[Cite as *Mtge. Electronic Registration Sys., Inc., v. Mosley,* 2010-Ohio-2886.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93170

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

PLAINTIFF-APPELLEE

vs.

TRACIE MOSLEY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-531027

BEFORE: Celebrezze, J., Stewart, P.J., and Jones, J.

RELEASED: June 24, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendants-appellants, Tracie Mosley and Paula Kurnava (collectively referred to as "appellants"), appeal the decision of the trial court in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"). Based on our review of the record and pertinent case law, we affirm.

{¶ 2} In August 2002, appellants responded to a flier from a company called USA Builders ("USA"), which purported to assist first-time home buyers in finding properties for purchase. Upon contacting USA, appellants spoke with a representative named Jerry Ponsky ("Ponsky"), who obtained appellants' contact information and arranged a meeting.

{¶ 3} During their initial consultation with Ponsky, appellants provided Ponsky with the information necessary to obtain their credit reports, and they signed a release allowing Ponsky to obtain such reports. Ponsky had suggested that appellants might be interested in purchasing a property located at 14805 Darwin Avenue (the "Property").

{¶ 4} Appellants then arranged to view the Property. According to appellant Tracie Mosley ("Mosley"), Ponsky assured appellants that certain repairs would be made to the Property.[1] Although appellants eventually

[1] According to Mosley's testimony at trial, these repairs included, but were not limited to, electrical wiring in the garage, removal of a wall that separated two bedrooms, and certain repairs to

decided to purchase the Property, they never memorialized a formal agreement with USA or Ponsky that the promised repairs would be completed. On October 4, 2002, appellants signed a purchase agreement wherein they promised to purchase the Property for $84,000. Since appellants were financially unable to purchase the Property without financing, Ponsky assisted them in applying for a loan with Bank One, N.A. ("Bank One") to finance the purchase.[2] Mosley admitted to allowing Ponsky to satisfy a car loan on his behalf in the amount of $13,000 so that the loan application would indicate that Mosley had less debt than he actually had. Appellants then executed a second mortgage on the Property in order to repay Ponsky for this loan. In support of their application for the first mortgage, appellants also signed a fake "gift letter," which indicated that appellants had more money in their checking account than they actually did.

{¶ 5} After engaging in the previously discussed activities in order to have the requisite credit score to obtain financing, appellants obtained a Bank One loan to finance the purchase of the Property. Appellants executed a promissory note (the "Note") in an amount of $81,200 plus interest and delivered the Note to Bank One. This Note established monthly payments for principal and interest in an amount of $506.59, due on the first day of

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the basement walls.

[2] Ponsky and Bank One are not parties to this action.

each month beginning December 1, 2002. Appellants were also provided with an initial escrow analysis indicating that the initial escrow payment would be an additional $168.74 per month.

{¶ 6} At closing, appellants were provided with the required disclosures. These disclosures included the Federal Truth-in-Lending Disclosures statement, which set forth the annual percentage rate, the finance charge, the amount financed, the total amount and number of payments, and the timing of payments scheduled to repay the loan. Appellants also signed a Uniform Residential Loan Application, through which they acknowledged and agreed that Bank One, its agents, successors, and assigns made no representations or warranties to appellants regarding the condition or value of the Property.

{¶ 7} Following execution and delivery of the Note, Bank One endorsed the Note in blank, rendering it bearer paper.[3] According to MERS, it is the holder of the Note despite the fact that the Note remained in the possession of the servicer, Bank One. On May 26, 2004, Bank One executed an assignment, formerly indicating that it had assigned the Note to MERS. Appellants also executed a mortgage (the "Mortgage") naming MERS, as nominee for Bank One, as the mortgagee.

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[3] There is no date specifying exactly when the Note was endorsed in blank.

{¶ 8} Despite the fact that appellant Paula Kurnava ("Kurnava") stopped working in 2003, appellants remained current in their payments on the Note until January 1, 2004. In February 2004, appellants' monthly payment on the Note increased due to an increase in the Property's real estate taxes. Because of this increase, appellants were unable to make their monthly payment and went into default. The current unpaid principal balance on the Note is $80,109.85, with interest accruing on that amount since January 1, 2004.

{¶ 9} On May 21, 2004, MERS filed a foreclosure action against appellants in the common pleas court. Appellants asserted several counterclaims, including estoppel, failure of consideration, want of consideration for a negotiable instrument, and rescission. Appellants also asserted counterclaims against MERS and MERS as nominee for Irwin Union Bank and Trust Co.[4] These counterclaims included civil conspiracy, fraud, conversion, a violation of the Truth in Lending Act, RICO violations,[5] and a violation of the obligation of good faith and fair dealing.

{¶ 10} This case proceeded to a bench trial before a magistrate beginning December 17, 2007. In her findings of fact and conclusions of law

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[4] MERS as nominee for Irwin Union Bank and Trust Co. was later dismissed from this action.

[5] The counterclaim related to the alleged RICO violation asserted that Bank One and Irwin Union Bank and Trust Co. conspired to commit such a violation. It is notable that Bank One was never named as a party in this action.

filed July 22, 2008, the magistrate reviewed all of the evidence presented at trial and found in favor of MERS on its claim for money damages and foreclosure of the Property.[6] The magistrate also found in favor of MERS with regard to appellants' claims and counterclaims. This appeal followed. Appellants present four assignments of error for our review.[7]

Law and Analysis

I. Standing

{¶ 11} In their first assignment of error, appellants argue that the trial court committed reversible error in finding that MERS had standing to bring the foreclosure action. MERS, however, argues that appellants waived this standing argument. MERS's argument in this respect is twofold: 1) it argues that appellants' argument at trial was solely that MERS was not a holder of the Note and no standing issue was raised, and 2) even if appellants had argued standing to the magistrate, lack of standing is not a jurisdictional defect under Ohio law and is waived if not timely raised. We find MERS's argument unpersuasive.

A. Waiver

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[6] The magistrate specifically rendered judgment in favor of MERS in the amount of $80,109.85 plus interest at the rate of 6.375 percent per annum from January 1, 2004.

[7] Appellants' assignments of error are contained in appendix A to this Opinion.

{¶ 12} In essence, MERS is asking this court to strictly scrutinize the language used by appellants when making their standing argument. A review of the record, however, clearly shows that appellants made several arguments with regard to whether MERS was the proper party to bring the foreclosure action. Specifically, in their reply in opposition to MERS's motion for summary judgment, appellants stated they reserved the right to file a motion to dismiss relating to whether MERS was the proper party to bring the foreclosure action. In their proposed findings of fact and conclusions of law, appellants argued that MERS was not the owner and holder of the Note, and thus was not entitled to foreclose on the mortgage. Finally, in their objections to the magistrate's decision, appellants argued that "[t]he magistrate's finding that the plaintiff, MERS, is the holder of the promissory note and has a right to foreclose is contrary to the evidence and an error of law." A review of the record in this case shows that appellants argued, on more than one occasion, that MERS was not the holder of the Note, and thus lacked standing to bring this foreclosure action.

{¶ 13} Whether appellants made a specific "standing" argument below is inconsequential to our analysis here. MERS relies on *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002, to argue that lack of standing is not a jurisdictional defect in Ohio. This argument is misguided. In *Suster*, an individual's estate brought a claim in the common

pleas court for wrongful incarceration. Id. at 71. The county prosecutor filed a petition in the Ohio Supreme Court for a writ of prohibition arguing that the trial court should be prohibited from taking further action due to its lack of jurisdiction. Id. at 71-72. Part of the relator's argument in *Suster* was that the estate did not have standing to bring a wrongful incarceration action because such a right was strictly conferred upon the individual himself pursuant to R.C. 2743.48. Id. at 76.

{¶ 14} The Court in *Suster* held that jurisdiction may have multiple meanings "depending upon the context in which it is used and the subject matter to which it is directed." Id. at 77, fn. 4, citing *Garverick v. Hoffman* (1970), 23 Ohio St.2d 74, 78-79, 262 N.E.2d 695. The Court went on to note that it only found standing to be a jurisdictional requirement in certain cases involving administrative appeals, which require parties to meet strict standing requirements for the administrative agency to have jurisdiction. Id., citing *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision*, 78 Ohio St.3d 459, 1997-Ohio-199, 678 N.E.2d 917; *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 513 N.E.2d 302.

{¶ 15} This case differs from *Suster* in one significant aspect. In *Suster*, the relator was challenging the trial court's jurisdiction through a writ of prohibition. In this case, appellants are challenging MERS's standing in a direct appeal. In fact, when discussing cases in which standing was found to

be a jurisdictional element, the Court in *Suster* acknowledged that "[i]n these cases, the issue of the party's standing was raised and handled by way of direct appeal, not by a writ of prohibition." *Suster* at 77, fn. 4.

{¶ 16} It is well established that, in most instances, standing is a necessary element in a court's jurisdiction and cannot be waived. *Buckeye Foods* at 460 ("Cleveland replies that standing is jurisdictional and cannot be waived. We agree with Cleveland."); *New Boston Coke Corp.* at 218 ("[T]he issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings."); *Gildner v. Accenture, L.L.P.*, Franklin App. No. 09AP-167, 2009-Ohio-5335, ¶9 ("[S]tanding is an element of the court's jurisdiction and thus cannot be waived. * * * It can be raised at any time.").

{¶ 17} Based on our review of the record, it is evident that appellants argued on several occasions that MERS was not the proper party in interest to bring the foreclosure action. MERS is essentially asking us to put form over substance in finding that appellants waived their standing argument. We are unwilling to apply such a strict construction to appellants' arguments below. Standing is a jurisdictional requirement and cannot be waived. Accordingly, we find that appellants did not waive their standing argument and it is properly before us on appeal.

B. MERS's Standing in this Case

{¶ 18} Appellants argue that MERS is not the real party in interest and therefore it lacks standing to pursue this action. Appellants rely on the fact that MERS has no beneficial interest in the mortgage to argue that it lacks standing to foreclose on the Property. A similar argument has been considered by federal courts, which have consistently held that MERS does have standing. See, e.g., *Morgera v. Countrywide Home Loans, Inc.* (E.D.Cal. 2010), No. 2:09-CV-01476-MCE-GGH (slip opinion) ("Courts have consistently found that MERS does in fact have standing to foreclose as the nominee of the lender."); *Trent v. Mtge. Electronic Registration Systems, Inc.* (C.A.11, 2008), 288 Fed. Appx. 571; *Mtge. Electronic Registration Systems, Inc. v. Azize* (Fla.App. 2007), 965 So.2d 151; *Mtge. Electronic Registration Systems, Inc. v. Revoredo* (Fla.App. 2007), 955 So.2d 33. In reaching this conclusion, the court in *Morgera* relied on the mortgage agreement. As in *Morgera*, the Mortgage in this case names MERS, as nominee for Bank One, as the mortgagee. Page 5 of the Mortgage, the bottom of which was initialed by appellants, also contains a provision that states: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of

Lender including, but not limited to, releasing and canceling this Security Instrument." This provision makes it obvious that MERS did, in fact, have standing to foreclose on the Property.

{¶ 19} Appellants also rely on *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, and *Wells Fargo Bank, N.A. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092, to argue that MERS lacked standing. In each of those cases, the courts held that a party lacks standing to invoke a court's jurisdiction unless he has some real interest in the subject matter of the action. *Byrd* at ¶9; *Jordan* at ¶21. Those cases are factually distinguishable from the case at bar. In this case, appellants executed a mortgage naming MERS, as nominee for Bank One, as the mortgagee. The Mortgage, which was signed by both appellants, also gave MERS a right to foreclose on the Property.

{¶ 20} The dissent argues that MERS has no beneficial interest in the outcome of the litigation, and thus it lacks standing. In *Morgera*, however, the court held that "[u]nder the mortgage contract, MERS has the legal right to foreclose on the debtor's property. The fact that MERS, the mortgagee, lacked a beneficial interest in the note that was secured by the mortgage does not deprive MERS of standing to enforce the note and foreclose the mortgage. MERS is the owner and holder of the note as nominee for the lender, and

thus MERS can enforce the note on the lender's behalf." (Internal citations omitted.) *Morgera* at 8.

{¶ 21} In this case, MERS has always been the mortgagee and has had a contractual right to foreclose on the Mortgage. With regard to the Note, the dissent correctly states that it was assigned to MERS after litigation had already commenced. What the dissent ignores is the fact that the Note was endorsed in blank. While there is no date accompanying the blank endorsement, no evidence was presented, nor did appellants ever claim, that the Note was endorsed in blank after litigation had commenced. Based on these facts, MERS did have standing to pursue this foreclosure action, appellants' reliance on *Byrd* and *Jordan* is misguided, and appellants' first assignment of error is overruled.

II. Independent Review of Magistrate's Decision

{¶ 22} In their second assignment of error, appellants argue that the trial court committed reversible error when it failed to conduct an independent review of the evidence before adopting the magistrate's decision. More specifically, they argue that the trial court abused its discretion when adopting the magistrate's decision, which held that appellants' affirmative defenses were not properly pleaded. Appellee argues that appellants rely solely on the trial court's judgment entry and present no evidence that the

trial court did not conduct an independent review of the evidence presented at trial.

{¶ 23} Civ.R. 53(D)(4)(d) provides that "[i]f one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Since this provision requires a de novo review, the trial court may not merely "rubber stamp" the magistrate's decision. *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 793, 758 N.E.2d 1234; *Roach v. Roach*, (1992), 79 Ohio App.3d 194, 207, 607 N.E.2d 35. "Thus, '[t]he trial court should not adopt challenged [magistrate's] findings of fact unless the trial court fully agrees with them — that is, the trial court, in weighing the evidence itself and fully substituting its judgment for that of the [magistrate], independently reaches the same conclusion.'" *McCarty v. Hayner*, Jackson App. No. 08CA8, 2009-Ohio-4540, ¶17, quoting *DeSantis v. Soller* (1990), 70 Ohio App.3d 226, 233, 590 N.E.2d 886.

{¶ 24} An appellate court presumes that the trial court conducted an independent review of the magistrate's decision unless the appellant affirmatively shows that the trial court failed to conduct such an independent analysis. *McCarty* at ¶18, citing *Hartt v. Munobe*, 67 Ohio St.3d 3, 7,

1993-Ohio-177, 615 N.E.2d 617; *Arnold v. Arnold*, Athens App. No. 04CA36, 2005-Ohio-5272, at ¶13; *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153, at ¶47. In addition, the fact that the trial court adopted the magistrate's decision in no way shows that the trial court did not exercise independent judgment. Id., citing *State ex rel. Scioto Cty. Child Support Enforcement Agency v. Adams* (July 23, 1999), Scioto App. No. 98CA2617.

{¶ 25} Appellants rely on the trial court's journal entry, in which it adopted the magistrate's decision, to argue that the trial court did not conduct the requisite independent review of the magistrate's decision. We find no merit to this argument. The trial court's journal entry specifically indicated that it had considered all of the evidence presented when making its determination. In fact, the journal entry states: "After consideration of Defendants' objection to the magistrate decision, the response of Plaintiff [MERS], Defendants' supplemental objections and Plaintiff's response to Defendants' supplemental objections, this court overrules Defendants' objection."

{¶ 26} The magistrate's opinion in this matter set forth extensive findings of fact and conclusions of law. The trial judge indicated that he had considered all of appellants' objections and supplemental objections and had determined that the magistrate's decision was sound. Appellants have failed

to point to one scintilla of evidence that proves the trial court failed to undertake an independent review of the magistrate's decision. Based on these circumstances, we cannot find that the trial judge failed to undertake an independent analysis of the case at bar. Although the trial judge's opinion is short, there is no evidence that he merely "rubber stamped" the magistrate's decision. See *McCarty* at ¶19; *MacConnell v. Nellis*, Montgomery App. No. 19924, 2004-Ohio-170, ¶12 ("Although the trial court's written decision is not lengthy, it did not merely 'rubber stamp' the magistrate's decision."). Appellant's second assignment of error is overruled.

III. Sufficiency and Manifest Weight of the Evidence

{¶ 27} In their third assignment of error, appellants argue that the trial court's decision was based on insufficient evidence and was against the manifest weight of the evidence. The gravamen of appellants' argument is that the trial court erred in finding in favor of MERS with regard to appellants' affirmative defenses and counterclaims.

{¶ 28} The Ohio Supreme Court established the standard for determining whether a civil judgment is against the manifest weight of the evidence. In *C.E. Morries Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578, the Court stated that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight

of the evidence." When reviewing the sufficiency of the evidence in civil cases, the question is whether, after viewing the evidence in a light most favorable to the prevailing party, the judgment is supported by competent, credible evidence. *Ruffo v. Shaddix* (June 10, 1999), Cuyahoga App. No. 74344, *2. Put more simply, the standard is "whether the verdict [is] one which could be reasonably reached from the evidence." Id., citing *Hartford Cas. Ins. Co. v. Easley* (1993), 90 Ohio App.3d 525, 630 N.E.2d 6. When engaging in this analysis, an appellate court must remember that the weight and credibility of the evidence are better determined by the trier of fact. Id. For ease of discussion, appellants' specific arguments will be addressed in the order in which they were argued in appellants' brief.

A. MERS's Liability as Assignee of Bank One

{¶ 29} With regard to their sufficiency and manifest weight arguments, appellants first argue that MERS should be held liable for fraud. Appellants specifically argue that MERS, as assignee and holder of the Note, is liable for any fraud Bank One perpetrated on appellants. This argument, while legally correct, has no factual basis in this case.

{¶ 30} MERS, as holder of the Note, would be liable as a holder for any fraud perpetrated by Bank One.

{¶ 31} "A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. * * *

In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 1998-Ohio-612, 692 N.E.2d 574, citing *Beer v. Griffith* (1980), 61 Ohio St.2d 119, 123, 399 N.E.2d 1227. Ohio courts have consistently held that the same elements must be proven in order to establish fraud or fraud in the inducement. *Natl. City Bank v. Slink & Taylor, LLC*, Portage App. No. 2002-P-0045, 2003-Ohio-6693, ¶27. The elements of fraud in the inducement are "(1) a representation of fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with utter disregard and recklessness, as to whether it is true or false, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation, (6) and a resulting injury proximately caused by the reliance." *Slink & Taylor* at ¶23.

{¶ 32} In order for appellants to substantiate a claim of fraud or fraud in the inducement against MERS, they were required to show at trial that Bank One made a material misrepresentation with regard to the Property. Appellants failed to meet this burden. The only wrongdoing proven at trial, if any, was on the part of Ponsky. Appellants presented no evidence that proved that Bank One and Ponsky were engaged in any sort of joint venture

or had any agency/ principal relationship. The only evidence presented by appellants to this effect was Mosley's testimony that he was under the impression that Ponsky worked for Bank One. Whether to give any weight to this testimony was within the sound discretion of the trial court and will not be questioned on appeal. This testimony is questionable, however, based on the irrefutable fact that appellants knew Ponsky worked for USA. Regardless, appellants presented no evidence to prove that Bank One should be held liable for misrepresentations, if any, made by Ponsky.

{¶ 33} Based on our review of the transcript, the trial court's decision to deny appellants' fraud claims was based on competent, credible evidence. No evidence was presented to show fraud on the part of Bank One. As such, MERS cannot be held liable for any alleged fraud on a theory of assignee liability.

B. Civil Conspiracy

{¶ 34} The second prong of appellants' sufficiency and manifest weight argument alleges that a civil conspiracy was proven to exist between Bank One and Ponsky and that the trial court committed reversible error in failing to hold MERS liable for such a conspiracy. Civil conspiracy is defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 126, 512 N.E.2d 640. "The elements of civil conspiracy are (1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself." *Urbanek v. All State Home Mtge. Co.*, 178 Ohio App.3d 493, 2008-Ohio-4871, 898 N.E.2d 1015, ¶19, citing *Universal Coach, Inc. v. New York City Transit Auth., Inc.* (1993), 90 Ohio App.3d 284, 292, 629 N.E.2d 28.

{¶ 35} Our analysis above shows that appellants failed to prove a malicious combination of two or more individuals. Appellants presented no affirmative evidence showing a relationship between Bank One and Ponsky. As such, appellants did not prove a civil conspiracy existed between the two so that MERS should be held liable. Since appellants did not meet the

requisite burden of proof, the trial court's decision was supported by competent, credible evidence and should not be disturbed on appeal.

{¶ 36} Appellants also allege that Bank One had a duty to disclose to them that it had a relationship with Ponsky. This might be true if such a relationship were proven. Despite appellants' argument to the contrary, they failed to establish any relationship between Bank One and Ponsky. Appellants' arguments are not supported by the record, and thus the trial court's judgment was sound.

C. Agency Relationship

{¶ 37} Appellants next argue that Ponsky was a de facto agent of Bank One, making Bank One liable for Ponsky's actions. They correctly point out that a principal can be held liable for the actions of its agent. What appellants neglect to recognize are the requirements for establishing the existence of an agency relationship.

{¶ 38} "'Under Ohio law an agency relationship is a consensual relationship (between two persons) where the agent has the power to bind the principal, and the principal has the right to control the agent. The existence of an agency relationship depends primarily upon the right of the principal to control the agent.'" *Remy v. Graszl* (Dec. 23, 1998), Richland App. No. 98 CA 64, *2, quoting *Arnson v. Gen. Motors Corp.* (N.D.Ohio 1974), 377 F. Supp. 209. Notably, the agreement to create an agency relationship may be

express or implied. *Trimble-Weber v. Weber* (1997), 119 Ohio App.3d 402, 407, 695 N.E.2d 344, citing *Johnson v. Tanksy Sawmill Toyota, Inc.* (1994), 95 Ohio App.3d 164, 167, 642 N.E.2d 9.

{¶ 39} The party alleging the existence of an agency relationship bears the burden of proving that such a relationship exists. *Gardner Plumbing, Inc. v. Cottrill* (1975), 44 Ohio St.2d 111, 115, 338 N.E.2d 757; *Remy* at *2, citing *Grigsby v. O.K. Travel* (1997), 118 Ohio App.3d 671, 675, 693 N.E.2d 1142. An agency relationship exists when the principal exercises control over the agent's actions and those actions are directed toward attaining the principal's goals. *Trimble-Weber* at 407.

{¶ 40} In this case, there is no evidence that Bank One and Ponsky had an express agreement that Ponsky could act on Bank One's behalf. In fact, the only evidence presented at trial that such a relationship was a possibility was Mosley's testimony that he thought Ponsky worked for Bank One. This testimony makes little sense, however, due to Mosley's testimony that he was aware of Ponsky's affiliation with USA. Because appellants failed to affirmatively prove the existence of an express agency relationship between Bank One and Ponsky, we must now turn to alternative theories concerning the manner in which an agency relationship may be established.

{¶ 41} Although there is no express agency relationship in this case, Bank One could still be found to have an agency relationship with Ponsky

through the apparent agency theory or the doctrine of agency by estoppel. By definition, apparent agency and agency by estoppel sound almost identical. In order for someone to be the apparent agent of another, he must have apparent authority. Apparent authority is defined as "'the power to affect the legal relations of another person by transactions with third persons * * * arising from * * * the other's manifestations to such third persons.'" *Master Consolidated Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St.3d 570, 576, 575 N.E.2d 817, quoting 1 Restatement of the Law 2d, Agency (1958) 30, Section 8. Comparably, "[a]n agency by estoppel is created where a principal holds an agent out as possessing authority to act on the principal's behalf, or the principal knowingly permits the agent to act as though the agent had such authority." *Cyrus v. Home Depot USA, Inc.*, Clermont App. No. CA2007-09-098, 2008-Ohio-4315, ¶11, citing *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 630, 691 N.E.2d 303.

{¶ 42} The Court in *Master Consol. Corp.* addressed the difference between agency by estoppel and apparent agency. In doing so, the court referenced a comment in the Ohio Jury Instructions, which distinguishes the two concepts by stating that "'estoppel is essentially the principle that a person must compensate another for any change of position (loss) induced by reliance on what the person said or otherwise manifested, because it would be unjust to allow him to deny the truth of his words or manifestations; apparent

authority is based on the objective theory of contracts, and arises when a person manifests to another that an agent or third person is authorized to act for him, irrespective of whether the person really intended to be bound, of whether the person told the same thing to the agent, and of whether the other person changed his position.'" (Emphasis omitted.) *Master Consol. Corp.* at 577, fn. 5.

{¶ 43} After analyzing appellants' agency theory under both apparent agency and agency by estoppel, their argument must fail. In order to substantiate a claim under either concept, the proponent must establish that the purported principal engaged in some sort of activity that would lead a third party to reasonably believe that the "agent" was permitted to act on his behalf. *Cyrus* at ¶11, citing *Shaffer v. Maier*, 68 Ohio St.3d 416, 418, 1994-Ohio-134, 627 N.E.2d 986 ("For a principal to be bound by an agent's acts, the evidence must show that: 1) the defendant made representations leading the plaintiff to reasonably believe that the wrongdoer was operating as an agent under the defendant's authority; and 2) the plaintiff was thereby induced to rely upon the ostensible agency relationship to his or her detriment."); *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, 886 N.E.2d 827, ¶14 ("In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person

dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority.").

{¶ 44} As demonstrated by the foregoing case law, in order for appellants to present a viable claim that Bank One should be liable for Ponsky's actions, either by apparent agency or agency by estoppel, they would have had to prove that Bank One took some action to hold Ponsky out as its agent. Appellants have not met this burden. As indicated above, appellants presented no evidence establishing that Bank One held Ponsky out as its agent in any way. The only evidence presented on this issue was Mosley's testimony that he was under the impression that Ponsky worked for Bank One. Mosley also testified that he had never been to a Bank One branch to fill out paperwork. This testimony, however, was refuted by Mosley's deposition testimony where he indicated that he had, in fact, been to a Bank One branch when filling out documents related to his loan. At trial, he explained this discrepancy by stating that he thought he had been to a Bank One branch when, in actuality, it had been the "Title Equity Building." According to Mosley's trial testimony, he was confused on this point because, while at the Title Equity building, he filled out documents that had Bank One's logo on them.

{¶ 45} Despite Mosley's testimony to the contrary, there is no evidence to show that Bank One took any actions to induce Mosley into believing that

Ponsky was a Bank One agent. No evidence was presented to show that Ponsky purported to act on behalf of Bank One. In fact, Mosley testified that he met Ponsky only after he responded to a flier left at his home by USA. Concomitantly, appellants lack evidence that Bank One took any actions to hold Ponsky out as its agent. Based on this lack of evidence, the trial court did not err when finding that no agency relationship existed between Ponsky and Bank One and further holding that MERS cannot be held liable on a theory of assignee liability.[8]

D. Implied Covenants of Good Faith and Fair Dealing

{¶ 46} Appellants next argue that MERS should be held liable for Bank One's alleged violation of the covenants of good faith and fair dealing that are implied in every contract. Noticeably, appellants did not allege that MERS, or Bank One for that matter, breached the contractual agreement between appellants and Bank One. As aptly pointed out by MERS, there is no claim for breach of the implied covenants of good faith and fair dealing independent of a breach of contract action. *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953, ¶52, citing *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio

[8] We recognize that appellants raised several affirmative defenses including, but not limited to, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, and rescission. Because these arguments are also premised on alleged wrongdoing by Bank One, which was not proven at trial, they too must fail.

App.3d 637, 646, 671 N.E.2d 578. Because appellants did not argue that MERS or Bank One breached the contract, they have no viable claim for breach of the implied covenants of good faith and fair dealing.

{¶ 47} Assuming arguendo that appellants asserted a breach of contract claim, they still have no viable argument that MERS breached the implied covenants of good faith and fair dealing. First, individuals cannot maintain a breach of contract action when they themselves failed to substantially perform under the contract terms. *Wauseon* at ¶25 ("'Generally, a breach of contract occurs when * * * the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach.'"), quoting *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108, 661 N.E.2d 218. The evidence presented at trial unequivocally showed that appellants failed to substantially comply with the contract terms when they ceased making their monthly mortgage payment. Since appellants had no viable breach of contract claim, they cannot maintain that MERS, as assignee to Bank One's interest in the Note, violated the implied covenants of good faith and fair dealing.

{¶ 48} Even if appellants had substantially complied with their contractual obligation, they offered no proof that MERS violated the covenants of good faith and fair dealing. The only argument appellants

made with respect to Bank One's alleged wrongdoing was its acting in concert with Ponsky in giving mortgages to unsophisticated and financially unstable individuals. Although appellants argued that Ponsky and Bank One acted in concert, they presented no affirmative proof on this issue. Appellants did not establish that Ponsky was Bank One's agent or that Bank One knew Ponsky had artificially inflated appellants' credit eligibility by procuring a fake gift letter and paying off Mosley's car loan.[9] Since appellants failed to prove any wrongdoing on the part of Bank One, they cannot maintain a successful cause of action asserting that Bank One violated the implied covenants of good faith and fair dealing. The trial court did not err in finding against appellants on this issue, and appellants' third assignment of error is overruled.

[9] In the magistrate's opinion, she noted that she "realize[d] the American dream of home ownership and the manipulations of non-party Jerry Ponsky lured [appellants] into a situation that was not financially prudent. The foreclosure crisis in this country stems from numerous factors, only one of which is persons similar to Jerry Ponsky. However, in this case [appellants] were more than victims, they were also participants. On the advice of Jerry Ponsky, they manipulated their debt and provided false documentation to obtain their loan."

IV. Admissibility of Evidence

{¶ 49} In their fourth assignment of error, appellants argue that the trial court abused its discretion when refusing to admit certain evidence presented by them at trial. The standard for issues regarding exclusion of evidence is well defined in Ohio. "The admission or exclusion of evidence rests within the sound discretion of the trial court." *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512. Therefore, we review the trial court's decision for an abuse of discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

A. Expert Report

{¶ 50} Appellants first argue that the trial court abused its discretion when refusing to admit the expert testimony of Dr. Thomas Bier. Although Dr. Bier was permitted to testify at trial, the magistrate's opinion noted that he merely offered data compilations and never offered an expert opinion on any matters related to trial. More specifically, Dr. Bier's report contained a compilation of data obtained from the public record that showed multiple transactions where Ponsky would sell a house for a large profit and a Bank One mortgage was used. The magistrate held that Dr. Bier did not testify to

matters outside the public record, offered no expert opinion, and thus could not testify as an expert pursuant to Evid.R. 702. We agree.

{¶ 51} Evid.R. 702 provides that "[a] witness may testify as an expert if all of the following apply:

{¶ 52} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons[.]"

{¶ 53} It is undisputed that the only testimony offered by Dr. Bier was related to data he compiled from public records. Dr. Bier made no findings, nor did he offer any opinions related to these records. Absent an expert opinion as to any alleged patterns established by the data compilations, they have no relevance to the present matter. Since Dr. Bier neither offered information outside the knowledge and experience of a layperson, nor did he offer an expert opinion related to the data compilations, we cannot find that the trial court's decision to exclude this evidence constitutes an abuse of discretion.

{¶ 54} Appellants also argue that the magistrate abused her discretion when she refused to allow Dr. Bier to testify to information contained in the supplement to his original report. In so ruling, the magistrate relied on Cuyahoga County Common Pleas Local Rule 21.2(B). This rule requires all supplemental expert reports to be provided to opposing counsel no later than

30 days before trial unless good cause is shown. It is undisputed that appellants failed to meet this deadline. In fact, appellants did not provide MERS with a copy of Dr. Bier's supplemental report until the week before trial.

{¶ 55} Appellants argue that they made a showing of good cause as to why the supplemental report was not provided to opposing counsel within the time constraints, and thus the supplemental report should have been admitted. We disagree. In making this argument, appellants simply claim that the data compilations were procured from public record and were thus irrefutable. Appellants go on to argue that because MERS could not refute the data compilations, they would not have been prejudiced by the admission of the supplemental report.

{¶ 56} Although the data presented in Dr. Bier's report was procured from the public record, MERS could have attempted to offer expert testimony that showed that the evidence did not establish a pattern or relationship between Bank One and Ponsky. Even if this evidence was irrefutable, appellants offered no good cause as to why they could not have provided opposing counsel with this supplemental report on an earlier date. Since it is undisputed that appellants did not comply with the time mandates in Local Rule 21.2(B), we cannot find that the magistrate abused her discretion in refusing to admit Dr. Bier's supplemental report.

B. Public Documents

{¶ 57} Appellants next argue that the magistrate abused her discretion in refusing to take judicial notice of self-authenticating public documents. Evid.R. 207 provides that a court may take judicial notice of an undisputed fact that is generally known within the trial court's territorial jurisdiction or capable of determination by resorting to resources whose accuracy cannot be questioned. Evid.R. 207(B). This rule does not, however, abrogate the timing mandates for when evidence to be used at trial must be presented to opposing counsel. See *AP Hotels of Illinois, Inc. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 343, 2008-Ohio-2565, 889 N.E.2d 115, ¶8, fn. 1 ("The BOE urges that we take judicial notice of this document, but judicial notice does not furnish litigants an exception to the rule that evidence must be timely offered in a judicial proceeding. We decline to consider the document, and we order that it be stricken from the record of this appeal").

{¶ 58} Many of the documents appellants attempted to admit at trial were certified public records. It is undisputed, however, that appellants did not provide these documents to opposing counsel until the week before trial; even the trial transcript indicates that MERS's attorneys had never seen some of the documents before trial. The trial court was under no obligation to take judicial notice of documents that were not timely provided to opposing counsel during the discovery process.

{¶ 59} At trial, appellants argued that MERS had knowledge of these documents and merely refused to provide them to appellants during discovery. It is notable that appellants had no evidence that MERS was hiding documentation, nor did they file a motion to compel. Since appellants did not provide the documents at issue to opposing counsel in a timely fashion, the magistrate did not abuse her discretion in refusing to take judicial notice of them.

C. Promissory Note

{¶ 60} Appellants next argue that the trial court committed reversible error in admitting the Note into evidence when appellants challenged its authenticity. Appellants rely on Evid.R. 1002, otherwise known as the best evidence rule, to argue that the original Note should have been admitted rather than a photocopy showing the Note that was endorsed in blank.

{¶ 61} Evid.R. 1002 provides that an original writing should be presented in order to prove its contents. Evid.R. 1003, however, provides that a duplicate is admissible unless there is a genuine question as to the original's authenticity or it would be unfair to admit the duplicate instead of the original. Appellants argue that they have challenged ownership of the Note from the outset of the case, and thus the trial court abused its discretion in admitting the duplicate which, unlike the original, was endorsed in blank. "A party seeking to exclude a 'duplicate' from evidence pursuant to Evid.R.

1003 has the burden of demonstrating that the 'duplicate' should not be admitted; unless it is apparent from the record that the trial court abused its discretion in admitting the 'duplicate,' the determination of the trial court will not be disturbed on appeal." *Natl. City Bank v. Fleming* (1981), 2 Ohio App.3d 50, 440 N.E.2d 590, paragraph eight of the syllabus.

{¶ 62} Appellants have presented no evidence to show it was unfair to admit the duplicate of the original Note that had been endorsed in blank. Mosley testified at trial that his signature and initials were on the Note, and the Note's authenticity was never questioned. The only issue with the Note was regarding who was the true owner; an issue appellants eagerly dispute. Appellants never disputed that the Note was endorsed in blank. Likewise, when admitting the Note into evidence, the magistrate acknowledged that the original Note did not contain the blank endorsement. Further, a duplicate of the original Note, without the blank endorsement, was attached to MERS's complaint in this case. As such, any error in admitting the duplicate, if any, was harmless.

{¶ 63} A review of the record in this case does not affirmatively establish that admitting the Note into evidence was reversible error. As such, the magistrate did not abuse her discretion in admitting the Note and appellants' fourth assignment of error is overruled.

Conclusion

{¶ 64} Although appellants did not waive their right to argue that MERS lacked standing to pursue the present action, the trial court did not commit reversible error in finding that MERS did, in fact, have standing. We see nothing in the record to indicate that the trial court failed to conduct an independent review of the magistrate's decision.

{¶ 65} The trial court did not abuse its discretion in finding in favor of MERS with regard to all of appellants' affirmative defenses and counterclaims. Any wrongdoing established by appellants, if any, was on the part of Ponsky, and no agency relationship was proven to have existed between Ponsky and Bank One so that MERS should be held liable.

{¶ 66} In addition, the trial court did not abuse its discretion in excluding Dr. Bier's testimony when Dr. Bier failed to offer any opinion that would qualify him as an expert witness. The trial court did not abuse its discretion in excluding Dr. Bier's supplemental report and refusing to take judicial notice of public records when such evidence was not provided to opposing counsel until the eve of trial. Finally, the trial court did not abuse its discretion in admitting a duplicate of the Note when an exact copy of the original was attached to the complaint, the Note's authenticity was not challenged, and the magistrate noted that the original Note was not endorsed in blank at the time it was signed.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
LARRY A. JONES, J., DISSENTS (WITH SEPARATE OPINION)

LARRY A. JONES, J., DISSENTING:

{¶ 67} I respectfully dissent from my learned colleagues in the majority. I believe there is evidence in the record to support reversal.

{¶ 68} In *Wells Fargo Bank, N.A. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092, this court held that Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case, and thus does not have standing to do so. Id. at 21, citing *Northland Ins. Co. v. Illuminating Co.*, Ashtabula App. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, at ¶17.

{¶ 69} In *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, Wells Fargo, the plaintiff, filed a complaint for foreclosure on January 23, 2007. Id. at ¶2. In *Byrd*, as in the case at bar, Wells Fargo

stated in the complaint that it was the holder and owner of the mortgage and the Note. Id. Wells Fargo was assigned the Note and mortgage on March 2, 2007, after the complaint had been filed. Id. at ¶3. The *Byrd* court concluded, "[u]nless a party has some real interest in the subject matter of the action, that party will *lack standing to invoke* the jurisdiction of the court." (Emphasis added.) Id. at ¶10.

{¶ 70} Here, MERS, as nominee, filed its complaint on May 21, 2004. MERS filed an assignment on July 2, 2004, which was signed on May 26, 2004. The facts in this matter fit squarely with the facts in both the *Byrd* and *Jordan* opinions. *Byrd* and *Jordan* held that a party must, at the time of filing, have a bona fide interest in the litigation in order to invoke the court's jurisdiction. The only interest MERS had at the time of filing in this case was its "nominee" status under the mortgage. MERS attempted to correct this by an assignment of the Note after the date of filing the complaint. However, MERS was never the Note holder. See, R.C. 1303.22(A); R.C. 1303.31.

{¶ 71} After the alleged assignment was signed, MERS was only a nominal party. After the loan closed, and long before litigation commenced, Bank One sold the loan to Fannie Mae. MERS did not bear the loss upon default. In fact, MERS is not the beneficial owner of the Note and only stands in the shoes as servicer. If the Property were to be sold at a sheriff's

sale, MERS would have no right to determine the amount of the bid, nor would it be able to take title.

{¶ 72} Appellants did not waive their right to argue standing, and plaintiff filed the assignment after it filed the complaint. Indeed, appellee admits that the Note was not assigned until May 26, 2004, five days *after* MERS commenced suit.

{¶ 73} MERS did not maintain a bona fide interest in the real property or litigation and is therefore not the real party in interest. Accordingly, I would find MERS lacked standing and could not properly invoke jurisdiction.

{¶ 74} Accordingly, I would sustain appellants' first assignment of error.

Appendix A

Appellants' Assignments of Error:

I. "The trial court erred as a matter of law and to the prejudice of appellants in finding that MERS maintained standing to properly invoke the trial court's jurisdiction."

II. "The trial court erred as a matter of law and to the prejudice of appellants in failing to conduct an independent review of the evidence as mandated under Civ.R. 53 and therefore abused its discretion in adopting the magistrate's decision."

III. "The trial court erred as a matter of law and to the prejudice of appellants in granting judgment to MERS and against appellants on their counterclaims."

IV. "The trial court erred as a matter of law and abused its discretion in its determination of the admissibility of evidence."