

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

EVERHOME MORTGAGE COMPANY,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-128
WILLIAM C. BEHRENS, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08CF003774.

Judgment: Affirmed.

Stacy L. Hart and Wayne E. Ulbrich, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, 8th Floor, P.O. Box 5480, Cincinnati, OH 45201-5480 (For Plaintiff-Appellee).

William C. Behrens, pro se, 645 Bank Street, Painesville, OH 44077 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} William C. Behrens, pro se, appeals from a judgment of the Lake County Court of Common Pleas confirming the sheriff's sale of his home in this foreclosure action. He claims the trial court lacked subject matter jurisdiction because the plaintiff, EverHome Mortgage Company, is not the real party in interest. Mr. Behrens failed to timely assert this claim below; thus, the doctrine of waiver requires us to affirm the judgment of the trial court.

Substantive Facts and Procedural History

{¶2} In 2004, Mr. Behrens purchased residential real estate in Painesville, Ohio. He gave a promissory note to First Horizon Home Loan Corporation (“First Horizon”) in the amount of \$136,000, and granted a first mortgage on the property to Mortgage Electronic Registration Systems, Inc, which acted as nominee for First Horizon.

{¶3} On December 1, 2008, EverHome Mortgage Company (“EverHome”) initiated a foreclosure action against Mr. Behrens. The complaint alleged EverHome is the holder of a note secured by a mortgage, which was assigned to EverHome, and that Mr. Mr. Behrens was in default of payment.¹ The fact of default is undisputed.

{¶4} Mr. Behrens did not answer the complaint, and EverHome moved for default judgment on January 21, 2009. On the same day, EverHome also filed a “Final Judicial Report,” to which was attached a document entitled “Assignment of Mortgage” showing an assignment of the mortgage from Mortgage Electronic Registration Systems, Inc., as nominee for First Horizon, to EverHome, on November 28, 2008.

{¶5} The trial court entered a “Judgment and Decree in Foreclosure” in EverHome’s favor. A sheriff’s sale was ordered, but then withdrawn to allow for a loss mitigation workout. The loss mitigation was not successful, and a sale was again ordered.

{¶6} On November 30, 2010, Mr. Behrens filed a motion to vacate the default judgment pursuant to Civ.R. 60(B)(3) and (5). He claimed the notary public’s signature on the Assignment of Mortgage attached to Final Judicial Report was not the same as her signature on her Notary Public Application form. Mr. Behrens maintained that

1. The complaint stated: “The mortgage was filed for record on October 20, 2004, in Instrument No. 2004R049190, of the county recorder’s records and it was assigned to the plaintiff herein.”

because the Assignment of Mortgage was a fraudulent document, EverHome was not a real party in interest, and therefore, it had no standing in bringing the foreclosure action. The trial court overruled the motion on the ground that the motion to vacate was filed untimely, nearly two years after the default judgment was entered. Mr. Behrens did not appeal from the trial court's denial of this motion to vacate.

{¶7} EverHome was the successful bidder at the sale and filed a motion to confirm the sale. Mr. Behrens then filed a (second) motion to vacate the default judgment. He claimed the complaint did not contain proper documentation to show the note was negotiated or the mortgage assigned, therefore, EverHome was not the real party in interest, and the default judgment entered by the trial court was void. Without explicitly addressing the motion, the trial court entered a "Judgment Entry Confirming Sale, Ordering Deed and Distributing Sale Proceeds," thereby denying the motion to vacate by implication.

{¶8} Mr. Behrens now appeals, assigning the following error for our review:

{¶9} "The trial court committed prejudicial error in denying defendant-appellant's motion to vacate void judgment and confirming sale, ordering deed, and distributing sale proceeds. The documents and pleadings before the court demonstrate no justiciable controversy between Plaintiff EverHome Mortgage Company and Defendant William C. Behrens. The court lacked subject matter jurisdiction to hear the case, and thus the judgment rendered is VOID *ab initio*, and must be vacated."

{¶10} Mr. Behrens claims that the complaint filed by EverHome did not establish, through proper documentation, that EverHome was the holder of the note and assignee of the mortgage, and therefore, EverHome lacked standing to institute the foreclosure

action. Mr. Behrens claims, therefore, the trial court lacked subject matter jurisdiction to grant the default judgment.

Common Law Motion to Vacate and Our Standard of Review

{¶11} As an initial matter, we note that Mr. Behrens' second motion to vacate was a common law motion to vacate, the denial of which is the subject of this appeal. As we explained in *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, a common law motion to vacate is the proper mechanism for a claim that the underlying judgment of the trial court is void *ab initio*, because the trial court has the authority to vacate such a judgment based on its inherent power. *Id.* at ¶14, citing *Westmoreland v. Valley Homes Mut. Housing Corp.*, 42 Ohio St.2d 291, 294 (1975). A proceeding to vacate a judgment on the ground that it is void for lack of jurisdiction is not subject to the provisions of Civil Rule 60(B), which apply to those judgments that are merely voidable, and not those which are void *ab initio*. *Id.*, citing *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61 (1956), paragraph one of the syllabus; *Patton v. Diemer*, 35 Ohio St.3d 68 (1988), paragraph four of the syllabus. Thus, Mr. Behrens utilized the proper mechanism for challenging what he claimed to be a void judgment for want of jurisdiction. The standard of review applied to a judgment on a common law motion to vacate is abuse of discretion. *Terwoord v. Harrison*, 10 Ohio St.2d 170, 171 (1967).

Subject Matter Jurisdiction and Standing

{¶12} "Subject matter jurisdiction is a court's power to hear and decide a case on the merits." *Morrison v. Steiner*, 32 Ohio St.2d 86 (1972), paragraph one of the syllabus. "[B]ecause subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. Standing, on the

other hand, is an affirmative defense which can be waived if not timely raised. As this court explained in a recent decision, *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. No. 2011-L-025, 2012-Ohio-124, “lack of standing is an affirmative defense which challenges the capacity of a party to bring an action – it does not challenge a trial court’s subject matter jurisdiction.” *Id.* at ¶13, citing *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998), citing *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 420 (1996), and *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 251 (1992). “Consequently, the failure to raise a standing objection or a ‘real party in interest’ defense at the trial court level constitutes waiver of the claim.” *Yeager* at ¶13, citing *Cart* at ¶18, citing *Washington Mut. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, ¶16.

{¶13} Here, Mr. Behrens claims the default judgment entered in this case was void because EverHome was not the real party in interest, and thus, lacked standing to initiate the foreclosure action and invoke the trial court’s jurisdiction.

{¶14} We are aware that there is a conflict of authorities among the appellate districts regarding whether a plaintiff in a mortgage foreclosure action must show that it owned a note and the mortgage when a complaint was filed in order to have standing. In fact, this is the question that had been certified by the Supreme Court of Ohio in *U.B. Bank, N.A. v. Duvall*, 128 Ohio St.3d 1443, 2011-Ohio-1618, on April 26, 2011.²

2. The conflict cases are: *U.S. Bank, N.A. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115; *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178 (7th Dist.); *Bank of NY. v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483; and *Countrywide Home Loan Servicing, LP. v. Thomas*, 10th Dist. No.09AP-819, 2010-Ohio-3018. The court, however, never resolved the conflict, because it subsequently dismissed the action as moot, after appellees filed a notice of suggestion of mootness.

{¶15} However, we do not reach the merits of this issue because Mr. Behrens failed to challenge EverHome’s standing prior to the entry of default judgment in EverHome’s favor.

{¶16} We recognize that there is also a split of authorities as to whether the issue of standing or the real-party-in-interest defense in a foreclosure action may be waived if not timely asserted.³ This court has already weighed in on this issue and held that the standing issue is not jurisdictional in nature, and therefore, it is waived if not timely challenged. *See Yeager, supra*, and *Cart, supra*.⁴

{¶17} Because Mr. Behrens failed to timely assert his claim that EverHome was not the real party in interest and therefore lacked the standing to bring this foreclosure action, he waived the issue. *Yeager, supra*; *Cart, supra*. Consequently, we do not reach the merits of the underlying issue regarding whether EverHome established standing in its complaint. Mr. Behrens’ failure to timely challenge EverHome’s standing is dispositive of this appeal.

{¶18} The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.

3. *See CitiMortgage, Inc. v. Slack*, 8th Dist. No. 94899, 2011-Ohio-613, ¶10, fn. 3, for a list of these conflicting authorities.

4. The cases holding similarly include: *Washington Natl. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, ¶16; *Freedom Mortgage Corp. v. Groom*, 10th Dist. Nos. 08AP-761 and 09AP-162, 2009-Ohio-4482, ¶21; *Portfolio Recovery Associates, LLC v. Thacker*, 2nd Dist. No. 2008 CA 119, 2009-Ohio-4406, ¶14; and *First Union Natl. Bank v. Hufford*, 146 Ohio App. 3d 673, 677 (3rd Dist.2001).