

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JPMORGAN CHASE BANK TRUSTEE, :  
et al.

Plaintiff-Appellee : C.A. CASE NO. 23927

v. : T.C. NO. 08CV8810

DENNIS L. MURPHY, et al. : (Civil appeal from  
Common Pleas Court)

Defendants-Appellants :

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**OPINION**

Rendered on the 29<sup>th</sup> day of October, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Dennis L. and Robin L. Murphy (“Murphy”), filed March 15, 2010. On September 25, 2008, JPMorgan Chase Bank, as Trustee, on behalf of the holders of the Truman Capital Mortgage Loan Trust 2004-2 Asset Backed Certificates, Series 2004-2 (“JPMorgan Chase”), filed a Complaint for Foreclosure against Murphy, asserting that Murphy owed an outstanding principal balance of \$110,255.99, plus interest, on a Note secured by a mortgage held by JPMorgan Chase. Attached to the Complaint is a copy of the Adjustable Rate Note and Open-End Mortgage, dated February 20, 1998, pursuant to which Murphy promised to pay Alternative Mortgage Source, Inc. (“Alternative”), the principal sum of \$123,250, along with interest. The property at issue is located at 6493 Shull Rd., Huber Heights.

{¶ 2} On October 14, 2008, Murphy filed pro se correspondence with the court, advising that they are “working through ‘Save the Dream’ organization out of Washington DC \* \* \* and locally CRIAA Community Reinvestment Institute Alumni Association \* \* \* to save our home.” Murphy further asserted that “the original loan is \* \* \* a predatory loan.” According to Murphy, the delinquency in payments is due to the illness and disability of Dennis Murphy. Murphy asked the court to stay the foreclosure proceedings to allow them to “obtain affordable financing through CRIAA.” The October 14<sup>th</sup> correspondence is delineated as an Answer on the court’s docket.

{¶ 3} On October 20, 2008, JPMorgan Chase filed a Final Judicial Report which provides in part, the “foreclosure action styled [*JPMorgan Chase v. Murphy*] \* \* \* reflects that all parties necessary for the adjudication of this dispute have been named.”

{¶ 4} On November 4, 2008, JPMorgan Chase filed a Motion for Summary

Judgment, asserting that Murphy executed and delivered the Note and Mortgage, that they did not make the required installment payments and are in default, that the Note has been accelerated, and that there is due and payable the principal balance of \$110,255.99 plus interest, late charges and costs.

{¶ 5} Also on November 4, 2008, JPMorgan Chase filed a “Notice of Filing of Lost Assignment Affidavit.” The affiant, Bill Koch, a Document Control Officer with Select Portfolio Servicing, Inc, formerly known as Fairbanks Capital Corp. (“Select”), attests that the original holder of the mortgage on the property at issue was Alternative, and that Select is now the custodian of the note and mortgage. The affidavit further provides that the note and mortgage were purchased by JPMorgan Chase “by its Attorney-in-Fact [Select] \* \* \* but the assignment from [Alternative] to JPMorgan Chase \* \* \* cannot be located for the recording.” Koch avers that “at all times,” JPMorgan Chase “has been the holder of the Mortgage/Deed of Trust and Note with full authority to exercise the rights of a lender thereunder.”

{¶ 6} JPMorgan Chase also filed the affidavit of Merlobel Custodio, another Document Control Officer for Select, attesting that Select provides “mortgage and foreclosure related services” to JPMorgan Chase, that Murphy is in default on their payments, and that JPMorgan Chase is entitled to enforce the mortgage. Attached to the affidavit are copies of the Note and Open-End Mortgage.

{¶ 7} On December 5, 2008, Murphy filed correspondence with the court outlining their attempts to secure representation and assistance in obtaining modification of their loan. This correspondence is delineated as a response to the motion for summary judgment on the

court's docket.

{¶ 8} On December 11, 2008, in ruling upon JPMorgan's Chase's motion for summary judgment, the trial court issued a Judgment Entry and Decree of Foreclosure against Murphy. The court determined that Murphy executed the Note and Mortgage, and that the Note and Mortgage "are in default because payments required to be made \* \* \* have not been made[, and that] the conditions of the Mortgage have been broken, the break is absolute, and [JPMorgan Chase] is entitled to have the equity of redemption and dower of the current title holders foreclosed."

{¶ 9} On February 10, 2010, Murphy, represented by counsel, filed a "Motion to Reopen and Dismiss Action for Lack of Plaintiff's Standing ab Initio; Motion for Declaratory Judgment Declaring Judgments Issued in this Action Void ab Initio; Motion for Leave to Join any Persons Required by O.R.C. § 2721.12," with a supporting memorandum.

According to Murphy, the judgment in foreclosure is void ab initio because JPMorgan Chase did not record the assignment of the mortgage to it prior to filing its complaint against Murphy and, accordingly, lacked standing to initiate the action. Murphy asserts that Alternative recorded the mortgage on March 3, 1998, and JPMorgan Chase filed its complaint against Murphy on September 25, 2008, but that Alternative and JPMorgan Chase did not record the assignment of the mortgage until December 17, 2008. Murphy contends that JPMorgan Chase "did not own the note or the mortgage" on September 25, 2008, when the action was initiated, and that the trial court lacked jurisdiction to enter judgment because JPMorgan Chase "did not have standing to bring this action on the date it filed the action."

{¶ 10} On February 18, 2010, JPMorgan Chase filed a Memorandum in Opposition,

asserting that an “assignee’s untimely recording of a mortgage assignment does not affect his legal rights as between mortgagor and mortgagee,” and that the “only effect of not recording the assignment is that Plaintiff runs the risk of losing its legal interest to a subsequent purchaser for value without notice of the assignment.”

{¶ 11} On February 18, 2010, the trial court overruled, without analysis, Murphy’s motions, finding them to be “not well-taken.” On March 12, 2010, a “Confirmation Entry of Sale and Distribution of Proceeds” was issued. On March 15, 2010, Murphy filed a pro se “Motion to Dismiss Sale to JPMorgan Chase and Declare Mortgage Paid in Full.”

{¶ 12} On March 12, 2010, the trial court issued a Confirmation Entry of Sale and Distribution of Proceeds, which provides that the property was sold by the Sheriff on February 19, 2010 to JPMorgan Chase, for \$76,000.00, and that JPMorgan Chase assigned its bid to The Bank of New York Mellon Trust Company. The Entry provides in part, “\* \* \* that the sale of the Property conformed in all respects to the law.”

{¶ 13} We note that Murphy did not attach a copy of the decision appealed from to the Notice of Appeal, nor does the Notice of Appeal indicate the date of the decision from which he appeals. The Notice of Appeal does indicate, however, that the appeal involves, inter alia, summary judgment. The record reveals that the trial court, in its decision on JPMorgan Chase’s motion for summary judgment, endorsed thereon a direction to the clerk to serve upon all parties notice of the judgment and the date of its entry upon the journal, and to “note said service upon its docket.” There is, however, no notation of service on the trial court’s docket as required by Civ.R. 58(B). In the absence of a notation in the docket, service is not complete. *Id.* Accordingly, the time for appealing the grant of summary

judgment is tolled. App.R.4(A). In other words, Murphy's time for appeal of the grant of summary judgment did not expire prior to the filing of his Notice of Appeal. The March 15, 2010 Notice of Appeal is also within the time prescribed for appeal from the February 18, 2010, decision overruling Murphy's motions. App.R. 4(A).

{¶ 14} In addressing Murphy's brief, for the sake of completeness, we will review both of the trial court's decisions. We initially note that Murphy's brief does not delineate specific assignments of error. Attached to the brief are numerous documents that are beyond our consideration, as they not part of the trial court record. App.R. 9(A). Murphy asks us to "vacate sale of property 6493 Shull Rd. in Huber Heights, OH 45424. Due to mortgage and mortgage servicing fraud for profit pray courts rule mortgage note is paid in full."

{¶ 15} "Civ. R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party 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 come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. (Internal citations omitted). Our review of the trial court's decision to grant summary judgment is de novo." *Cohen v. G/C Contracting Corp.*, Greene App. No. 2006 CA 102, 2007-Ohio-4888.

{¶ 16} Civ.R. 17 provides in part, "Every action shall be prosecuted in the name of the real party in interest. \* \* \*."

{¶ 17} Along with its Motion for Summary Judgment, JPMorgan Chase filed

competent summary judgment evidence, pursuant to Civ.R.56(C), in the form of affidavits and a judicial report, establishing that it is the real party in interest to prosecute its claim against Murphy. Murphy did not challenge JPMorgan Chase's status as the real party in interest in their Answer or in their response to the motion for summary judgment, and they did not assert that JPMorgan Chase lacked standing to seek foreclosure until after the trial court granted summary judgment in favor of JPMorgan Chase. Murphy merely asked the trial court to stay the foreclosure proceedings. In other words, there was no genuine issue as to any material fact before the trial court, and the court correctly determined that JPMorgan Chase was entitled to summary judgment and foreclosure.

{¶ 18} In their subsequent motion to reopen and dismiss, and for declaratory judgment, Murphy asserted that JPMorgan Chase did not own the note and mortgage and accordingly lacked standing, that the "issue of standing may be raised at anytime," and that "[w]hen a court lacks jurisdiction over the case because it was filed by a person without standing, the case must be dismissed."

{¶ 19} "It is well understood \* \* \* that the lack of subject matter jurisdiction may be raised anytime." *Hunt v. Hunt* (Oct. 28, 1994), Greene App. No. 93-CA-92. While Murphy asserted that their motion to dismiss was a "jurisdictional motion," we have previously held, "[b]ecause '[t]he issue of lack of standing "challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court," \* \* \* the issue of standing or the "real-party-in-interest" defense is waived if not timely asserted.'" *Countrywide Home Loans v. Swayne*, Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶ 29. In other words, "standing is not an issue of subject matter jurisdiction." *Portfolio Recovery*

*Assoc., L.L.C. v. Thacker*, Clark App. No. 2008 CA 119, 2009-Ohio-4406, ¶ 14. As noted above, Murphy did not timely challenge the standing of JPMorgan Chase to prosecute the foreclosure action, and Murphy accordingly waived this argument.

{¶ 20} Since the trial court properly granted summary judgment in favor of JPMorgan Chase and overruled Murphy's motions to reopen, dismiss and for declaratory judgment, the judgment of the trial court is affirmed.

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BROGAN, J., concurs.

FROELICH, J., concurring:

{¶ 21} I concur. I write only to stress that this court is acutely aware of potential legal issues surrounding foreclosures. This is perhaps illustrated in the majority opinion where, although we must hold pro se Appellants to the same standards as those represented by counsel, we have been very liberal in applying the Appellate Rules and in interpreting the Appellants' arguments.

{¶ 22} The homeowners contend judgment against them was in error because, they allege, the assignment of the mortgage to JPMorgan (the plaintiff in the foreclosure complaint) was not recorded until sometime after the Complaint was filed. This alleged fact, the homeowners contend, means that JPMorgan did not have standing to bring the foreclosure, and that the trial court thus did not have subject matter jurisdiction to render judgment in favor of JPMorgan; the homeowners conclude that the foreclosure judgment is void since it was granted by a court that did not have subject matter jurisdiction.

{¶ 23} But this is not a situation where a municipal court grants a real estate



foreclosure. Rather, the foreclosure was rendered by the General Division of the Common Pleas Court which has the power and authority (i.e., the subject matter jurisdiction) to grant foreclosure judgments.

{¶ 24} It is a totally different matter to assert, as do the Appellants, that the Common Pleas Court should have been aware that one of the parties to the litigation - over which the court had subject matter jurisdiction - was not a real party in interest and lacked standing to participate in the litigation. If that were the situation, such contention should have been brought to the attention of the trial court and would have been addressed. Appellant did not do this and thereby gave up, or waived, the right to argue the issue in this court.

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Copies mailed to:

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Hon. Barbara P. Gorman