**[Cite as *Fannie Mae v. Hicks*, 2015-Ohio-1955.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 102079**

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## FANNIE MAE (FEDERAL NATIONAL MORTGAGE ASSOCIATION)

PLAINTIFF-APPELLEE

vs.

## LYNDA HICKS, ET AL.

DEFENDANTS-APPELLANTS

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**JUDGMENT:**
REVERSED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-746293

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

**RELEASED AND JOURNALIZED:** May 21, 2015

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EILEEN T. GALLAGHER, J.:

**{¶1}** Defendant-appellant, Lynda Hicks ("Hicks"), appeals the trial court's order denying her motion for summary judgment and granting summary judgment in favor of plaintiff-appellee, Federal National Mortgage Association ("Fannie Mae"), on its foreclosure claim. She raises one assignment of error for our review:

1. It was error for the trial court to enter judgment against appellant.

**{¶2}** After careful review of the record and relevant case law, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

## I. Facts and Procedural History

**{¶3}** In June 2004, Hicks purchased a home in Shaker Heights, Ohio. To finance the purchase, Hicks executed a promissory note payable to All American Home Lending, Inc. ("All American") in the amount of $152,000. As security for the note, Hicks executed a mortgage in favor of All American on the property located at 2550-2552 Kendall Road, Shaker Heights, Ohio 44120. All American subsequently assigned the mortgage and note to Chase Manhattan Mortgage Corporation ("Chase Manhattan"), and Chase Manhattan later merged into Chase Home Finance L.L.C.

**{¶4}** In February 2010, Hicks failed to make a payment on her mortgage. Chase Home Finance L.L.C. provided Hicks with notice of her default and an opportunity to cure the default before the loan was accelerated. Hicks did not cure the default, the loan was accelerated, and Chase Home Finance L.L.C. assigned the mortgage to Fannie Mae. Chase Home Finance L.L.C., assigned the mortgage to Fannie Mae. An allonge alleged

to have been attached to the original note contained an undated special endorsement from Chase Home Finance L.L.C. to Fannie Mae.

**{¶5}** In January 2011, Fannie Mae filed a complaint in foreclosure against Hicks. In its complaint, Fannie Mae alleged it was assigned the subject mortgage on November 19, 2010, and was a "person entitled to enforce the note" pursuant to R.C. 1303.31. Copies of the note, allonge to the note, and mortgage were attached to the complaint.

**{¶6}** In February 2013, Fannie Mae filed an amended complaint to reflect that the original note had been lost by the prior servicer, Chase Manhattan. The amended complaint attached a copy of a lost note affidavit from Chase Manhattan. The lost note affidavit was executed on June 30, 2014, and expressly indemnified Fannie Mae for any losses related to the lost note.

**{¶7}** Two months later, Fannie Mae filed a second amended complaint. The second amended complaint included a copy of the assignment of mortgage to Fannie Mae that was not attached to the first amended complaint.

**{¶8}** In June 2014, Fannie Mae filed a motion for summary judgment arguing that, although it was not entitled to enforce the lost note under R.C. 1303.38, it was entitled to judgment foreclosing the property as holder of the mortgage. On the same day, Hicks filed a motion for summary judgment, arguing that Fannie Mae was not entitled to a judgment on the mortgage because it could not establish its rights under the note.

**{¶9}** The magistrate later issued a decision granting Fannie Mae's motion for summary judgment and denying Hicks's motion. Hicks did not file objections to the

magistrate's opinion, and the trial court adopted the magistrate's decision in full. Hicks now appeals from the trial court's judgment.

## II. Law and Analysis

**{¶10}** In her sole assignment of error, Hicks argues that the trial court erred in granting summary judgment in favor of Fannie Mae and denying her motion for summary judgment.

### A. Standard of Review

**{¶11}** Typically, an appellate court reviews a trial court's decision granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). To prevail on a motion for summary judgment claim in a foreclosure action, the plaintiff must prove:

> (1) that the plaintiff is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due.

*Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 20.

**{¶12}** In this case, however, Hicks failed to object to the magistrate decison's conclusions of law. Accordingly, Hicks has waived all but plain error. *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128, ¶ 10, citing *Morgan Stanley Credit Corp. v. Fillinger*, 8th Dist. Cuyahoga No. 98197, 2012-Ohio-4295, ¶ 12.

**{¶13}** Civ.R. 53 imposes an affirmative duty on parties to submit timely, specific, written objections to the trial court, identifying any error of fact or law in the magistrate's decision. *Hameed v. Rhoades*, 8th Dist. Cuyahoga No. 94267, 2010-Ohio-4894, ¶ 14. Civ.R. 53(D)(3)(b)(iv) provides:

> Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

**{¶14}** When applying the plain error doctrine in the civil context, the Ohio Supreme Court has stated that reviewing courts "must proceed with the utmost caution." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The doctrine is limited to those "extremely rare cases" in which "exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings." *Id*.

**{¶15}** Accordingly, we consider the judgment of the trial court applying the plain error standard of review.

### B. Standing

**{¶16}** Initially, we address Hicks's argument that pursuant to *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, Fannie Mae did not have standing to file a complaint in foreclosure against her. Hicks contends there was insufficient evidence to establish Fannie Mae's interest in the promissory note at the time the foreclosure suit was filed.

**{¶17}** A party commencing litigation must have standing to sue in order to invoke the jurisdiction of the common pleas court. *Schwartzwald* at ¶ 20. 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. *Tate v. Garfield Hts.*, 8th Dist. Cuyahoga No. 99099, 2013-Ohio-2204, ¶ 12; *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986). Thus, lack of standing at the commencement of the lawsuit cannot be cured through an assignment prior to judgment; "[t]he lack of standing at the commencement of a foreclosure action requires dismissal of the complaint." *Schwartzwald* at ¶ 37-40.

**{¶18}** Prior to *Schwartzwald*, this court held that in order to have standing in a foreclosure action, the plaintiff must establish that "it owned the note *and* the mortgage when the complaint was filed." (Emphasis added.) *Wells Fargo Bank v. Jordan*, 8th Dist. Cuyahoga No. 91675, 2009-Ohio-1092, ¶ 23. In *Schwartzwald*, the court concluded that the lender did not have standing to invoke the jurisdiction of the common pleas court because "it failed to establish an interest in the note *or* mortgage at the time it filed suit." (Emphasis added.) *Schwartzwald* at ¶ 28. This statement implies that having an interest in either the note or the mortgage at the time the complaint is filed is sufficient to establish standing. However, the court did not expressly state that a plaintiff seeking foreclosure can establish standing by proving an interest in one or the other; it simply found that the lender in that case had neither.

**{¶19}** The ambiguity inherent in the *Schwartzwald* court's conclusion has caused a conflict among Ohio appellate districts.[1] Pursuant to *Schwartzwald*, the Tenth Appellate District held that, in order to have standing to commence a foreclosure action, the plaintiff must prove it was both the holder of the note and had an interest in the mortgage on the date it filed the complaint. *FV-I, Inc. v. Lackey*, 10th Dist. Franklin No. 13AP-983, 2014-Ohio-4944.

**{¶20}** In *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, (8th Dist.), we relied on *Schwartzwald* and held that a plaintiff seeking foreclosure "may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned *or* (2) is the holder of the note." (Emphasis sic.) *Id*. at ¶ 21. Therefore, until the Ohio Supreme Court resolves this conflict, we are bound by this court's precedent and hold that Fannie Mae had standing to commence this foreclosure action against Hicks because it established an interest in the mortgage at the time it filed the complaint. *Id*. *See also U.S. Bank Natl. Assn. v. Perry*, 8th Dist. Cuyahoga No. 99608, 2013-Ohio-3814, ¶ 9.

### C. Enforcement of a Lost Note

**{¶21}** Chapter 1303 of the Ohio Revised Code, Ohio's version of Article 3 of the Uniform Commercial Code ("UCC"), applies to the note in this case. When someone

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[1] This issue has been certified to the Ohio Supreme Court for resolution. *See SRMOF 2009-1 Trust v. Lewis*, 138 Ohio St.3d 1492, 2014-Ohio-2021, 8 N.E.3d 962.

signs a promissory note as its maker ("issuer"), he or she automatically incurs the obligation that the instrument will be paid to a "person entitled to enforce" the note. R.C. 1303.52. (UCC 3-412). "Person entitled to enforce" is defined in R.C. 1303.31(A) (UCC 3-301) as: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; or (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.

**{¶22}** In the case at hand, Fannie Mae is not a nonholder in possession of the instrument who has rights of a holder. The note is lost. Moreover, under Ohio's version of the UCC, the allonge's inability to be affixed to the original note is a fatal defect as it relates to Fannie Mae's holder status. *Wells Fargo Bank N.A. v. Freed*, 3d Dist. Hancock No. 5-12-01, 2012-Ohio-5941, ¶ 25, citing *HSBC Bank USA v. Thompson*, 2d Dist. Montgomery No. 23761, 2010-Ohio-4158, ¶ 66 ("[T]he [allonge] must be affixed to the instrument in order for the signatures to be considered part of the instrument."). Thus, Fannie Mae only qualifies as "a person entitled to enforce" the note if it can satisfy the requirements of R.C. 1303.38.

**{¶23}** R.C. 1303.38, Ohio's enactment of UCC 3-309, permits a person to enforce a lost, destroyed or stolen instrument through secondary evidence under the following conditions:

> (1) *the person was in possession of the instrument and entitled to enforce it when loss of possession occurred*, (2) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (3) the person cannot reasonably obtain possession of the instrument because the

> instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(Emphasis added.) R.C. 1303.38.

**{¶24}** In *Dennis Joslin Co., LLC v. Robinson Broadcasting Corp.*, 977 F.Supp. 491 (D.D.C.1997), the U.S. District Court for the District of Columbia concluded that, under the plain language of the § 3-309 version applicable in that case (identical to the current Ohio statute), only the person in possession of a negotiable instrument at the time of loss is entitled to enforce that instrument. According to the *Joslin* court, a person seeking to enforce a lost note must meet two tests: "it must have been both in possession of the note when it was lost and entitled to enforce the note when it was lost." *Id.* at 495. Accordingly, in *Joslin*, the court held that the transferee of rights under a note that was lost while in the possession of the transferor could not recover under the note. *Id.*

**{¶25}** Since the *Joslin* decision, the drafters of the UCC have amended section 3-309 to reject the *Joslin* holding. *See* U.C.C., Section 3-309, Comment 2 (2002). The current provision permits enforcement if the person either "(A) was entitled to enforce the instrument when loss of possession occurred; or (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." The remaining requirements for enforcement in the 2002 version remain the same as the 1990 version. However, Ohio has not adopted the 2002 amended version of Section 3-309.

**{¶26}** Thus, in Ohio, a party is not entitled to enforce a lost note unless it was entitled to enforce the instrument when the loss occurred. In light of the foregoing, Fannie Mae concedes that it is not entitled to enforce the promissory note because it was not in possession of the note at the time it was lost. Nevertheless, Fannie Mae argues it was entitled to judgment foreclosing the property as holder of the mortgage even though it was not a "person entitled to enforce" the lost note under R.C. 1303.31 and 1303.38.

**D. Enforcement of the Mortgage**

**{¶27}** In arguing that it was entitled to enforce the mortgage despite not being able to enforce the note,[2] Fannie Mae relies extensively on this court's opinion in *Blue View Corp. v. Gordon*, 8th Dist. Cuyahoga No. 88936, 2007-Ohio-5433 , and the Seventh Appellate District's opinion in *Natl. City Mtge. v. Piccirilli*, 7th Dist. Mahoning No. 08 MA 230, 2011-Ohio-4312. The magistrate agreed with Fannie Mae's interpretation of *Blue View* and *Piccirilli* and relied exclusively on these cases in granting summary judgment in favor of Fannie Mae. We, however, disagree with the lower court's application of *Blue View* and *Piccirilli*.

**{¶28}** In *Blue View* and *Piccirilli*, the courts were asked to determine whether a holder of the mortgage was entitled to enforce the mortgage where it was unable to obtain a personal judgment on the note because the defaulting debtor obtained a discharge from personal liability through Chapter 7 bankruptcy proceedings. In resolving this issue, the

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[2] A similar argument has been raised in the certified conflict case currently before the Ohio Supreme Court. *See SRMOF 2009-1 Trust v. Lewis*, 138 Ohio St.3d 1492, 2014-Ohio-2021, 8 N.E.3d 962.

courts held that although a discharge in bankruptcy may extinguish the personal liability of the debtor, a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. *See Blue View* at ¶ 22; *Piccirilli* at ¶ 27. Significantly, *Blue View* and *Piccirilli* did not involve factual scenarios, such as here, where the holders of the mortgage were not persons entitled to enforce the underlying promissory note.

**{¶29}** In its opinion, the magistrate stated "[o]ur Eighth District Court of Appeals has recognized the right of a mortgagee to foreclose a mortgage, even when the mortgagee cannot enforce the promissory note." Magistrate's Decision, citing *Blue View*, 8th Dist. Cuyahoga No. 88936, 2007-Ohio-5433, at ¶ 20-21. In our view, the trial court's statement is a mischaracterization of our holding. Contrary to the trial court's opinion, Blue View Corporation established that it was a person entitled to enforce the promissory note under R.C. 1303.31(A) because it satisfied the requirements of the lost note exception under R.C. 1303.38. *Id*. at ¶ 20. Thus, *Blue View* does not hold that a mortgagee is entitled to enforce the mortgage even where it is not entitled to enforce the promissory note. Instead, *Blue View* simply states that Blue View Corporation was entitled to obtain judgment on the mortgage even though it was unable to obtain a judgment on its promissory note following the debtor's Chapter 7 bankruptcy proceedings. The decision has no application to the factual circumstances of this case. Here, Hicks did not file for bankruptcy and Fannie Mae concedes that it is not entitled to enforce the subject note under R.C. 1303.38. Thus, the trial court's reliance on *Blue View* was misplaced.

**{¶30}** For these same reasons, *Piccirilli,* 7th Dist. Mahoning No. 08 MA 230, 2011-Ohio-4312, is inapplicable as well. Although the court stated, "[t]here was no question that the case could be litigated on the mortgage alone, even without any possibility or attempt to receive judgment on the promissory note[,]" the court was referencing the bank's ability to seek judgment on the mortgage even though it was not entitled to judgment on the promissory note because the property owners discharged their liability on the debt through bankruptcy proceedings. *Id.* at ¶ 27. Again, as in *Blue View,* 2007-Ohio-5433,the bank established that, but for the bankruptcy proceedings, it was a person entitled to enforce the note as holder of the instrument. *Id.* at ¶ 23 ("Christina Bank has provided an array of other documents providing that it is the holder of the * * * note* * *."). In fact, *Piccirilli* did not involve a lost note scenario. Thus, Fannie Mae, and the magistrate opinion's reliance on *Piccirilli* for the proposition that a foreclosing party is entitled to enforce the mortgage even where it is not entitled to enforce the promissory note is unpersuasive.

**{¶31}** While there are circumstances such as bankruptcy proceedings that preclude a party from obtaining personal judgment on the note, it does not follow that a party can enforce a mortgage without being a "person entitled to enforce" the note. In other words, there is a significant difference between being a *party that cannot obtain judgment* on the note and being *a party that is not entitled to enforce* the note under R.C. 1303.31(A) (UCC 3-301). (Emphasis added.) The distinction is significant because it determines a party's rights as holder of the mortgage.

**{¶32}** A foreclosure proceeding is the enforcement of a debt obligation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d. 546, 2009-Ohio-306, 906 N.E.2d 396. As a result, foreclosure in Ohio is a two-step process. *First Knox Natl. Bank v. Peterson*, 5th Dist. Knox No. 08CA28, 2009-Ohio-5096, ¶ 18. Only after the court determines liability on the underlying obligation can it proceed to the foreclosure analysis under the mortgage. *Id*. Thus, a determination of liability under the note is a prerequisite to enforcement of the mortgage itself because a mortgage is but an incident to the debt it secures. *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (1895). As stated by the United States Supreme Court, "[t]he note and the mortgage are inseparable; the former essential, the latter incident." *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1872).

**{¶33}** Applying the foregoing to the case at hand, we find that Fannie Mae was not entitled to enforce the mortgage where it failed to establish that it was entitled to enforce the note under the lost note exception. Without establishing its right to enforce the underlying debt obligation, Fannie Mae cannot satisfy the prerequisite to obtaining a judgment under the mortgage. In other words, "[a] mortgage may be enforced only by * * * a person who is entitled to enforce the obligation the mortgage secures." Restatement (Third) of Property: Mortgages, § 5.4(C) (1997). *See also In Re Dorsey*, 13, 8036 (B.A.P. 6th Cir.2014). To find otherwise would promote the separation of the note and mortgage and potentially subject the defaulting party to claims from multiple parties.

**{¶34}** Accordingly, we find the trial court committed plain error in granting summary judgment in favor of Fannie Mae and denying summary judgment in favor of Hicks. Because Fannie Mae was not entitled to enforce the note and mortgage, Hicks is entitled to judgment as a matter of law. The trial court's judgment relied on a mischaracterization of case law and would result in "a manifest miscarriage of justice." We emphasize that our holding should not result in a windfall for the defaulting home owners. *But see United States Natl. Bank Assn. v. Hoffer*, N.J. Super. No. BER-F-29217-12, 2014 N.J. Super. Unpub. LEXIS 115 (Jan. 17, 2014). The obligation under the note has not disappeared simply because Fannie Mae is not the party entitled to enforce it. Where the foreclosing party cannot prove its entitlement to enforce the note and mortgage, and hence is forbidden the possibility of foreclosure, the party's only remedy is to pass assignments back to the entity from which the obligation was purchased, and so on, until it reaches the party who is entitled to enforce it.

**{¶35}** Hicks's sole assignment of error is sustained.

## III. Conclusion

**{¶36}** The trial court committed plain error in granting summary judgment in favor of Fannie Mae and against Hicks. Fannie Mae has failed to establish its right to enforce the note and, in turn, the mortgage. Accordingly, Hicks is entitled to judgment as a matter of law.

**{¶37}** Judgment reversed and remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
TIM McCORMACK, J., CONCUR