

ROUNDTABLE DISCUSSION
on
FED. HOME LOAN MTGE. CORP. v. SCHWARTZWALD

March 7, 2013
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I. Welcome / Introduction

II. Overview of *Fed. Home Loan Mtge. Corp. v. Schwartzwald*

- A. Brief summary of facts and decision.
- B. Impact of the decision: see part IV below for discussion of Ohio Supreme Court and appellate court rulings issued in response to *Schwartzwald*.

III. Magistrates' perspective

- A. What has the Magistrates' experience been since *Schwartzwald*? How are parties' arguments changing? What trends is the Court seeing?
- B. Has the Court changed any of its protocols or procedures regarding standing issues in cases where the homeowner is *pro se* or does not appear?

IV. Discussion and Q&A Regarding Recent Case Law and Procedural Issues

- A. Ohio Supreme Court decisions after *Schwartzwald*.
- B. Appellate court decisions (including 9th District).
- C. Motion practice based on Civ. R. 12 and Civ. R. 56.

CASE SUMMARIES

I. Post-Schwartzwald Decisions from the Supreme Court of Ohio:

- The Ohio Supreme Court reversed one decision from the Ninth Appellate District — *Indy Mac Fed. Bank FSB v. OTM Inv.*, 2012 WL 6122024. The Ninth District had held that “a bank need not possess a valid assignment at the time of filing suit so long as the bank procures the assignment in sufficient time to apprise the litigants and the court that the bank is the real party in interest.” *IndyMac Fed. Bank, FSB v. OTM Invests., Inc.*, 2011-Ohio-3742 appeal allowed, 2011-Ohio-6556, 130 Ohio St. 3d 1493, 958 N.E.2d 956 and rev'd sub nom. *IndyMac Fed. Bank, F.S.B. v. OTM Invests., Inc.*, 2012-Ohio-5496.
- *CitiMortgage, Inc. v. Schippel*, No. 2012-1553 (remand to 6th Dist. for application of decision in *Schwartzwald*)
 - Case involved bank merger and conflicting versions of copy of note attached to complaint and later presented at deposition. Lower court found no genuine issue of material fact as to standing.
- *Bank of New York Mellon Trust Co. v. Shaffer*, No.2012-1609 (reversed and remanded to 11th Dist. for application of *Schwartzwald*)
 - Lower court held lack of standing was cured by filing of post-complaint mortgage assignment.
- *Fifth Third Mtge. v. Bihn*, 2012-Ohio-637, 2012 WL 525580 (reversed and remanded to trial court for application of *Schwartzwald*; 2nd Dist case)
 - Lower court held lack of standing was cured by filing of post-complaint mortgage assignment.
- *Bank of America, N.A. v. Jimenez*, 2012-Ohio-5499, 2012 WL 6121620 (reversed and remanded to trial court for application of *Schwartzwald*; 5th Dist. case)
 - Lower court held lack of standing was cured by filing of post-complaint mortgage assignment.
- *Washington Mutual Bank v. Wallace*, 2012-Ohio-5495, 2012 WL 6121767 (certified conflict answered in negative, reversed and remanded to trial court for application of *Schwartzwald*; 12th Dist. case)
 - Lower court held lack of standing was cured by filing of post-complaint mortgage assignment, and further held that bank's misrepresentation that it was the holder of the mortgage did not justify relief from judgment.
- *U.S. Bank N.A. v. Perry*, 2012-Ohio-5497, 2012 WL 6122083 (judgment of 8th Dist. aff'd. on authority of *Schwartzwald*)

- Lower court held lack of standing could not be cured by filing of post-complaint mortgage assignment.

II. Post-Schwartzwald Decisions from the Ninth District Court of Appeals:

- *Bank of America v. Kuchta*, 2012-Ohio-5562 (9th Dist. Medina Co.)

Defendants appealed failure of trial court to hold a hearing on their 60(B) motion and alleged that plaintiff lacked standing to foreclose based in part on lack of valid mortgage assignment when it filed case. Court of Appeals reversed and remanded to trial court. Copy of note attached to complaint was not indorsed and mortgage was assigned to plaintiff after complaint filed and purported to assign the note and mortgage. Court of Appeals mentioned post-complaint mortgage assignment as issue that warranted 60(B) hearing given *Schwartzwald*.

- *Wells Fargo v. Burrows*, 2012-Ohio-5995 (9th Dist. Summit Co.)

Appeal of summary judgment of foreclosure. Wells Fargo alleged in complaint that it was assignee of note and mortgage, copies of which were attached. Defendants challenged standing of Wells Fargo to file foreclosure. Court of Appeals found that no assignment to Wells Fargo was attached to the complaint and the attached copy of the note was not indorsed to Wells Fargo. Reversed and remanded to trial court with instructions to dismiss case without prejudice based on *Schwartzwald*. Decision outlines burden of proof in foreclosure.

- *Citibank SD v. Rowe*, 2013-Ohio-523 (9th Dist. Lorain Co.)

Appeal of summary judgment in credit card case. Court found genuine issue of material fact precluded summary judgment on issue of standing where plaintiff failed to present sufficient evidence of alleged merger with bank that issued credit card.

III. Post-Schwartzwald Decisions from Other Appellate Districts:

- *Bank of NY Mellon Trust Co. v. Shaffer*, 2012-Ohio-3638 (11th Dist.)

Bank of NY Mellon filed foreclosure on June 8, 2009. Its complaint alleged that it was holder of note, a copy of which was unavailable. Mortgage assignment to Bank of NY was filed June 22, 2009. After default judgment entered, Shaffer filed an answer and then a motion to dismiss based on bank's lack of standing. Trial court denied motion to dismiss. Court of appeals affirmed, holding that Shaffer failed to raise standing in responsive pleading

prior to default judgment and so allegation that bank was holder of note is admitted under Civ.R. 8(D).

- *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894 (8th Dist.)

Foreclosure complaint by CitiMortgage, filed on September 20, 2006, contained allonge with indorsement in blank. On October 13, 2006, assignment of mortgage to CitiMortgage was recorded. Default judgment was granted on August 15, 2008. On July 8, 2011, Pattersons filed motion to vacate judgment and for stay. Property sold at sheriff's sale on October 3, 2011. Trial Court granted Patterson's motion to vacate on April 19, 2012, based on decision in *Wells Fargo v. Jordan*, 2009-Ohio-1092 (standing requires proof that plaintiff owned both note and mortgage when complaint filed), and CitiMortgage appealed. Appellate court reversed and remanded case based on its reading of ¶ 28 in *Schwartzwald* (Freddie Mac lacked standing because it failed to establish interest in note or mortgage when case filed). Court reversed its holding in *Jordan* with respect to proof of ownership of mortgage at time case is filed).

- *Deutsche Bank Natl. Trust Co. v. Rudolph*, 2012-Ohio-614 (8th Dist.)

Deutsche Bank as Trustee for New Century Home Equity Loan Trust 2006-2 filed foreclosure against Rudolph in February 2012. Its complaint alleged that Deutsche Bank was holder of note and mortgage. Rudolph filed 12(B)(6) motion to dismiss, claiming that mortgage was assigned after 2005 closing date for Trust and the assignment was void. Rudolph also contended that Deutsche Bank did not own the note, based on the fact that the copy of the allonge attached to the complaint did not contain hole punch marks while the note attached to the complaint did. Trial court granted Rudolph's motion and dismissed case with prejudice. Deutsche Bank appealed, arguing that it had standing. Appellate court reversed and remanded case, finding that based on *Unger*, Rudolph could not challenge the validity of the mortgage assignment and could not attack the plaintiff's holder status through her 12(B)(6) motion since Deutsche Bank properly pled that it held the note.

- *U.S. Bank v. McGinn*, 2013-Ohio-8 (6th Dist.)

Appeal of summary judgment of foreclosure based on plaintiff's lack of standing. U.S. Bank filed complaint against McGinns in which it alleged that it was holder and owner of note and mortgage. GMAC serviced the loan. The copy of note attached to complaint was indorsed by Intervale to Decision One Mortgage and contained a second blank indorsement by Decision One. No mortgage assignment was attached to the complaint, and the copy of the attached mortgage named Intervale Mortgage Corp. as the mortgagee. Trial court granted summary judgment and McGinns appealed, assigning lack of standing as the single error for consideration. The appellate court reversed and

remanded the case, finding that the differences in the indorsements created a material fact issue as to whether U.S. Bank possessed the note prior to filing its complaint and thus lacked standing. The Court found that the mortgage assignment to U.S. Bank after its complaint was filed could not form the basis for standing in keeping with *Schwartzwald* (obtaining an interest in the note and mortgage after commencement of action cannot cure lack of standing), but was not dispositive of that issue if the note was transferred to U.S. Bank prior to the date its complaint was filed, citing *Aurora Loan Services, LLC v. Louis*, 2012-Ohio-384 (transfer of obligation secured by a mortgage acts as equitable assignment of the mortgage).

- *Fed. Home Loan Mtge. Corp. v. Rufo*, 2012-Ohio-5930, 2012 WL 6561389 (11th Dist.)

Appeal of summary judgment for plaintiff reversed. Note not attached to complaint. One month after complaint filed, the mortgage was assigned by MERS to plaintiff. Later, the plaintiff filed notice of filing note and mortgage assignment with copy of note indorsed in blank. Court of Appeals found that affidavit in support of summary judgment was insufficient to show that plaintiff held the note when it filed the complaint.

- *Osbourne v. Van Dyk Mortg. Corp.* 2013-Ohio-332, 2013 WL 431323 (12th Dist.)

Plaintiff could not establish ownership interest in property necessary for common law claims of breach of fiduciary duty, fraud, and negligence against mortgage company. Court of Appeals relied on *Schwartzwald* to determine existence of plaintiff's standing.

- *Mulby v. Poptic*, 2012-Ohio-5731, 2012 WL 6082892(8th Dist.)

Appeal from summary judgment of foreclosure in favor of plaintiff. Defendant claimed that note had not been assigned to plaintiffs who lacked standing to foreclose. Court of Appeals found that mortgage "and 'the indebtedness secured thereby' (*which can only mean the note*)" was assigned to plaintiffs. Successor trustees who were defendants in case admitted in answer that they assigned the note to plaintiffs before the case was filed.

- *PNC Bank v. Botts*, 2012-Ohio-5383 (10th Dist.)

Trial court denied 60(B) motion and 12(B)(1) motion. Defendant argued that note attached to complaint was not indorsed to PNC and that mortgage attached to complaint was assigned to First Franklin, not PNC, and that he deserved hearing on 60(B)(3) motion citing fraud on the court by PNC by falsely asserting that it was the real party in interest. Court of Appeals found that Botts failed to raise fraud claim at trial court level and could not raise it

by way of 60(B)(3) motion. Court of Appeals also held that lack of standing cannot be challenged by 12(B)(1) motion because lack of standing does not challenge the subject matter jurisdiction of the court.

- *Christiana Bank & Trust v. Ostrander*, 2013-Ohio-46 (6th Dist.)

Defendant appealed denial of motion to withdraw property from sale. Court of Appeals reversed trial court's foreclosure judgment and dismissed case without prejudice. It focused on lack of evidence in record to show that plaintiff held note when it commenced action and fact that assignment of mortgage relied upon by plaintiff had nothing to do with property or parties. Court of Appeals found that plaintiff failed to establish justiciable interest in subject matter of action.

- *Nationstar v. Van Cott*, 2012-Ohio-5807 (6th Dist.)

Appeal of summary judgment. Court of Appeals reversed and remanded in light of *Schwartzwald*. Loan originated by Goldstar Mortgage Corp. Nationstar alleged it was entitled to enforce note but did not attach copy of note to its complaint and filed mortgage assignment after complaint was filed. Court of Appeals found genuine issue of material fact as to Nationstar's standing to bring foreclosure action.

- *One West v. Yevtich*, 2012-Ohio-6246 (6th Dist.)

Appeal of denial of 60(B) motion and 12(B)(1) motion. Mortgage assigned to plaintiff after complaint filed. Based on *Schwartzwald*, Court of Appeals held that party lacks standing if it fails to establish interest in mortgage or note when action commenced; 12(B)(1) motion should have been granted. Reversed and dismissed without prejudice.