[Cite as *Bank of NY Mellon Trust Co. v. Shaffer*, 2012-Ohio-3638.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. f.k.a. THE BANK OF NEW YORK TRUST COMPANY, N.A., AS SUCCESSOR IN INTEREST TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, f.k.a. JP MORGAN CHASE BANK, AS TRUSTEE-SURF-BC2,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3051**
- vs -	:	
THERESA A. SHAFFER a.k.a. THERESA MCFAUL, et al.,	:	
Defendant-Appellant,	:	
GEAUGA COUNTY TREASURER, et al.,	:	
Defendants-Appellees.		

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 09F000648.

Judgment: Affirmed.

Matthew I. McKelvey, Lerner, Sampson & Rothfuss, P.O. Box 5480, Cincinnati, OH 45201 (For Plaintiff-Appellee).

Bill L. Purtell, Lerner, Sampson & Rothfuss, 120 East Fourth Street, Suite 800, Cincinnati, OH 45202 (For Plaintiff-Appellee).

James R. Douglass, James R. Douglass Co., L.P.A., 20521 Chagrin Boulevard, Ste. D, Shaker Heights, OH 44122 (For Defendant-Appellant).

David P. Joyce, Geauga County Prosecutor, Courthouse Annex, 231 Main Street,

Chardon, OH 44024 (For Appellee-Geauga County Treasurer).

David W. Cliffe, 525 Vine Street, #800, Cincinnati, OH 45202 (For Appellee-The Huntington National Bank, Successor by Merger to Sky Bank).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Theresa A. Shaffer, appeals the November 29, 2011 Judgment of the Geauga County Court of Common Pleas, denying her Motion for Relief from Judgment from a prior Judgment and Decree in Foreclosure. The issues before this court are: whether the trial court properly denied her Motion for Relief as untimely where a cross-claim remained pending; whether plaintiff-appellee, Bank of New York Mellon Trust Co.'s, alleged lack of standing rendered the Judgment in Foreclosure void ab initio; and whether Shaffer was entitled to a hearing on the merits of her Motion to Dismiss. For the following reasons, we affirm the Judgment of the court below.

{¶2} On June 8, 2009, New York Mellon filed a Complaint in Foreclosure and Reformation of Mortgage in the Geauga County Court of Common Pleas against Theresa Shaffer, Brian Shaffer, the Geauga County Treasurer, Huntington National Bank, and various John Doe defendants.

{¶3} The plaintiff, captioned as The Bank of New York Mellon Trust Company, N.A. fka The Bank of New York Trust Company, N.A., as successor in interest to JPMorgan Chase Bank, National Association, fka JPMorgan Chase Bank, as Trustee-SURF-BC2 c/o Litton Loan Servicing, L.P., alleged that it was "the holder of a note," by assignment, "a copy of which is unavailable at this time." New York Mellon further alleged that the note and the mortgage securing the note were in default. A copy of the

mortgage, filed for record on January 21, 2004, identifies "Wilmington Finance, a division of AIG Federal Savings Bank," as the lender.

{¶4} On June 23, 2009, the Geauga Country Treasurer filed his Answer.

{¶5} On July 14, 2009, Huntington Bank filed an Answer to New York Mellon's Complaint and a Cross-Claim against Theresa and Brian Shaffer, for mortgage indebtedness.

{¶6} On September 11, 2009, New York Mellon filed a Creditor's Affidavit, sworn to by Yvette Mitchell, identified within the Affidavit as a "person [with] authority to negotiate and agree to a settlement of Creditor's claims." Mitchell testified that the principal balance owed by the Shaffers was $178,505.91, "[t]he Creditor **does** hold the Debtor[']s note by assignment," and "[a]n assignment of mortgage was recorded with [the] Geauga County Recorder on June 22, 2009."

{¶7} Also on September 11, 2009, New York Mellon filed an Affidavit of Status of Account, sworn to by Christopher Spradling, identified in the affidavit as "a Foreclosure Manager with Litton Loan Servicing, L.P. as serving agent for The Bank of New York Mellon Trust Company, N.A." Spradling testified that, by virtue of his employment, he "has the custody of and has personal knowledge of * * * the account of Theresa A. Shaffer aka Theresa McFaul and Brian M. Shaffer, defendants herein." Spradling testified the principal balance owed by the Shaffers was $178,505.91.

{¶8} Also on September 11, 2009, New York Mellon filed a Motion for Default Judgment against Theresa and Brian Shaffer.

{¶9} On December 9, 2009, Theresa Shaffer filed a Motion for Leave to Plead, which the trial court granted until January 4, 2010.

{¶10} On January 5, 2010, Theresa Shaffer filed a Motion for Extension of Time to Respond to Plaintiff's Complaint, which the trial court granted until February 8, 2010.

{¶11} On February 8, 2010, Theresa Shaffer filed another Motion for Extension of Time to Respond to Plaintiff's Complaint, which the trial court denied.

{¶12} On February 25, 2010, the trial court issued a Judgment and Decree in Foreclosure and Reformation of Mortgage. The court found Theresa Shaffer to be "in default of * * * Answer"; "that the allegations contained in the Complaint are true"; and "that the conditions of [the] Mortgage have been broken and plaintiff is entitled to have the equity of redemption of the defendant-titleholders foreclosed." The court also determined the Geauga County Treasurer to have senior priority to the proceeds of the sale of the real estate, followed by New York Mellon and, thereafter, by Huntington Bank. Finally, the court reformed the mortgage to reflect the fact that Theresa and Brian Shaffer were not, in fact, married at the time of the execution of the mortgage.

{¶13} On the same date, four and a half hours after the filing of the Judgment and Decree in Foreclosure, Theresa Shaffer filed her Answer.

{¶14} On March 2, 2010, Theresa Shaffer filed a Motion to Vacate Order for Sale and Withdraw Property from Sale, in which she further requested mediation "to prevent foreclosure sale."

{¶15} On March 19, 2010, the trial court ordered the case stayed and the parties to attend mediation.

{¶16} On July 9, 2010, Theresa Shaffer filed a Motion to Dismiss. Shaffer sought to have the foreclose action dismissed on the grounds that New York Mellon did

not have standing to bring the action and miscalculated the amount of default. Shaffer also asked that the mediation scheduled for that day (July 9) be cancelled.

{¶17} On July 15, 2010, the trial court denied the Motion to Dismiss.

{¶18} On September 2, 2010, Theresa Shaffer filed a Motion for Summary Judgment. Shaffer asserted she was entitled to judgment because New York Mellon "has no legal title to the mortgage and failed to prove ownership of the mortgage," and because it "made serious mistakes in calculations and claims regarding overdue amounts causing incorrect and improper crediting."

{¶19} On September 13, 2010, the trial court entered an Order Vacating Foreclosure Mediation Stay, noting that such efforts were "unsuccessful."

{¶20} On October 28, 2010, the trial court denied the Motion for Summary Judgment.

{¶21} On November 22, 2010, Theresa Shaffer filed another Motion to Dismiss based on New York Mellon's alleged lack of standing.

{¶22} On December 7, 2010, the trial court denied the November 22, 2010 Motion to Dismiss.

{¶23} On April 17, 2011, Huntington Bank filed a Motion to Dismiss Cross-Claim on Grounds other than on the Merits. The cross-claim had been filed against Theresa and Brian Shaffer.

{¶24} On April 28, 2011, the trial court granted Huntington Bank's Motion to Dismiss Cross-Claim.

{¶25} On September 26, 2011, Theresa Shaffer filed a Motion for Relief from Judgment, seeking to have the February 25, 2010 Judgment and Decree in Foreclosure

vacated. Again, the basis for the Motion for Relief from Judgment was New York Mellon's alleged lack of "standing to invoke the jurisdiction of this Court."

{¶26} On November 29, 2011, the trial court entered a Judgment Entry denying the Motion for Relief from Judgment. The court found that the Motion was filed over eighteen months after the Judgment and Decree in Foreclosure, and that Shaffer "has offered no reason why the motion was filed so long after the entry of judgment." The court continued: "Even had Ms. Shaffer filed her Motion for Relief from Judgment within a reasonable time, she has not demonstrated entitlement to such relief. Her motion offers no explanation as to why she failed to file an answer or responsive pleading within the time provided by the Rules of Civil Procedure and the extensions granted by the Court."

{¶27} On December 23, 2011, Theresa Shaffer filed her Notice of Appeal. On appeal, Shaffer raises the following assignments of error:

{¶28} "[1.] The court erred when it granted judgment in favor [of] a plaintiff that failed to invoke the subject matter jurisdiction of the court."

{¶29} "[2.] The trial court erred when it denied Defendant-Appellant[']s Motion for Relief from Judgment as not timely filed."

{¶30} "[3.] The court erred when it failed to not afford Defendant-Appellant a hearing."

{¶31} In her first assignment of error, Theresa Shaffer contends that New York Mellon lacked standing, i.e., "an interest in the subject real property," necessary to invoke the jurisdiction of the Geauga County Court of Common Pleas. Moreover, "at no

time during the course of the proceedings," did New York Mellon cure this defect "by demonstrating an after acquired interest in the mortgage."

{¶32} This court has repeatedly affirmed that "[s]tanding * * * is an affirmative defense which can be waived if not timely raised." *EverHome Mtge. Co. v. Behrens*, 11th Dist. No. 2011-L-128, 2012-Ohio-1454, ¶ 12; *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. No. 2011-L-025, 2012-Ohio-124, ¶ 13; *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, ¶ 18 (cases cited). In the present case, Shaffer has failed to raise the issue of standing and/or real party in interest in any responsive pleading prior to the entry of default judgment.

{¶33} Additionally, we note that there is no defect in New York Mellon's standing on the face of the record before us. The Complaint alleged that New York Mellon "is the holder of a note * * * secured by a mortgage * * * and * * * assigned to the plaintiff herein." As Shaffer did not deny these averments in a responsive pleading, they must be taken as "admitted." Civ.R. 8(D). The assignment of the mortgage was affirmed prior to entry of foreclosure by the Creditor's Affidavit of Yvette Mitchell, which stated that the "assignment of [the] mortgage was recorded with [the] Geauga County Recorder on June 22, 2009." Accordingly, there is no factual basis to question New York Mellon's standing for prosecuting the underlying foreclosure.

{¶34} Regarding Mitchell's Affidavit, Shaffer contends that Mitchell failed to aver that the testimony contained therein was based upon her personal knowledge. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26 (the requirement of personal knowledge applies generally to "lay witness testimony in a court of law"). However, Shaffer did not timely object to

Mitchell's Affidavit[1], and New York Mellon's standing to bring the action was established, as noted above, by the averments of the Complaint.

{¶35} At oral argument, it was suggested that the trial court should have been put on notice that a potential problem existed with New York Mellon being the real party in interest because the assignment of the mortgage was not included in the Final Judicial Report. According to Mitchell's Affidavit, however, the assignment was recorded on June 22, 2009, while the effective date of the Final Judicial Report is June 10, 2009. Local Rule 12(A) for the Geauga County Court of Common Pleas provides that the final report should update the chain of title "through the date of lis pendens," i.e. the date on which a complaint is filed. R.C. 2703.26.

{¶36} In sum, New York Mellon's status as the holder of the mortgage was alleged by the Complaint, deemed admitted by Shaffer's failure to plead, confirmed by Mitchell's Affidavit, and is not contradicted by the Final Judicial Report.

{¶37} The first assignment of error is without merit.

{¶38} In the second assignment of error, Theresa Shaffer argues the trial court erred by denying her Motion for Relief from Judgment as untimely.

{¶39} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v.*

1. We note that the form of Mitchell's Affidavit is the form prescribed by the Geauga County Court of Common Pleas for use as the Creditor's Affidavit.

ARC Industries, Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶40} The Judgment Entry denying the Motion for Relief states: "Defendant's Motion for Relief from Judgment was filed on September 26, 2011, more than eighteen months from the entry of the [February 25, 2010] judgment which Defendant seeks to vacate. Defendant has offered no reason why the motion was filed so long after entry of judgment." Shaffer maintains that, since Huntington Bank's cross-claims remained pending when the foreclosure was entered, it did not constitute a final order. Thus, the timeliness requirement of Civil Rule 60(B) did not apply to her Motion for Relief.

{¶41} Contrary to Shaffer's position, the February 25, 2010 Judgment and Decree in Foreclosure did constitute a final order, inasmuch as it affected a substantial right, determined the action with respect to all the parties' respective interests in the subject property, and contained the language "no just reason for delay." R.C. 2505.02(B)(1); Civ.R. 54(B); *see Whipps v. Ryan*, 10th Dist. Nos. 07AP-231 and 07AP-232, 2008-Ohio-1216, ¶ 18-21.

{¶42} Assuming, arguendo, that a final order in this case did not exist until April 28, 2011, when Huntington Bank dismissed its cross-claims against the Shaffers, Theresa Shaffer would still not be entitled to relief. If April 28, 2011, were the date of the final order, Shaffer should have filed a direct appeal as the arguments raised in her Motion for Relief had been previously raised in the course of the proceedings. *Steadley v. Montanya*, 67 Ohio St.2d 297, 299, 423 N.E.2d 851 (1981) ("Civ.R. 60(B) may not be used as a substitute for a timely appeal"). Construing her Motion as one for reconsideration, it would be considered a nullity in that it was filed after a final order.

Kuss v. Clements, 11th Dist. No. 2012-P-0023, 2012-Ohio-1678, ¶ 4. Accordingly, whether construed as a Civil Rule 60(B) motion or as a motion for reconsideration, and whether a final order was entered on February 25, 2010, or April 28, 2011, Shaffer's Motion for Relief was properly denied by the trial court.

{¶43} The second assignment of error is without merit.

{¶44} In her third and final assignment of error, Theresa Shaffer argues that her Motion for Relief from Judgment contained sufficient operative facts that would entitle her to a hearing on its merits. The Ohio Supreme Court has held: "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." (Citation omitted.) *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983).

{¶45} In the present case, Shaffer has failed to demonstrate operative facts that she is entitled to relief under Civil Rule 60(B). As discussed under the second assignment of error, the February 25, 2010 Judgment and Decree in Foreclosure constituted a final order and, thus, Shaffer's Motion failed to satisfy the Rule's timeliness requirement, and so obviated the need for an evidentiary hearing. *Bednar v. Bednar*, 20 Ohio App.3d 176, 178, 485 N.E.2d 834 (9th Dist.1984) ("[t]he trial court has the authority to dismiss a Civ.R. 60(B) motion without first granting an evidentiary hearing when such motion is untimely filed").

{¶46} Moreover, Shaffer's Motion for Relief failed to make any argument that she was entitled to relief under one of the grounds stated in sections (1) through (5) of the Rule. Rather, her Motion was premised, without reference to Civil Rule 60(B), on

the proposition that New York Mellon's alleged lack of standing at the time the Complaint was filed rendered the Judgment in Foreclosure void ab initio. That proposition has been repeatedly rejected by this court. *Behrens*, 2012-Ohio-1454, at ¶ 16; *Yeager*, 2012-Ohio-124, at ¶ 13; *Cart*, 2010-Ohio-1157, at ¶ 18.

{¶47} The third assignment of error is without merit.

{¶48} For the foregoing reasons, the Judgment of the Geauga County Court of Common Pleas, denying Shaffer's Motion for Relief from Judgment, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

{¶49} Inasmuch as the Bank of New York Mellon never met its burden of proving that it was the holder of the note underlying the mortgage at any stage of the foreclosure proceedings, I must respectfully dissent.

{¶50} In order to prevail in a foreclosure action, even on a default basis, a plaintiff must establish: 1) that they are the holder of an executed note and mortgage, 2) that the mortgage was properly recorded, 3) that a default of payment on the note occurred, and 4) the sum due. *See, e.g.*, *Neighborhood Hous. Serv. of Toledo, Inc. v.*

Brown, 6th Dist. No. L-08-1217, 2008-Ohio-6399, ¶16, citing *Equitable Fed. S. & L. Assn. v. Hopton*, 5th Dist. No. CA-6664, 1985 Ohio App. LEXIS 9215 (Oct. 28, 1985).

{¶51} Default judgments are employed where findings by the court regarding matters at issue may be determined by the pleadings alone. While it is undisputed that Civ.R. 55(A) provides that default judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action, it is also beyond dispute that cases should be decided on their merits. *CitiMortgage, Inc. v. Kermeen*, 2d Dist. No. 2011CA2, 2012-Ohio-1655, ¶34.

{¶52} Civ.R. 55(A) provides as follows:

{¶53} "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties."

{¶54} The rule leaves it to the trial court's discretion to decide if a hearing is necessary and to determine whether further evidence is required to support a claim against a defaulting defendant. *See Dallas v. Ferneau*, 25 Ohio St. 636 (1874); *Buckeye Supply Co. v. Northeast Drilling Co*., 24 Ohio App.3d 134, 136, (9th Dist.1985). But, a plaintiff is not entitled to a default judgment solely on the basis that the defendant has failed to timely file an answer, nor should a judgment be based solely upon mere allegations "deemed admitted" by default. Trial courts do not have the discretion to grant a default judgment when there has been a failure of proof, as occurred in this case.

{¶55} Throughout the course of the proceedings below, the bank could not produce the note or a copy of the note, nor did it present an assignment of the mortgage. Although the Creditor's Affidavit contained the averment that the creditor held the note by an assignment which was filed with the Geauga County Recorder on June 22, 2009 (curiously without any reference to a volume and page number), it must be noted that the affiant, Ms. Mitchell's, personal knowledge and authority was described as extending only to "negotiate and agree to a settlement of Creditor's claims," and Mr. Spradling's affidavit of account status pertained only to the account of money due and owing, and not the status of the bank's right to enforce the note as a holder.

{¶56} These affidavits may have been sufficient to establish a default in payment and an amount due and owing, but they are not sufficient to meet the bank's burden to establish that it is the holder of the note and assignee of the mortgage and that the assignment was properly recorded.

{¶57} Why is this important? Because Ohio's negotiable instrument law makes it important.

{¶58} The Second District's opinion in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 194 Ohio App.3d 644, 2011-Ohio-2681, contains an excellent analysis of the lender's right to enforce the note, and its analysis beings with a review of the statutes pertaining to the holder of a note:

{¶59} "R.C. 1303.31(A) identifies three classes of persons who are 'entitled to enforce' an instrument, such as a note: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in

possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D).

{¶60} "With respect to negotiable instruments, 'holder' means either:

{¶61} "'(a) If the instrument is payable to bearer, a person who is in possession of the instrument;

"'(b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.' R.C. 1301.01(T)(1).

{¶62} "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.' R.C. 1302.22(A). The transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument. R.C. 1303.22(B).

{¶63} "'Negotiation' is a particular type of transfer. Specifically, 'negotiation' means 'a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument.' R.C. 1303.21(A). 'Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.' R.C. 1303.21(B)." *Schwartzwald* at ¶35-40.

{¶64} Here, when the bank filed its complaint, it failed to attach a copy of the note, as required by Civ.R. 10, explaining that it was "unavailable at this time." The fact of the matter is that the bank never produced the note or a copy of the note. As the court in *Schwartzwald* observed, "an assignment of a mortgage is sufficient to establish

the transfer of the note, and vice versa," citing Section 5.4 of the Third Restatement of Property (Mortgages). *Id*. at ¶53. Since the plaintiff in *Schwartzwald* actually filed the assignment of mortgage with the trial court after the complaint had been filed but before final judgment, the Second District was able to conclude that the *evidence established* that lender's right to bring the foreclosure action as a nonholder in possession with a right to enforce the note. In the case before us, the Bank of NY never produced the recorded assignment. Ohio's negotiable instrument law does not provide for an affidavit as a substitute for a negotiable instrument.

{¶65} As this court recently stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). I find that the judgment of the trial court does not comport with the record in this case. There simply was a failure of proof in this case.

{¶66} Courts hearing foreclosures necessarily abuse their discretion when granting a motion for default judgment without requiring the lender to establish that it is the holder of the note and mortgage as described in Ohio's commercial code *at some point* before final judgment is entered.

{¶67} Once again, the court in *Schwartzwald* explained why this is critical, citing the Third Circuit Court of Appeals decision in *Adams v. Madison Realty & Dev., Inc*., 853 F.2d 163 (3d Cir.1988). The Third Circuit explained that "it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the

risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title." *Schwartzwald* at ¶47, quoting *Adams* at 168. The Third Circuit further observed that, "Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that '[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol.'" (Citation omitted.) *Schwartzwald* at ¶49, quoting *Adams* at 169.

{¶68} Therefore, I would reverse the judgment of the trial court and remand for further proceedings.