the mortgage at the time a suit is filed. Similar to our previous opinion in *Bobo*, 2014-Ohio-4975, we need not resolve that conflict because as in the prior *Bobo* opinion, CitiMortgage's summary judgment evidence has established it was holder of both the note and mortgage, and was entitled to enforce both the note and mortgage at the time of the filing of the complaint. As such, we find no merit to Appellant's second issue presented for review.

Does a genuine issue of material fact remain in dispute when the affidavit in support of the motion for summary judgment does not set forth the manner in which the notice of default/notice of acceleration was sent.

{¶25} In order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary quality materials demonstrating: (1) that it is the holder of the note, which is secured by a mortgage, or that it is otherwise entitled to enforce the instrument; (2) that the mortgagor is in default; (3) that all conditions precedent have been met; and (4) the amount of the principal and interest due. *JP Morgan Chase Bank, N.A. v. Swan*, 6th Dist. Lucas No. L-14-1186, 2014-Ohio-1056, ¶ 9; *Fed. Natl. Mtge. Assn. v. Brunner*, 2013-Ohio-128, 986 N.E.2d 565, ¶ 10 (6th Dist.); *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26. Appellants argue CitiMortgage did not satisfy its burden of providing evidence that the required notice of acceleration/notice of default was sent. They argue for the trial court to determine that CitiMortgage satisfied the condition precedent, the trial court had to infer that "sent" was the same as "mailed by first class mail." Appellants point out in reviewing a motion for summary judgment, the appellate court must view the evidence in the light most favorable to the Appellants.

{¶26} CitiMortgage responds that Appellants do not raise a genuine issue of material fact. CitiMortgage argues Cullen's affidavit, attached to its motion for summary judgment, avers that notice of default was sent to Carolyn Smart and a

copy of the notice was attached. CitiMortgage further points out the mortgage provides that "Notice to any one Borrower shall constitute notice to all Borrowers." CitiMortgage contends that Appellants do not actually contend that Appellee failed to give notice; they oppose summary judgment because Cullen's affidavit did not specify the manner of delivery.

{¶27} Cullen's affidavit is attached to the motion for summary judgment. The mortgage is attached as Exhibit B to her affidavit. The mortgage lists the "Borrower" as Carolyn Smart. The mortgage provides at Paragraph 15, for notice to be sent as follows:

> "All notices given by Borrower or Lender in connection with his Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly provides otherwise."

{¶28} Cullen's affidavit provides at paragraph 10:

> "I have examined the loan account history for Carolyn Smart's loan as kept in CitiMortgage's business records. A true and accurate copy of the loan account history outlining the transactions relating to Carolyn Smart's account is attached as Exhibit D. As evidenced by the attached loan account history, Carolyn Smart's account is in default due to her failure to make all required payments."

At paragraph 11 Cullen further stated: "Attached hereto as Exhibit E is a true and accurate copy of the notice that was sent to Carolyn Smart regarding the default."

However, neither Exhibit D nor Exhibit E were found attached to the motion for summary judgment contained in the court's file submitted for appellate review.

{¶29} We observe Cullen's affidavit states that she had examined the loan account history for Carolyn Smart's loan and that it was in default. In *Bobo, supra*, at ¶ 28, we recently stated:

> "To be considered in a summary judgment motion, Civ.R. 56(E) requires an affidavit to be made on personal knowledge, set forth such facts as would be admissible in evidence, and affirmatively show that the affiant is competent to testify to the matters stated in the affidavit." *Fifth Third Mtge. Co. v. Bell*, 12th Dist. Madison No. CA2013-02-003, 2013-Ohio-3678, ¶ 27, citing Civ.R. 56(E); see also *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶ 24.

{¶30} While Cullen's affidavit avers that true and accurate copies of the account loan history and the notice sent to Smart were attached as Exhibits D and E respectively, these exhibits are absent from the record on appeal. As we also pointed out in *Bobo, supra,* at ¶ 28:

> "[D]ocuments referred to in an affidavit must be attached and must be sworn or certified copies." *Brown, supra,* citing Civ. R. 56(E). "Verification of these documents is generally satisfied by an appropriate averment in the affidavit, for example, that 'such copies are true copies and reproductions.' *Id.* quoting *State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981); see also *Walraven* at ¶ 31."

{¶31} Based on our de novo review of the record, we find that CitiMortgage failed to satisfy its initial burden under Civ.R. 56(C) of proving that proper notice

was given to Smart, a condition precedent to the foreclosure action. The moving party must point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support his claim. *Grund, supra,* at ¶ 19, citing *Dresher, supra,* at 293, 662 N.E.2d 264. The documents Cullen referred to, Exhibits D and E, were not attached and therefore absent from this record.[6] We find CitiMortgage did not sufficiently support its motion for summary judgment. As such, Appellants' argument has merit. The trial court erred in finding there was no genuine issue of material fact.

> Does a genuine issue of material fact remain in dispute when evidence is presented that CitiMortgage, Inc. improperly entered the home and winterized the same, thereby demonstrating that CitiMortgage, Inc. lacked clean hands.

{¶32} Having determined above that CitiMortgage did not present sufficient evidence to support its motion for summary judgment, we find no need to consider whether CitiMortgage lacked "clean hands" with regard to securing the property and protecting its collateral. As such, Appellants third assignment of error is rendered moot.

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[6] Interestingly, the parties in motion practice refer at various times to Exhibits D and E, as well as the affidavit of Elizabeth Bobo. However, these documents are simply not provided on appeal. Based on our de novo standard of review, we must not overlook these omissions. (See, also *U.S. Bank, N.A. v. LaVelle,* 8th Dist. Cuyahoga No. 101729, 2015-Ohio-1307, where "no explanation for the inconsistent versions of the note or the disappearance of special endorsement * * *" rendered appellate court "unable to effectively determine chain of assignments and ultimately the legitimacy of the assignment of the note * * *." ¶ 21, 23.)

{¶33} For the foregoing reasons, we find the trial court erred by its grant of summary judgment to CitiMortgage. Accordingly, we sustain Appellants' sole assignment of error and reverse the judgment of the trial court.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED. Appellant shall recover of Appellee any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion, except for footnote 2.

For the Court,

BY: _____
Matthew W. McFarland
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.