

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>WELLS FARGO BANK, N.A.,</b>	:	
<b>TRUSTEE POOLING AND SERVICING</b>	:	
<b>AGREEMENT DATED AS OF NOV. 1,</b>	:	<b>CASE NO. 2011 CVE 001338</b>
<b>2004 ASSET-BACKED PASS-</b>	:	
<b>THROUGH CERTIFICATES, SERIES</b>	:	
<b>2004-WHQ2</b>	:	
	:	<b>Judge McBride</b>
Plaintiff	:	
	:	
vs.	:	
	:	<b>DECISION/ENTRY</b>
<b>ESTHER EICHELBRENNER, et al.</b>	:	
	:	
Defendants	:	
	:	

Reimer, Arnovitz, Cherek & Jeffrey Co., L.P.A., Mike L. Wiery, attorney for the plaintiff Wells Fargo Bank, N.A., 30455 Solon Road, Solon, Ohio 44139.

Dever Law Firm, Scott A. Hoberg and Jonathan T. Dever, attorneys for the defendant Esther Eichelbrenner, 9146 Cincinnati-Columbus Road, West Chester, Ohio 45069.

This cause is before the court for consideration of a motion to vacate judgment and for a stay of eviction filed by the defendant Esther Eichelbrenner.

The court scheduled and held an evidentiary hearing on the motion on April 29, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## **FACTS OF THE CASE**

The plaintiff Wells Fargo Bank, N.A., Trustee Pooling and Servicing Agreement dated as of November 1, 2004 Asset-Backed Pass-Through Certificates, Series 2004-WHQ2 (hereinafter "Wells Fargo") filed its complaint for foreclosure in the present case on August 1, 2011. Attached to the complaint are an adjustable rate note executed by the defendant Esther Eichelbrenner for the benefit of the lender Argent Mortgage Company, LLC, and a mortgage executed by both Esther Eichelbrenner and Rocky Eichelbrenner, with Argent Mortgage Company as the lender. The note states that a mortgage dated the same date as the note protects the note holder from possible losses which might result from failing to keep the promises set forth in the note.<sup>1</sup> The mortgage refers to the note dated September 22, 2004 in the amount of \$135,000, which is consistent with the promissory note attached to the complaint.<sup>2</sup> The mortgage also states that it secures repayment of the loan, all renewals, extensions and modifications of the Note, and the performance of the borrower's covenants and agreements under the note and mortgage.<sup>3</sup>

An assignment of mortgage is also attached to the complaint which states that Argent Mortgage Company "does hereby sell, transfer and set over, without recourse,

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<sup>1</sup> Note at pg. 3.

<sup>2</sup> Mortgage at pg. 2.

<sup>3</sup> Id. at pg. 3.

unto Wells Fargo Bank N.A. as Trustee under Polling and Servicing Agreement dated as of November 1, 2004 Asset Backed Pass Through Certificates, Series 2004-WHQ2 \* \* \* ” the mortgage deed “together with the Promissory Note secured thereby and referred to therein, and all sums of money due and to become due thereon.”

After obtaining service on Esther Eichelbrenner on August 9, 2011, the plaintiff moved for default judgment on November 15, 2011. Default judgment was granted by the court, and the default judgment entry was filed in the record on November 21, 2011. The property was sold at sheriff’s sale and that sale was confirmed by the court on July 9, 2012.<sup>4</sup>

The present motion to vacate the judgment and stay eviction proceedings was filed on March 25, 2013. In the motion, Esther Eichelbrenner argues that the subject judgment is void because the plaintiff lacked standing to file the foreclosure action. At the hearing on this matter, Esther Eichelbrenner testified to various loan modifications she attempted with OCWEN, the servicer of the loan; however, this testimony was not relevant to the issue raised in the motion before the court, which is whether the judgment is void *ab initio*.

## LEGAL ANALYSIS

The present motion is one to vacate a judgment based on the argument that the judgment is void. “A judgment rendered by a court lacking subject matter jurisdiction is

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<sup>4</sup> Judgment Entry Confirming Sale and Ordering Distribution, filed July 9, 2012.

void *ab initio*.”<sup>5</sup> “The authority to vacate a void judgment is not derived from Civ.R. 60(B) but rather constitutes an inherent power possessed by Ohio courts.”<sup>6</sup>

The defendant argues that the judgment rendered in the present case is void because the plaintiff failed to establish that it had standing to bring this foreclosure action.

The Ohio Supreme Court has recently held that standing is a jurisdictional requirement and must be determined at time of the filing of the complaint.<sup>7</sup> As such, a “lack of standing at the commencement of a foreclosure action requires dismissal of the complaint[.]”<sup>8</sup>

In the present case, the assignment of mortgage attached to the complaint establishes that Wells Fargo is the current holder of the subject mortgage. However, the defendant argues that Wells Fargo did not establish that it was the holder of the note at the time the present action was filed.

There is no endorsement, either blank or specific, on the subject promissory note. However, as noted above, the assignment of mortgage specifically states an intention to transfer the note along with the mortgage. The mortgage document refers to the promissory note and the note likewise refers to the mortgage.

In *Fed. Home Loan Mtge. Corp. v. Rufo*, 983 N.E.2d 406, 2012-Ohio-5930 (Ohio App. 11<sup>th</sup> Dist., 2012), the court noted that “[i]n the context of a mortgage foreclosure action, the mortgage holder must establish an interest in the mortgage or promissory

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<sup>5</sup> *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

<sup>6</sup> *Id.* at paragraph four of the syllabus.

<sup>7</sup> *Fed. Home Loan Mtge. Corp. v. Schwartzwald* (2012), 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-5017, ¶¶ 22 and 24.

<sup>8</sup> *Id.* at ¶ 40.

note in order to have standing to invoke the jurisdiction of the common pleas court.”<sup>9</sup>

The court in *Rufo* held that “MERS’ assignment of the mortgage to Freddie Mac was sufficient to transfer *both the mortgage and the note to Freddie Mac.*”<sup>10</sup> In that case, the mortgage provided that it secured to the lender the performance of the borrower’s agreements under the promissory note and protects the holder of the note from losses that could result from the borrower failing to keep the promises made in the note.<sup>11</sup> Due to the fact that the note referred to the mortgage and the mortgage referred to the note and evidenced the parties’ intention to keep them together, the court held that the assignment of the mortgage was sufficient to transfer both the note and mortgage.<sup>12</sup>

The *Rufo* court relied on the analysis set forth in *Bank of New York v. Dobbs* (Sept. 8, 2009), 5<sup>th</sup> Dist. No. 2009-CA-000002, 2009-Ohio-4742. In the *Dobbs* case, the assignment of note and mortgage stated as follows: “Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for Countrywide Home Loans, Inc. \* \* \* for valuable consideration \* \* \* does hereby sell, assign, transfer and set over, without recourse, unto The Bank of New York as Trustee for the Certificate Holders CWAS Inc. Asset-Backed Certificates, Series 2006-11\* \* \* a certain Mortgage Deed bearing the date of April 27, 2006, executed and delivered by Kevin Dobbs \* \* \* and recorded in Book 1012, Page 0564 of the Knox County Recorder’s office\* \* \* together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon.”<sup>13</sup> The court notes that the pertinent language is nearly

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<sup>9</sup> *Rufo* at ¶ 18, citing, *Schwartzwald* at ¶ 28.

<sup>10</sup> *Id.* at ¶ 39.

<sup>11</sup> *Id.* at ¶ 42.

<sup>12</sup> *Id.* at ¶¶43-44.

<sup>13</sup> *Dobbs* at ¶ 25.

identical to the language included in the assignment of mortgage at issue in the case at bar.

The defendant in *Dobbs* argued that the chain of title was incomplete because the record was devoid of evidence demonstrating assignment of the note to MERS from Countrywide. The mortgage at issue specifically named MERS as the mortgagee, but the note did not mention MERS.<sup>14</sup> The *Dobbs* court discussed transfers of mortgages as follows:

“Section 5.4 of the Restatement III, Property (Mortgages) discusses transfers of the obligations secured by a mortgage and transfers of the mortgage itself by the original mortgagee to a successor, or a chain of successors. Such transfers occur in what is commonly termed the ‘secondary mortgage market’, as distinct from the ‘primary mortgage market’ in which the mortgage loans are originated by lenders and executed by borrowers.

The Restatement asserts as its essential premise is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly. The Restatement suggests that with fair frequency mortgagees fail to document their transfers so carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4(b) suggests ‘Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.’ Thus, the obligation follows the mortgage if the record indicates the parties so intended.”<sup>15</sup>

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<sup>14</sup> Id. at ¶ 24.

<sup>15</sup> Id. at ¶¶ 27-28.

The mortgage at issue in *Dobbs* stated that it secured (1) the repayment of the Loan, and all renewals, extensions and modifications of the Note and (2) the performance of Borrower's conveyance under the Security Instrument and the Note.<sup>16</sup> The promissory note stated that “a Mortgage Deed of Trust, or Security Deed (the Security Instrument), dated the same day as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note.”<sup>17</sup> This language is virtually identical to the pertinent language in the Note and Mortgage at issue in the present case.

The court in *Dobbs* held that the assignment from MERS to Bank of New York transferred both the Note and Mortgage.<sup>18</sup> Furthermore, the court reasoned that “[b]ecause the note refers to the mortgage and the mortgage, in turn, refers to the note, we find a clear intent by the parties to keep the note and mortgage together, rather than transferring the mortgage alone[,]” and found that the chain of title between Countrywide, MERS and Bank of New York was not broken.<sup>19</sup> The defendant in *Dobbs* also noted, as does the defendant in the case sub judice, that “the right to enforce a note cannot be assigned but instead, the note must be negotiated in accord with Ohio's version of the Uniform Commercial Code[,]” and that “[a]n attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note.”<sup>20</sup> However, the *Dobbs* court noted that the assignment to Bank of New York stated that the “mortgage and note were sold, assigned and conveyed without retention of any

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<sup>16</sup> Id. at ¶ 32.

<sup>17</sup> Id. at ¶ 34.

<sup>18</sup> Id. at ¶ 35.

<sup>19</sup> Id. at ¶ 36.

<sup>20</sup> Id. at ¶ 38, citing, R.C. 1301.01 *et seq.*

rights.”<sup>21</sup> Ultimately, the court determined that the plaintiff bank had legal standing to bring the foreclosure action.<sup>22</sup>

Based on the above analysis, the court finds that the assignment of mortgage was sufficient to transfer both the note and mortgage to Wells Fargo. Further, the assignment of mortgage in the present case states that the mortgage and note were sold, transferred, and set over to Wells Fargo *without recourse*. This was the same language used in the assignment in the *Dobbs* case. As such, like in the *Dobbs* case, the assignor in the case at bar did not retain any rights to enforce the note and mortgage. Therefore, Wells Fargo has the right to enforce the obligations under the promissory note.

### CONCLUSION

The defendant’s motion to vacate judgment is not well-taken and is hereby denied. The motion to stay eviction proceedings is hereby rendered moot.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

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<sup>21</sup> Id.

<sup>22</sup> Id. at ¶ 41.

## **CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 10th day of June 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride