

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

RESIDENTIAL FUNDING,)
)
Plaintiff,)
)
v.)
)
ANTHONY MUHAMMAD, et al.)
)
Defendants.)
)
)
)
)
)

CASE NO. A0709130
JUDGE MARTIN
DEFENDANT STATE OF OHIO'S
OBJECTIONS TO THE
MAGISTRATE'S DECISION

The Defendant State of Ohio objects, by and through the undersigned counsel, to the Magistrate's Decision rendered on February 7, 2008, denying the State of Ohio's Motion to Dismiss. In denying the State of Ohio's Motion to Dismiss, the Magistrate failed to find that the Plaintiff did not have standing to bring this action, and that the Court does not have jurisdiction to hear this case. The Magistrate also erroneously concluded that the Plaintiff is the real party in interest, pursuant to Civ. Rule 17(A). The Defendant State of Ohio (hereinafter "the State of Ohio") respectfully requests the Court to sustain the State of Ohio's objections to the Magistrate's Decisions, and to grant the Motion to Dismiss.

BACKGROUND

The Plaintiff, Residential Funding, filed a Complaint in foreclosure on October 10, 2007. In the Complaint, the Plaintiff alleged that it was "the holder and owner of a note, a copy of which is unavailable at this time." (Plaintiff's Complaint ¶ 1). Plaintiff also claimed to be the holder of a Mortgage, and attached a copy of the original Mortgage in the name of the original lender, Suntrust Mortgage, Inc. (Plaintiff's Complaint Exhibit A). The State of Ohio filed an Answer to the Complaint claiming an interest in the case on December

7, 2007. The State of Ohio also filed a Motion to Dismiss the case for lack of jurisdiction, or in the alternative, because Plaintiff was not the real party in interest on December 7, 2007. Plaintiff filed a Memorandum Contra to the State of Ohio's Motion to Dismiss on December 14, 2007, and then an Amended Memorandum Contra on December 21, 2007, to which the State of Ohio Replied on January 4, 2008. The State of Ohio followed up by filing a Notice of Supplemental Authority on January 18, 2008. The Plaintiff then filed its own Notice of Supplemental Authority on January 24, 2008.

An oral argument was held on the State of Ohio's Motion to Dismiss before Magistrate Michael Bachman in the Hamilton County Court of Common Pleas on January 24, 2008. A Magistrate's Decision denying the State of Ohio's Motion to Dismiss was issued on February 7, 2008, which was filed with the Clerk on the same day.

The State of Ohio objects to the Magistrate's Decision for the reasons fully explained below. The State of Ohio further relies on its previously filed Motion to Dismiss and supplemental memorandum filed in support of the Motion to Dismiss, and urges the Court to review and consider such pleadings in ruling on these objections.

LAW AND ARGUMENT

A. The State of Ohio Does Not Have a Conflict of Interest.

The Department of Taxation's interests are best preserved by assuring that the parties to the action are the proper parties. According to the Supreme Court of Ohio "a judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*." *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70, 518 N.E.2d 941. As a result, if the Court were to enter judgment without jurisdiction or without the proper parties, the State of Ohio would be

prejudiced by having to participate in judicial proceedings to set aside the sale and then relitigate the entire foreclosure.

Moreover, the State of Ohio maintains that the interests of the Department of Taxation are better served when homeowners remain in their homes, increasing the likelihood of payment on tax liens as the equity in the homes increases over time. When homes are sold at a Sheriff's sale due to foreclosure, the State's ability to collect on its tax liens decreases because all other secured liens against the property generally have priority over the State's liens.

B. The Court Must Grant the State of Ohio's Motion to Dismiss Because the Court Does Not Have Jurisdiction to Hear the Case at Bar.

1. The Magistrate's Decision improperly merges the State of Ohio's jurisdictional argument with the alternative Civ. R. 17(A) argument.

The jurisdictional and real party in interest claims asserted by the State of Ohio are alternative arguments that must be considered separately. The State of Ohio's argument relating to Civ. R. 17(A) was submitted to this Court as an alternative argument to the standing and jurisdiction argument it advanced in Section I of its initial Motion to Dismiss and Memorandum in Support. The State of Ohio does not contend that Civ. R. 17(A) is jurisdictional in nature. Rather, the State of Ohio is making a standing argument that is jurisdictional in nature because there is no actual controversy between the parties to the suit. As discussed in the State of Ohio's original Motion to Dismiss, Article III, Section (4)(B) of the Ohio Constitution requires an actual controversy to exist in order for there to be a justiciable issue. Without such a controversy, Plaintiff does not have standing. Without standing, the Court does not have jurisdiction to hear the case at bar.

In its complaint and pleadings, Plaintiff failed to file a copy of a Note or an Assignment of Mortgage, establishing its legal interest in the property at issue. Plaintiff did, however, produce a copy of an alleged Assignment of Mortgage to the State of Ohio, showing that Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") attempted to assign the Mortgage to the Plaintiff only after the Complaint was filed (*See* Assignment of Mortgage, Attached as Exhibit A). This alleged Assignment of Mortgage was executed on November 14, 2007, and recorded on November 28, 2007, more than a month after the Plaintiff filed the Complaint in this case. (*Id.*). Although this alleged Assignment of Mortgage attempts to assign the Note to the Plaintiff, Plaintiff still has not filed or produced any evidence demonstrating its ownership or possession of the Note. (*Id.*).

In order for a Plaintiff to have standing, the Plaintiff must establish: 1) an injury in fact; 2) caused by defendant's conduct; and 3) redressability via a favorable decision. *Bourke v. Carnahan* (10th Dist.), 163 Ohio App.3d 818, 2005-Ohio-5422, ¶ 5. In this case, Plaintiff has not met the first requirement necessary to have standing. Plaintiff has not established that it owns the Note and/or Mortgage, and thus has not established that it suffered an injury in fact. Further, not only does the State of Ohio dispute the integrity of the alleged Assignment of the Mortgage produced by the Plaintiff, but also the fact that this alleged transfer occurred more than a month after the Plaintiff filed its Complaint. (Attached as Exhibit A). Based upon the face of the alleged Assignment of Mortgage, Plaintiff could not have had any legal interest in the Note and/or Mortgage when the Complaint was filed, and therefore, could not have suffered a concrete injury.

Plaintiff failed to meet the first requirement necessary to have standing to bring this action, and therefore no actual controversy exists between the parties. Therefore, the Court does not have jurisdiction in this matter, and the Magistrate's Decision should be overruled.

2. The Court improperly relied on the recording statutes rather than the law that requires assignments of interests in real estate to be in writing.

The Court misconstrued the application of the recording statutes in Ohio to the jurisdictional question before this Court. The recording statute was referenced merely as supportive authority for the undeniable conclusion that Ohio law requires transfers of interests in real property to be in writing; it was not for the proposition that they must all be recorded in order to effectuate a transfer of a property interest. *See* R.C. § 1335.04; R.C. § 5301.25.

However, the Magistrate's Decision seems to focus on the discretionary nature of recording. (Magistrate's Decision pp. 5-7). The Magistrate's Decision correctly concludes that a Note does not need to be recorded. (Magistrate's Decision pp. 5-6). This is for the very simple reason that a Note is a negotiable instrument. *Buckeye Federal Sav. & Loan Ass'n v. Guirlinger* (1991), 62 Ohio St. 3d 312, 315 (stating "promissory notes are negotiable instruments under R.C. § 1303.03(A)"). According to the Ohio Revised Code, in order for a negotiable instrument to be properly transferred, it must be negotiated. R.C. § 1303.21(B). Negotiation includes not only the physical transfer of the instrument but also indorsement by the holder to the transferee, which of course, must be in writing. *Id.*; R.C. § 1303.22.

In the case at bar, there is no evidence, and it is not alleged that the Note was ever negotiated to the Plaintiff or that there was a physical transfer of the Note to the Plaintiff. In

fact, Plaintiff has never even produced a Note in this case. The Magistrate's Decision fails to acknowledge the missing link of negotiation of the Note at issue or the fact that the Note has never even been produced in this case. Furthermore, although R.C. § 1303.31 and R.C. § 1303.38 allow for a non-holder to enforce a negotiable instrument under certain circumstances, there is no indication that the circumstances contemplated by those statutory provisions are present in this action.

The State also agrees with the conclusion reached in the Magistrate's Decision that recordation of a mortgage is not required to transfer an interest in the property, but is merely required for perfection of the lien in order to give constructive notice to other parties that may potentially bring suit. (Magistrate's Decision p. 6). However, missing from the Decision is a more important conclusion that a written assignment is required to validly **transfer** a mortgage (R.C. § 1335.04 and §§ 5301.01, et seq.); whereas, recordation is only required for **perfection of the lien**. While it is true that an unrecorded mortgage can be an effective transfer; the assignment must be executed in writing prior to filing the Complaint before the Plaintiff can establish that it has standing to invoke the jurisdiction of the Court. Magistrate Bachman even acknowledged this notion "[t]his assignment must predate the filing of the foreclosure action." (Magistrate's Decision p. 7).

Here, notwithstanding that it was never filed with the Court, the Assignment did not take place until November 14, 2007, well after the Complaint was filed on October 10, 2007. (See Attached as Exhibit A). Therefore, Plaintiff did not have standing to bring this action, and the Magistrate's Decision should be overruled.

- 3. The allowance of notice pleading is not related to a party's lack of standing to bring a lawsuit.**

The Magistrate's Decision incorrectly assumes that notice pleading does not require the Complaint to establish that the Plaintiff has a cognizable interest in the case. (Magistrate's Decision pp. 6-7). The Court should recognize that notice pleading only applies to the nature of the claims and defenses thereto (*Bourke v. Carnahan* (2005), 163 Ohio App.3d 818, 824; *State Farm Mut. Auto Ins. Co. v. Loken*, 5th Dist. No. 04-CA-40, 2004 Ohio 5074, at ¶17); it does not pertain to establishing the standing of the parties. The purpose of notice pleading is to put the defendant on notice of the claims and actions which are brought against him/her.

“One of the basic purposes of notice pleading is to insure, ‘that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto.’” *Scassa v. Dye*, 7th Dist. No. 02CA0779, 2003 Ohio 3480, at ¶26 (quoting *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83, 455 N.E.2d 1344). However, this does not eliminate the requirement that the Plaintiff must have standing at the time of filing in order to bring such claims. Standing is a necessary prerequisite to establish a court's jurisdiction to hear a case. *Cain v. Calhoun* (1979), 61 Ohio App. 2d 240, 242 fn. 2 (citing *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176). Therefore, the appropriate time to establish that the Plaintiff is the holder of the Note and Mortgage is at the time of filing the Complaint, not at the time of judgment rendered on the Complaint.

On the face of the Complaint at issue, Plaintiff has alleged an injury from the Defendant's failure to make payments in accordance with the terms of a promissory note. However, there is no document attached to the Complaint, or even any specific allegation that indirectly connects the Plaintiff to the Defendant. In fact, according to the Plaintiff, the original Note “is unavailable at this time.” (Plaintiff's Complaint ¶ 1). The promissory note

represents the duty to pay the lender. In the case at bar, it is impossible to determine to whom the Defendant owes an obligation, given the fact that the Plaintiff has failed to even produce a Note. Merely alleging that it is the holder of the Note is insufficient when there is no written proof of the alleged interest in the Note.

Plaintiff has filed an Assignment with the Recorder's office, but has failed to submit it to the Court in this case. (Attached as Exhibit A). Nevertheless, the Assignment fails also to establish the necessary link between the original lender and the Plaintiff. Rather, the Assignment is from MERS to Plaintiff. (Id.). However, there is no evidence that MERS was the original lender, or that the original lender ever negotiated or transferred the Note and/or Mortgage to MERS. (See Plaintiff's Complaint Exhibit A). Furthermore, no document has been produced granting authority to MERS to negotiate the Note on behalf of the original lender or any other entity. (Id.). Yet MERS still attempted, albeit unsuccessfully, to assign the Note to the Plaintiff by the language "together with the Promissory Note secured thereby and referred to therein." (See Attached Exhibit A). Based upon the record before the Court in this case, Plaintiff has failed to establish that MERS was the lawful holder and owner of the Note at the time it allegedly assigned the Note and Mortgage to Plaintiff, or that it had any authority to act on behalf of the lawful owner and holder. Therefore, MERS could not and thus did not, transfer any legal interest in the Note to Plaintiff. Moreover, Plaintiff also failed to establish that it is the rightful holder of the Mortgage.

According to the face of the Mortgage, "MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns". (See Plaintiff's Complaint Exhibit A). Yet, the term "nominee" is specifically defined as "one designated to act for another in his or her place." Black's Law Dictionary 1050 (6th ed. 1990). The

definition goes on to explain that the term nominee “has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.” *Id.* Nominee has been further defined as “the delegation of authority . . . in a representative or nominal capacity only, and **does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him**” *Winters National Bank and Trust Company v. Saker, et al* (1979), 66 Ohio App.2d 31, 35 (emphasis added). The Mortgage then goes on to contradict itself by stating “MERS is the mortgagee under this Security Instrument.” (See Plaintiff’s Complaint Exhibit A). Therefore, the Assignment did not validly transfer the Mortgage either.

The Court should also find direction from a decision in the Delaware County Court of Common Pleas: “[t]he Court agrees that the Plaintiff must establish the link between the original lender . . . and the Plaintiff.” *Franklin Credit Management Corp. v. Neill*, (Delaware Cty. CP Feb. 5, 2008), Case No. 07 CV E 09 1163, at *1 (Attached as Exhibit B). In that case, the Plaintiff provided an Assignment of the Mortgage from MERS to the Plaintiff, but the Court found that this failed to establish a link between the original lender and the Plaintiff. *Id.* For this reason, this Court should find that it lacks jurisdiction to proceed in a case where Plaintiff has not established a sufficient link between its alleged loss and the Defendant’s conduct.

Having failed to establish that it holds an interest in the Note and/or Mortgage, the Plaintiff has failed to show that it suffered an injury in fact; therefore, Plaintiff does not have standing to bring this action. A person lacking any right or interest to protect may not invoke the jurisdiction of a court. *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, 178, 298 N.E.2d 515. Having failed to show that it is the holder of the

Note and/or Mortgage and that an actual controversy exists between the parties, Plaintiff's action should be dismissed. Therefore, the Court does not have jurisdiction in this matter, and the Magistrate's Decision should be overruled.

4. Civ. Rule 10(D) requires that the Plaintiff own the Note and Mortgage that it is required to attach to the Complaint.

In the Magistrate's Decision, the Court inexplicably holds that the Plaintiff is only required to attach the original Note and Mortgage, yet not the relevant documents to the Complaint. (Magistrate's Decision pp. 7-8). Quite to the contrary, the Civil Rule 8 notice pleading provisions, when read in conjunction with Civil Rule 10(D), clearly must be read to require the Plaintiff to attach the note and mortgage that it owns, not just **any** note and mortgage. Otherwise, this would permit a complete stranger to any cause of action to file suit and obtain a judgment just because they may have an intention to acquire an interest in the claim at some undefined time in the future. This is precisely why a party must establish that it has standing at the outset of the case. In this case, as previously discussed, the Plaintiff was not the owner or holder of the Note and Mortgage at the time this action was filed.

5. The federal case law is persuasive

There are now four applicable federal court decisions, which should be considered persuasive authority for the issues before this Court. See *In re Foreclosure Cases* (N.D. Ohio Oct. 31, 2007), 2007 U.S. Dist. Lexis 84011 (See State of Ohio's Notice of Supplemental Authority, Exhibit C); *In re Foreclosure Cases* (S.D. Ohio Nov. 15, 2007), 2007 U.S. Dist. Lexis 84569 (See State of Ohio's Notice of Supplemental Authority, Exhibit D); *In Re Foreclosure Cases* (N.D. Ohio Nov. 14, 2007) (Attached as Exhibit C); *In re Foreclosure Cases* (S.D. Ohio Dec. 12, 2007), 2007 U.S. Dist. LEXIS 95673 (See State of Ohio's Notice

of Supplemental Authority, Exhibit A). The Magistrate's Decision misinterprets those decisions to find that they were based on the question of diversity jurisdiction. (Magistrate's Decision p. 9). The well written opinion of Judge Holshuh, specifically explained that this is not a diversity issue; rather, it is solely a jurisdictional issue of standing:

Plaintiffs are correct that every case presented to this Court involves the preliminary question of whether the plaintiff is the one who suffered the injury. This is why standing is considered a "qualifying hurdle." This question, however, **is separate from the question of whether diversity jurisdiction exists.** The § 1332 requirements (diversity of citizenship and an amount in controversy exceeding \$75,000) says absolutely nothing about the Article III standing requirements of injury in fact, causation, and redressability. The doctrine of standing would become a nullity in diversity cases if simply satisfying the requirements of § 1332 sufficed to establish standing. Furthermore, the constitutional standing question of whether Plaintiffs actually suffered an injury in fact at the time these respective cases were filed is distinct from the element of Plaintiffs' claims requiring them to hold the note in order to enforce it.

Id. at *8 (emphasis added). The federal courts have dismissed the cases cited above based on the Plaintiffs' lack of standing because the Plaintiffs failed to establish that they were holders of the Notes and Mortgages prior to filing suit. Judge Holshuh held:

the Court finds that Plaintiffs have not established that they in fact owned the notes and mortgages in question at the time these respective complaints were filed. Because Plaintiffs apparently did not own the notes and mortgages at the time the complaints were filed, Plaintiffs suffered no injury in fact from the debtors' default. Plaintiffs thus do not have standing to bring these actions, and these cases should be dismissed for lack of standing.

Id. at *13. Since the same jurisdictional issues are presented in state court, this Court should find the federal court decisions persuasive and directly on point, leading to the same conclusion that foreclosure actions should be dismissed if the Plaintiffs fail to establish that they had standing to bring the actions at the time the cases are filed.

C. The Magistrate's Decision Incorrectly Concluded that Plaintiff is the Real Party in Interest.

1. **Civ. Rule 17(A) does not apply to parties who are not the real party in interest at the time the complaint is filed.**

The Magistrate's Decision appears to have sanctioned Plaintiff's attempt to use Civil Rule 17 as a sword rather than a shield. Civil Rule 17 was designed to allow for substitution of the real party in interest within a reasonable time when/if the real party in interest changed during the course of litigation. However, Plaintiff is attempting to employ Civil Rule 17(A) in complete reverse. Plaintiff filed suit and then asked for reasonable time to **become** the real party in interest. The Complaint was filed on October 10, 2007, but the alleged Assignment of Mortgage was not executed until November 14, 2007. Therefore, any interest it acquired in the Note and/or Mortgage (in the event the Assignment is well taken) was only acquired **after** the Complaint was filed. (See Attached as Exhibit A). Not to mention, this Assignment was never even filed with this Court and the Note has never been produced.

Civil Rule 17 assumes that the Plaintiff is the real party in interest at the time the complaint is filed, and allows Plaintiff to substitute another party when they transfer or sell their interest in the claim after the suit is filed. It is not intended to allow parties to file a lawsuit to recover on a claim for which they have no valid interest. Allowing the Plaintiff to establish that it became the real party in interest after the Complaint was filed is a misapplication of Civil Rule 17. Although the Magistrate looked to Federal Civil Rule 17 for support (Magistrate's Decision p. 8), the Decision ignores the fact that federal courts have dismissed complaints and held that the corrective provision does not give a plaintiff *carte blanche* to correct the pleadings when the plaintiff made no showing of confusion or honest mistake as to the real party in interest. See e.g., *Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074-1075, (9th Cir. 1989); *Metal Forming Technologies, Inc. v. Marsh & MacLennon, Co.*,

224 F.R.D. 431, 436-437 (S.D. Ind. 2004) (citing *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 308 (5th Cir. 2001)). Furthermore, the Magistrate's Decision even acknowledged that "[t]his assignment must predate the filing of the foreclosure action." (Magistrate's Decision p. 7).

In this case, Residential Funding has neither shown nor suggested that errors in its Complaint are due to confusion or honest mistake. Rather, Plaintiff merely recorded a faulty Assignment of the Mortgage after the Complaint was filed, and then failed to submit this alleged Assignment to the Court. Additionally, Plaintiff has failed to establish its ownership of the Note with the Court. Civil Rule 17 cannot be used to correct such defects, and the Magistrate's Decision should be overruled

2. The Magistrate's Decision is inconsistent with prior rulings of this Court.

The Magistrate's Decision fails to incorporate prior holdings of this Court on identical issues. In fact, both **this Court and Magistrate Bachman** have ruled in favor of the State's position within the past two-and-a-half months.

In *Wells Fargo Bank v. Byrd*, this Court overruled Magistrate Bachman's opinion by sustaining the defendant's objections and dismissing the case because the plaintiff was "not the real party in interest **when this case was filed.**" *Wells Fargo Bank v. Byrd* (Hamilton Cty. CP December 12, 2007), Case No. A0700643, at *1 (emphasis added). (See State of Ohio's Notice of Supplemental Authority, Exhibit B). Subsequently, in accordance with the *Byrd* decision, Magistrate Bachman also dismissed a case where the complaint was filed on October 30, 2007, and an assignment of the mortgage was not filed until November 26, 2007. *LaSalle Bank Midwst, N.A. v. Bybee* (Hamilton Cty. CP February 1, 2008), Case No. A0709782, at *1 (Attached as Exhibit D). In an ironic twist, less than one week before

Magistrate Bachman rendered a decision in the case at bar, in *Bybee*, Magistrate Bachman dismissed the case holding that “the court finds the plaintiff was not the real party in interest at the time the complaint was filed.” *Id.* Furthermore, in the Magistrate’s Decision in the case at bar, Magistrate Bachman even stated: “[t]he plaintiff, however, may need to demonstrate to the court that it possessed the assignment at the time the lawsuit was filed.” (Magistrate’s Decision p. 9).

Other Ohio Courts have reached similar conclusions. In *DLJ Mortgage Capital, Inc. v. Bazy*, the Montgomery County Court of Common Pleas granted the defendant’s motion to dismiss on the basis that the plaintiff was not a real party in interest. *DLJ Mortgage Capital, Inc. v. Bazy, et al.* (Montgomery Cty. CP May 16, 2003), Case No. 02-4316, *5. (See State of Ohio’s Notice of Supplemental Authority, Exhibit E). In *Bazy*, just as in this case, the Plaintiff filed a Complaint and attached a Note in the name of the original lender, which was different than the name of the Plaintiff that appeared in the Complaint. *Id.* at p. 2. Later, after the defendant had already contested the Plaintiff’s standing, the Plaintiff filed an Assignment of the Mortgage, which Plaintiff asserted also assigned the Note. *Id.* Just as in this case, the Assignment was executed and dated after the date on which the Complaint was filed. *Id.* The Court dismissed the case, finding that the Plaintiff was not the real party in interest on the date the action was filed. The Court noted that at the time the Complaint was filed, the Plaintiff was not the real party in interest because it was not the true holder of the Note. *Id.* at p. 3. The Court also reasoned that because the Plaintiff had not obtained an interest in the Note and Mortgage until almost four (4) weeks after the Complaint was filed, even if the Plaintiff was afforded additional time to amend its Complaint, there was no way

the Plaintiff could produce any document that could establish that it was the lawful holder of the Note and Mortgage on the date the Complaint was filed. *Id.* at 4-5.

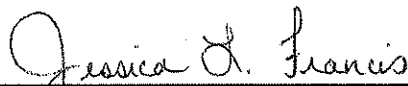
Nearly identical to the *Byrd*, *Bybee* and *Bazzy* cases, the Complaint, in the case at bar, was filed on October 10, 2007, yet the attempted Assignment of the Mortgage did not occur until November 14, 2007, more than a month after the Plaintiff filed the Complaint. Therefore, the Plaintiff was not the real party in interest when the case was filed. Consequently, the State of Ohio respectfully requests this Court to overrule the Magistrate's Decision in accordance with Civ. R. 17 and this Court's decision in *Byrd*.

C. Conclusion

In denying the State of Ohio's Motion to Dismiss, the Magistrate failed to find that the Plaintiff did not have standing to bring this action, and that the Court does not have jurisdiction to hear this case. Additionally, the Magistrate erroneously concluded that the Plaintiff is the real party in interest, pursuant to Civ. Rule 17. For the reasons described above, and based on the case law previously submitted to this Court in the State of Ohio's Motion to Dismiss and accompanying memoranda, the State of Ohio respectfully requests the Court to sustain its objections to the Magistrate's Decisions, and to grant the Motion to Dismiss.

Respectfully submitted,

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Attorney General of Ohio



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Counsel for Defendant State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Objections to the Magistrate's Decision was served upon the following via ordinary U.S. mail, postage prepaid this 21st day of February 2008.

Anthony Muhammad
562 Maple Avenue
Cincinnati, Ohio 45229

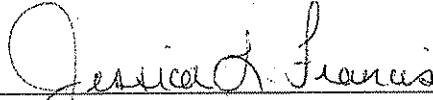
Jane Doe, unknown spouse of
Anthony Muhammad
562 Maple Avenue
Cincinnati, Ohio 45229

Abthel, Inc.
562 Maple Avenue
Cincinnati, Ohio 45229

Mortgage Electronic Registration Systems, Inc.
P.O. Box 7814
Ocala, Florida 34478

Lerner, Sampson & Rothfuss
c/o Lynn A Busch
P.O. Box 5480
Cincinnati, Ohio 45201

Counsel for Plaintiff

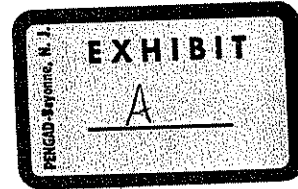


JESSICA L. FRANCIS (0074703)
Assistant Attorney General

LS&R No.: 200743441
Loan No.: 0203359567

Sun Trust VA.

ASSIGNMENT OF MORTGAGE



KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Mortgage Electronic Registration Systems, Inc., whose address is P.O. Box 7814, Ocala, FL 34478-7814, does hereby sell, assign, transfer and set over unto Residential Funding, whose address is 1001 Semmes Ave., Richmond, VA 23224, a certain mortgage from Anthony Muhammad, unmarried person to Mortgage Electronic Registration Systems, Inc, dated June 30, 2006, recorded July 6, 2006, in Volume 10288, Page 1908, in the office of the Hamilton County Recorder, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon, and secured by the following real estate:

Situated in the City of Cincinnati, County of Hamilton, State of Ohio, and being all that lot of ground situated, lying and being on the south side of Hopkins Street, between Central Avenue and John Streets, in the City of Cincinnati, Ohio, being part of Square 3 of Betts Division and squares in said City and more particularly described as follows:

Commencing on the south side of Hopkins Street at a point 198 feet east of John Street; thence eastwardly with Hopkins Street 18 feet; thence southwardly parallel with John Street 101 feet; thence westwardly parallel with Hopkins Street 18 feet; thence northwardly parallel to the east line of Truman Alley 101 feet to Hopkins Street, at the point of commencement.

PROPERTY ADDRESS:
421 HOPKINS STREET
CINCINNATI, OH 45203

IN WITNESS WHEREOF, Mortgage Electronic Registration Systems, Inc. has set its hand this 14 day of November, 2007.

Mortgage Electronic Registration Systems, Inc.

By: Karanne E. Lockett
*Printed Name Karanne E. Lockett
Title Assistant Vice President

Rebecca Prae Groppa
Hamilton County Recorder's Office
Doc #: 07-0166829 Type: AM
Filed: 11/28/07 07:23:11 AM \$28.00
Off. Rec.: 10710 00268 F L23 2 49

11 28 07 07:23:11 AM
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10710 268

STATE OF Virginia

SS.

COUNTY OF Richmond

Before me, a Notary Public in and for said County and State, personally appeared Roxanne E. Lockett, Assistant V.P., of Mortgage Electronic Registration Systems, Inc., who acknowledged the signing thereof to be their free and voluntary act and deed and the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed my official seal on the day and year last aforesaid.

#308311

Commission Expires

Latoya L. Cook
Notary Public

6-30-2009

This instrument was prepared by:

LERNER, SAMPSON & ROTHFUSS
A Legal Professional Association
P.O. Box 5480
Cincinnati, OH 45201-5480

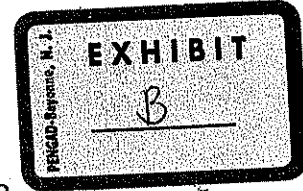
IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

FRANKLIN CREDIT MANAGEMENT :
CORP, :

Plaintiff, : Case No. 07 CV E 09 1163.

-vs- :

TAMARA NEILL, :
Defendant. :



JAN ANTONOPLOS
CLERK
2008 FEB -5 AM 9:16
COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

JUDGMENT ENTRY

This case is before the Court on Defendant, State of Ohio's Motion To Dismiss. Plaintiff filed a Brief in Opposition, and Defendant, State of Ohio filed a Reply thereto, as well as a Notice of Supplemental Authority.

Defendant, State of Ohio brings its motion pursuant to Civil Rule 17, on the basis that this Court lacks jurisdiction to hear this matter and the Plaintiff has failed to establish that it is the real party in interest. Plaintiff asserts; however, that in its Brief in Opposition it supplemented the assignment of the mortgage at issue, and therefore, the case can proceed. Defendant, State of Ohio, disputes that although Plaintiff has attached the assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Mila, Inc. to Franklin Credit Management Corporation, Plaintiff has failed to establish a link between the original lender, Mila, Inc. and the Plaintiff.

The Court agrees that Plaintiff must establish the link between the original lender, Mila, Inc. and the Plaintiff. Nonetheless, Plaintiff's failure to provide the

assignment does not in itself merit dismissal of this action. Therefore, Defendant, State of Ohio's Motion To Dismiss is DENIED, and Plaintiff has until Monday, March 31, 2008 to provide the necessary assignments of the mortgage at issue in this case.

Dated: February 4, 2008.



W. DUNCAN WHITNEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

KIMBERLY L BORCHERT, 323 WEST LAKESIDE AVE STE 200, CLEVELAND, OH, 44113, Attorney for Plaintiff

MICHAEL J. SCHULER, ASSISTANT ATTORNEY GENERAL, 30 EAST BROAD STREET, 14TH FLOOR, COLUMBUS, OH 43215, Attorney for Defendant

MARCIA J. MACON-BRUCE, SECTION CHIEF, COLLECTIONS ENFORCEMENT, 150 EAST GAY STREET, 21ST FLOOR, COLUMBUS, OH 43215, Attorney for Defendant



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	:	Case Nos. 1:07cv1007	1:07cv2660
	:	07cv1059	07cv2677
IN RE FORECLOSURE ACTIONS	:	07cv1060	07cv2776
	:	07cv1122	07cv2789
	:	07cv1252	07cv2797
	:	07cv1367	07cv2826
	:	07cv1515	07cv2951
	:	07cv1827	07cv2961
	:	07cv1872	07cv2963
	:	07cv1936	07cv2993
	:	07cv1981	07cv3022
	:	07cv1985	07cv3039
	:	07cv1992	07cv3143
	:	07cv2010	07cv3259
	:	07cv2257	07cv3306
	:	07cv2636	
	:	07cv2643	
	:		
	:	JUDGE KATHLEEN M. O'MALLEY	
	:		
	:	<u>ORDER</u>	

Section I of the United States District Court for the Northern District of Ohio's *Fifth Amended General Order No. 2006-16* (October 10, 2007), captioned "The Complaint and Service," outlines specific filing requirements applicable to the numerous private foreclosure actions being filed in federal court. Specifically, Section 1.2.5 of that order provides:

1.2 The complaint must be accompanied by the following:

1.2.5 An affidavit documenting that the named plaintiff is the owner and holder of the note and mortgage, whether the original mortgagee or by later assignment, successor in interest or as a trustee for another entity.

Fifth Amended General Order No. 2006-16 (October 10, 2007) (Emphasis added).¹ A foreclosure plaintiff, therefore, especially one who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit was filed. In other words, a foreclosure plaintiff must provide documentation that it is the owner and holder of the note and mortgage as of the date the foreclosure action is filed.

It is reasonably clear from Section 1.2.5 that an affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient to comply with Section 1.2.5's "documentation" requirement. To the extent a note and mortgage are no longer held or owned by the originating lender, a plaintiff must appropriately document the chain of ownership to demonstrate its legal status *vis-a-vis* the items at the time it files suit on those items. Appropriate "documentation" includes, but is not limited to, trust and/or assignment documents executed before the action was commenced, or both as circumstances may require.

In this case, the plaintiff is not identified on the note and mortgage as the original owner/holder, and has either: (1) not timely filed adequate documentation demonstrating that it was the owner and holder at the time it filed suit; or (2) filed documentation indicating that an assignment or execution of trust interest occurred, but occurred after the filing of the complaint.²

¹ None of the amendments to the order altered Section 1.2.5. That section has remained the same. Regardless, by its express terms, the *Fifth Amended General Order No. 2006-16* (October 10, 2007) applies to all then-pending and new foreclosure actions.

² The Court is only concerned with the date on which the documents were executed, not the dates on which they were recorded (if recorded) with the county recorder's office.

Accordingly, the plaintiff's complaint does not comply with Section 1.2.5 of the Court's *Fifth Amended General Order No. 2006-16* (October 10, 2007).³ This case is **DISMISSED without prejudice. Pursuant to the Court's local rules, if re-filed, this case shall be marked as related and reassigned to the undersigned.**⁴

IT IS SO ORDERED.

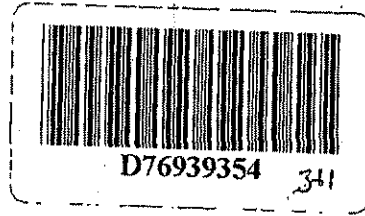
s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: November 14, 2007

³ As of October 10, 2007 when it was issued, the Court's *Fifth Amended General Order No. 2006-16* automatically granted plaintiffs in then-pending foreclosure actions thirty (30) days to amend their pleadings to conform with, among other things, the order's owner/holder "documentation" requirement(s). As of November 9, 2007, the automatic thirty-day period in which to cure pleading defects in then-pending actions expired.

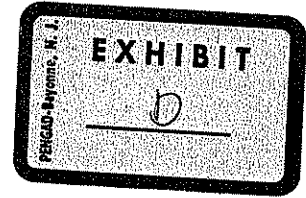
⁴ Because it was dismissed for failure to comply with the Court's *Fifth Amended General Order No. 2006-16*, if this case is re-filed and ultimately proceeds to judgment, the Court will not award in a subsequent action any fees or expenses incurred in connection with this case (*i.e.*, the dismissed case).

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



M

LASALLE BANK MIDWEST, N.A., : Case No. A0709782
Plaintiff, : Judge Martin
v. :
JOHN L. BYBEE, SR., et al., :
Defendants. :



MAGISTRATE'S DECISION

RENDERED THIS 15th DAY OF FEBRUARY, 2008.

This case is before the court upon plaintiff's motion for default judgment. The complaint was filed on October 30, 2007. The assignment of the mortgage was not executed until November 26, 2007.¹ Plaintiff does not aver that it was the real party in interest *at the time the complaint was filed.*² The court finds that plaintiff was not the real party in interest at the time the complaint was filed.³

DECISION

The case is DISMISSED without prejudice.

MICHAEL L. BACHMAN,
MAGISTRATE
COURT OF COMMON PLEAS

¹ / Notice of Filing of Assignment of Mortgage, Ex. A.

² / Aff. as to Real Party in Interest, Jan. 11, 2008.

³ / See *Wells Fargo Bank, N.A. v. Gloria Byrd, et al.*, A0700643, Amended Judgment Entry, Dec. 12, 2007.

NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

Copies sent by Clerk of Courts to:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 2-4-08 Deputy Clerk: 