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FOR CLIENTS AND FRIENDS OF DREHER TOMKIES SCHEIDERER LLP

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OHIO SUPREME COURT HOLDS PLAINTIFF MUST HAVE STANDING AT COMMENCEMENT OF FORECLOSURE

Federal Home Loan Mortgage Corporation commenced a foreclosure action on April 15, 2009 against the Schwartzwalds. *Federal Home Mortgage Corp. v. Schwartzwald,* Slip. Op. No. 2012-Ohio-5017, 2012 WL 5359243, (Oct. 31, 2012). The foreclosure action included a copy of the mortgage identifying the Schwartzwalds as borrowers and Legacy Mortgage as lender, but did not include a copy of the note.

On April 24, 2009, Federal Home Loan filed with the court a copy of the note signed by the Schwartzwalds in favor of Legacy Mortgage. The final page carried a blank endorsement by Wells Fargo placed above the endorsement by Legacy Mortgage payable to Wells Fargo.

On May 15, 2009, Wells Fargo assigned the note and mortgage to Federal Home Loan, and Federal Home Loan filed with the court a copy of the assignment on June 17, 2009. Federal Home Loan and moved for a default judgment and a summary judgment.

The Schwartzwalds also moved for summary judgment, asserting that Federal Home Loan lacked standing to foreclose on their property.

The Schwartzwalds argued that the essential aspect of standing is injury to a legally protected right and claimed that Federal Home Loan had not been injured by their default at the time it commenced the foreclosure action, because Federal Home Loan had not obtained the note and mortgage until after it filed the complaint.

Federal Home Loan argued that, pursuant to Section 1303.31 of the UCC, it is a "person entitled to enforce the note" because it is "[a] nonholder in possession of the instrument who has the rights of a holder" by virtue of the negotiation of the note from Legacy to Wells Fargo and the assignment from Wells Fargo. Further, Federal Home Loan maintained that Section 1303.31 defines only which party is entitled to enforce a note and that the failure to be a real party in interest at the commencement of suit can be cured pursuant to Rule 17(A) (regarding the real party in interest) by the assignment of the mortgage and note.

The court stated that it had previously recognized that standing is a "jurisdictional requirement." Citing the United States Supreme Court, the court said that because standing to sue is required to invoke the jurisdiction of the common pleas court, standing is to be determined as of the commencement of suit. According to the court, 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.

The court also cited to cases in other states that have concluded that standing is determined as of the filing of the complaint. The court found that Rule 17(A) can not be relied on to cure a lack of standing at the commencement of the action.

The court concluded that it is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Rule 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

The court held that, as it was undisputed that Federal Home Loan did not have standing at the time Federal Home Loan commenced the foreclosure action, Federal Home Loan failed to invoke the jurisdiction of the court of common pleas. The court dismissed the case without prejudice.

The case underscores the importance of maintaining proper documentation at all times. ❑

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