

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

DEUTSCHE BANK NATIONAL
TRUST, NA

Plaintiff,

v.

CARL H. WOODFORD, et al.

Defendants.

) CASE NO. 07 CVH-10-13722
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) JUDGE SCHNEIDER
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COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS

INTRODUCTION

Plaintiff filed this foreclosure action, even though it has not shown that it has any interest in the property at issue, and named the State of Ohio as a party as a potential lien holder. Although Plaintiff asserts that it is the proper party to this action, it failed to identify documents establishing that it holds the promissory note and mortgage. Nor has Plaintiff identified the full trail of assignments of the note and mortgage from the original lender or mortgagee. Because Ohio law requires plaintiffs in foreclosure actions to attach such documentation to the complaint, Civ. R. 10(D), Plaintiff's pleadings, on their face, are insufficient to establish that the Plaintiff is the real party in interest.

The documents attached to Plaintiff's foreclosure complaint reveal that it is not the proper party to bring this action. Accordingly, the Court should dismiss Plaintiff's complaint because no actual controversy exists, and thus the Court lacks jurisdiction to proceed. In the alternative, if the Court concludes that it has jurisdiction, it should enter an order under Civil Rule 17(A) requiring Plaintiff either to substitute the real party in interest or to provide documentary proof that it is the real party in interest within fourteen days.

Failure to comply with this order should result in dismissal. Even should Plaintiff comply, the State of Ohio urges the Court to use its authority to order mediation so that the parties can negotiate a workout agreement, thereby resolving their dispute without resort to foreclosure.

ARGUMENT

A. This Court lacks jurisdiction over Plaintiff's claims because Plaintiff cannot establish the existence of an actual controversy.

1. Courts of common pleas have jurisdiction only over actual controversies.

The Ohio Constitution provides, "The courts of common pleas and divisions thereof shall have such original jurisdiction over all *justiciable matters* . . . as may be provided by law." Ohio Const. Art. IV, § 4(B) (emphasis added). Accordingly, a prerequisite to this Court's jurisdiction is the existence of a "justiciable matter."

Absent an actual controversy, there is no justiciable matter sufficient to invoke this Court's jurisdiction. In *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County* (1996), 74 Ohio St. 3d 536, investors in an insurance syndicate sued the banks that had issued letters of credit, seeking to prevent the banks from disbursing funds against these lines of credit. The banks sought a writ of prohibition from the Ohio Supreme Court, which issued the writ, concluding that the common pleas court patently and unambiguously lacked jurisdiction. *Id.* at 542. The Court held "that the presence of a disagreement, however sharp and acrimonious it may be, is insufficient to create an actual controversy if the parties to the action do not have adverse legal interests." *Id.* In that case, the beneficiary of the letter of credit (the insurance syndicate) was the only party with an adverse legal interest to the investors. Because the investors failed to name the beneficiary

as a defendant, there was no actual controversy between the parties and therefore no jurisdiction. *Id.* at 542-43.

Barclays establishes that when a plaintiff sues the wrong party, the court lacks jurisdiction because there is no actual controversy between the parties. Just the same, when the wrong plaintiff brings an action, no actual controversy exists.

Importantly, because jurisdiction addresses the court's power to address a case, the proper remedy when a court lacks jurisdiction is to dismiss the complaint. Civ. R. 12(H)(3). The issue of jurisdiction cannot be waived, and therefore may be raised at any time—including after the pleading stage and even on appeal. *Cleveland Elec. Illum. Co. v. Lake County Bd. of Revision*, 96 Ohio St. 3d 165, 2002-Ohio-4033, ¶ 16; *H.R. Options, Inc. v. Zaino*, 100 Ohio St. 3d 373, 2004-Ohio-1, ¶ 8 (though raised late, an objection based on a jurisdictional defect was “preserved because a party cannot waive subject-matter jurisdiction, regardless of procedural deficiencies”). Relatedly, courts may address the issue of jurisdiction sua sponte. *Rinehart v. Dillard* (10th Dist.), 2007-Ohio-4310, ¶ 17.

2. When, as here, a plaintiff lacks standing, the plaintiff fails to present an actual controversy to the court.

The doctrine of standing operates to ensure actual adversity between the plaintiff and defendant. To have standing, a plaintiff must establish (1) an injury-in-fact; (2) caused by the defendant's conduct; and (3) redressability via a favorable decision. *Bourke v. Carnahan* (10th Dist.), 163 Ohio App. 3d 818, 2005-Ohio-5422, ¶10. Importantly, standing is a threshold issue that courts must decide prior to addressing the merits of a claim. *Cuyahoga County Bd. of Comm'rs v. State of Ohio* (2006), 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶22 (“A preliminary inquiry in all legal claims is the issue of standing.”). The Ohio Supreme Court has made clear that the party seeking relief bears the burden of establishing

its standing. *Ohio Contractors Ass'n v. Bicking* (1994), 71 Ohio St. 3d 318, 230 (“[T]o have standing, the [plaintiff] association must establish that its members have suffered actual injury.”).

Here, Plaintiff lacks standing because it failed to establish that, when it filed its foreclosure complaint, it held the promissory note and mortgage deed to the home at issue. Under Ohio law, any transaction of an interest in real property must be in writing, R.C. 1335.04, and the interest must be recorded in the county where the property lies, R.C. 5301.25(A). This paper trail operates to identify the party with an interest in the property adverse to the homeowner’s—the party with standing. Further, Ohio law requires a plaintiff in a foreclosure action to attach to the complaint the mortgage deed and note forming the basis of the suit. Civ. R. 10(D)(1); *Beneficial Mortgage of Ohio v. Jacobs* (2d Dist.), 2002-Ohio-3162, ¶ 10. Because in this case, the exhibits attached to the foreclosure complaint do not establish that Plaintiff held the mortgage deed and the note at the time it sued, Plaintiff lacks standing to bring this case. *In re Foreclosure Cases*, 2007 U.S. Dist. Lexis 84011 (N.D. Ohio Oct. 31, 2007); *In re Foreclosure Cases*, 2007 U.S. Dist. Lexis 84569 (S.D. Ohio Nov. 15, 2007). As shown above, when a plaintiff lacks standing the jurisdictional prerequisite of an actual controversy is lacking. Accordingly, this Court lacks jurisdiction over this case.

3. *State ex rel. Tubbs Jones v. Suster* is not binding and is inapposite.

Plaintiff may claim that the court has jurisdiction, even if Plaintiff lacks standing, relying on *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St. 3d 70, but *Suster* is inapposite. In *Suster*, three Justices of the Ohio Supreme Court stated in dicta that standing is not jurisdictional because “[l]ack of standing challenges the capacity of a party to bring an

action, not the subject matter of the court.” *Id.* at 77. This Court should ignore this passage from *Suster* for four reasons.

First, this portion of *Suster* is not binding. Only the author and two additional Justices concurred in its discussion of standing. Then-Justice Cook explicitly disavowed the discussion of standing, although she joined other sections of the primary opinion. Because *Suster*’s discussion of standing represents the views of only three Justices, it is advisory at best.

Second, *Suster*’s discussion confuses standing with a party’s “capacity” to bring an action. Questions of “capacity” are aimed at the putative plaintiff’s mental competency, having reached the age of majority, and the like. *Wannamaker v. Davis* (2d Dist.), 2007-Ohio-4340 ¶ 42. Standing, by contrast, questions whether the plaintiff’s interests are sufficiently adverse to the defendant’s to create an actual controversy. Put differently, standing determines whether the dispute “will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *State ex rel Int’l Ass’n of Firefighters, Local 381 v. City of Findlay*, 2006-Ohio-1774, ¶ 18 (quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 469). Thus, standing asks whether the plaintiff can invoke the court’s jurisdiction to resolve an actual controversy between the named parties.

Third, this passage from *Suster* creates a false dichotomy between jurisdiction and standing. As shown above, when the parties lack sufficiently adverse interests to create an actual controversy, Article IV, Section 4(B) of the Ohio Constitution deprives the courts of common pleas of jurisdiction over the dispute. Notably, the three *Suster* Justices who

opined on standing did not consider the effect of standing on the Ohio Constitution's "justiciable matters" requirement.

Finally, Suster reached the Ohio Supreme Court on a petition for a writ of prohibition. Accordingly, the issue in that case was not whether the lack of standing deprived the trial court of jurisdiction. Instead, it was whether the purported lack of standing "patently and unambiguously" deprived the trial court of jurisdiction. *Goldberg v. Maloney* (2006), 111 Ohio St. 3d 211, ¶ 21 ("without a patent and unambiguous lack of jurisdiction, there is generally no entitlement to a writ of prohibition to prevent a trial court's exercise of jurisdiction."). Because *Suster* is non-binding and inapposite, this Court should not apply its dicta regarding standing.

4. Even if *Suster* were binding, its dicta is not applicable to the issue of standing in a mortgage foreclosure action.

Even if *Suster's* discussion of standing were binding (which it is not), the Court should still conclude that Plaintiff's lack of standing deprives the Court of jurisdiction. As the *Suster* trio noted, "the term jurisdiction has different meanings depending upon the context in which it is used and the subject matter to which it is directed. We have held that standing is jurisdictional only in "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." *Suster*, 84 Ohio St. 3d at 77 n.4 (internal citation omitted). For instance, in *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St. 3d 16, the Ohio Supreme Court determined that a company lacked standing to challenge a rule issued by the Ohio EPA because the party did not comply with the statutory provision governing appeals to the Environmental Board of Appeal. More specifically, the statute restricted the power to appeal to entities that were parties to a proceeding before the director.

Because the challenging company had not participated before the director, the Ohio Supreme Court held that the company did not have standing to appeal and further held that this issue was jurisdictional and could not be waived. *Id.* at 218. See also *Buckeye Foods v. Cuyahoga County Bd. of Revision* (1997), 78 Ohio St. 3d 459 (standing to file a complaint against a board of revision is jurisdictional in nature because strict compliance with the governing statutory scheme is required).

The *Suster* court explicitly left open the issue of whether standing is jurisdictional in other types of actions with strict statutory schemes. Foreclosure actions and interests in real estate are governed by a strict statutory scheme. As noted above, Ohio law strictly requires that interests in land, and assignments thereof, be recorded with the appropriate county recorder. R.C. 5301.23, 5301.25(A), 5301.31, 5303.32. Ohio law also strictly dictates procedural requirements for prosecuting foreclosure actions to assure full protections of due process before a homeowner is removed from their home. See R.C. 323.28, R.C. 323.47, R.C. 5303.01 et seq, R.C. 5301.24; R.C. 5721.18 and R.C. 5721.19. Accordingly, when a plaintiff cannot establish that it holds a claimed interest in a parcel of real property, it lacks standing to sue on that interest. And because this lack of standing arises from a strict statutory scheme, it is jurisdictional just as the lack of standing was in *Boston Coke* and *Buckeye Foods*.

B. In the alternative, if the Court determines that it has jurisdiction, it should order that, within fourteen days, the real party in interest must be substituted for Plaintiff.

If the Court concludes that it has jurisdiction, it should order Plaintiff to substitute or join the real party in interest with fourteen days or face dismissal because Plaintiff is not the real party in interest. Civil Rule 17(A) requires that “[e]very action shall be prosecuted in the name of the real party in interest.” The rule further provides that “[n]o action shall be

dismissed on the ground that it is not the prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” Civ. R. 17(A). The real party in interest, in turn, “is the party who, by substantive law, possesses the right to be enforced.” *Morse v. Summit Moving & Storage* (9th Dist.), 2003-Ohio-1475 (quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App. 2d 237, 240). Turning to the substantive law of real property, “in a standard foreclosure action, the party holding the mortgage would clearly be the real party in interest.” *Metmor Fin., Inc. v. Slimmer* (11th Dist.), 1996 Ohio App. Lexis 2003, at *6 (quoting *Kramer v. Millott* (6th Dist.), 1994 Ohio App. Lexis 4454). When the original mortgage-holder assigns his interest to another, “the assignee in possession of [the] mortgage is the real party in interest and, therefore, the proper plaintiff in a foreclosure action.” *Id.* (quoting *Mullin v. Claremont Realty Co.* (1st Dist. 1930), 39 Ohio App. 103, 104).

As explained above, Plaintiff has not adequately pleaded that it holds the promissory note and mortgage deed. Consequently, Plaintiff is not the real party in interest. Accordingly, the Court should dismiss the complaint if Plaintiff fails to establish, within fourteen days, that it is the real party in interest or if it fails to substitute or join the real party in interest. Plaintiff should have established its standing as the real party in interest at the time the complaint was filed, therefore, an additional fourteen days to produce evidence which should have existed at the time the complaint was filed is reasonable. Civ. R. 12 (H)(3) specifically provides that “whenever it appears by suggestion of the party or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Therefore, if the Plaintiff cannot promptly establish its standing to invoke the

jurisdiction of this Court, the Court should dismiss this action. See *Morse*, 2003-Ohio-1475, at ¶¶ 9-10 (affirming dismissal of plaintiff's complaint because plaintiff was not the real party in interest).

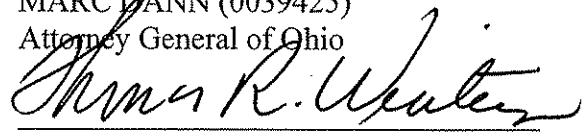
CONCLUSION

For the foregoing reasons, the State of Ohio, respectfully asks the Court to immediately dismiss Plaintiff's foreclosure complaint based on its failure to invoke the jurisdiction of this Court. The State of Ohio further urges this Court to consider reviewing all similar foreclosure filings on its docket, and to dismiss such actions, sua sponte, if the plaintiff has similarly failed to establish jurisdiction. Alternatively, the Court should consider issuing an order in this case, and in all other pending foreclosure actions not prosecuted in the name of the real party in interest, to require the Plaintiffs to file within fourteen days an amended complaint either adding the real party in interest or attaching properly recorded assignments to prove that the Plaintiff has standing to prosecute the action. Failure to do so should result in prompt dismissals of such actions.

The State of Ohio urges this course of action because it will provide the lenders and homeowners an adequate opportunity to adopt a mortgage workout, which will enable them to avoid further burdening this Court and others with such disputes. If this Court retains jurisdiction over this matter, however, we ask the Court to take the path urged by Chief Justice Moyer that the best option to resolve these disputes is through an attempt at mediation to reach a workout agreement, which would both provide the Plaintiff with a paying mortgagor and keep the homeowner in his or her home.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss was served upon the following via ordinary U.S. mail, postage pre-paid this 20th day of November ~~December~~ 2007.

Eric Deighton
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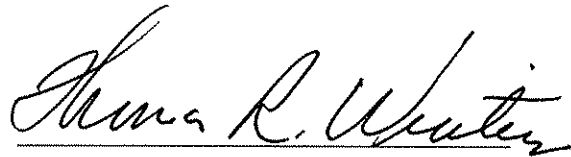
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Assistant Attorney General

TO THE CLERK

The clerk is hereby instructed to serve a copy of this entry, by regular mail, to the following parties of record :

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)	JUDGE SCHNEIDER
Plaintiff,)	
)	
v.)	
)	
CARL H. WOODFORD, et al.)	
)	
Defendants.)	
_____)	

This matter is before the Court, upon motion of the State of Ohio, to dismiss this action by failing to establish that it is the real party in interest in this action. The Court agrees that it is apparent on the face of the pleadings that the Plaintiff has failed to establish that it is the holder of the note and mortgage. Before dismissing this action, however, the Court is granting the Plaintiff 14 days from the time stamped date of this entry to file an amended complaint either joining the real party in interest or attaching properly recorded assignments to establish that it is the real party in interest, as required by Civil Rule 17. Failure to file a timely amended complaint, as ordered herein, will result in a dismissal of this action.

IT IS SO ORDERED.

JUDGE SCHNEIDER

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The clerk is hereby instructed to serve a copy of this entry, by regular mail, to the following parties of record :

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