[Cite as *Nationstar Mtge., L.L.C. v. Wagener*, 2015-Ohio-1289.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101280

NATIONSTAR MORTGAGE, L.L.C.

PLAINTIFF-APPELLEE

vs.

EDWIN J. WAGENER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-763858

BEFORE: E.A. Gallagher, P.J., McCormack, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 2, 2015

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EILEEN A. GALLAGHER, P.J.:

{¶1} In this foreclosure action, defendants-appellants Edwin J. Wagener and Mary Wagener (the "Wageners") appeal from the decision of the trial court granting summary judgment in favor of substitute plaintiff-appellee Nationstar Mortgage L.L.C. ("Nationstar").[1] Finding no merit to the appeal, we affirm the trial court's judgment.

Procedural and Factual Background

{¶2} On March 12, 2007, the Wageners executed a note payable to Countrywide Home Loans, Inc. ("Countrywide") for the principal amount of $172,000. To secure payment of the note, the Wageners executed a mortgage on real property located at 10340 Whitewood Rd., Brecksville, Ohio, in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as a nominee for Countrywide and its successors and assigns. The mortgage was recorded on March 29, 2007.

{¶3} Countrywide thereafter endorsed the note in blank. On April 26, 2011, MERS assigned the mortgage "together with the note(s) and obligations therein described" to BAC Home Loans Servicing, LP f.k.a. Countrywide Home Loans Servicing LP ("BAC Home Loans"). The assignment was recorded on May 5, 2011. In July 2011, BAC Home Loans merged into Bank of America, N.A. ("Bank of America").[2]

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[1] Bank of America, N.A. is the named plaintiff in this case. On April 24, 2013, the trial court granted plaintiff Bank of America, N.A.'s motion to substitute party plaintiff and Nationstar was substituted as plaintiff.

[2] There is no information in the record as to precisely when possession of the note was transferred to BAC Home Loans or Bank of America; however, Nationstar has presented evidence that Bank of America was in possession of the original note endorsed in blank at the time Bank of America filed the complaint and that Bank of

{¶4} The Wageners failed to make payments due on the note and on September 8, 2011, Bank of America filed a complaint against them to recover the unpaid balance due on the note and to foreclose on the mortgaged property. Copies of the note (endorsed in blank by Countrywide), the mortgage, the assignment of mortgage from MERS to BAC Home Loans and copies of documents from the office of the secretary of state of Texas evidencing the merger of BAC Home Loans into Bank of America effective July 1, 2011 (the "certificate of merger") and Countrywide's name change to BAC Home Loans effective April 27, 2009, were attached to the complaint.[3] The Wageners filed a pro se answer and the case was referred to mediation.

{¶5} The Wageners filed a Chapter 7 bankruptcy and on June 18, 2012, the trial court entered an order staying the action.[4] In October 2012, the stay was lifted and the case reactivated. The Wageners (now represented by counsel) filed an amended answer, asserting various affirmative defenses and several counterclaims against Bank of America for alleged violations of the Fair Debt Collection Practices Act and Ohio Consumer Sales Practices Act, fraud and invasion of privacy by intrusion of seclusion.

America maintained continuous possession of the note until servicing of the Wageners' loan was transferred to Nationstar in February 2013. *See infra* at ¶ 30-31.

[3] A copy of a notice of federal tax lien was also attached to the complaint. MERS, as nominee for Countrywide Bank, FSB ("Countrywide Bank"), and the United States were also joined as defendants due to their potential interests in the property based on an open-end mortgage related to a line of credit Countrywide Bank had extended to the Wageners and the federal tax lien. The United States was dismissed from the action in March 2013.

[4] The Wageners were discharged of any personal liability on the note in

{¶6} On February 28, 2013, Bank of America, as successor by merger to BAC Home Loans, assigned its interest in the note and mortgage to Nationstar. The assignment was recorded on March 21, 2013. On April 24, 2013, the trial court granted Bank of America's motion to substitute Nationstar as the plaintiff pursuant to Civ.R. 25(C). The Wageners did not object to the substitution of Nationstar as the plaintiff.

{¶7} On May 24, 2013, Nationstar filed a motion for summary judgment on the complaint. Nationstar asserted that it was entitled to judgment and a decree of foreclosure as a matter of law because there were no genuine issues of fact that (1) the Wageners' loan was in default and had not been cured, (2) notice of default and intent to accelerate the loan balance had been provided to the Wageners and (3) Nationstar, by virtue of the assignment from Bank of America and its possession of the original note endorsed in blank, was the current holder of the note and mortgage.

{¶8} Nationstar supported its motion with an affidavit from Bryan Muncy, an assistant secretary for Nationstar, along with copies of the note, the mortgage, the assignments from MERS to BAC Home Loans and from Bank of America to Nationstar, two notices advising the Wageners that the servicing of their mortgage loan was being transferred to Nationstar, a notice of intent to accelerate the loan due to default and the payment history for the loan — that Muncy attested in his affidavit to be "true and correct copies" of the originals. The Wageners opposed the motion, arguing that Nationstar had failed to establish that (1) Nationstar had standing to enforce the note and mortgage, (2)

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their Chapter 7 bankruptcy.

Bank of America had standing at the time the complaint was filed or (3) Nationstar or its predecessors had complied with certain conditions precedent to foreclosure required by the note and mortgage. The Wageners also argued that the evidence submitted in support of Nationstar's motion for summary judgment, in particular, Muncy's affidavit, was not proper summary judgment evidence under Civ.R. 56(E).[5] Nationstar also filed a separate motion for summary judgment on the Wageners' counterclaims. The Wageners did not oppose that motion. On August 12, 2013, the trial court granted Nationstar's motions for summary judgment, indicating that a magistrate's decision would follow detailing the specific rights and liabilities of the parties.

{¶9} On September 16, 2013, the magistrate issued her decision granting summary judgment in favor of Nationstar on its complaint and the Wageners' counterclaims and dismissing the Wageners' counterclaims with prejudice. The Wageners filed objections to the magistrate's decision, raising the same arguments they made in opposing Nationstar's motion for summary judgment on its complaint.[6] MERS,

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[5] In support of their opposition, the Wageners submitted two internet printouts: (1) a document stating (without any information identifying the mortgage to which it relates) that "Freddie Mac is the owner of your mortgage and it was acquired on March 27, 2007" and (2) excerpts from Freddie Mac's servicer guidelines. Based on these documents, the Wageners argued below that summary judgment was improper because Freddie Mac was the owner of the mortgage, not Bank of America or Nationstar. The Wageners have abandoned this argument on appeal. The Wageners submitted no other evidence in support of their opposition to summary judgment.

[6] The Wageners did not object to the portion of the magistrate's decision dismissing their counterclaims and have not advanced an argument on appeal that the trial court erred in granting Nationstar's motion for summary judgment on their counterclaims. Therefore, we limit our review to the propriety of the trial court's granting of summary judgment on Nationstar's foreclosure complaint.

as nominee for Countrywide Bank, filed a motion for leave to file an answer instanter and to amend the magistrate's decision to reflect its junior lien interest in the property. The trial court granted the motion and the magistrate's decision was amended to reflect MERS's answer. The trial court overruled the Wageners' objections and, on April 8, 2014, entered a judgment entry adopting the magistrate's amended decision granting summary judgment and a decree of foreclosure to Nationstar, specifically finding that "[p]laintiff had standing to bring this action."

{¶10} The Wageners appealed the trial court's judgment, raising the following assignment of error for review:

> The trial court erred when it granted the substitute plaintiff appellee Nationstar's motion for summary judgment when [Bank of America] was unable to demonstrate standing, let alone entitlement to judgment as a matter of law.

Law and Analysis

Standard of Review

{¶11} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

{¶12} Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law and (3) viewing the evidence most strongly in favor of the

nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

{¶13} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

Standing to Bring Foreclosure Action

{¶14} In support of their sole assignment of error, the Wageners first argue that the trial court erred in granting summary judgment to Nationstar on the complaint because Nationstar failed to establish that the original plaintiff, Bank of America, had standing to bring the foreclosure action at the time it filed the complaint.

{¶15} A party commencing litigation must have standing to sue in order to invoke the jurisdiction of the common pleas court. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 38. To have standing, a plaintiff must have "a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court." *Bank of Am., N.A. v. Adams*, 8th Dist. Cuyahoga No. 101056, 2015-Ohio-675, ¶ 7, citing *Tate v.*

Garfield Hts., 8th Dist. Cuyahoga No. 99099, 2013-Ohio-2204, ¶ 12, and *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986). Because standing is required to invoke the jurisdiction of the common pleas court, "'standing is to be determined as of the commencement of suit,'" *Schwartzwald* at ¶ 24, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5, and "'depends on the state of things at the time of the action brought,'" *Schwartzwald* at ¶ 25, quoting *Mollan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824). "'Post-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress.'" *Schwartzwald* at ¶ 26, quoting 13A Wright, Miller & Cooper, *Federal Practice and Procedure* Section 3531, at 9 (2008).

{¶16} In a foreclosure action, a party has standing, "when, at the time it files its complaint of foreclosure, it either (1) has had the mortgage assigned to it, or (2) it is the holder of the note." *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21 (8th Dist.), citing *Schwartzwald* at ¶ 28 (where plaintiff failed to establish an interest in note or mortgage at the time it filed foreclosure action, it had no standing to invoke the jurisdiction of the common pleas court). If a plaintiff lacks standing at the time it commences a foreclosure action, the case must be dismissed; it cannot be cured through an assignment or other transfer prior to judgment. *Schwartzwald* at ¶ 39-40.

Effect of Substitution of Plaintiff on Standing Requirement

{¶17} As an initial matter, Nationstar argues that we "need not reach the question" raised in the Wageners' assignment of error, i.e., whether Bank of America had standing at the time it filed the complaint, because Bank of America's "standing to invoke the jurisdiction of the Trial Court on the date of the Complaint became irrelevant after the Mortgage and Note were subsequently transferred and assigned to Nationstar." Nationstar contends that because of the substitution, the only standing that mattered was its standing as of the date Nationstar was substituted as the plaintiff, i.e., April 24, 2013. Nationstar contends that it "invoked the jurisdiction" of the common pleas court when it was substituted as the plaintiff and that because it established that it had standing to bring a foreclosure action as of April 24, 2013, summary judgment was proper and it did not matter whether Bank of America had standing when it filed the foreclosure action on September 8, 2011. We disagree.

{¶18} As the Ohio Supreme Court clearly stated in *Schwartzwald*, a plaintiff cannot rely on procedural substitution rules to cure a lack of standing when a foreclosure action is commenced:

> Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.
>
> Accordingly, a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.

Schwartzwald at ¶ 28-39.

{¶19} Because under *Schwartzwald,* "a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance," if Bank of America did not have standing at the time it filed its complaint, that deficiency could not be remedied by later substituting Nationstar, i.e., a party allegedly with standing, as the plaintiff. If Bank of America lacked standing to bring the action, it also lacked standing to make a motion to substitute Nationstar as the real party in interest. *See Schwartzwald* at ¶ 36, citing *Zurch Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir.2002).

{¶20} Nationstar cites *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, for the proposition that where a party is substituted in as a plaintiff in a foreclosure action, it no longer has to be shown that the original plaintiff had standing on the date the complaint was filed. We do not read *Jackson* as standing for the proposition for which it is cited by Nationstar. The *Jackson* court stated:

> According to Ohio law, the "current holder" of a note and mortgage is entitled to bring a foreclosure action against a defaulting mortgagor. *BAC Home Loans Servicing, LP v. Kolenich*, 12th Dist. Butler No. CA2012-01-001, 2012-Ohio-5006, ¶ 38, citing R.C. 1303.31(A). Once Bank of America filed its motion to substitute, the court had evidence that Nationstar was the "current holder" of both the Jacksons' note and mortgage because both the note and mortgage had been assigned to Nationstar from Bank of America on November 8, 2012. Therefore, Bank

> of America was not required to produce the original note in order to prove that it had the ability to file the foreclosure suit as the Jacksons contend.

Id. at ¶ 25. The statement quoted above was made in the context of determining whether Bank of America *had an obligation to produce the original note* in order to establish it had standing at the time of filing of the complaint following the substitution of Nationstar as plaintiff, not whether Nationstar had no obligation, following its substitution as plaintiff, to establish that Bank of America had standing at the time it filed its complaint. *Id.* at ¶ 21-26. The Twelfth District held that because (1) the defendants had not raised a genuine issue as to the authenticity of the original note, (2) had not demonstrated that admission of the copy of the note would be otherwise unfair and (3) the trial court had evidence that Nationstar was now the "current holder" of the note and mortgage based on the assignment of the note and mortgage from Bank of America to Nationstar, the trial court did not err in admitting the copy of the note pursuant to Evid.R. 1003. *Id.* at ¶ 25-26. The *Jackson* court then continued its analysis of whether "Bank of America, *and* Nationstar through its substitution, was the proper party to bring the foreclosure action," concluding that "*Bank of America, and therefore Nationstar by substitution*, was the proper party to bring the foreclosure action" and that "Bank of America/Nationstar had standing." (Emphasis added.) *Id.* at ¶ 36, 39, 44.

{¶21} *Indymac Bank F.S.B. v. Borosh*, 8th Dist. Cuyahoga No. 98520, 2013-Ohio-1180, on which Nationstar also relies, is likewise inapposite. In that case, the plaintiff cured a defect in its original complaint — i.e., that the mortgage had not yet been

transferred to the plaintiff — by amending the complaint two weeks later (as a matter of right under Civ.R. 15(A) before the defendants filed a responsive pleading) after the mortgage had been assigned to the plaintiff. Because "an amended complaint 'takes the place of the original, which is then totally abandoned,'" this court held that even if the plaintiff lacked standing at the time it filed its original complaint, attaching the assignment of mortgage to an amended complaint was sufficient to establish standing. *Id.* at ¶ 6, citing *Harris v. Ohio Edison Co.*, 7th Dist. Mahoning No. 91 C.A. 108, 1992 Ohio App. LEXIS 4085 (Aug. 3, 1992). In this case, Nationstar has cited no authority establishing that the substitution of parties under Civ.R. 25(C)[7] has the same effect as amending the complaint.[8]

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[7] Civ.R. 25(C) provides that "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

[8] In further support of its "irrelevancy" argument, Nationstar cites *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. Franklin No. 09AP-819, 2010-Ohio-3018, and *Nationstar Mtge. LLC v. West*, 2d Dist. Montgomery Nos. 25813 and 25837, 2014-Ohio-735. We do not read either of these cases as supporting Nationstar's argument that Bank of America's standing as of the date of the filing of the complaint is "a red herring" and "legally irrelevant." In *Thomas*, the court noted that it was "undisputed" that the original plaintiff was the holder of the note at the time it filed the complaint. *Thomas*, at ¶ 10-11. Furthermore, *Thomas* was decided before the Ohio Supreme Court's decision in *Schwartzwald*. To the extent it may be interpreted as supporting Nationstar's argument, we believe it is contrary to *Schwartzwald*. Similarly in *West,* the court concluded that *"Schwartzwald* [did] not apply" because the original plaintiff "had a right to enforce the note and mortgage at the time the foreclosure was filed." *West* at ¶ 26. The court further stated, "the relevant issues are whether [the original plaintiff] had the right to enforce the note when it filed suit, and whether Nationstar subsequently obtained the right to enforce the note. Unquestionably, both entities had the right to enforce the note at the appropriate times." *Id.* at ¶ 33.

Accordingly, we find that to prevail on its motion for summary judgment Nationstar was required to establish that Bank of America had standing at the time it filed its complaint in this action.

Standing of Bank of America When Complaint Filed

{¶22} We now turn to the issue of whether a genuine issue of fact exists regarding whether Bank of America had standing to bring this foreclosure action at the time it filed the complaint. The Wageners argue that the trial court erred in entering summary judgment because genuine issues of fact existed both as to whether Bank of America had standing through possession of the original note and whether it had standing through assignment of the mortgage when the complaint was filed.[9]

Possession of the Original Note When the Complaint Was Filed

{¶23} The Wageners contend that the evidence Nationstar submitted to prove that Bank of America had possession of the original note when the complaint was filed — Bryan Muncy's affidavit — was not based on personal knowledge as required under Civ.R. 56(E) and was, therefore, insufficient to carry Nationstar's burden on summary judgment. We disagree.

Requirements for Affidavits on Summary Judgment

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[9] Based on *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶ 13, the Wageners argue that Bank of America had to both be the holder of the note and the mortgage at the time it initiated this action in order to have standing. However, as discussed above, this court requires only that a plaintiff either be the holder of the note or have the mortgage assigned to it at the time the complaint is filed to have standing. *See Patterson*, 2012-Ohio-5894, at ¶ 21.

{¶24} The Wageners assert that Muncy's affidavit is nothing more than "rubber stamp testimony" and that it does not comply with Civ.R. 56(E) because it fails to set forth in detail the factual basis for Muncy's claim that he has personal knowledge regarding the facts to which he testifies in the affidavit. The Wageners complain that although Muncy asserts that "[t]he averments provided in this Affidavit are within the scope of my duties" for Nationstar, he never identifies what those duties are. The Wageners also object to Muncy's assertion that he has "access to" Nationstar's business records without "defin[ing] what those records are."

{¶25} Civ.R. 56(E) sets forth the requirements for affidavits submitted on summary judgment. It provides, in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.
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> * * *

{¶26} Muncy's affidavit sets forth the information necessary to satisfy the requirements of Civ.R. 56(E). "'Unless controverted by other evidence, a specific averment that an affidavit pertaining to business is made upon personal knowledge of the affiant satisfies the Civ.R. 56(E) requirement that affidavits both in support or in opposition to motions for summary judgment show that the affiant is competent to testify

to the matters stated.'" *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 20, quoting *Bank One, N.A. v. Swartz*, 9th Dist. Lorain No. 03CA008308, 2004-Ohio-1986, ¶ 14, citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), paragraph two of the syllabus. There is no requirement that an affiant explain the basis for his or her personal knowledge where personal knowledge can be reasonably inferred based on the affiant's position and other facts contained in the affidavit. *Bank of Am. v. Lynch*, 8th Dist. Cuyahoga No. 100457, 2014-Ohio-3586, ¶ 24-27, citing *Nationstar Mtge., L.L.C. v. Perry*, 8th Dist. Cuyahoga No. 99497, 2013-Ohio-5024, ¶ 15, citing *Najar* at ¶ 74.

{¶27} Muncy averred that his affidavit was based on "personal knowledge obtained from [his] personal review of the business records for the loan which is the subject of this action." Muncy explained that through his position as an assistant secretary at Nationstar he has access to Nationstar's business records, including loan documents and loan account records, and has personal knowledge regarding "the operation of and the circumstances surrounding the maintenance and retrieval of records in Nationstar's record keeping systems." Although Muncy did not describe his specific job duties in his affidavit, he provided a broad overview of the processes by which Nationstar's loan account records are created and maintained, including how Nationstar has incorporated the business records of its predecessors into its own.

{¶28} Muncy incorporated the note endorsed in blank, the mortgage, the assignments from MERS to BAC Home Loans and from Bank of America to Nationstar,

the notice of intent to accelerate the loan due to default dated December 2010, two notices advising the Wageners that the servicing of their mortgage loan was being transferred to Nationstar and the payment history for the loan by reference into his affidavit. Muncy averred that he had personally reviewed these documents and that they were "[t]rue and correct copies" of the originals "kept, maintained, and relied upon [by Nationstar] in the course of [its] ordinary and regularly conducted business activity."

{¶29} Muncy averred, based on the documents, that the Wageners had executed and delivered a promissory note to Countrywide in 2007 and that the note was thereafter endorsed in blank by Countrywide. Muncy further averred that at the time of the filing of the complaint, Bank of America, the "successor by merger to BAC Home Loans," was in possession of the original note, that Bank of America had maintained continuous possession of the note until servicing of the Wageners' loan was transferred to Nationstar and that Nationstar "now has possession of the original Note." Muncy also identified the chain of assignments leading to the assignment of the note and mortgage to Nationstar. Muncy averred that payments had not been made as required under the loan agreement, that the default on the loan had not been cured and that Nationstar had elected to accelerate the balance due under the terms of the note and mortgage. Muncy averred that a principal balance of $144,168.73, plus interest at the rate of 6.25 percent per annum from November 1, 2010 was due and owing on the note.

{¶30} The Wageners argue that regardless of the averments in his affidavit, "there is no earthly way" that Muncy (or any other representative of Nationstar) could

have personal knowledge regarding whether Bank of America had possession of the Wageners' original note (or any other document) when the complaint was filed. As such, the Wageners contend a genuine issue of fact existed as to whether Bank of America had possession of the original note at the time it filed the complaint. We disagree.

{¶31} The facts stated in Muncy's affidavit, combined with the position he holds at Nationstar and his assertions regarding his job duties there, create a reasonable inference that Muncy has personal knowledge of the facts contained in his affidavit. With respect to Muncy's purported knowledge of the actions taken by Nationstar's predecessors with respect to the Wageners' loan, as Muncy explained in his affidavit, his knowledge of the facts and circumstances relating to the Wageners' loan was not based just on his review of the records created by Nationstar but also included the loan account records of Nationstar's predecessors, which had been incorporated into Nationstar's business records.

Similar averments have been deemed sufficient to satisfy a plaintiff's burden on summary judgment in other foreclosure actions. *See, e.g., Nationstar Mtge. L.L.C. v. Williams*, 5th Dist. Delaware No. 14 CAE 04 0029, 2014-Ohio-4553, ¶ 16-18 (affidavit was "properly admissible Civil Rule 56 evidence" where it could be reasonably inferred from affiant's position as assistant secretary of plaintiff and statement that she reviewed the loan documents that affiant had personal knowledge of facts stated in affidavit), citing *OneWest Bank, FSB v. Albert*, 5th Dist. Stark No. 2013CA00180, 2014-Ohio-2158, ¶ 23-26; *see also Wells Fargo Bank, N.A. v. Hammond*, 8th Dist. Cuyahoga No. 100141,

2014-Ohio-5270, ¶ 34-36 (averments in affidavit were sufficient to establish that plaintiff possessed original promissory note since 2008); *JPMorgan Chase Bank, NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, ¶ 25 (affidavit satisfied Civ.R. 56(E) where affiant averred that statements in affidavit were based on personal knowledge developed from his position as bank's vice president and his review of historic business records of bank's predecessors relating to borrower's loan).

{¶32} The Wageners reliance on *Bank of N.Y. Mellon Trust Co. Natl. v. Mihalca*, 9th Dist. Summit No. 25747, 2012-Ohio-567, is misplaced. In that case, the affidavit submitted in support of the plaintiff bank's motion for summary judgment was from an individual who identified herself as the assistant secretary for Barclay's Capital Release Estate, Inc. "as the attorney in fact for the [plaintiff bank]" without explaining how that position related to or made the affiant familiar with the bank's records and, specifically, the appellant's account records. *Id.* at ¶ 3, 17. The Ninth District held that these facts along with the affiant's "broad averment" that the plaintiff bank was "the holder" of the note without identifying the factual basis that led to such a conclusion "suggest[ed]" that it was "unlikely that she had personal knowledge of the Bank's current possession of the note" and that the affidavit was therefore insufficient to establish the bank's entitlement to foreclosure. *Id.* at ¶ 17-18. Muncy, by contrast, clearly identified both his connection to Nationstar and Nationstar's connection to Bank of America in his affidavit and explained that his position as assistant secretary for Nationstar made him familiar with the

relevant mortgage loan account records of Nationstar and its predecessors, including the records relating to the Wageners' loan.

{¶33} Likewise, this is not a case such as *Bank of N.Y. Mellon v. Villalba*, 9th Dist. Summit No. 26709, 2014-Ohio-4351, in which ambiguity or imprecise language in the averments of the affidavit "seems to indicate" that the affiant lacked personal knowledge of the plaintiff's possession of the note. *Id.* at ¶ 13-16 (where affiant averred in her affidavit that bank "directly *or* through an agent" had possession of the note, suggesting that affiant was unsure as to the location of the note, that bank "purchased, acquired *and/or* otherwise obtained possession of the note and mortgage before June 22, 2011" and that affiant's personal knowledge of matters asserted in affidavit came from her review of the particular business records attached to affidavit but documents attached to affidavit did not establish when, if ever, bank came into possession of the note, affidavit did not support claim that affiant had personal knowledge of the bank's possession of note as of the date at issue). (Emphasis added.) In his affidavit, by contrast, Muncy clearly and unambiguously stated:

> At the time of the filing of the Complaint in foreclosure on September 8, 2011, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP was in possession of the original promissory Note and continuously thereafter until servicing of the Wageners' loan account transferred to Nationstar. Nationstar now has possession of the original Note.

{¶34} Upon Nationstar's submission of this evidence, the burden then shifted to the Wageners to present evidence of conflicting facts demonstrating a genuine issue of material fact for trial as to Muncy's personal knowledge. The Wageners, however, have

not pointed to any evidence in the record to rebut Muncy's statement that he had personal knowledge, based on his review of the records relating to the Wageners loan, of the matters referenced in his affidavit.

{¶35} Although the Wageners complain that "[n]one of the exhibits attached to [Muncy's] affidavit demonstrate[s] that [Bank of America] had possession of the original note when the complaint was filed" and that there is no "'chain of title' offered by way of transmittal letters, or otherwise to demonstrate the path the [note] allegedly traveled on its way into the possession of Nationstar," they cite no authority supporting their contention that specific documentary evidence must be produced establishing how, when and by what means a party came into possession of a note in order to establish standing for summary judgment purposes.

{¶36} Further, the averment in Muncy's affidavit that Bank of America was in possession of the note at the time it filed its complaint is supported by the fact that a copy of the note endorsed in blank was attached to the complaint when it was filed by Bank of America. *See, e.g., Perry*, 2013-Ohio-5024 at ¶ 12; *U.S. Bank, N.A. v. Adams*, 6th Dist. Erie No. E-11-070, 2012-Ohio-6253, ¶ 18, citing *Cent. Mtge. Co. v. Elia*, 9th Dist. Summit No. 25505, 2011-Ohio-3188, ¶ 11.

{¶37} The Wageners also contend that Muncy's affidavit was deficient because Muncy did not state that he personally viewed the original note (as opposed to an electronic scan of the note) and compared the original to the copy of the note attached to his affidavit before testifying that the copy of the note was a "true and correct copy" of

the original. *See Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. Stark No. 2010-CA-000291, 2011-Ohio-3203, ¶ 49; *HSBC Mtge. Servs. Inc. v. Edmon*, 6th Dist. Erie No. E-11-046, 2012-Ohio-4990, ¶ 15-24.

{¶38} This court previously rejected such an argument in *Hammond*, 2014-Ohio-5270, as follows:

> As for the decision of the Fifth District Court of Appeals in *Wachovia Bank of Delaware, N.A.*, 2011-Ohio-3203 at ¶ 46, 49, which provides that summary judgment affidavits based on documents must include an averment that the affiant compared copies of the documents attached to the affidavit with the originals, this court has not adopted this as a requirement under Civ.R. 56(E), nor do we intend to do so because the Ohio Supreme Court has not made this a requirement of Civ.R. 56(E). *See HSBC Mtge. Servs. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778.
>
> * * * [W]e find appellant's reliance on *Edmon* to be misplaced. In *Edmon*, the Sixth District held that the trial court erred in granting summary judgment to the bank where the borrower demonstrated a triable issue of fact as to the authenticity of the promissory note by offering testimony showing that the loan servicing officer did not review the original promissory note prior to swearing in her affidavit that the copy of the note attached to complaint was a true and accurate copy of the original. In *Edmon*, the servicing officer admitted at her deposition that she never viewed the original note. In the case at hand, however, appellant has provided this court with no evidence to suggest that [the affiant] reviewed only imaged copies of the documents he claimed to authenticate in his affidavit. Thus, there is no triable issue relating to [the affiant's] personal knowledge in this matter.

Id. at ¶ 37-38. In this case, Muncy's affidavit included statements from which it could be inferred that he compared the original note and mortgage (and the other documents referenced in his affidavit) to the copies so he could attest that the copies attached to his affidavit were true and correct. *See U.S. Bank N.A. v. Bobo*, 4th Dist. Athens No.

13CA45, 2014-Ohio-4975, ¶ 30. The Wageners provided no evidence to suggest that Muncy reviewed only an imaged copy of the note he claims to authenticate in his affidavit. Therefore, there is no triable issue of fact relating to Muncy's authentication of these documents as set forth in his affidavit.[10]

{¶39} The summary judgment evidence submitted by Nationstar established that Bank of America had the requisite standing to bring the foreclosure action because it possessed the original note endorsed in blank at the time it filed the complaint. The "holder" of a note is a "person entitled to enforce [it]." R.C. 1303.31(A)(1). Under R.C. 1301.201(B)(21)(a), a holder includes "[t]he person in possession of a negotiable instrument payable either to bearer or to an identified person that is the person in possession." The note, a copy of which was attached both to the complaint and Muncy's affidavit, was bearer paper because it was endorsed in blank by Countrywide.

{¶40} Accordingly, there is no genuine issue of material fact as to Bank of America's possession of the original note at the time it filed the complaint. The trial court did not err in concluding that Bank of America had standing to bring the foreclosure action.

Standing Through Assignment of the Mortgage Evidence of Merger

[10] The Wageners also assert in their reply brief that a genuine issue of material of fact existed as to whether Bank of America had possession of the original note when the complaint was filed because "Freddie Mac owned the loan." The Wageners, however, make no argument and cite no legal authority in support of this contention. Accordingly, we decline to address it. App.R. 16(A)(7).

{¶41} The Wageners also contend that Bank of America lacked standing to file the foreclosure action because there was "no Civil Rule 56 evidence before the trial court" proving that BAC Home Loans had merged into Bank of America. The Wageners contend that because there is no assignment of the mortgage directly to Bank of America, Nationstar was required to present Civ.R. 56(E) evidence of the merger of BAC Home Loans into Bank of America in order to prove that Bank of America was the holder of the mortgage at the time it filed the complaint. Although in its summary judgment motion, Nationstar referred to a copy of the certificate of merger that Bank of America had attached to its complaint as evidence of the merger of BAC Home Loans into Bank of America, the Wageners contend that this document could not be used to establish merger because the certificate was a photocopy rather than an original certified copy of the certificate of merger and was not otherwise authenticated in Muncy's affidavit. The Wageners contend that the absence of this evidence not only affected Bank of America's standing at the time of the filing of the complaint but also Nationstar's authority to foreclose on the mortgage (i.e., that without evidence of the merger, there was no evidence that Bank of America had authority to assign the note and mortgage to Nationstar), creating genuine issues of material fact both as to Bank of America's standing at the time it filed the complaint and Nationstar's standing at the time it was substituted as plaintiff and filed its summary judgment motion. We disagree.

{¶42} First, the Wageners did not raise the issue below. Therefore, they have waived it. It is well established that a party cannot raise new issues for the first time on

appeal that he or she failed to raise before the trial court. *See, e.g., Mosley v. Cuyahoga Cty Bd. of Mental Retardation,* 8th Dist. Cuyahoga No. 96070, 2011-Ohio-3072, ¶ 55, citing *Dolan v. Dolan,* 11th Dist. Trumbull Nos. 2000-T-0154 and 2001-T-0003, 2002-Ohio-2440,¶ 7, citing *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 322 N.E.2d 629 (1975); *Home Bank, F.S.B. v. Papadelis*, 8th Dist. Cuyahoga Nos. 87527, 87528, 87529 and 87530 2006-Ohio-5453, ¶ 32. This rule applies with equal force in appeals of summary judgment proceedings in foreclosure actions. *See, e.g., Wells Fargo Bank, N.A. v. Geiser*, 12th Dist. Butler No. CA2013-06-103, 2014-Ohio-3379, ¶ 10, fn. 3 ("'It is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal and failure to raise an issue before the trial court results in waiver of that issue for appellate purposes.'"), quoting *Dudley v. Dudley*, 12th Dist. Butler No. CA2008-07-165, 2009-Ohio-1166, ¶ 18.

{¶43} Furthermore, failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C). *Papadelis* at ¶ 31, citing *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (8th Dist.1987); *see also Dzambasow v. Abakumov*, 8th Dist. Cuyahoga No. 80621, 2005-Ohio-6719, ¶ 27 ("'[I]f the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its sound discretion, consider those materials in ruling on the summary judgment motion.'"), quoting *Christe v. GMS Mgt. Co., Inc.*, 124 Ohio App.3d 84, 90, 705 N.E.2d 691 (9th Dist.1997).

{¶44} Second, Nationstar did not need to establish that the mortgage had been formally assigned to Bank of America at the time the complaint was filed or that the mortgage had been formally assigned to Nationstar at the time it was substituted as plaintiff to establish a right to foreclose on the mortgage. A party seeking to foreclose on the mortgage need only establish that it was the holder of the note *or* had the mortgage assigned to it to have standing to enforce it. *Patterson*, 2012-Ohio-5894, at ¶ 21; *see also Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 65 ("Even if the assignment of mortgage from Argent to Deutsche Bank was invalid, Deutsche Bank would still be entitled to enforce the mortgage because under Ohio law, the mortgage 'follows the note' it secures. * * * The physical transfer of the note endorsed in blank, which the mortgage secures, constitutes an equitable assignment of the mortgage, regardless of whether the mortgage is actually (or validly) assigned or delivered."). As detailed above, Nationstar established through the Muncy affidavit that Bank of America was in possession of the original note at the time that the complaint was filed and that Nationstar was in possession of the original note at the time it was substituted as the plaintiff. This was proof enough.

{¶45} Third, Muncy's affidavit included an averment that Bank of America was the "successor by merger to BAC Homes Loans Servicing, LP fka Countrywide Home Loans Servicing, LP." Such averments have been deemed sufficient to establish the fact a merger has occurred for summary judgment purposes in a foreclosure action. *See, e.g., Bank of Am., N.A. v. Eten,* 12th Dist. Butler No. CA2013-05-087, 2014-Ohio-987, ¶ 17,

citing *Wachovia Bank of Delaware, N.A.*, 5th Dist. Stark No. 2011CA00261, 2012-Ohio-4479, ¶ 22-27. The Wageners did not present any evidence rebutting this evidence of merger.[11]

{¶46} Therefore, the Wageners did not raise a genuine issue of material fact regarding Bank of America's standing to bring the foreclosure action.

Arguments Unrelated to Standing of Bank of America

{¶47} Although the Wageners' vaguely worded assignment of error is arguably limited to the standing of Bank of America at the time it filed its complaint, the Wageners also raise two additional issues unrelated to the standing of Bank of America that they contend precluded summary judgment in favor of Nationstar. First, the Wageners contend that the trial court erred in entering summary judgment because the documents attached to Muncy's affidavit established that the only rights transferred from Bank of America to Nationstar were "servicing rights" and not "holder status." Second, they argue that summary judgment was improper because genuine issues of material fact existed as to whether all conditions precedent to foreclosure had been satisfied. Neither of these arguments is persuasive.

Transfer of Servicing Rights

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[11] Further, with respect to the Wageners' argument that the lack of proper evidence of the merger between BAC Home Loans and Bank of America affected Nationstar's ability to foreclose on the mortgage, as noted above, the Wageners did not oppose the substitution of Nationstar as the plaintiff in this case (and have not contended that the trial court erred in substituting Nationstar as the plaintiff). If the Wageners believed there was an issue as to Nationstar's ability to foreclose on the mortgage based on some deficiency in the purported transfer and assignment of Bank of America's interest in the note and mortgage to Nationstar, they should have raised that issue at that time.

{¶48} With respect to the Wageners' contention that the only rights transferred from Bank of America to Nationstar were "servicing rights" and not "holder status," once again, based upon our review of the record, it does not appear that the Wageners ever raised this issue with the trial court. As such, they have waived the issue. Even if, however, we were to consider the issue, we would find that it does not preclude summary judgment in this case.

{¶49} In support of their argument that only servicing rights were transferred to Nationstar, the Wageners cite to the following language contained in the "Notice of Assignment, Sale or Transfer of Servicing Rights," which Nationstar sent the Wageners on or about February 28, 2013:

> You are hereby notified that the servicing of your mortgage loan, that is, the right to collect payments from you, is being assigned, sold or transferred from BANK OF AMERICA, N.A. to Nationstar Mortgage, L.L.C., effective 2/16/13.
>
> This assignment, sale, or transfer of the servicing of the mortgage loan does not affect any other terms or condition of the mortgage instruments, other than the terms related to servicing of the loan.

{¶50} Simply because the Wageners were notified of the transfer of servicing from Bank of America to Nationstar in the "Notice of Assignment, Sale or Transfer of *Servicing* Rights," (emphasis added), does not mean Nationstar did not also become the holder of the note and mortgage by virtue of the assignment and/or transfer of possession of the note from Bank of America. Whereas the mortgage required that the borrower be given written notice of a change in servicer, the mortgage did not require that the

borrower be given notice of a sale or other transfer of the note itself. Paragraph 20 of the mortgage states, in relevant part:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to the Borrower. A sale might result in a change in the entity (known as the "Loan Servicer" that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under this Note, this Security Instrument, and Applicable Law. There might also be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan servicer, Borrower will be given written notice of the change * * *.

{¶51} As detailed above, the record reflects that Nationstar, by virtue of its possession of the original note endorsed in blank, was the holder of the note and also that the note and mortgage were assigned to Nationstar before it was substituted as the plaintiff. Accordingly, Nationstar established that it was the holder of the note and mortgage and, therefore, that it had standing to enforce the note and mortgage. This argument lacks merit.

Failure to Satisfy Conditions Precedent

{¶52} As its final argument, the Wageners contend that summary judgment was improper because Nationstar failed to establish that it (or its predecessors) provided

proper notice to the Wageners of default and acceleration as required under the terms of the mortgage.

{¶53} Where prior notice of default or acceleration is required under the terms of a mortgage, compliance with that requirement is a condition precedent to foreclosure. *See, e.g., N.Y. Life Ins. & Annuity v. Vengal*, 8th Dist. Cuyahoga No. 100557, 2014-Ohio-4798, ¶ 11, citing *Bank of Am., N.A. v. Pate*, 8th Dist. Cuyahoga No. 100157, 2014-Ohio-1078, ¶ 8. A plaintiff seeking to foreclose on the mortgaged property must, therefore, prove that such notice has been given.

{¶54} As proof that notice of default and intent to accelerate had been provided to the Wageners as required under the note and mortgage, Nationstar submitted a notice of intent to accelerate, dated December 20, 2010. The notice was attached to Muncy's affidavit, and Muncy averred in his affidavit that BAC Home Loans had sent the notice to the Wageners.

{¶55} The Wageners contend that the notice of intent to accelerate "should not have been admissible" because Muncy averred in his affidavit only that "he reviewed the records of Nationstar" and failed to establish that he had personal knowledge of the business records or practices of BAC Home Loans. As such, the Wageners contend, Muncy could not properly "authenticate a letter allegedly sent by" BAC Home Loans or establish that the notice of intent to accelerate letter had, in fact, been sent to the Wageners by BAC Home Loans.

{¶56} As detailed above, Muncy averred in his affidavit that the business records of Nationstar's predecessors were incorporated into Nationstar's business records as an ordinary business practice and that Nationstar regularly maintains and relies upon those business records as part of its ordinary and regularly conducted business activities when servicing mortgage loan accounts. Muncy further averred that he had personally reviewed those records relating to the Wageners' loan, and that, based on these records, BAC Homes Loans "Nationstar's servicing predecessor," had sent the Wageners the notice of intent to accelerate, a true and correct copy of which was attached to his affidavit. "'A witness providing the foundation [for a recorded business activity] need not have firsthand knowledge of the transaction.'" *U.S. Bank N.A. v. Wilkens*, 8th Dist. Cuyahoga No. 96617, 2012-Ohio-1038, ¶ 46, quoting *Moore v. Vandemark Co., Inc*., 12th Dist. Clermont Co. No. CA2003-07-063, 2004-Ohio-4313, ¶ 18. The averments of Muncy's affidavit relating to the notice of intent to accelerate were sufficient to authenticate the notice and could be properly relied upon by the trial court in awarding summary judgment to Nationstar. *See, e.g., RBS Citizens, N.A. v. Zigdon,* 8th Dist. Cuyahoga No. 93945 2010-Ohio-3511, ¶ 15-17 (affidavit was admissible to support summary judgment motion where documents affiant reviewed and relied upon related to borrowers' loan were business records created by predecessor); *Cent. Mtge. Co. v. Bonner,* 12th Dist. Butler No. CA2012-10-204, 2013-Ohio-3876, ¶ 12-20 (Evid.R. 803(6) permits an entity that did not create business records to admit business records of a predecessor entity when all other requirements of the rule are met and circumstances

indicate the records are trustworthy). The Wageners have not presented any evidence of specific facts challenging Muncy's testimony regarding this issue and do not dispute that they received the notice.

{¶57} The Wagners further claim that, even if the notice of intent to accelerate was properly considered by the trial court, the notice was deficient. The Wageners contend that the notice did not contain "the language contractually required" by the Wageners' mortgage and failed to properly inform the Wageners of their rights to reinstate the loan after acceleration and to assert defenses to acceleration and foreclosure in the foreclosure proceeding. They also claim the notice was deficient because the letter was sent by BAC Home Loans as the servicer and because there is no evidence of "the method of mailing" of the notice. None of these arguments has any merit.

{¶58} Paragraph 22 of the mortgage, entitled "Acceleration; Remedies," provides in relevant part:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to the Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. * * *

(Emphasis omitted.)

{¶59} Paragraph 6(C) of the note states:

> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the Interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

{¶60} The notice, dated December 20, 2010, states that the loan "is in serious default because the required payments have not been made," that the Wageners have a right to cure the default, that $3,275,60 is the amount "now required to reinstate the loan" and that if the Wageners fail to remit $3,275,60 by January 19, 2011 to cure the default, "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property." The notice further provides, in relevant part:

> You may, if required by law or your loan documents, have the right to cure the default after acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time period permitted by law. * * * Further, you may have the right to bring a court action to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure.

{¶61} A review of the notice sent on behalf of Bank of America shows that it conformed to the requirements of the note and mortgage. The Wageners contend that because the notice states "you may have a right *to bring a court action to assert the non-existence of a default or any other defense you may have* to acceleration and

foreclosure," it "misrepresented" to the Wageners that, in order to assert a defense to foreclosure they would have to bring their own judicial action. We disagree. The notice does not state that the Wageners' exclusive means of asserting any defenses to acceleration or foreclosure they might have was to file their own court action. Nor did the Wageners interpret it as such, as evidenced by the myriad of defenses the Wageners asserted in their answer. As the Seventh District recently explained in rejecting a nearly identical argument involving a notice and mortgage with substantially similar language:

> As for the notice's mention of bringing a court action to assert the non-existence of default or any other defense the borrower may have to acceleration and foreclosure, it specifies the possible defense of nonexistence of a default and as per the contract also discloses that other defenses exist, specifying that they are "defenses to acceleration and foreclosure." Furthermore, overlooked in the borrowers' argument is the fact that the recitation of the defenses was made in the context of the bank speaking of its own initiation of foreclosure proceedings. We conclude that the letter did not violate the contractual requirement that the notice inform the borrower of the right to assert a defense in the foreclosure proceeding.

Bank of Am., N.A. v. Stewart, 7th Dist. Mahoning 13 NA 48, 2014-Ohio-723, ¶ 21. We agree with the reasoning of the Seventh District in *Stewart*.

{¶62} The fact that the notice was sent by the servicer rather than the "lender" or "note holder" is of no consequence. The letter is written on Bank of America letterhead.

It specifically states that BAC Home Loans services the loan "on behalf of the holder of the promissory note" and that "[t]his communication is from BAC Home Loans Servicing, LP, the Bank of America company that services your home loan." Likewise, the fact that Muncy did not specify the manner of the mailing in his affidavit does not create a genuine issue of material fact for trial. The copy of the notice attached to the affidavit includes a copy of the mailing label, which indicates that the notice was sent to the Wageners via first class mail at the property address, as required under the terms of the note and mortgage. *See also Vengal*, 2014-Ohio-4798, at ¶ 20 (affiant's statement that notice of intent to foreclose "was sent to [defendant] on December 7, 2010 * * * at [the property address]" was sufficient to establish that notice was sent by first class mail despite the fact that affidavit did not specifically state that notice was sent by first class mail or that it was sent by any other means). The Wageners did not dispute that they received the notice.

Conclusion

{¶63} Upon our review of the record, we find that the trial court properly entered summary judgment in favor of Nationstar on its complaint. Muncy's affidavit and the other evidentiary materials submitted by Nationstar established that Bank of America, based on its possession of the original note endorsed in blank and the subsequent assignments of the mortgage and Bank of America's merger with BAC Home Loans,[12]

[12] As this court explained in *Bank of Am., N.A. v. Later*, 8th Dist. Cuyahoga No. 100606, 2014-Ohio-2536:

was both the holder of the note and mortgage at the time it filed its complaint. The evidentiary materials further established that Nationstar, by means of its possession of the original note endorsed in blank and Bank of America's assignment of its interest in the note and mortgage to Nationstar, was the holder of the notice and mortgage when it became the substitute plaintiff in April 2013. Nationstar also presented evidence establishing that the loan was in default and had not been cured, the amount owed on the loan and that the conditions precedent to foreclosure as set forth in the note and mortgage had been satisfied. *See JPMorgan Chase Bank, N.A. v. Dattilo*, 8th Dist. Cuyahoga No. 101239, 2014-Ohio-5286, ¶ 8, citing *Najar*, 2013-Ohio-1657, at ¶ 17. Once Nationstar met its burden under Civ.R. 56, the Wageners could not rest upon mere allegations or denials in the pleadings but were obligated to present evidence of specific facts demonstrating a genuine issue of material fact for trial. The Wageners did not meet their reciprocal burden.

> "[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." *Morris v. Invest. Life Ins. Co.*, 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971). "[T]he absorbed company becomes a part of the resulting company following merger [and] the merged company has the ability to enforce * * * agreements as if the resulting company had stepped in the shoes of the absorbed company." *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, ¶ 7. Once "'an existing bank takes the place of another bank after a merger, no further action is necessary' to become a real party in interest." *[Bank of Am., N.A. v. Harris,* 8th Dist. Cuyahoga No. 99272, 2013-Ohio-5749, ¶ 18], quoting *Huntington Natl. Bank v. Hoffer*, 2d Dist. Greene No. 2010-CA-31, 2011-Ohio-242, ¶ 15.

Later at ¶ 15.

{¶64} Accordingly, the trial court properly entered summary judgment in favor of Nationstar on its complaint. The Wageners' sole assignment of error is overruled.

{¶65} Judgment affirmed.

It is ordered that appellee recover from appellants the 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR