[Cite as *Deutsche Bank Trust Co. Americas v. Ziegler*, 2015-Ohio-1586.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DEUTSCHE BANK TRUST CO. AMERICAS	:	
	:	Appellate Case No. 26287
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2012-CV-5479
v.	:	
	:	(Civil Appeal from
TALBOT D. ZIEGLER, et al.	:	Common Pleas Court)
	:	
Defendants-Appellants	:	

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O P I N I O N

Rendered on the 24th day of April, 2015.

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WELBAUM, J.

{¶ 1} In this foreclosure action, Defendants-Appellants, Talbot and Angela Ziegler, appeal, pro se, from a judgment entry denying their motion for Civ.R. 60(B) relief. In a single assignment of error, the Zieglers contend that the trial court abused its discretion in denying the motion because the trial court lacked jurisdiction over the foreclosure action.

{¶ 2} We conclude that the trial court did not abuse its discretion in denying the motion for Civ.R. 60(B) relief. Initially, we conclude that Angela Ziegler cannot collaterally attack the trial court's foreclosure judgment because her arguments reiterate arguments that concern the merits of the case and could have been raised on appeal. However, Angela Ziegler failed to appeal the foreclosure judgment. In fact, she never appeared in the case. Civ.R. 60(B) cannot be used as a substitute for an appeal.

{¶ 3} We further conclude that Talbot Ziegler failed to establish entitlement to relief under any of the three requirements outlined in Civ.R. 60(B). Specifically, Ziegler failed to establish: (1) that he had a meritorious defense or claim to present if relief were granted; (2) that he was entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) that his motion was made within a reasonable time. Because failure to establish any one of these requirements is fatal to Civ.R. 60(B) relief, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} For purposes of convenience, we incorporate the following factual background, which is listed in *Deutsche Bank Trust Co. v. Ziegler*, 2d Dist. Montgomery No. 25744, 2014-Ohio-471 (*Ziegler I*):

On June 30, 2012, Deutsche Bank filed a complaint for foreclosure against Talbot Ziegler, Angela Ziegler, PNC Bank, and the Montgomery County Treasurer. Deutsche Bank alleged in the complaint that Talbot Ziegler had delivered a promissory note for $185,400, at an interest rate of 7.625% per annum, and that Deutsche Bank was the true holder of the note, as successor in interest to National City Mortgage. Deutsche Bank further alleged that the note had not been paid according to its terms, and that $183,976.93 was currently due and owing.

The complaint also alleged that Angela and Talbot Ziegler had executed a mortgage conveying real estate located at 850 Big Hill Road, Dayton, Ohio, to secure payment of the note, and that the mortgage had also been assigned to Deutsche Bank. Deutsche Bank asked for judgment on the note, foreclosure on the premises, and marshaling of liens on the property.

On August 23, 2012, Talbot Ziegler filed an answer, pro se, admitting that he executed a mortgage for the property located at 850 Big Hill Road, and denying the remainder of the allegations in the complaint. Ziegler also asserted 22 affirmative defenses and requested court-ordered mediation. He did not file a counterclaim. Angela Ziegler did not file any response to the complaint.

The trial court held status conferences in September and November 2012, and in January and February 2013. On January 30, 2013, Talbot Ziegler filed a motion, requesting 30 days leave to retain counsel in the

event that the parties could not reach settlement on or before the February 12, 2013 status conference. Ziegler also asked leave to file "counter complaints" in tort and contract. In the motion, Ziegler contended that Deutsche Bank had unreasonably delayed the processing of loan modification requests.

Subsequently, on March 4, 2013, Deutsche Bank filed a motion for summary judgment, requesting that the court grant judgment on the amount owed on the note and order foreclosure of the property as requested in the complaint. Angela Ziegler did not file a response to the motion. Talbot Ziegler filed a memorandum opposing summary judgment, arguing the affirmative defenses of promissory estoppel, unclean hands, and laches. In the memorandum, Ziegler detailed various ways in which PNC Mortgage, the loan servicer for Deutsche Bank, had allegedly misled him regarding loan modification, and had unreasonably delayed action on his applications for loan modification between April 2012 and February 2013. Among other things, Ziegler alleged that Deutsche Bank had continued to increase the amount of annual income needed for modification, and that counsel for Deutsche Bank had failed to promptly tender documentation to PNC Mortgage, which showed that the Zieglers' income was sufficient to meet the terms of the proposed modification. Ziegler did not, however, provide an affidavit or any documents to support his allegations.

On April 12, 2013, the trial court overruled Ziegler's motion for leave to retain counsel and to file a counterclaim. The court noted that Ziegler

> had sufficient time to retain counsel, and that any extensions would serve to delay foreclosure and were unwarranted on the record before the court. On the same day, the trial court rendered summary judgment in favor of Deutsche Bank, and filed a judgment entry and decree of foreclosure.

Ziegler at ¶ 3-8.

{¶ 5} Prior to the time that Deutsche Bank moved for summary judgment, the Supreme Court had issued its decision in *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, which indicated that standing was a jurisdictional requirement in foreclosure actions. Although *Schwartzwald* was issued in October 2012, Talbot Ziegler never raised any issue about Deutsche Bank's alleged lack of standing prior to the time that the trial court granted summary judgment on the foreclosure claim.

{¶ 6} Talbot Ziegler appealed from the foreclosure judgment, but Angela did not appeal. *Ziegler I*, 2d Dist. Montgomery No. 25744, 2014-Ohio-471, at ¶ 9. Ziegler asserted only one assignment of error on appeal, i.e., that the trial court had erred in granting summary judgment because it had not considered his affirmative defenses of estoppel, unclean hands, and laches. *Id.* at ¶ 11.

{¶ 7} Talbot Ziegler's brief in the first appeal was filed on July 19, 2013. After the time had elapsed for filing briefs, Ziegler filed a motion asking to cite additional authorities. *Ziegler I* at ¶ 20. We concluded that Ziegler was actually attempting to assert an additional assignment of error, in order to allege that Deutsche Bank was not the holder of the note under Ohio law, and that fraud had been committed in the trial court. *Id.* at ¶ 23-24. We declined to consider this as an additional assignment of error because

Ziegler failed to raise the issue in the trial court, even though he had ample opportunity to do so. *Id*. at ¶ 25. We also noted that Ziegler failed to raise the matter in our court, even though, again, he would have been aware of the alleged issues when he filed his brief. *Id.*

{¶ 8} As a final matter, we stated that "If Ziegler believes that fraud has been committed, he can raise the matter in the trial court pursuant to a Civ.R.60(B)(3) motion, which allows vacation of judgments based on fraud or misconduct of an adverse party. The trial court is a more appropriate forum for this matter, particularly since the issue has not been previously considered." *Id*. at ¶ 26.

{¶ 9} We affirmed the foreclosure judgment in early February 2014. On April 9, 2014, the Zieglers filed a motion to vacate the summary judgment, pursuant to Civ.R. 60(B)(3). They argued in the motion and in a reply memorandum that Deutsche Bank lacked standing to pursue the action because it was not a holder of the note; that the judgment was void ab initio because the court lacked subject matter jurisdiction; and that summary judgment was based on "criminal fraud" because Deutsche Bank and its counsel had prevented the Zieglers from defending the case. The Zieglers also filed a motion in June 2014, seeking to stay the execution of a sheriff's sale.

{¶ 10} Subsequently, on June 11, 2014, the trial court overruled the motion for stay and the motion to vacate the judgment. The court concluded that Deutsche Bank had standing to sue as of the filing of the complaint, and that the Zieglers had not satisfied the requirements of Civ.R. 60(B). The Zieglers now appeal from the judgment overruling the motion for stay and motion to vacate.

II. Civ. R. 60(B) Relief

{¶ 11} The Zieglers' sole assignment of error states that:

> The Trial Court Abused Its Discretion Because the Decisions to Grant Summary Judgment and Deny the Appellant's Civ.R. 60(B)(1-5) collateral action are unreasonable, arbitrary, and unconscionable.

{¶ 12} Under this assignment of error, the Zieglers present three issues for review. Their first issue states that:

> When a Defendant in a foreclosure action litigates the issues of standing and fraud at the trial level – and prior to the adjudication of the original appeal – must the trial court objectively resolve the issues, consistent with Ohio law, in a Civ.R. 60(B)(1-5) action when an Ohio appeals court defers the issues back to the trial court?

{¶ 13} Unfortunately, the Zieglers' arguments under this assignment of error are difficult to decipher. As an initial matter, we note that the Zieglers did not litigate any standing or fraud issues in the trial court prior to the original appeal. The only issues they litigated were those mentioned above, which concerned the bank's actions in connection with loan modification.

{¶ 14} We also note that the Zieglers appear to argue that their action involves all five branches of Civ.R. 60(B). However, their fraud claim is specific to Civ.R. 60(B)(3), and we will confine our analysis to that branch of the rule.

{¶ 15} In the remainder of the discussion of their first issue, the Zieglers contend that in order to qualify as a "holder," Deutsche Bank was required to possess and produce an original "blue ink" note payable to bearer or to Deutsche Bank, as well as an

endorsement on the note or in an allonge. The Zieglers further contend that the note was not properly negotiated and transferred from the original holder (National City Mortgage) to Deutsche Bank. As a result, the Zieglers contend that Deutsche Bank lacked standing when suit was filed, based on *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214.

{¶ 16} In view of these alleged facts, the Zieglers argue that the trial court originally improperly granted summary judgment, and that, when the motion to vacate was considered, improperly focused on the fact that Deutsche Bank acquired the interests of National City Mortgage Company pursuant to a merger, rather than negotiation. The Zieglers contend that, contrary to the trial court's conclusion, Deutsche Bank did not become a successor in interest or merge into National City Bank or National City Mortgage; instead, National City Bank was purchased in 2008 by PNC Financial Services. The Zieglers also contend that Deutsche Bank improperly "switched" arguments in defending against the motion to vacate, by contending that it also had rights as a non-holder.

{¶ 17} In response, Deutsche Bank maintains that res judicata bars a defendant who participated in litigation from using post-judgment motions to contest standing. The bank further argues that the trial court had subject-matter jurisdiction over the action, and that lack of standing may not be collaterally used to attack a judgment.

{¶ 18} As pertinent here, Civ.R. 60(B) provides that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated

> intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; * * * The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

{¶ 19} " 'Civ.R. 60(B) represents an attempt to strike a balance between conflicting principles that litigation must be brought to an end and that justice should be done.' " *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077 (2d Dist.), ¶ 30, quoting *Chapman v. Chapman*, 2d Dist. Montgomery No. 21244, 2006-Ohio-2328, ¶ 13. "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. ARC Indus*., Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994), citing *GTE* at 151.

{¶ 20} We review the trial court's decision for abuse of discretion. (Citation omitted.) *Id.* "A trial court abuses its discretion when its decision is 'unreasonable, arbitrary or unconscionable.' " *Herring* at ¶ 34, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 21} In the case before us, Deutsche Bank alleged in the complaint that it was

the true holder of the promissory note signed by Talbot Ziegler and that it was the successor in interest by merger to National City Mortgage Bank. Deutsche Bank further alleged that the mortgage originally granted to National City Mortgage, a division of National City Bank, had been subsequently assigned to Deutsche Bank. In addition, Deutsche Bank attached copies of the note and mortgage to the complaint. Both documents are dated December 22, 2006.

{¶ 22} The note identifies the "lender" as National City Mortgage, a division of National City Bank and the "borrower" as Talbot Ziegler. The note additionally states that the borrower understands that "the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' " Complaint, Ex. A., p. 1.

{¶ 23} The mortgage identifies the "borrowers" as Talbot and Angela Ziegler, and the "lender" as National City Mortgage, a division of National City Bank. The mortgage also identifies the "Note" as "the promissory note signed by Borrower and dated December 22, 2006." Complaint, Ex. B., p. 1. Pursuant to the mortgage agreement, the Zieglers transferred their interest in the property located at 850 Big Hill Road, Dayton, Ohio, as security for the repayment of the debt evidenced by the note. The mortgage agreement also states that "[t]he Note or a partial interest in the Note (together with this Security Interest) can be sold one or more times without prior notice to Borrower." *Id.* at p. 12.

{¶ 24} Deutsche Bank filed a Notice of Filing Preliminary Judicial Report on June 30, 2012, the same day the complaint was filed. The judicial report, issued by First American Title Insurance Company, states that, based on an examination of Montgomery

County, Ohio, property records, a mortgage from the Zieglers to National City Mortgage was filed for record on December 28, 2006, and an assignment of mortgage from National City Mortgage to Deutsche Bank was recorded on April 19, 2011. This would have been prior to the institution of suit on June 30, 2012.

{¶ 25} Subsequently, Talbot Ziegler filed answers on August 23, 2012 and August 24, 2012, admitting that he had executed a note and mortgage for the property located at 850 Big Hill Road, Dayton, Ohio.[1] The answers contain many affirmative defenses, including lack of standing. However, neither Talbot nor Angela Ziegler ever denied signing the notes attached to the complaint, nor did they raise any issues about the authenticity of the notes or any transfers of the notes prior to the time that the trial court granted summary judgment.

{¶ 26} On March 4, 2013, Deutsche Bank filed a motion for summary judgment, attaching a document assigning the note and mortgage from National City Mortgage to Deutsche Bank. The assignment is dated February 13, 2007. Deutsche Bank also attached the affidavit of Justin Pierce, who was an authorized signer of PNC Bank, National Association ("PNC Bank"), which was identified as the servicing agent for Deutsche Bank. Pierce stated that Deutsche Bank was the holder, and had the right to enforce the promissory note signed by Talbot Ziegler. Pierce also indicated that the mortgage had been signed by both Talbot and Angela Ziegler on December 22, 2006, for the amount of $185,400. In addition, Pierce identified the mortgage and note as true copies of the electronically stored duplicates of the originals of the note and mortgage. Pierce further stated that the note and mortgage had been given to National City

[1] It is unclear why Talbot Ziegler filed two answers, as they appear to be identical.

Mortgage, and that Deutsche Bank had not transferred possession of the note since it had been given possession of the note by National City Mortgage. Finally, Pierce stated that Deutsche Bank was the current holder of the note and mortgage that were the subjects of the foreclosure action.

{¶ 27} As was noted, in responding to the summary judgment motion, Talbot Ziegler did not challenge the authenticity of the note and mortgage, nor did he ever assert that he had, in fact, not signed the documents. Instead, Ziegler's response to summary judgment was based solely on allegations that he had attempted to negotiate with PNC Bank, the loan servicer, with respect to loan modification, and that Deutsche Bank had arbitrarily changed the loan modification requirements and had failed to process material documentation. However, Ziegler did not submit any evidentiary materials to support his allegations, nor did he submit any evidentiary materials challenging the matters contained in Deutsche Bank's motion for summary judgment or the supporting affidavit.

{¶ 28} On April 12, 2013, the trial court granted the bank's motion for summary judgment. The court concluded that the bank had met its initial burden under Civ.R. 56 of establishing a right to foreclose on the property, and that Ziegler had failed to establish that there was a genuine issue of material fact as to the original default leading to the foreclosure action. In this regard, the court noted that the bank had provided copies of the promissory note signed by Talbot Ziegler; the mortgage signed by Talbot and Angela Ziegler; the assignment of the mortgage; and an affidavit from an individual with personal knowledge of the account, which demonstrated a default on the note and mortgage.

{¶ 29} As was noted in our opinion on appeal, Talbot Ziegler did not raise the issue of standing in his appeal until after the time for filing briefs had expired. We rejected his

attempt to untimely raise the issue, because he had failed to raise the matter in the trial court or previously during the appeal. *Ziegler I*, 2d Dist. Montgomery No. 25744, 2014-Ohio-471, at ¶ 21-25. We commented that Talbot Ziegler had already filed a motion in the trial court seeking to vacate the summary judgment decision, and in view of the allegations of fraud, the matter would better be addressed in the first instance in the trial court, which had not been given a chance to address the matter. *Id.* at ¶ 26.[2]

{¶ 30} Based on the assignment of error that had been properly submitted, we affirmed the foreclosure judgment of the trial court. *Id.* at ¶ 13-14. In particular, we observed that "In his appellate brief, Ziegler does not challenge the sufficiency of the evidentiary materials that were submitted. Instead, he contests only the trial court's failure to let him proceed on the affirmative defenses that he pled. However, Ziegler failed to present evidence in the trial court in the form required by Civ.R. 56." *Id.* at ¶ 15.

{¶ 31} Ziegler then filed a motion to vacate in the trial court in April 2014, alleging that Deutsche Bank lacked standing to sue when it filed the complaint, because it was not a "holder" of the note, and because the Bank took eight months to produce the assignment of mortgage and affidavit of status. The trial court disagreed, concluding that the bank had standing to sue as of the filing of the complaint. In this regard, the court relied on the merger alleged in the complaint and Pierce's affidavit, which confirmed that Deutsche Bank acquired the note when it merged with National City Mortgage Company. Doc. # 32, p. 5. The trial court concluded that a note could be transferred by methods other than negotiation, and that the merger, rather than a negotiation, resulted in transfer of the note.

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[2] By the time our opinion was issued, the trial court had overruled the motion to vacate, due to the fact that the case was on appeal and there was a bankruptcy involving Ziegler.

{¶ 32} After our decision in the first appeal, and after the trial court's decision on the Zieglers' motion for relief from judgment, the Supreme Court of Ohio decided *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040. In *Kuchta*, the court stated that "a mortgagee's lack of standing to bring an action in foreclosure, *if established*, would constitute a meritorious defense to the action." (Emphasis added.) *Id.* at ¶ 11. *Kuchta* did not address this particular point, however, and instead focused only on the second prong of the *GTE* test, which relates to whether the moving party is entitled to relief on the basis of fraud. *Id.*

{¶ 33} As was noted, the Zieglers contend that Deutsche Bank lacked standing to enforce the note because it did not provide a "blue ink" original to the court, and because the note was not endorsed to Deutsche Bank. As an initial matter, no case authority has been presented to indicate that a bank is required to produce an original document for the court. *Compare Deutsche Bank Natl. Trust Co. v. Taylor*, 9th Dist. Summit No. 25281, 2011-Ohio-435, ¶ 19 (rejecting the mortgagor's argument that, among other things, the "blue ink" original of a note did not exist. The court observed that the mortgagor failed to provide either relevant citations of authority or evidence to support his point).

{¶ 34} We have previously indicated that "[w]here a note is governed by R.C. Chapter 1303, the issue of ownership of the note is not necessarily the critical factor." *Nationstar Mtge., L.L.C. v. West*, 2d Dist. Montgomery Nos. 25813, 25837, 2014-Ohio-735, ¶ 29. In general, " 'a note secured by a mortgage is a negotiable instrument.' " *Id.* at ¶ 27, quoting *Bank of Am., N.A. v. Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, ¶ 29.

{¶ 35} In *West*, we applied the criteria in R.C. 1303.03(A) to decide if the note was

a negotiable instrument. We concluded that it was, based on the fact that the note "contained a promise to pay the lender a set amount, plus interest, provided for monthly payments, and specified the due date for payment in full." *Id.* at ¶ 28. The note in the case before us contains these provisions, and also meets the criteria for a negotiable instrument under R.C. 1303.03(A).

{¶ 36} After deciding that the note was a negotiable instrument, we observed in *West* that:

> Under R.C. Chapter 1303, "the question of who has an ownership interest in a note is different from the question of who is entitled to enforce a note. Sometimes the person entitled to enforce the note and the owner of the note are one and the same. Sometimes they are not. Indeed, R.C. 1303.31(B) states that '[a] person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.' Furthermore, a plaintiff is not required to plead that it was the 'owner' of the note and mortgage in its complaint." *Pasqualone* at ¶ 23, citing *U.S. Bank Natl. Assn. v. Mitchell*, 6th Dist. Sandusky No. S-10-043, 2012-Ohio-3732, ¶ 16, and *Bank of New York Mellon Trust Co. v. Fox*, 6th Dist. Ottawa No. OT-11-046, 2012-Ohio-6245, ¶ 15. " 'An assertion of ownership rights does not indicate entitlement to enforce an instrument, nor does a lack of ownership necessarily prevent a person from being entitled to enforce an instrument.' " *Pasqualone* at ¶ 23, quoting *Mitchell* at ¶ 16.

West, 2d Dist. Montgomery Nos. 25813, 25837, 2014-Ohio-735, at ¶ 29, quoting

Pasqualone at ¶ 23.

{¶ 37} We further observed in *West* that:

> In *Pasqualone*, the Tenth District Court of Appeals discussed in detail the difference between a debtor's interest in the ownership of a note and a debtor's interest in who has the right to enforce the note. The court explained that if " 'the maker pays someone other than a "person entitled to enforce" – even if that person physically possesses the note the maker signed – the payment generally has *no* effect on the obligations under the note.' " (Emphasis sic.) *Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio–5795, at ¶ 24, quoting *In re Veal*, 450 B.R. 897, 910 (Bankr.9th Cir.2011). (Other citations omitted.) Thus, "in a promissory note default case, once the court determines that a plaintiff is the person entitled to enforce the note, and judgment is entered against a defendant on that basis, the defendant is generally protected from being subject to subsequent claims for default on the same note to the extent payment is made to the person entitled to enforce the note whether by the proceeds of the mortgage foreclosure sale or otherwise. Therefore, a debtor's concern with who is the person entitled to enforce a note is paramount." *Pasqualone* at ¶ 24.
>
> In contrast, "the question of *ownership* of a note is not the debtor's concern * * *." (Emphasis sic.) *Id.* at ¶ 25. In this regard, the Tenth District Court of Appeals stressed in *Pasqualone* that:
>
> "This distinction [between an owner of a note and a person entitled to

> enforce a note] further recognizes that the rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note. They are designed to provide for the maker a relatively simple way of determining to whom the obligation is owed and, thus, whom the maker must pay in order to avoid defaulting on the obligation. UCC § 3-602(a), (c) [R.C. 1303.67(A)]. By contrast, the rules concerning transfer of ownership and other interests in a note identify who, among competing claimants, is entitled to the note's economic value (that is, the value of the maker's promise to pay). Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the Veals [as the makers of the note] should not care who actually owns the note – and it is thus irrelevant whether the note has been fractionalized or securitized – so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the 'person entitled to enforce' the note, the Veals should be content." *Pasqualone* at ¶ 25, quoting *Veal* at 912-13.

West, 2d Dist. Montgomery Nos. 25813, 25837, 2014-Ohio-735, at ¶ 30-31, quoting *Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, at ¶ 24-25.

{¶ 38} In addition, we noted in *West* that "R.C. 1303.31(B) stresses this concept, by stating that '[a] person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.' " *Id*. at ¶ 32. Thus, we concluded that the fact that another party allegedly

owned the mortgage and note was irrelevant; instead, the relevant issue was whether the plaintiff bank had the right to enforce the note when it filed suit. *Id.* at ¶ 33.

{¶ 39} In *Pasqualone*, a majority of the panel also concluded that modification should be made of the court's prior holding that a debtor lacks standing to challenge the validity of an assignment because it "is not a party to the assignment of a note and mortgage." *Pasqualone* at ¶ 35, discussing *Deutsche Bank Natl. Trust. Co. v. Whiteman*, 10th Dist. No. 12AP-536, 2013-Ohio-1636, ¶ 16. A majority of the panel concluded that instead, in limited situations, "where R.C. Chapter 1303 applies, a debtor may challenge the assignment of a note (by negotiation or transfer) if such challenge fits the criteria of a denial, defense or claim in recoupment as outlined in R.C. 1303.36 or 1303.35." (Footnotes omitted.) *Pasqualone* at ¶ 35. However, because the mortgagor's defenses did not fit the criteria in these statutes, the court of appeals concluded in *Pasqualone* that the bank's right to payment and to enforce the obligation on the promissory note was not subject to the mortgagor's alleged meritorious defenses under Civ.R. 60(B). *Id.* at ¶ 35.

{¶ 40} R.C. 1303.31(A) states that the following persons are entitled to enforce a negotiable instrument:

> (1) The holder of the instrument;
>
> (2) A nonholder in possession of the instrument who has the rights of a holder;
>
> (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.

{¶ 41} R.C. 1301.201(A)(21) defines a "holder" to mean:

> (a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
>
> (b) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
>
> (c) The person in control of a negotiable electronic document of title.

{¶ 42} Based on this statute, we have observed that "a person need not be a 'holder' of the instrument in order to be entitled to enforce it. Instead, a person can be a nonholder in possession of the instrument who has the rights of a holder." *LaSalle Bank Natl. Assn. v. Brown*, 2014-Ohio-3261, 17 N.E.3d 81, ¶ 36 (2d Dist.). We further noted that "[t]his status can be bestowed in various ways." *Id.* As an example, we quoted the following remarks from V*eal*, 450 B.R. 897 (Bankr. 9th Cir.2011):

> "Non–UCC law can bestow this type of status; such law may, for example, recognize various classes of successors in interest such as subrogees or administrators of decedent's estates. *See* Comment to UCC § 3-301. More commonly, however, a person becomes a nonholder in possession if the physical delivery of the note to that person constitutes a 'transfer' but not a 'negotiation.' *Compare* UCC § 3-201 (definition of negotiation) with UCC § 3-203(a) (definition of transfer). Under the UCC, a 'transfer' of a negotiable instrument 'vests in the transferee any right of the transferor to enforce the instrument.' UCC § 3-203(b). As a result, if a

> holder transfers the note to another person by a process not involving an Article 3 negotiation – such as a sale of notes in bulk without individual indorsement of each note – that other person (the transferee) obtains from the holder the right to enforce the note even if no negotiation takes place and, thus, the transferee does not become an Article 3 'holder.' *See* Comment 1 to UCC § 3-203."

LaSalle at ¶ 36, quoting *Veal* at 911.

{¶ 43} Under R.C. 1303.22:

> (A) 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.
>
> (B) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a direct or indirect transfer from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

{¶ 44} In view of the above discussion, the trial court correctly concluded that Deutsche Bank obtained possession of the note and mortgage prior to suit pursuant to a transfer, and thus, had standing to file suit. The Zieglers contend that this is improper, because Deutsche Bank stated that it was a "holder" of the note, not that it was a non-holder in possession. According to the Zieglers, this change in theory indicates fraud on the part of the bank. We disagree.

{¶ 45} As was noted, whether a party obtains possession of the note by transfer or negotiation is irrelevant for purposes of enforceability under R.C. 1303.31. The Zieglers have never submitted any evidence to indicate that the note and mortgage were improperly obtained by Deutsche Bank. Although the Zieglers have alleged that National City Mortgage was sold to PNC in 2008, they failed to submit any evidence to substantiate this assertion. " 'Relief from a final judgment should not be granted unless the party seeking such relief makes at least a prima facie showing that the ends of justice will be better served by setting the judgment aside.' " *Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077, at ¶ 32 (2d Dist.), quoting *Wayne Mut. Ins. Co. v. Marlow,* 2d Dist. Montgomery No. 16882, 1998 WL 288912, *2-3 (June 5, 1998). (Other citation omitted.) "Broad, conclusory statements do not satisfy the requirement that a Civ.R. 60(B) motion must be supported by operative facts that would warrant relief from judgment." (Citations omitted.) *Herring* at ¶ 32. In the case before us, the only evidence of record is that Deutsche Bank is in possession of the note and mortgage, pursuant to a transfer from the prior owner, National City Mortgage, and that Deutsche Bank has a right to enforce the note and mortgage.

{¶ 46} Furthermore, as was noted in *Pasqualone* and *West*, the Zieglers should not be concerned about who "owns" the note; their only concern is with who has the right to enforce the note. *Pasqualone,* 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, at ¶ 24-25; *West*, 2d Dist. Montgomery Nos. 25813, 25837, 2014-Ohio-735, at ¶ 30-31. In fact, under the holding in *Pasqualone*, the Zieglers would not even be entitled to challenge the assignment of the note, since their alleged meritorious defense does not fit within the requirements for a denial, defense, or recoupment claim found in R.C. 1303.35

or 1303.36. *Pasqualone* at ¶ 36.

{¶ 47} The second requirement for relief under Civ.R.60(B) is that "the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5) * * *." *GTE,* 47 Ohio St.2d at 146, 351 N.E.2d 113, paragraph two of the syllabus. However, under the decision in *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, the alleged fraud in this case would not be grounds for relief under Civ.R. 60(B)(3). In this regard, the Supreme Court of Ohio stated that:

> We agree with the widely held view, expressed by the Tenth District in [*PNC Bank, N.A. v.*] *Botts*, [10th Dist. Franklin No. 12AP–256, 2012-Ohio-5383,] that the fraud, misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3) refers to deceit or other unconscionable conduct committed by a party to obtain a judgment and does not refer to conduct that would have been a defense to or claim in the case itself. *Botts* at ¶ 15; *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077, ¶ 31 (2d Dist.); *First Merit Bank, N.A. v. Crouse*, 9th Dist. Lorain No. 06CA008946, 2007-Ohio-2440, 2007 WL 1461173, ¶ 32; *Wells Fargo Fin. Leasing, Inc. v. Gilliland*, 4th Dist. Scioto No. 03CA2916, 2004-Ohio-1755, 2004 WL 734558, ¶ 19; *Tower Mgt. Co. v. Barnes*, 8th Dist. Cuyahoga No. 51030, 1986 WL 8623, *3.

Kuchta at ¶ 13.

{¶ 48} Although the Zieglers discuss *Kuchta* in their brief, they do not address this particular point. Instead, they focus on the argument that the bank allegedly lacked standing when the complaint was filed, that the defect could not be thereafter cured, and,

that because standing is a jurisdictional requirement, the complaint against them should have been dismissed. However, we have already concluded that the bank had standing at the time suit was filed.[3]

{¶ 49} The Zieglers do attempt to distinguish *Kuchta,* by noting that the parties in *Kuchta* never argued that they were induced into relying on a promise of loan modification (extrinsic fraud). However, the problem with this argument is that the Zieglers never presented any such evidence in the trial court. We noted this fact in our prior opinion. *Ziegler I,* 2d Dist. Montgomery No. 25744, 2014-Ohio-471, at ¶ 17-19. In addition, the Zieglers failed to present any such evidence in connection with their motion for relief from judgment. As a result, there is no basis in the record for concluding that the bank committed extrinsic fraud, or that *Kuchta* should be distinguished on this basis.

{¶ 50} With respect to the Zieglers' allegations of intrinsic fraud, we rejected similar claims in *Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077 (2d Dist.) We noted that:

> "In determining the existence of fraud of an adverse party for purposes of Civ.R. 60(B), the movant must prove the elements of fraud. * * * In an action for fraud, the plaintiff must prove *each of the following elements*: (a) a representation, which (b) is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation, and (f) a

[3] In any event, the Supreme Court of Ohio recently held that evidence of standing need not be filed with the complaint. Instead, "[p]roof of standing may be submitted *subsequent* to filing the complaint." (Citations omitted.) (Emphasis in original.) *Wells Fargo Bank, N.A. v. Horn*, Slip Opinion No. 2015-Ohio-1484, ¶ 12, explaining *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214.

> resulting injury proximately caused by the reliance." *Hasch v. Hasch*, Lake App. No. 2008-L-183, 2009-Ohio-6377, 2009 WL 4547608, ¶ 42. As stated above, the fraud must be material to obtaining a judgment, not fraud or misconduct upon which a defense was or could have been based. Fraud on an adverse party may exist when, for example, a party presents material false testimony at trial, and the falsity is not discovered until after the trial. *Seibert v. Murphy*, Scioto App. No. 02 CA 2825, 2002-Ohio-6454, 2002 WL 31662598.

(Emphasis sic.) *Herring* at ¶ 37.

{¶ 51} As a preliminary matter, the representation that Deutsche Bank was the holder of the note was not false. The note, itself, indicated that anyone to whom the note was transferred would be considered the "note holder." Furthermore, the note was assigned or transferred to Deutsche Bank in 2007 and filed with the recorder in 2011, before the complaint was filed. Deutsche Bank was also in possession of the note at the time suit was filed, and, thereafter. Even if Deutsche Bank may not technically have qualified as a "holder" under the definition in R.C. 1301.201(A)(21)(a) due to the absence of an endorsement, the bank was the note holder, pursuant to the terms of the note that Talbot Ziegler signed. Deutsche Bank was also entitled to enforce the note, as we have indicated.

{¶ 52} Furthermore, assuming for purposes of argument that the bank made a false representation, there is no evidence that Ziegler justifiably relied on the representation. As was noted in *Herring*, "the irregularities in the assignment of mortgage cited by [the defendant] were apparent on the assignment's face and could

have been identified and raised in the trial court in a responsive pleading." *Herring,* 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077, at ¶ 43 (2d Dist.). There is no reason why Ziegler could not have raised the issues of which he complains prior to the foreclosure judgment, and there is no basis upon which to conclude that he justifiably relied on any representations of Deutsche Bank.

{¶ 53} We do agree that a portion of the holding in *Kuchta* would not necessarily prohibit Talbot Ziegler's attempt to file a Civ.R. 60(B)(3) motion. In *Kuchta*, the court held that "[a]n allegation that a plaintiff fraudulently claimed to have standing may not be asserted as a ground for vacating the judgment under Civ.R. 60(B)(3)." *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, paragraph two of the syllabus.

{¶ 54} In *Kuchta*, which was also a foreclosure case, the defendants did not respond to the bank's motion for summary judgment and did not appeal the judgment of foreclosure. *Id.* at ¶ 3-5. They then filed a motion to vacate the summary judgment and decree of foreclosure under Civ.R. 60(B)(3). *Id.* at ¶ 5. Among other things, the court concluded that res judicata prevented the defendants from using the standing issue to establish entitlement to relief under Civ.R. 60(B)(3), because Civ.R. 60(B) "cannot be used as a substitute for an appeal." *Id.* at ¶ 16. The court stressed that the defendants filed the motion "to relitigate an issue that they had raised at the start of litigation and which they failed to appeal." *Id.*

{¶ 55} In view of this holding, res judicata precludes Angela Ziegler from collaterally attacking the judgment, because she failed to appeal from the trial court's foreclosure judgment. In fact, Angela Ziegler chose not to appear in the trial court prior to the time the foreclosure judgment was rendered. She had an opportunity to raise the

issue of standing in the trial court, but chose not to do so.

{¶ 56} Furthermore, Angela Ziegler is merely repeating arguments that concern the merits of the case and could have been raised on appeal. As was noted in *Kuchta*, "a Civ.R. 60(B) motion cannot be used as a substitute for an appeal." (Citation omitted.) *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at ¶ 16. Where the defect of the judgment is apparent from the record, an appeal will lie; where it is not, relief must be sought under Civ.R. 60(B), because error cannot be demonstrated from the record. *See, e.g., Blount v. Smith*, 8th Dist. Cuyahoga No. 96991, 2012-Ohio-595, ¶ 9. "Thus, when one party merely reiterates arguments that concern the merits of the case and that could have been raised on appeal, relief under Civ.R. 60(B) is not available as a substitute for appeal." (Citation omitted.) *Id.*

{¶ 57} The holding in *Kuchta* would not necessarily preclude Talbot Ziegler from attempting to collaterally attack the judgment, since he did appeal from the foreclosure judgment. However, for the reasons previously stated, the ground that Talbot Ziegler urges is not the type of fraud contemplated by Civ.R. 60(B)(3). More specifically, the alleged fraud is the type that could have been raised as a defense to the action. In addition, the alleged error could have been demonstrated from the record.

{¶ 58} The final consideration under Civ.R. 60(B) is whether the motion was brought 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*, 47 Ohio St.2d at 146, 351 N.E.2d 113, paragraph two of the syllabus. The one-year time period is an outer limit and does not necessarily mean that a party has one year to file; instead, all motions are subject to a rule of reasonableness. *Gosink v.*

Hamm, 111 Ohio App.3d 495, 499, 676 N.E.2d 604 (1st Dist.1996). "In all cases, Civ.R. 60(B) motions must be filed within a reasonable time and the movant has the burden of presenting 'allegations of operative facts to demonstrate that he is filing his motion within a reasonable period of time.' " *Lebanon Auto Parts v. Dracakis*, 12th Dist. Warren No. CA99-09-110, 2000 WL 433240, *2 (Apr. 17, 2000), quoting *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974).

{¶ 59} In *Herring*, we concluded that the defendant's motion for relief from judgment, even though filed within a year of the amended judgment of foreclosure, was not timely for purposes of Civ.R. 60(B). In this regard, we observed that:

> Moreover, even though Herring's Civ.R. 60(B) motion was filed within one year of the amended judgment, Herring did not timely challenge GMAC's status as the real party in interest when the complaint was filed. In his motion, Herring asserted that GMAC engaged in fraud by recording an assignment of mortgage that was "so filled with flagrant and fraudulent irregularities that can lead to but one conclusion that the Plaintiff did not become a holder of the Mortgage until after the Complaint was filed." However, the assignment of mortgage was recorded by the Montgomery County Recorder's Office on April 11, 2007, prior to the May 14, 2007 deadline for filing the Herrings' answer to GMAC's complaint. The Herrings were aware of the complaint against them, and the irregularities in the assignment of mortgage cited by Herring were apparent on the assignment's face and could have been identified and raised in the trial court in a responsive pleading. The assignment of mortgage was not filed

> with the court – and the "irregularities" in that document were not raised in the trial court – until it was attached to Herring's Civ.R. 60(B) motion in June 2009. Herring cannot blame GMAC for his and his wife's inaction in failing to challenge GMAC's status as a real party in interest. *See Mid–State Trust IX v. Davis,* Champaign App. No. 07-CA-31, 2008-Ohio-1985, 2008 WL 1838350.

Herring, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077, at ¶ 43 (2d Dist.).

{¶ 60} In the case before us, the promissory note and mortgage were attached to the complaint, which was filed on June 30, 2012. The preliminary judicial report, showing the recording of the assignment of the mortgage to Deutsche Bank on April 19, 2011, was also filed on June 30, 2012. The assignment would also have been of public record at the recorder's office, and would have been available for Ziegler's review. Furthermore, although Talbot Ziegler raised lack of standing in his answer, along with many other defenses, he never mentioned the issue in the trial court prior to the foreclosure judgment.

{¶ 61} When Deutsche Bank filed its motion for summary judgment in March 2013, nearly a year after the complaint was filed, the assignment of the note and mortgage were attached to the bank's motion for summary judgment. While any deficiencies in the bank's documentation would have been apparent from the time that suit was filed, or at the latest, in March 2013, Ziegler never raised any issues with the trial court prior to the time that the foreclosure judgment was granted. The motion that was ultimately filed, on April 4, 2014, was presented to the court nearly two years after the complaint was filed, and about a year and a half after *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979

N.E.2d 1214, was decided.[4] Accordingly, we conclude that the Zieglers failed to file their motion for relief from judgment within a reasonable time, even though the motion was filed a few days prior to expiration of the one-year outer time limit in Civ.R. 60(B).

{¶ 62} Based on the preceding discussion, we conclude that res judicata precludes Angela Ziegler from collaterally attacking the foreclosure proceeding. In addition, Talbot Ziegler's motion fails to meet any of the three criteria for asserting relief under Civ.R. 60(B). Since even one failure to meet the criteria in Civ.R. 60(B) is fatal, the trial court did not abuse its discretion in overruling the motion for relief from judgment. *Strack*, 70 Ohio St.3d at 174, 637 N.E.2d 914, citing *GTE*, 47 Ohio St.2d at 151, 351 N.E.2d 113. Although this disposes of the Zieglers' assignment of error, we will briefly consider the remaining issues raised in the Zieglers' brief.

{¶ 63} The Zieglers' second issue states that:

> When an appellant in a foreclosure action litigates the issues of standing and fraud in an original appeal, is it error for the appeals court to determine the issues are not cognizable, defer them back to the trial court, then refuse to grant a stay of execution after accepting the appeal of a corresponding Civ.R. 60(B)(1-5) action?

{¶ 64} Under this issue, Ziegler appears to be arguing that we are required to consider the issue of fraud despite the Supreme Court of Ohio's statement in *Kuchta* that

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[4] We note that the Zieglers filed a similar motion to vacate in the trial court on December 12, 2013. The trial court overruled this motion on December 17, 2013, due to the pendency of the Zieglers' appeal and a bankruptcy proceeding. Nonetheless, this was still well over a year after *Schwartzwald* was decided. Again, the Zieglers had ample information in order to assert this matter during the trial court proceedings prior to the foreclosure judgment, but failed to do so. Talbot Ziegler has never offered any explanation for this failure.

"[l]ack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment in foreclosure." *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, paragraph two of the syllabus. According to Ziegler, we should have considered the fraud issue when he attempted to raise it on appeal, and cannot now deny him the ability to raise the matter based on the holding in *Kuchta*. As was previously noted, we agree that Talbot Ziegler, only, could raise the matter in the trial court, and in this appeal.

{¶ 65} When we issued our prior opinion*, Kuchta* had not yet been decided, and the appropriate course was to defer to the trial court, since the matter had never been raised in the trial court. In addition, Ziegler had already filed one motion to vacate in the trial court on those grounds. However, the fact that Talbot Ziegler was not precluded from collaterally attacking the judgment does not mean that he would be successful in doing so. Ziegler's success would depend on his ability to satisfy the requirements for Civ.R. 60(B) relief, which he has not demonstrated.

{¶ 66} Ziegler also argues under this issue that his appeal is not being brought under Civ.R. 60(B)(3) only, but is also being brought on the additional remaining grounds in Civ.R. 60(B), including "whether the Plaintiff-Appellee's conduct created (1) discoverable mistakes, (2) inadvertence, (3) surprise, (4) excusable neglect, and (5) newly discovered evidence (by virtue of the trial court's failure to examine existing evidence)." Brief of Defendant-Appellant Talbot D. Ziegler, p. 20. These allegations fall within Civ.R. 60(B)(1) and (2).

{¶ 67} We have already indicated that the argument being made in the trial court was based on alleged fraud under Civ.R 60(B)(3), and that this is the ground we would

consider on appeal. Nonetheless, even if we were inclined to consider the applicability of Civ.R. 60(B)(1) and (2), the focus of Civ.R. 60(B)(1) is not the conduct of the opposing party; it is the conduct of the moving party or its representative. *Foy v. Trumbull Corr. Inst*., 10th Dist. Franklin No. 11AP-464, 2011-Ohio-6298, ¶ 11. As an example of a proper situation under Civ.R. 60(B)(1), excusable neglect has been found where a mortgage loan company failed to appear and defend an action brought to determine lien seniority. *Harris, N.A. v. Douglas*, 10th Dist. Franklin No. 11AP-722, 2012-Ohio-1377, ¶ 9 and 24. The loan company's failure to defend was due to the fact that it did not realize it had an interest in the loan, based on its errors in entering the loan information into a database. *Id.* at ¶ 24. This is not the situation in the case before us. As was noted, Talbot Ziegler was made aware of the documentation pertaining to the claim well before the trial court granted the foreclosure judgment.

{¶ 68} Moreover, with respect to the trial court's alleged failure to consider newly discovered evidence under Civ.R.60(B)(2), "a motion for relief from judgment cannot be predicated upon the argument that the trial court made a mistake in rendering its decision." *Foy* at ¶ 11, citing *Chester Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc*., 102 Ohio App.3d 404, 408, 657 N.E.2d 348 (11th Dist.1995).

{¶ 69} We also note that there was no newly discovered evidence. Civ.R. 60(B)(2) is not satisfied where the moving party fails to establish that the evidence "was 'newly discovered' or that the evidence could not have been earlier discovered with due diligence during the pendency of the proceedings." *Settonni v. Settonni*, 8th Dist. Cuyahoga No. 97784, 2012-Ohio-3084, ¶ 22. As we have stressed, all the evidence in this case was available in the record prior to the time that the trial court granted the

foreclosure judgment.

{¶ 70} Accordingly, the Zieglers' second issue is without merit.

{¶ 71} The Zieglers' third issue states that:

> Does an Ohio common pleas court have jurisdiction over a foreclosure action when the plaintiff fails to present any evidence of standing at the commencement of the case?

{¶ 72} Under this issue, the Zieglers appear to be arguing that the decision of the Supreme Court of Ohio in *Kuchta* is incorrect. They contend that they would be remiss in failing to raise this issue, since a motion for reconsideration was pending before the Supreme Court of Ohio when they filed their brief. We decline to address this issue. The Supreme Court of Ohio clearly stated in *Kuchta* that "[a]lthough standing is required in order to invoke the jurisdiction of the court of common pleas over a particular action, lack of standing does not affect the subject-matter jurisdiction of the court." *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, paragraph three of the syllabus. Furthermore, the Supreme Court of Ohio denied the motion for reconsideration in December 2014. *See Bank of Am., N.A. v. Kuchta*, 140 Ohio St.3d 1523, 2014-Ohio-5251, 20 N.E.3d 730 (Table). As a result, there is no merit in the third issue for review. The issue would be without merit in any event, since Deutsche Bank had standing to assert its claim against the Zieglers when it filed the complaint.

{¶ 73} Based on the preceding discussion, the Zieglers' sole assignment of error is overruled.

III. Conclusion

{¶ 74} The Zieglers' sole assignment of error having been overruled, the judgment

of the trial court is affirmed.

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FROELICH, P.J. and FAIN, J., concur.

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