[Cite as *Natl. Collegiate Student Loan Trust v. Hair*, 2015-Ohio-832.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2 PLAINTIFF-APPELLEE	)	CASE NO. 13 MA 8
VS. AARON HAIR, et al. DEFENDANTS-APPELLANTS	)	OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 12 CV 584

JUDGMENT: Reversed. Complaint Dismissed Without Prejudice.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Eric Wasseanan
Babcock & Wasserman Co., L.P.A.
55 Public Square, Suite 700
Cleveland, Ohio 44113

For Defendants-Appellants:

Atty. Philip D. Zuzolo
Atty. Patrick B. Duricy
Zuzolo Law Offices, LLC
700 Youngstown-Warren. Road
Niles, Ohio 44446

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 3, 2015

[Cite as *Natl. Collegiate Student Loan Trust v. Hair*, 2015-Ohio-832.]
WAITE, J.

{¶1} This case arises from a grant of summary judgment to Appellee National Collegiate Student Loan Trust 2005-2 ("NCSL Trust") after Appellants Aaron and Martha Hair defaulted on a promissory note as part of a student loan. Appellants, as promisor and co-signer of the note, assert that the trial court erred in granting summary judgment because NCSL Trust had not proved standing prior to final judgment, and because genuine issues of material fact existed as to the amount owed.

{¶2} NCSL Trust did not provide sufficient evidence on the record for the trial court to conclude that it had standing at the time of filing the complaint or at the time summary judgment was granted. The document purportedly establishing standing was not filed until after final judgment had been entered. We reverse the judgment of the trial court and dismiss the case without prejudice due to lack of standing on the part of the plaintiff.

STATEMENT OF FACTS

{¶3} On February 28, 2005, Appellants Aaron and Martha Hair entered into a promissory note for a student loan with Bank One/JP Morgan Chase Bank, N.A. (Bank One) for $12,000, with a prepaid finance charge of $834.22. The total payments, if all were made as scheduled over 240 months, would have been $26,071.20. It is alleged that Appellants later defaulted on the loan.

{¶4} On February 27, 2012, Appellee NCSL Trust filed a complaint in the Mahoning County Common Pleas Court against Appellants seeking $21,550.42,

which encompassed the principal sum of $15,258.42, with interest accruing at a variable rate of 6.85% in the amount of $6,303.00 as of January 4, 2012.

{¶5} On May 3, 2012, NCSL Trust filed a motion for summary judgment. Attached thereto was an affidavit by a Ms. Meghan Carabello stating that she keeps the records in the regular course of business for NCSL Trust and that the records indicate that Appellants owed NCSL Trust $21,550.42.

{¶6} On January 4, 2013 Appellants filed their response in opposition to summary judgment and a motion to dismiss for lack of standing. On January 11, 2013, the trial court granted NCSL Trust's motion for summary judgment and denied Appellants' motion to dismiss. On January 17, 2013 NCSL Trust belatedly filed its response to Appellants' motion to dismiss or, in the alternative, leave to file an amended complaint. This timely appeal followed.

STANDARD OF REVIEW

{¶7} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary

judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364, N.E.2d 267 (1977).

{¶8} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E. 2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶9} The portions of the record or evidentiary materials listed in Civ.R. 56(C) include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. The court is obligated to view all the evidentiary material in a light most favorable to the nonmoving party. *Temple* at 364.

{¶10} Summary judgment is appropriate when there is no genuine issue as to any material fact. A material fact is dependent on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662

N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2 ON THE SOLE COUNT OF ITS COMPLAINT WHEN THE APPELLEE DID NOT HAVE STANDING TO FILE THE COMPLAINT, AND THE APPELLEE DID NOT ESTABLISH THE SUM OWED WITHOUT A QUESTION OF MATERIAL FACT OR GENUINE DISPUTE THEREON.

{¶11} Appellants present two main questions within their sole assignment of error. The first is whether NCSL Trust had standing to file the complaint. The second is whether NCSL Trust established the amount of money still owed on the promissory note such that no genuine issue of material fact exists as to that question. Because we resolve this appeal based on the first issue, the second issue is moot.

{¶12} Regarding the question of a plaintiff's standing to invoke the jurisdiction of the court over a promissory note, the Ohio Supreme Court recently held that: "Because standing to sue is required to invoke the jurisdiction of the common pleas court, 'standing is to be determined as of the commencement of suit.'" *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 18, 2012-Ohio-5017, 979 N.E.2d 1214, ¶24, citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5. The Supreme Court further held that a

later correction or substitution of the proper party is insufficient to correct any deficiency. *Schwartzwald* at ¶25-28.

{¶13} R.C. 1303.31(A)(1) states that the holder of an instrument is entitled to enforce the instrument. We recently held that being the holder of a note at the time that suit was filed is sufficient to establish standing even when that holder had not yet been assigned the mortgage underlying the note at the time of filing. *Citimortgage, Inc. v. Randy Loncar*, 7th Dist. No. 11 MA 174, 2013-Ohio-2959, ¶15-17. We also held that the interest created through being the holder of a promissory note is sufficient to meet the real interest requirement in order to establish jurisdiction. *Id*.

{¶14} It appears from the record that at the time the trial court granted summary judgment, Appellee had not provided sufficient evidence on the record to prove that it was the holder of the note and, thus, entitled to file suit. Appellee attached only the original loan agreement between Appellants and Bank One/JP Morgan Chase Bank, N.A. to its original complaint. Based on this loan agreement, the trial court granted summary judgment on January 11, 2013. On January 17, 2013, Appellees filed a response to defendant's motion to dismiss. Attached to that response was a purported assignment of the promissory note from Bank One to NCSL Trust. Because a final order had already been entered, this evidence was filed too late to be of any value for purposes of granting summary judgment or for purposes of appeal. Since there was no evidence supporting Appellee's interest in the note at the time of final judgment, pursuant to *Schwartzwald*, the complaint should have been dismissed.

{¶15} Appellee argues that this case can be distinguished from *Schwartzwald*. In *Schwartzwald*, the plaintiff lacked standing from the outset and later tried to obtain proper standing after the suit had commenced. However, in this case, according to Appellee the purported lack of standing was merely a problem of finding the proper assignment form to demonstrate Appellee's standing. Appellee contends that the assignment occurred prior to the time it filed the claim, but acknowledges that the evidence proving this assignment was not filed prior to the time the court issued its final judgment. Appellee concedes that it filed the assignment instrument on January 17, 2013, six days after the court issued final judgment in this matter.

{¶16} We cannot overlook the basic premise that cases are decided on evidence, and that appeals are decided on the evidence that was part of the trial court record at the time judgment was entered. Since Appellee did not prove in a timely manner that it had standing, this appeal cannot be distinguished from *Schwartzwald*. Appellee's January 17, 2013, filing was not properly before the trial court prior to the issuance of final judgment, and we cannot consider it for purposes of reviewing the January 11, 2013, judgment entry. A reviewing court cannot add matters to the record and then decide the appeal on that basis. *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730, 891 N.E.2d 802 (1st Dist.). Pursuant to *Schwartzwald*, Appellant’s assignment of error has merit and is sustained. The judgment of the trial court is reversed and the complaint is dismissed without prejudice.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.