

OHIO SUPREME COURT RULES STANDING MUST EXIST WHEN FORECLOSURE IS FILED, BUT CAN BE PROVEN LATER

The Supreme Court of Ohio recently held that, although the plaintiff in a mortgage foreclosure action must have standing to sue when suit is filed, standing can be proven after the case is filed.

A copy of the opinion is available

at: <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-1484.pdf>

The plaintiff mortgagee sued to foreclose its mortgage in 2010 after borrowers defaulted on the promissory note. The complaint did not seek a deficiency because the borrowers' personal liability had been discharged in bankruptcy.

One of the borrowers filed an answer raising lack of standing as a defense. The mortgagee moved for summary judgment, supporting its position on standing by submitting the affidavit of a "Default Litigation Specialist" who explained the chronology of events by which the mortgagee's predecessor in interest changed its name then merged into the plaintiff mortgagee.

The trial court granted the mortgagee's motion for summary judgment. The borrower appealed on several grounds, but did not challenge the trial court's conclusion that the bank had standing to sue.

The appellate court, however, took up the standing issue sua sponte. Relying on an earlier Ohio Supreme Court decision, the appellate court held that a foreclosure plaintiff must attach to the complaint proof that it has standing when the complaint is filed, and because the mortgagee didn't do this, the appellate court held that the mortgagee lacked standing and thus could not invoke the court's jurisdiction. The case was remanded to the trial court with instructions to dismiss the complaint without prejudice.

On appeal to the Supreme Court of Ohio, the mortgagee argued that it was not required to attach to the complaint the evidence it would use to prove standing. The Ohio Supreme Court began its analysis by reiterating that standing is a jurisdiction requirement and that a party that lacks standing cannot invoke the court's jurisdiction. It then turned to its earlier decision, *Fed. Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St. 3d, 2012-Ohio-5017, 979 N.E. 2d 1214, on which the appellate court had relied in

holding that the plaintiff in a foreclosure action must attach evidence of standing to the complaint.

In *Schwartzwald*, the note was not assigned to the plaintiff until after the complaint was filed, and the Ohio Supreme Court held that standing is determined when the complaint is filed and lack thereof cannot be cured by assignment before final judgment. The Court pointed out, however, that *Schwartzwald* did not hold that the plaintiff must also submit proof of standing at the time the case is filed.

Instead, citing two Ohio court of appeals decisions, the Ohio Supreme Court agreed that proof of standing may be submitted after the complaint is filed.

In addition, the Ohio Supreme Court reasoned that requiring a plaintiff to attached proof of standing to the foreclosure complaint would contravene Ohio's notice-pleading standard, which only require a "short and plain statement of the claim." The Court held that, because the factual allegations in the complaint are deemed true for purposes of determining whether the complaint states a claim, a plaintiff is not required to provide proof at the pleading stage beyond the allegations in the complaint.

The Ohio Supreme Court then turned to whether Ohio Rule of Civil Procedure 10(D), which requires that when a claim is based on a written instrument, it must be attached to the complaint, applied to the case at bar. At least one Ohio appellate court had held that the rule requires a foreclosure plaintiff to attach loan documents to the complaint. The Court quickly dispatched this issue by concluding that the failure to attach documents to a complaint does not equate to lack of standing, and that Rule 10(D) does not apply to the case at bar because the issue presented was not whether the plaintiff attached loan documents to the complaint, but whether the plaintiff was the successor-in-interest to the original creditor.

The Ohio Supreme Court held that although a foreclosure plaintiff must have standing when suit is filed, proof of standing may be submitted after the complaint is filed. The judgment of the court of appeals was reversed, the foreclosure action reinstated, and the case remanded to the court of appeals for further proceedings.